The Changing Climate for Competition Law

A Convenient Truth

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Abstract

As the topics of climate change and sustainability have increasingly occupied the minds and activities of policy makers, companies and individuals globally, competition law stakeholders have been urged to reconsider the relationship between antitrust and public policy. The aim of this thesis is to examine this relationship, both in its current form as well as how it may look in the future, emphasising how companies may collaborate to promote public interest matters without infringing Article 101(1) TFEU. The focus will be on environmental developments**,** but other public interests such as health and employment will also be discussed to provide a broader context to the discussion. The thesis begins with an examination of the wider aims of EU policy and of EU competition law and argues that competition law and the legal analysis conducted under it are in fact accountable to these wider aims. Article 101 and its three sub-articles are explained and scrutinised in detail to discern where public interest matters may be taken into consideration and how the analytical approach changes depending on whether the matters are considered under Article 101(1) or 101(3). The recent developments on the topic described at the end also indicate that there is continuing interest in this area. The concluding argument is that that there is scope for public policy considerations in competition law without threatening the integrity of competition.

Abbreviations

AG	Attorney General
ACM	Netherlands Authority for Consumers and Markets
CJEU	Court of Justice of the European Union
DoJ	US Department of Justice
ECN	European Competition Network
EU	European Union
HCC	Hellenic Competition Commission
GC	General Court
GCLC	Global Competition Law Centre
OECD	Organisation for Economic Co-operation and Development
TFEU	Treaty on the Functioning of the European Union

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1 Introduction

1.1 Topic

'As the urgency of addressing climate change rises, many industries face a daunting task of overhauling established business models to shift to a lower-carbon footing. While some companies will be able to make adequate progress on their own, there is growing recognition that collaboration within industries could be the most effective way to bring about the long-lasting change needed to attempt to slow the pace of global warming. But strict enforcement of competition rules can stand in the way of such endeavours getting off the ground.'[1]

The fierce protection of competition as a key value within the EU cannot be doubted. It is enshrined in the Union's exclusive competence in the establishment of competition rules,[2] it is evident in the Commission's sizeable sanctions for breaches of competition law and it is the heart and soul of the market economy upon which all member states are now modelled. The idea behind competition is that it promotes continuous innovation, the upholding of quality and lowering of the prices of products and services.[3] Competition, in theory, is intended to benefit everyone: the producers by becoming more efficient and the consumers by providing them a range of choice between products and services. At best it markets itself as a societal benefit, perhaps even a societal need. At worst, it is considered the least bad option; '[c]ompetition is ruthless, unprincipled, uncharitable, unforgiving – and a boon to society'.[4]

This intended 'win-win' approach must be subject to scrutiny: it is worth exploring whether the intention accurately translates into practice, and if not, what the consequences are. A particularly interesting question to explore is what happens if the intended maximisation of consumer welfare (if this is indeed the aim of competition law, see further the discussion in Chapter 2) in fact indirectly results in negative consequences to the very society which it aims - or claims - to benefit.

The reform that is often referred to as the 'modernisation' of EU competition law further anchored the economic focussed thinking that would come to define

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[1] Nicole Kar, 'Competition rules stymie co-operation on climate goals', *Financial Times*, 30 January 2020, https://www.ft.com/content/b3e0da9c-3eba-11ea-b84f-a62c46f39bc2, accessed 17 April 2020.

[2] Article 3(1)(b) TFEU.

[3] Alison Jones and Brenda Sufrin, *EU Competition Law* (Oxford University Press, 2016), 2.

[4] *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1268 (7th Cir. 1992), para 8.

the Commission's approach to competition law. Consumer welfare subsequently became the main, if not the only aspiration:[5] '…the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market.'[6] Jones and Sufrin suggest that '[t]he adoption by the Commission of the consumer welfare standard makes it particularly difficult to take other considerations into account'.[7]

The view that Nicole Kar presents in the opening quote to this introduction, i.e. that the most effective changes in climate change combatting activities will come from increased collaboration between undertakings, is shared by a number of commentators. In the 2010 OECD Roundtable on Horizontal Agreements in the Environmental Context[8] (the OECD Roundtable) the UK Competition Authority expressed the view that in the endeavour to lessen the legislative burden on business, policy makers would welcome agreements made between undertakings, as they can assist in fulfilling policy goals without regulatory intervention; '[s]uch agreements have the potential of allowing firms to pursue actions that secure beneficial environmental outcomes in as efficient a way as possible.'[9] In a recent article on the topic, Simon Holmes gives examples from his own experience as a judge and academic of such collaborations (e.g. between supermarkets to increase recycling) but also of cases where attempts at collaborating have been rejected or abandoned for fear of competition law risks.[10] Holmes shares Kar's urgency to act on climate change by enabling more possibilities for such agreements under Article 101.[11]

The COVID-19 pandemic of 2020 has shed even more light on the public interest aspect in the competition law sphere, prompting statements from both national and international competition bodies. One such example came from the European Competition Network[12] (ECN) in March 2020 which stated that the consequences of the pandemic could give rise to necessary collaborations be-

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[5] Jones and Sufrin, *EU Competition Law*, 38.

[6] Mario Monti, 'The Future for Competition Policy in the European Union', Merchant Taylor's Hall London, 9 July 2001, SPEECH/01/340, https://ec.europa.eu/competition/speeches/index_2001.html, accessed 1 September 2020. See further Neelie Kroes, 'Delivering Better Markets and Better Choices' European Consumer and Competition Day, London, 15 September 2005, SPEECH/05/512, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512, accessed 1 September 2020.

[7] Jones and Sufrin, *EU Competition Law*, 43.

[8] OFT–OECD, 'OFT Contribution to the OECD Policy Roundtable on Horizontal Agreements in the Environmental Context 2010', 24 November 2011, http://www.oecd.org/competition/cartels/49139867.pdf, accessed 14 October 2020.

[9] OECD Roundtable, 98.

[10] Simon Holmes, 'Climate change, sustainability, and competition law', *Journal of Antitrust Enforcement*, Volume 8, Issue 2 (July 2020), 354–405, 356.

[11] Holmes, 'Climate change', 366.

[12] The European Competition Network is a cooperation between the European Commission and the national competition authorities in all EU Member States.

tween undertakings to guarantee the distribution of scarce products to consumers. The ECN underlined that it would not under these extraordinary circumstances 'actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply.'[13]

1.2 Issue and questions

The aim of this thesis is to explore the dichotomy between public policy and competition and assess whether there is scope under current competition laws to allow for public policy promoting agreements. More precisely, it will strive to answer the question to which extent can and should competition law consider public policy?

The thesis will investigate how competition lawmakers may allow for activities, and in particular agreements, which further public policy interest to be implemented without threatening the integrity of competition law. We want to avoid ending up in a situation where competition law can be used as a sword against improvements in the public interest (see the example of the Amazon Soy Moratorium in Chapter 3.1.3.1). This is not a new kind of tension between manufacturers looking after their own interests and authorities trying to achieve improvements in the social sphere: in 2013 Canadian lawmakers were forced to go back on attempts to implement improved environmental regulation due to the threat of arbitral action from big companies, enabled by a bilateral investment treaty between Canada and other nations.[14] During her speech at the 2019 GCLC Conference on Sustainability and Competition Policy, Margrethe Vestager, the Commissioner for Competition, summarized the issue in the following terms:

> 'It's also important that sustainability agreements aren't used to make it hard for some businesses to compete. We don't want a handful of companies to misuse the idea of sustainability, to define what products are

[13] European Competition Network, 'Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis', 23 March 2020, https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf, accessed 3 October 2020. Similar statements were issued by the International Competition Network, 'ICN Steering Group Statement: Competition during and after the COVID-19 Pandemic', April 2020, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf, accessed 3 October 2020, as well as the UK Competition & Markets Authority (CMA), 'CMA approach to business cooperation in response to COVID-19', ref: CMA 118, 25 March 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875468/COVID-19_guidance_-.pdf, accessed 3 October 2020.

[14] Naomi Klein, *This Changes Everything: Capitalism vs. the Climate*, (New York: Simon & Schuster, 2014), 66-69.

allowed in the market, in a way that suits them – and that keeps others out.'[15]

To answer the initial question, a deeper understanding of the – potentially conflicting - purposes of competition law is necessary: for example, if the main purpose of competition law is to protect competition in itself, i.e. upholding competition for the sake of competition being a positive force in and of itself, then public policy may have no place at the table. A related issue is how this idea may be interpreted against the provision in the more general sections of the Treaty of the Functioning of the European Union (TFEU), e.g. Article 7 TFEU which provides that '[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.'

The main issue to examine however, in order to fulfil the aim of this thesis, is the structure and purpose of Article 101 TFEU. An in-depth understanding of the article is required to provide context to the challenges in creating competition rules allowing for agreements between companies which further public policy endeavours. An overview of areas in which industry collaborations and national laws have been deemed acceptable or have been rejected will further facilitate the discussion regarding how far-reaching such collaborations have been or could be.

1.3 Delimitations

This paper deals with EU Competition law and will not delve into national or local antitrust regulations, except where necessary for comparative reasons; e.g. US antitrust often provides a relevant comparison due to its long existence and significant developments made in the area.

Although abuse of a dominant position under Article 102 also provides some interesting perspectives in this area, this thesis will not go into further detail on how to assess public interest criteria in mergers and acquisitions, e.g. how article 102 could be used to prevent abuse in the public interest sphere,[16] or protect activities which could otherwise be considered abusive.[17] But it should be noted that significant development relating to merger activities is taking place as well, a

[15] Margarethe Vestager, 'Competition and sustainability', GCLC Conference on Sustainability and Competition Policy, Brussels, 24 October 2019, https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en, accessed 21 November 2020.
[16] For further discussion around this, see e.g. Holmes, 'Climate change', 384.
[17] Holmes, 'Climate change', 388.

recent example entailing the German economics minister's approval of joint venture, which had been prohibited by the Federal Cartel Office, for reasons of environmental benefit.[18]

The concept of 'public policy' or 'public interest' will be used throughout this paper as a collective description of measures taken to promote considerations which are intended to further some type of public good, including, but not limited to environmental, social and governance factors; factors which, to a large extent make up the collective goals of the EU in accordance with the Treaties.[19] The thesis will however pay particular attention to environment and sustainability issues, both in order to limit the scope of the discussion and because of the significant international development that has taken place in this area in the past decade; Chapter 5 in this thesis on recent and current developments is in fact mostly dedicated to sustainability related advances. References to and discussion of cases concerning other types of public interests have been included to provide depth and context to the analysis and assess what significance environmental interests can have within the EU competition law framework.

1.4 Methodology and material

The issue and questions under examination in this thesis call for different approaches when it comes to the methods employed for research.

As described above, one part of this thesis will focus on the current legal framework of Article 101 TFEU. This discussion will require application of the doctrinal legal research methodology, which entails an examination, description and analysis of primary and secondary sources of law.[20] Describing the law in this way can be seen as a quite formalistic approach, but is necessary in order to understand the basic framework that has led to the (potential) problem at hand (i.e. the obstacles in concluding public interest focussed agreements) and evaluate *de lege ferenda* and whether the legal text in itself is in need of re-evaluation.

The doctrinal method has however also been argued to contain a substantial element of critical assessment.[21] The sources of law that are generally considered

[18] Linklaters LLP, German Federal Minister of Economics and Energy overrides the prohibition of a slide-bearing business joint venture for environmental policy reasons, 27 August 2019, https://www.linklaters.com/en/insights/publications/2019/august/german-federal-minister-overrides-the-prohibition-of-a-slide-bearing-business-joint-venture accessed 21 November 2020.

[19] This definition has been partly borrowed by Giorgio Monti, 'Article 81 EC and Public Policy', *Common Market Law Review*, Volume 39, Issue 5 (2002), 1057-1099, 1059. See further Chapter 2 of this thesis for a discussion on the aims and goals of the Treaties.

[20] Mike McConville and Wing Hong Chui, ed., *Research Methods for Law,* (Edinburgh University Press, 2017), 3.

[21] Mattias Hjertstedt, Beskrivningar av rättsdogmatisk metod: om innehållet i metodavsnitt vid användning av ett rättsdogmatiskt tillvägagångssätt, in: Ruth Mannelqvist, Staffan Ingmanson, Carin Ulander-Wänman ed., *Festskrift till Örjan Edström* (165-173). (Umeå: Juridiska institutionen, Umeå universitet (2019), 167.

to constitute the core or foundation for legal research are the wording of the law, case law, legislative history and legal literature.[22] This gives rise to a broader analytical scope, encompassing review of the benefits and challenges that the current legal framework poses[23] and which will support the analysis and discussion.

As the EU has exclusive competence in the establishment of competition laws necessary for the internal market,[24] the relevant material will be heavily based on EU legal sources. This includes primary legislation, such as the TFEU and TEU, and secondary legislation, e.g. regulations, directives, decisions, recommendations and opinions.[25] The secondary legislation contains a hierarchy of its own, e.g. the regulations, directives and decisions are binding but recommendations and opinions only provide guidance, without imposing obligations.[26] Lastly, sources of EU law also include supplementary law, like case law and general principles of law.

To adequately assess this material, the established methods for the interpretation of EU law, especially how to appropriately analyse primary and secondary legislation, must be duly taken into account.[27] For example, the European Commission long sought to establish a clear framework on the proposed analytical approach to Article 101, which in 2004 resulted in the publishing of official guidelines on the interpretation of the article (the Article 101(3) Guidelines).[28] These guidelines, while not strictly legally binding, in practice serve as a much-used resource for interpretation of the article among practitioners. Notwithstanding their usefulness, they have been challenged in the courts on numerous occasions. While the guidelines therefore aim to establish legal certainty, they may, interestingly, lead to the very opposite.

The other focal point of this thesis is to examine the purposes of competition law in order to put the *de lege ferenda* discussion into a wider context. In addition to the doctrinal method above, this section requires a more interdisciplinary approach to the analytical method in order to frame the debate and find an answer to whether the law in practice brings about desired results. This gives rise to a discussion of what it is society wants (or should want) to achieve and whether the 'traditional' views on what the EU is trying to accomplish and what the aim of competition law is can be challenged or reinterpreted.[29]

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[22] Jan Kleineman, Rättsdogmatisk metod, in: Fredric Korling, Mauro Zamboni ed., *Juridisk metodlära*, (Lund: Studentlitteratur, 2013), 21.

[23] Hjerstedt, Beskrivningar av rättsdogmatisk metod, 167.

[24] Article 3 TFEU.

[25] Udo Bux, European Parliament, Sources and scope of European Union law, February 2020, https://www.europarl.europa.eu/factsheets/en/sheet/6/sources-and-scope-of-european-union-law accessed 15 November 2020.

[26] Article 288 TFEU.

[27] Jane Reichel, EU-rättslig metod, in: Fredric Korling, Mauro Zamboni, ed., *Juridisk metodlära*, (Lund: Studentlitteratur, 2013), 115.

[28] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97.

[29] McConville and Chui, *Research Methods for Law,* 5-6.

No empirical studies have been made e.g. to investigate the practical need for industry collaborations, but the author notes that there are contrasting views as to the weight of the perceived problem.[30]

1.5 Structure of the thesis

In Chapter 2, this thesis will explore the possible aims of competition law as described in legal literature as well as within the context of political discourse in the EU.

Chapter 3 contains a brief discussion on situations where competition may be compromised today. This chapter will also present some general and specific examples of past and current industry collaborations, legislation and monopolies with public policy aims, to understand what challenges they have faced connected to competition, if any.

Chapter 4 will analyse the current law on the topic, namely Article 101 TFEU, and explain its structure and the analytical approach to be taken when appraising agreements under the legal provision. The purpose of the chapter is to understand how an agreement to promote a public interest can be assessed under current rules and evaluate the consequences of the application of Article 101 to such agreements, taking into consideration the framework of agreements restrictive by object and agreements restrictive by effect. A significant part of the analysis is the assessment under Article 101(3) and the discussion on whether public interest agreements could fulfil the cumulative Article 101(3) criteria to exempt agreements from Article 101(1).

References to the old Article 81 Treaty establishing the European Community (EC) and Article 85 Treaty establishing the European Economic Community (EEC) have been 'translated' where necessary to 'Article 101 TFEU' to avoid confusion. In some cases however it has been deemed more natural to maintain the old references.

[30] C.f. Kar, 'Competition rules' contra the response to her article: Andy Thompson, 'Letter: Far too many cartels already operate', *Financial Times*, 6 February 2020, https://www.ft.com/content/ba175ce2-4103-11ea-a047-eae9bd51ceba, accessed 10 April 2020. Furthermore, the recent draft guidelines by the Netherlands Authority for Consumers & Markets (ACM), 'Draft Guidelines, Sustainability Agreements, Opportunities within Competition Law', 9 July 2020, https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf, accessed 5 November 2020, state on page 3 that '[i]n ACM's experience, sustainability agreements, in many situations, can be made *without* any major problems.' (Emphasis added).

2 The aim of Competition Law

2.1 General views on the aim of competition law

In order to answer the question of whether public policy objectives in the form of collaborations between companies are (or can be) reconcilable with competition law, it is important to contextualize the discussion by looking at what the aim of competition law is. It is hardly a surprise that the views offered by literature are profoundly impacted by conflicting economic and political theories, leading to a range of possible aims coming into play.

Jones and Sufrin suggest that the differences in opinion boil down to two main ideas: one that focusses on economic goals and another that takes into account additional policy considerations.[31]

The first idea revolves around the aim of upholding efficient markets and ensuring the best possible outcome in terms of welfare (this is often referred to as the 'welfarist' approach).[32] Welfare in this context is generally interpreted as meaning consumer welfare rather than total (social) welfare, the former said to be easier to dissect and 'sell' to the general public; Nazzini describes how the notion of consumer translates into 'fairness, redistribution and protection of the many and vulnerable'.[33]

Another theory based on economic goals is that competition law aims to safeguard the competition process as such, in order to protect the economic freedom of the individual and their participation in the market. This is referred to as the ordoliberal school of thought.[34] It can be compared to the neo-classical approach where allocative efficiency is considered the ultimate aim, the allocative efficiency representing an optimal balance in the distribution of goods and the supply and demand.[35] Closely related to the ordoliberal view is the theory that the objective of competition laws is to protect competitors themselves, e.g. by enabling smaller firms to compete with larger ones through the use of subsidies or other measures. The welfare aspect is still resounding and reinforces the idea of maintaining competitive markets, protecting small business etc. even though this may not always

[31] Jones and Sufrin, *EU Competition Law*, 26.
[32] Jones and Sufrin, *EU Competition Law*, 26-27.
[33] Renato Nazzini, *The Foundations of European Union Competition Law – The Objective and Principles of Article*, (Oxford University Press, 2011), 44-45.
[34] Jones and Sufrin, *EU Competition Law*, 27.
[35] Jones and Sufrin, *EU Competition Law*, 7.

be reconcilable with maximising efficiency.[36] This discussion sometimes steers towards the somewhat ambiguous idea of fairness as an aim of competition law. Provisions based on fairness must be specific on who is intended to be on the receiving end of the fairness (because being fair to one party may lead to unfairness for another).[37]

The notion of welfare in this regard has however not escaped criticism just because it is based on ingrained traditions. It has e.g. been submitted that welfare should be interpreted in line with one of the UN's Sustainable Development Goals[38] (health and wellbeing) as well as alternative measures of national well-being which go beyond GDP, such as happiness.[39]

In terms of considering additional policy considerations, other than economic ones, such as environmental, employment and industrial, these can also be furthered by competition law, e.g. through the blocking of mergers which could lead to adverse effects such as job losses. Such laws may of course come at the price of efficiency.[40] The question remains however as to whether they *should* form part of the competition law aims.

Bishop and Walker qualify their own theory of the goal of competition law as being the 'protection and promotion of effective competition' by explaining that it is the outcome for the consumers that drives this goal.[41] Effective competition is a concept that has arisen within the context of EU Competition law in a number of instances, most specifically case law,[42] where it has been described as 'the degree of competition necessary to ensure the attainment of the objectives of the Treaty'.[43]

In summary, there are several theories and possibilities when it comes to the aims of competition law and who the outcome of the law should in fact serve.

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[36] Jones and Sufrin, *EU Competition Law*, 28 ('the protection of small and inefficient business may also take wealth from consumers and lead to a loss in economic welfare.').

[37] Jones and Sufrin, *EU Competition Law*, 28.

[38] More information about the UN Sustainable Development Goals can be found on the dedicated website: https://www.un.org/sustainabledevelopment/, accessed 12 October 2020.

[39] Holmes, 'Climate change', 362.

[40] Jones and Sufrin, *EU Competition Law*, 28.

[41] Simon Bishop and Mike Walker, *The Economics of EC Competition Law*, (Sweet & Maxwell, 2010), 20-21.

[42] See e.g. Case 27/76 *United Brands v Commission* [1978] EU:C:1978:22, para 65, and Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] EU:C:1973:22, para 225.

[43] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission* [2009] EU:C:2009:610, para 109.

2.2 Wider EU goals and their connection to competition rules

2.2.1 Introduction

EU competition law does not operate in a vacuum, something which is evident both from the TFEU and in case law. The CJEU has on several occasions noted that the wider EU goals, most of which are connected to the public interest in one way or another, must be taken into account in the application of competition rules.[44] In an interview from 2015 Vestager was asked whether there was a connection between competition policy and overall priorities promoted by the Commission, to which she responded that although specific priorities cannot determine the outcome in a case, the Commission's objectives may direct the prioritization of cases.[45]

This subchapter will give an overview of the broader scope of the goals of the EU as a whole and how they may interconnect with competition rules.

2.2.2 TFEU provisions

The interaction between the various provisions in the TFEU can be inferred from several of the articles. Article 7 TFEU, which was mentioned in the introduction to this thesis, is one example. In a report from 2018, the Committee on Economic and Monetary Affairs of the European Parliament summarises its view on the importance of Article 7 succinctly:

> '…competition rules are treaty based and, as enshrined in Article 7 of the TFEU, should be seen in the light of the wider European values underpinning Union legislation regarding social affairs, the social market economy, environmental standards, climate policy and consumer protection… the application of EU competition law should address all market distortions, including those created by negative social and environmental externalities'.[46]

Another example can be found in Article 9 TFEU, which lists employment, education, training, adequate social protection guarantees, counteracting social

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[44] E.g. Case 14/68, *Walt Wilhelm v. Bundeskartellamt*, [1969] EU:C:1969:4, 14; Case 6/72, *Europemballage Corporation and Continental Can Company Inc v. Commission*, [1973] EU:C:1973:22, 244.

[45] European Commission, 'EU Competition Policy in Action', Luxembourg: Publications Office of the European Union, 2016, https://ec.europa.eu/competition/publications/kd0216250enn.pdf, accessed 13 October 2020.

[46] Committee on Economic and Monetary Affairs of the European Parliament, Annual Report on Competition Policy, 31 January 2018 https://www.europarl.europa.eu/doceo/document/A-8-2018-0474_EN.html, para 7, accessed 14 October 2020.

exclusion and high protection of human health as aspects which shall be considered in the policies that the EU implements. Similarly, implementation of policies and other EU activities should under Article 10, strive to fight against discrimination, under Article 11 ensure environmental protection and promote sustainable development (in fact environmental protection requirements 'must', in accordance with the text, be integrated in the implementation of EU activities) and under Article 12 consider consumer protection requirements.

In an article from 2002, Monti, albeit in reference to the predecessors of the articles mentioned above, suggests that the Commission in fact has an *obligation* to take into account other EU goals when applying Article 101(3) and that the residual question is only what weight should be awarded to those factors when a decision is taken.[47] While there has been a significant amount of development in the competition law sphere since then, including the Article 101(3) Guidelines, the interpretation remains valid and the question is still relevant. Although the core goals of the EU are key in the definition and implementation of EU policy in general, as expressly stated in the TFEU, in exempting an article there is nothing that would suggest that the Commission could ever place more weight on these goals than what is required in Article 101(3). However, at the same time, if the core goals were only considered once an agreement was deemed exempt, they would be superfluous to the analysis.[48] The exemption criteria are further elaborated on in Chapter 4.5.

Somewhat ambiguously, the Commission in the 1992 *Ford/Volkswagen*[49] decision commented that job creation, development and market integration were aspects which were being considered but that it 'would not be enough to make an exemption possible unless the conditions of Article [101(3)] were fulfilled.'[50] The meaning of this statement has divided commentators, with some arguing that the exemption was, at least to some extent, contingent on the public interest factors mentioned by the Commission.[51] Monti promotes the view that the wider EU policy factors should only contribute to an exemption where the Article 101 values are not compromised, in particular in terms of efficiency, and that this interpretation accurately balances the Article 101 aims and the wider EU goals. He argues that based on EU case law, 'an agreement's contribution to a particular Community policy is not sufficient to warrant an exemption, but an agreement which results in increased efficiency *and* which contributes to other Community goals is exempted because the combination of these two benefits outweighs the restriction of competition.'[52]

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[47] Monti, 'Article 81 EC', 1070-1071.

[48] Monti, 'Article 81 EC', 1070.

[49] *Ford/Volkswagen* (COMP/33.814) [1993] OJ L20/14.

[50] *Ford/Volkswagen*, para 36.

[51] Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (Oxford University Press, 1999), para 2.131.

[52] Monti, 'Article 81 EC', 1070-1071.

2.2.3 TEU and EU Charter of Fundamental Rights provisions

On a more general level, the Treaty on the European Union (TEU) also contains provisions connected to the EU's wider aims. Article 3 mentions sustainability twice: in Article 3(3) it is stated that the EU 'shall work for the sustainable development of Europe' and in Article 3(5) that it shall contribute to 'the sustainable development of the Earth'. The concept of sustainability is not further defined within the context of the article, but the overall idea seems clear: the aims of the Union go far beyond purely economic aims and they should be considered in general when applying EU law. It has even been argued that these provisions indicate that any identified conflict between economic goals and sustainability should be managed with the help of the proportionality principle.[53]

In addition to the TEU, the EU Charter on Fundamental Rights states in Article 37 that environmental considerations should be integrated into the EU's policies.

2.2.4 The *Albany* dimension

In its 1999 decision in *Albany,*[54] the CJEU ruled that collective bargaining agreements would fall outside of the scope of Article 101(1). Although the agreements were considered restrictive of competition, the public policy dimension of those agreements, i.e. the collaboration efforts between workers and management to improve working conditions, would according to the court 'be seriously undermined' were they to be deemed as infringing competition laws.[55] *Albany* could be argued as a case that genuinely considered the wider objectives of the EU,[56] although it has also been argued to be a case catering to political sentiment in a particularly sensitive area.[57] The outcome could be seen as opening up an alternative path to the appraisal of public interest agreements, allowing for them to be exempted from Article 101(1) where they are found to promote the mentioned objectives. This reasoning was subsequently confirmed in *Van der Woude*,[58] through direct reference to *Albany*, where the court stated that the nature and purpose of an agreement could lead to it falling outside of the scope of Article 101(1).

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[53] Holmes, 'Climate change', 360.

[54] C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] EU:C:1999:430.

[55] *Albany*, para 59.

[56] See *Albany*, para 60: 'It therefore follows from an interpretation of the provisions of the Treaty *as a whole* which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside of scope of Article 85(1) of the Treaty.' (emphasis added).

[57] Holmes, 'Climate change', 370.

[58] Case C-222/98, *Van der Woude v Stichting Beatrixoord* [2000] EU:C:2000:475.

Albany was also cited in *3F v Commission*,[59] a case where another finding would again, in the eyes of the court, have 'seriously undermined' social policy objectives.[60] In its decision, the CJEU also remarked that 'the Community has not only an economic but also a social purpose, the rights under the provisions of the Treaty on State aid and competition must be balanced, where appropriate, against the objectives pursued by social policy'.[61]

2.2.5 Other considerations

There is little doubt that environmental matters have occupied a big part of the international and national political discussions in Europe over the past few years. The Paris Climate Agreement[62] of 2015 was a milestone in the climate change space (despite the progress being somewhat marred by the subsequent announcement made by Donald Trump of the US' withdrawal from the accord). The United Nations Sustainable Development Goals introduced earlier that year also set a clear agenda and targets for nations as well as private actors to make relevant changes in their business models and operations to achieve change within the environmental and social space. The EU has committed to the Sustainable Development Goals,[63] with the 'European Green Deal' promoted as one of the Commission's top priorities.[64] In 2020, the European Commission released the 'Taxonomy Regulation',[65] which created a set of criteria for stakeholders to assess which economic activities can be considered sustainable from an environmental perspective. The idea was to establish a transparent framework for determining what activities would be considered sustainable and align practices and standards. Although the taxonomy is not directly applicable to competition, it forms an integral part of the European Green Deal and could potentially provide quantitative and qualitative inspiration for evaluating sustainability aspects of agreements under Article 101(1) as well.

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[59] C-319/07 P, *3F v Commission* [2009] EU:C:2009:435.

[60] *3F*, para 57.

[61] *3F*, para 58.

[62] More information about the Paris Agreement can be found on the United Nations' website: https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement, accessed 12 October 2020.

[63] European Commission, EU holistic approach to sustainable development - The EU approach towards implementing the UN's 2030 Agenda for Sustainable Development together with its Member States, https://ec.europa.eu/info/strategy/international-strategies/sustainable-development-goals/eu-approach-sustainable-development-0_sv, accessed 12 October 2020.

[64] European Commission, The European Commission's priorities - 6 Commission priorities for 2019-24, https://ec.europa.eu/info/strategy/priorities-2019-2024_en, accessed 12 October 2020.

[65] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, (2020) OJ L198, 13–43.

2.3 Concluding remarks on the aim of EU Competition law and its interplay with wider EU goals

As was seen in the introduction to this chapter, evaluating the possible aims of EU competition law does not culminate in a simple list of possible goals. Even those agreeing on consumer welfare as the ultimate purpose find themselves in disagreement on what components constitute consumer welfare. Although the trend leans towards emphasizing economic goals, it has been suggested that even those goals are not necessarily limited to economic efficiency. Instead, within the definition of effective competition, it seems vital to understand what the outcome will be for consumers: '[e]ffective competition is therefore the means to an end, not the end itself.'[66] But the means to *what* end? Even in a market economy it is too simplistic to argue that the resulting benefit to consumers should be purely economic. Furthermore, the economic aspect is in itself difficult to quantify; it cannot e.g. be limited to financial considerations – cheaper is not always better. And when it comes to the public interest issue, if we are to follow the consumer outcome reasoning, we need to return to the question of what the outcome for consumers in fact is when it comes to competition concerning socially important services like health care, education, fire protection etc.

The approach in *Albany*, *Van der Woude* and *3F* also appears to widen the scope of considerations to include public policy, or as the court put it in the latter case 'social factors'. However, such an approach could, as has been argued for *Albany* above, be sensitive to the political climate, and whatever public interest is currently trending, with the resulting risk of compromising legal certainty.

The TFEU's provisions and clearly stated sustainability and environment related goals are difficult to ignore. They are both numerous (as seen, at least five articles make direct references to various public interest aspects) and explicit in their need to be integrated into general policy. One commentator argues that they 'show emphatically that EU competition policy cannot be separated from the EU environmental policy'.[67]

Recent developments like the Paris Climate Agreement and the Sustainable Development Goals are interesting from two perspectives: firstly, it is difficult to envision how the continuing and increasing emphasis by the Commission on these types of public interest topics would not have some spill over effect on competition law decisions, at the very least indirectly. As will been seen in section 4.5 on the interpretation of the exemption in Article 101(3), the analysis of the first criterion, promotion of technical and economic progress, has at times been

[66] Jones and Sufrin, *EU Competition Law*, 25.

[67] Marios C. Iacovides and Christos Vrettos, 'Falling through the cracks no more? Article 102 TFEU and sustainability I – the nexus between dominance, environmental degradation, and social injustice', *Stockholm Faculty of Law Research Paper Series No 79* (25 September 2020), https://ssrn.com/abstract=3699416, accessed 22 December 2020, 10.

stretched to include environmental benefits. It has even been argued that this should lead to an interpretation of EU law in a given case which promotes the integration principle, e.g. in terms of considering environmental protection requirements.[68] Secondly, the extraordinary focus on climate matters in the past few years may indicate that a change in our competition laws or legal interpretation of those laws is called for. In the words of Holmes: '[w]e must put more weight on environmental factors and move the dial radically in the direction of permitting arrangements that contribute to combatting climate change, in particular, and to protecting the environment and sustainable production in general.'[69]

[68] Martin Wasmeier, 'The integration of environmental protection as a general rule for interpreting Community law', *Common Market Law Review*, Volume 38, Issue 1 (2001), 159-177, 159. NB. that Wasmeier is discussing Article 2 EC, the predecessor to Article 11 TFEU.
[69] Holmes, 'Climate change', 358.

3 Reasons to compromise competition

3.1 Competition restricting activities motivated by public interest

3.1.1 Introduction

Whatever one's beliefs regarding the goals of competition laws are, it is undisputed that competition is the heart and soul of the market economy. But even those with copious amounts of trust in the system recognize that a completely liberal approach to competition law may not serve the system in the way it should – this is also a key aspect of ordoliberalism.[70]

Protecting competition at all costs for the sake of protecting the system can bring unwanted consequences. There are therefore areas of industry that are still not fully exposed to competition for reasons of protecting a public interest. The most rudimental example of this is legislation that is put in place to protect consumers from producers cutting corners and using potentially harmful practices or substances in consumer products. At some point however, where it can be assumed that the consumer will benefit more from the product or service than it costs them in terms of health or environment, the balance shifts. Examples that illustrate the hard-to-define limits of this balancing act is the still widespread, world-wide use of the highly versatile, but highly unsustainable palm oil[71] contra the vilified 'microbeads', the small plastic specks added to e.g. body scrubs and toothpastes, now banned in many countries for their harmful effects on the environment.[72] As indicated in the example with Systembolaget below, public policy reasons may also justify broader industry spanning limitations on competition through regulation; one commentator has expressed it as some methods of competition being 'socially undesirable' and in some industries even unfeasible.[73]

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[70] C.f. aspects of Chicago economics which offer a more conservative view of competition, liberalisation of markets and the belief in their ability to 'self-correct'. An overview of the Chicago School and related ideologies can be found in Jones and Sufrin, *EU Competition* Law, 14ff.

[71] WWF, 8 Things to know about palm oil, 17 January 2020, https://www.wwf.org.uk/updates/8-things-know-about-palm-oil accessed 2 November 2020.

[72] Emma Watkins, et.al., 'Policy approaches to incentivise sustainable plastic design', *OECD Environment Working Papers*, No. 149 (2019), OECD Publishing, Paris, 23.

[73] Maurice E. Stucke, 'Is Competition Always Good?', *Journal of Antitrust Enforcement*, Volume 1, Issue 1 (2013), Pages 162–197, 170.

This chapter will in the following provide a brief overview of some agreements and collaborations between competitors or implemented rules and laws that have been allowed to further a public interest despite their inherent anti-competitive nature. The purpose is to put the discussion and analysis in the following chapters into a wider, social context.

3.1.2 General examples

One general exception from taking competition restricting measures relates to agreements required by a Member State's national law. If an agreement between undertakings, which is found to be anti-competitive, is a result of national legislation, this agreement will fall outside of Article 101(1). This is because the activities of the relevant undertakings is not a consequence of anti-competitive conduct on their part but rather due to Member State policy.[74] In general, there is a tendency to prefer regulation to facilitate public interest agreements rather than try to fit such interests in under other legal frameworks, like competition law.[75] The Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (the Horizontal Guidelines) envisage such a scenario but calls for caution:

> 'In certain cases, companies are encouraged by public authorities to enter into horizontal co-operation agreements in order to attain a public policy objective by way of self-regulation. However, companies remain subject to Article 101 if a national law merely encourages or makes it easier for them to engage in autonomous anti-competitive conduct. In other words, the fact that public authorities encourage a horizontal co-operation agreement does not mean that it is permissible under Article 101.'[76]

Another exception relates to public service obligations. E.g. recital 18 of the Directive 2001/83/EC on the Community code relating to medicinal products for human use states that a public service obligation exists on wholesalers to ensure a consistent and timely provision of pharmaceuticals to specific areas. Naturally, this regulation has the potential to restrict how the wholesaler would act in a completely 'free' market scenario, especially when considering the incentives offered by parallel trade in the area.[77] This is an example of where public health considerations may trump competition considerations – even though parallel

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[74] Jones and Sufrin, *EU Competition Law*, 177.

[75] See e.g. Holmes, 'Climate change', 355 and Maarten Pieter Schinkel and Yossi Spiegel, 'Can collusion promote sustainable consumption and production?', *International Journal of Industrial Organization*, Vol. 53 (2017), pp. 371-398, 391.

[76] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011) OJ C3/2, para 22.

[77] Silvija Aile, 'Parallel Trade in Pharmaceuticals: Reconsidering the Underlying European Community Policies', *European Journal of Law Reform*, Volume 7, Number 3/4 (2005),463-504, 465.

trade is generally considered pro-competitive and is an accepted practice in the EU.[78]

Public interest has been a significant aspect in the CJEU's finding that recommendations by an industry body which has been formed under statutory powers do not amount to an agreement. The criteria that must be fulfilled for this finding to stand are that the body in question has no decision-making mandate delegated to it by the public authority and that the recommendations under scrutiny have taken into consideration the public interest.[79]

In addition to this, businesses can agree on standards higher than those provided by regulation, through standardization agreements. These can be compatible with competition law where they fulfil certain criteria, e.g. transparency in how the standard is adopted, that it does not come with an obligation to comply etc.[80]

Finally, a brief note on the relationship between intellectual property rights and competition law is warranted. This is a multifaceted issue that requires extensive discussion and analysis. In this chapter it will merely be noted that exercising one's intellectual property rights could *prima facie* seem like an infringement on competition law (e.g. preventing the use of a trademark without a license could be said to directly restrict competition) but for obvious reasons trademark rights are protected in their own right.[81]

3.1.3 Specific examples

3.1.3.1 Amazon Soy Moratorium

The Amazon Soy Moratorium is a collaboration spanning across the civil society the soy industry and the Brazilian government with the aim of halting deforestation by committing trading firms to abstain from buying soybeans from certain parts of the Amazonian rainforest. The agreement is believed to have contributed to halting deforestation due to soybean farming, but it is under threat as farmers in Brazil have launched efforts to end the agreement.[82]

3.1.3.2 Systembolaget

Systembolaget, the state-owned chain of liquor stores, is a retail monopoly in the area of alcohol sales. Although not strictly related to the topic of this thesis

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[78] Aile, 'Parallel Trade', 465. See further e.g. C-468/06 to C-478/06, *Sot. Lelos kai Sia EE and others v GlaxoSmithKline AEVE Farmakeftikon Poionton (Glaxo Greece)* [2008] EU:C:2008:504, para 65.

[79] Case-96/94, *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl* [1995] EU:C:1995:308, para 42.

[80] The Horizontal Guidelines, paras 280-283.

[81] Stucke, 'Is Competition Always Good?', 6.

[82] Kar, 'Competition rules'. For more information, see e.g. Roberto Samora, 'Brazil farmers push traders to end Amazon soy moratorium', *Reuters*, 5 November 2019, https://www.reuters.com/article/us-brazil-soybeans-moratorium-idUSKBN1XF2J6 , accessed 2 November 2020.

in terms of agreements based on public interest, it constitutes an interesting example as the EU approval of the monopoly structure was based on the desire by the Swedish state to protect public health.[83] In other words it was accepted that competition could be hampered in favour of a public interest goal.

3.1.3.3 Albany

The case of Albany has already been described in Chapter 2.2.4 above but warrants a brief note in this chapter as well as the case establishes that Article 101(1) is not applicable in collective agreement scenarios. Agreements between employees and employers with the aim of enhancing the conditions in the workplace and for the workers therefore fall outside of the scope of Article 101(1). Refer to Chapter 2.2.4 for the reasoning of the court regarding to the wider objectives of the TFEU and how it related to the conclusions.

3.1.3.4 UK Competition Act

The UK Competition Act 1998 provides in Chapter 1, section 3, for agreements excluded from the Article 101(1)-corresponding prohibition in section 2 of the same Act. One of these exclusions relies on public policy, albeit against the seemingly high threshold of 'exceptional and compelling reasons'.[84] The provision was recently in focus because of a statement by the UK Competition & Markets Authority on collaborations between undertakings during the COVID-19 crisis. The statement declares that the crisis may warrant coordination between competing businesses to meet certain social needs and where such coordination is necessary and proportional, no action will be taken against those businesses.[85]

3.1.3.5 California Emission Deal

In August 2020, the California Air Resources Board together with major carmakers confirmed the establishment of an agreement to cut emissions in the state. The news came after the first announcement of the agreement a year earlier which prompted the US Department of Justice (DoJ) to open an antitrust investigation to determine if it was anti-competitive.[86] The investigation was closed with no further statements as to matters considered by the DoJ in the case. The Assistant Attorney General of the Antitrust Division of the DoJ did however respond to criticism that the investigation was politically motivated (Donald Trump had attempted to revoke California's authority to set their own emission

[83] Systembolaget, EU Compliance, https://www.omsystembolaget.se/english/our-way-of-working/eu-compliance/ accessed 2 November 2020.
[84] UK Competition Act 1998, Schedule 3, section 7.
[85] CMA, ref: CMA 118, para 1.5.
[86] David Shepardson, 'Defying Trump, California locks in vehicle emission deals with major automakers', *Reuters,* 17 August 2020, https://www.reuters.com/article/us-autos-emissions-california-idUSKCN25D2CH, accessed 21 November 2020.

standards, despite the state's waiver being in place since the 1970s),[87] emphasizing that the law must be motivated by cultivating competition and not moral stances and that 'laudable ends do not justify collusive means in our chosen system of laws'.[88]

3.2 Concluding remarks on reasons to restrict competition

In this chapter it has been seen that certain balancing factors are necessary to ensure that competition law fulfils its consumer welfare purpose and that public interest aspects can form part of those balancing factors. But the question nevertheless keeps reverting to what the consumer welfare purpose entails or should entail. As described in Chapter 3.1.1, the continued extensive use of palm oil is argued to be justified, at least in part for consumer welfare reasons despite its harmful effect on the environment – so what is the tipping point for when consumer welfare instead becomes consumer harm? For now, it can be concluded that public interest does have a role to play and that that role takes the form of a variety of measures as exemplified in Chapter 3.1.1-3.1.3. These examples are an indication of the many creative solutions that can be applied to promote public interest agreements within the scope of competition law, but they also speak to the currently fragmented nature of the matter.

As mentioned, effective regulation is often cited as the preferred solution to resolve issues that would otherwise arise due to competition law. Regulation could on the one hand promote consistency across markets[89] but on the other hand it can be both complex to design such law and difficult to harmonise regulation across borders and cultures, something which would be important in order to maximise its effect. Furthermore, calls for additional regulation are likely to emanate from various interest groups, whereas corporations may be more opposed to those types of interventions which can make their operations less efficient and more expensive. This gives rise to a significant conflict of interest that the law would need to take into account.

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[87] 'Trump strips California of power to set auto emission standards', *BBC News*, 18 September 2019, https://www.bbc.com/news/world-us-canada-49746701 accessed 21 November 2020.

[88] Makan Delrahim, 'DOJ Antitrust Division: Popular ends should not justify anti-competitive collusion', *USA Today,* 9 December 2019, https://eu.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/ accessed 21 November 2020.

[89] Julian Nowag, 'Sustainability & Competition Law and Policy', OECD, DAF/COMP(2020)3, 10 December 2020, 11.

4 Article 101 TFEU

4.1 Introduction to Chapter 4

This chapter will provide a closer description of the meaning and function of Article 101 TFEU in order to give an overview of the legal provision and frame the discussion of how an increased acceptance of collaboration between undertakings can find a place within the context of the law.

The chapter will begin by explaining what the objective of Article 101 is, since this should steer the interpretation of the provision.[90] The discussion will endeavour to tie back to Chapter 2 on the purpose of competition law in general. A brief description of the building blocks (the three paragraphs) of Article 101 has also been included. Following this, there is a section on how the analysis under the article is conducted, the point of which is to examine whether public interest considerations can be taken into account in this analysis.

It should be noted that certain issues and concepts related to Article 101, such as the definition of 'undertaking' or the meaning of 'agreement' or 'concerted practice' will not be elaborated on in detail in this thesis. The reason for this is that these issues have little bearing on the subject matter and the question at hand; the potential agreements and collaborations between entities that this paper is exploring would need to be established within the scope envisaged by the prohibition in Article 101 for the relevant issue, i.e. whether such agreements should be valid to fulfil a public interest purpose, to arise. In the same way, the economic operators concluding the agreement would need to fall within the article's definition of undertakings and fulfil the appreciability requirement (see further Chapter 4.3.2, category (b) below).

4.2 The purpose, content and structure of Article 101 TFEU

4.2.1 Purpose of Article 101

The prohibition in Article 101 is aimed at catching collusive practices which have the objective or effect of restricting competition. In effect, this means that two

[90] Jones and Sufrin, *EU Competition* Law, 113.

undertakings that independently set the same or similar policies are not in breach of the article, due to the lack of the element of collusion or collaboration.[91]

The Article 101(3) Guidelines furthermore state that the aim of Article 101 is to 'protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.[92] This was echoed by the CJEU in *GlaxoSmithKline*,[93] where the court stated that the aim of the article was to protect competition 'as such' by upholding the structure of the market and ensuring that the interests of competitors and consumers were protected.[94] Finally, following the arguments made in Chapter 2, Article 101 should also be considered within the context of the wider aims of EU policy.[95]

4.2.2 The prohibition in Article 101(1) TFEU

The first paragraph of the article contains a prohibition of certain conduct which aims to restrict competition. Article 101(1) prohibits

> 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'.

The article applies to conduct by 'undertakings' and 'associations of undertakings'. The definition of these concepts has been established in case law and includes all entities that participate in some type of economic activity. The structure of the entity in terms of its legal status or how it is financed is not relevant.[96]
A crucial element in establishing whether there is an 'agreement', 'decision' or 'concerted practice' is identifying some type of joint conduct or collusion between two or more undertakings.[97] The law only applies in situations where the conduct to an 'appreciable' extent affects trade between member states.[98]

In the following, the word 'agreement' will be used to cover the concepts of 'agreements', 'decisions' and 'concerted practices' as set out in the legal text. The word 'restriction' will be used to cover the concept of 'restriction or distortion'.

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[91] See e.g. Case C-238/05, *Asnef-Equifax v Asociación de Usarios de Servicios Bancarios (Ausbanc)* [2006], EU:C:2006:734, para 52.
[92] Article 101(3) Guidelines, para 13
[93] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission* [2009] EU:C:2009:610.
[94] *GlaxoSmithKline,* para 63.
[95] Iacovides and Vrettos, 'Falling through the cracks', 7.
[96] See e.g. Case C-41/90, *Höfner and Elser v Macrotron GmbH* [1991] EU:C:1991:161, para 21.
[97] See e.g. Case T-41/96, *Bayer AG v Commission (Adalat)* [2000], EU:T:2000:242, para 173.
[98] Article 101(3) Guidelines, para 15.

4.2.3 The nullity in Article 101(2) TFEU

Article 101(2) establishes that an agreement prohibited by Article 101 will be automatically void. This does not necessarily entail the entire agreement, but at minimum it will affect the parts that fulfil the criteria in 101(1).[99]

4.2.4 The exception in Article 101(3) TFEU

The third paragraph contains an exception, whereby the first paragraph can be declared inapplicable. Where an agreement is found to infringe Article 101(1), Article 101(3) may thereby provide an exemption. This is determined upon a balancing of interests, where the objective benefits of the conduct in terms of economic gains and efficiencies is considered against its potential of restricting competition.[100] The Commission established the Article 101(3) Guidelines in 2004 to provide a methodology for the analysis of the article.

4.3 The analysis under Article 101

4.3.1 The analytical framework and process

The Commission and the EU Courts' methodology when analysing agreements under Article 101 has developed over the years in response to identified difficulties in the original approach and to criticism by commentators.[101]

The Article 101(3) Guidelines state that each case must be assessed on its own merits, allowing for flexibility in the application of the Guidelines.[102] Nevertheless, it sets out the basic approach of evaluating an agreement under Article 101 in two main steps. The first step is establishing the infringement of Article 101(1) by identifying the agreement as having the object or effect of restricting competition. The second step is examining whether such agreement fulfils the criteria in Article 101(3) by its pro-competitive effects outweighing the anti-competitive effects.[103] Furthermore, the analysis is conducted against the backdrop of the Guidelines' stated aim of competition rules, specifically 'to protect competition on the market as a means of enhancing consumer welfare'.[104]

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[99] Case 56/65, *Société Technique Minière (STM) v Maschinenbau Ulm* [1966] EU:C:1966:38, 250.

[100] See e.g. *GlaxoSmithKline*, para 95.

[101] Jones and Sufrin, *EU Competition Law*, 187. See further recitals 1-3 of the 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, (2003) OJ L 1, p. 1–25.

[102] Article 101(3) Guidelines, para 6.

[103] Article 101(3) Guidelines, para 11.

[104] Article 101(3) Guidelines, para 13.

Reconciling Article 101(1) and 101(3) can be done in a number of ways. Jones and Sufrin mention three possibilities, all three of which have been employed at one point or other by the CJEU and/or the Commission. The first option is to interpret Article 101(1) broadly, an approach which would potentially catch many agreements, necessitating a more detailed examination of the agreement under Article 101(3). The second option is conducting the detailed analysis already under Article 101(1), thereby at the outset drawing certain conclusions as to the negative impact of the agreement to consumer welfare. The role of Article 101(3) is then limited but could potentially allow public interest factors to come into play. The third option is to share the analysis more equally between the two subarticles.[105] The latter approach was seemingly promoted by the General Court (GC) in *M6;*[106] commenting on the relationship between the articles, the GC considered that there would be little purpose left for Article 101(3) if the analysis of the pro and anti-competitive nature of an agreement would be conducted under Article 101(1).[107]

The basic outline of the analysis appears straightforward, but the practical application is more complex; one of the questions that arises is how should 'procompetitive effects' be defined and could public policy considerations ever fall within the ambit of that definition? Or should such considerations rather fall under the consumer welfare concept? In addition to this, depending on where the emphasis in the analysis is placed and how the balance is struck between Article 101(1) and 101(3), the outcome for agreements promoting public interest may be different. An emphasis on restrictions under Article 101(1) may lead to the agreement being caught by the article too readily and there is a risk that it cannot be justified under Article 101(3) either.

4.3.2 Categorisation of agreements

In assessing an agreement and its potential for restricting competition, it is common practice in competition law systems to categorise agreements based on their potential of restricting competition. The reason for this is, among other things, to reinforce legal certainty by ensuring consistency and objectivity in the application of the law. There are four main categories of agreements in the EU, with varying presumptions as to their legality:[108]

(a) Agreements restrictive by object: for agreements which have as their object the restriction of competition the presumption is that these restrict competition appreciably, regardless of their effect.[109] The CJEU has in

[105] Jones and Sufrin, *EU Competition Law,* 183.

[106] Case T-112/99, *Métropole Télévision (M6) v Commission* [2001] EU:T:2002:242.

[107] *M6,* para 74.

[108] Jones and Sufrin, *EU Competition Law,* 190-191.

[109] Case 56 and 58/64, *Établissements Consten SàRL and Grundig-Verkaufs-GmbH v Commission* [1966] EU:C:1966:41, 342-343, Case C-8/08, *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse*

several cases reiterated that to identify restriction by object the purpose or objectives of the agreement must be considered, including the clauses and the context.[110] The defendant must prove that the agreement meets the criteria in Article 101(3) for the presumption to be rebutted.

(b) Agreements not fulfilling the appreciability requirement: where the undertakings that have entered into the relevant agreement have a weak position on the market the agreement will not be caught by the Article 101(1) prohibition, unless the agreement is found restrictive by object.[111]

(c) Block exemptions: there is a safe harbour for agreements which satisfy EU block exemptions; they are presumed to fulfil Article 101(3).

(d) Agreements restrictive by effect: other agreements are assessed on a case by case basis to determine whether they have as their effect the restriction of competition and whether they in that case can fulfil the Article 101(3) criteria. An assessment of the likely impact of the agreement is made. They are thereby not presumed to be restrictive.

4.4 Appraisal of agreements to promote a public interest under Article 101(1)

4.4.1 Introduction

In the following section the discussion will focus on how a public interest agreement can be assessed under Article 101(1). The starting point for the analysis will be the categorisation described above in 4.3.2 Not all categories are relevant for this discussion. Category (b), appreciability, places more analytical focus on the particular parties to an agreement, rather than the agreement itself, and as such it will not be discussed further here. As mentioned above, an agreement in the public interest which is not found to be appreciable falls outside of Article 101. Category (c), block exemptions, will also not be further discussed here as an agreement that falls within a block exemption automatically falls outside of Article 101(1).[112] There is no block exemption specifically focussed on public interest,

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Mededingingsautoriteit [2009] EU:C:2009:343, paras 28 and 30, *GlaxoSmithKline* para 55 and C-373/14 P *Toshiba Corporation v Commission* EU:C:2016:26 paras 25-26.

[110] See e.g. Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd. (BIDS)* [2008] EU:C:2008:643, para 21, *GlaxoSmithKline,* para 58.

[111] 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 (De Minimis Notice) [2014] OJ C291/1, paras 1-2.

[112] See Article 2(1) Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain

however, the topic will be revisited in Chapter 5.1.3 on current developments as the European Commission has stated that it will be looking at sustainability issues in relation to the recently initiated review of two horizontal block exemption regulations.

The purpose of this sub-chapter is to review the law to understand if the solution to bringing in public policy considerations into the competition law sphere leans more towards changes to the law or a modified analysis under Article 101.

4.4.2 Agreements restrictive by object

A number of situations have been identified in case law as typically or inherently restrictive by object, e.g. price fixing and market sharing.[113] In *CB*[114] the CJEU stated that object restrictions should be interpreted restrictively and applied in situations where the collusion implies such a level of damage to competition that it renders an examination of the actual effects meaningless.[115]

As is the case with the effect of the agreement, the parties' subjective intentions with respect to actually restricting competition is less important in this context;[116] hypothetically, a public interest agreement based on e.g. some type of market sharing, with or without an intention to limit competition, could thereby be at risk of being caught by this first category (category (a), as described above in Chapter 4.3.2) and the presumption would be that it would be restrictive of competition in accordance with Article 101(1). Even if a new agreement category was added exempting public interest motivated agreements from Article 101(1), extensive analysis would need to be undertaken to filter out agreements masquerading as being in the public interest. Nevertheless, the argument that an agreement restrictive by object should not fall under Article 101(1) due to its aim of promoting a public interest or having pro-competitive benefits has come up several times in case law, e.g. in *BIDS*[117] which is discussed below.

It is imperative to point out the importance of context when evaluating an agreement's objective. The context can either lead to an expansion of the type of agreements that would be caught by Article 101(1), by adding scenarios to the typical object restraints, or a narrowing of the scope of those agreements where,

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categories of research and development agreements, (2010) OJ L 335, p. 36–42 (Research & Development Block Exemption Regulation) and Article 2(1) Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, (2010) OJ L335, p. 43–47.

[113] See e.g. Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services Ltd (ENS)* v Commission [1998] EU:T:1998:198, para 136.

[114] Case C-67/13 P, *Groupement des Cartes Bancaires (CB) v Commission* EU:C:2014:2204.

[115] *CB,* para 58.

[116] See e.g. *Bayer*, para 173, although intent can be taken into account as evidence, see Case T-368/00, *General Motors Nederland and Opel Nederland* [2003] EU:T:2003:275, para 198.

[117] Case C-209/07, *Competition Authority v Beef industry Development Society Ltd (BIDS)* [2008] EU:C:2008:643.

on the basis of the aim or the background of the agreement, it is clear that 'an assumption of anti-competitive effects is not warranted'.[118] A finding that a type of agreement is held to be restrictive by object is obviously far reaching, in that it catches all such contracts and results in prohibition of the contract, regardless of the effect. For this reason it has been argued that object restrictions should be limited to scenarios where 'experience based on economic analysis' calls for it, in other words, where the legal and economic context implies a sufficiently high level of harm to competition.[119] In relation to the first scenario, expanding the object restraints, there have been statements made by the CJEU in e.g. *T-Mobile*[120] which promotes a broad view of object restraints. In the case the court stated that in identifying anti-competitive object it was enough that the agreement or practice had the 'potential' to negatively impact competition.[121] Conversely, in *CB* the CJEU emphasised that the category of restrictions by object should be interpreted restrictively.[122] A more narrow interpretation of restrictions by object could potentially enable, or at least facilitate, for public interest agreements to escape Article 101(1), as could an interpretation based on experience. In fact, in the introduction to their draft guidelines on applying EU competition rules to agreements promoting sustainability[123] (the Sustainability Guidelines), the Netherlands Authority for Consumers and Markets (ACM) stated that '[i]n ACM's experience, sustainability agreements, in many situations, can be made without any major problems'.[124]

The argument that an agreement seemingly restrictive by object should not be found to restrict competition where it seeks to achieve a legitimate aim has been raised in several cases. A legitimate aim is not necessarily always in the public interest, however, a public interest could be presumed to always be a legitimate aim. In *BIDS*, the CJEU pointed out that the agreement between the parties was incompatible with EU competition law in that the law makes clear that any measure taken by the parties must be determined by each undertaking independently – regardless of the arguments made by the parties that the arrangement had been instated to deal with what was referred to as an industry crisis.[125] A potentially

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[118] Jones and Sufrin, *EU Competition Law*, 200.

[119] Opinion of Advocate General Nils Wahl delivered on 27 March 2014, Case C-67/13, *Groupement des cartes bancaires (CB) v European Commission*, para 44 and 55. He also emphasizes the importance of distinguishing the effects analysis from the context analysis.

[120] Case C-8/08, *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] EU:C:2009:343.

[121] *T-Mobile*, para 31.

[122] *CB*, para 58, also cited by the CJEU in Case C-345/14, *SIA 'Maxima Latvija' v Konkurences Padome* EU:C:2015:784 para 20.

[123] Autoriteit Consument & Markt (*Eng.* Netherlands Authority for Consumers and Markets) (ACM), Guidelines, 'Sustainability Agreements, Opportunities within Competition Law', July 2020, https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf, accessed 15 November 2020.

[124] Sustainability Guidelines, 3. The Sustainability Guidelines are further discussed in Chapter 5.1.1.

[125] *BIDS*, para 34.

legitimate aim was thereby not enough to justify the agreement and measures taken. Furthermore, in *CB* it was stated that 'the fact that the measures at issue pursue the legitimate objective of combatting free-riding does not preclude their being regarded as having an object restrictive of competition.'[126] From these cases it is evident that there is no natural exemption of public interest agreements from the scope of object restrictions – the requirement of assessing the agreements in a legal and economic context remains.

US antitrust analysis has favoured the so called 'rule of reason' since the 1977 *Continental TV Inc, v GTE Sylvania Inc*[127] case. In essence, this approach allows the court to consider an agreement's competition-promoting aspects and weigh them against its capacity to restrict competition. To illustrate, in the US Supreme Court's judgement in *Broadcast Music, Inc (BMI) v Columbia Broadcasting System Inc*,[128] the court decided that an agreement, despite its price fixing nature, a factor that in the US antitrust context ordinarily would imply an arrangement illegal *per se*, should be assessed under the rule of reason: the agreement should, in other words, be evaluated against its potential of increasing economic efficiency and thereby promote competition rather than stifle it.

The rule of reason has so far been rejected by commentators and the EU Courts. In *M6* the GC expressly stated that the rule of reason is not applicable in EU competition law.[129] Jones and Sufrin also point out that (in US antitrust procedures) the rule in practice has been proven difficult to apply.[130] They concede however that it is not obvious whether the agreements seeking legitimate objectives instead would be exempted under Article 101(3).[131] In its White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty[132] (the White Paper) the Commission states that Article 85(3) (now Article 101(3)) already 'contains all the elements of a "rule of reason"'.[133] This statement requires some clarification, or perhaps modification as it overlooks the difference in where the burden of proof lies. For alleged breaches of Article 101(1), the party alleging the infringement must prove it (e.g. the national competition authority or the Commission) and the party that seeks to establish an Article 101(3) exemption must in turn prove this.[134] The burden of proof under Article 101(3) is thereby concentrated to the defendant and cannot be said to correspond to a rule

[126] *CB* Para 69
[127] *Continental TV Inc, v GTE Slyvania Inc*, 433 US 36 (1977).
[128] *Broadcast Music, Inc (BMI) v Columbia Broadcasting System, Inc*, 441 US 1 (1979).
[129] *M6*, paras 72-76
[130] Jones and Sufrin, *EU Competition Law,* 187.
[131] Jones and Sufrin, *EU Competition Law,* 209.
[132] European Commission, White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, (1999) OJ C132, p. 1–33.
[133] White Paper, para 57.
[134] Article 2 Reg 1/2003.

of reason approach as such, where the burden of proof shifts between the plaintiff and defendant. Furthermore, cases such as *STM*[135] indicate that there, even in EU competition law, is scope for a flexible approach to the appraisal in Article 101(1). In its judgement, the court stated that the analysis should take into consideration how the situation for competition would look if the agreement in question had not been entered into; 'In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking.'[136] The court, still on Article 101(1), furthermore emphasised the need to look at the wider context to understand potential justifications for the disputed agreement.[137] It has also been argued that *Wouters*[138] introduces a 'European-style rule of reason'[139] (see discussion on *Wouters* in 4.4.3).

If this group of agreements, in other words agreements motivated by public policy objectives, would be deemed restrictive by object, this would put at risk certain positive (or objectively positive) developments. Jones and Sufrin question whether such approach is reconcilable with the Article 101 objectives:

> 'rather it would seem to create a risk of infringement for technical reasons and wrongly condemning pro-competitive agreements and false positives. Indeed, although such agreements may have the potential to restrict competition it is hard to see that they reveal a sufficiently deleterious and obvious risk to competition, as required by the CJEU in *STM* and *CB*.'[140]

In *Pierre Fabre v Président de l'Autorité de la concurrence*[141] the CJEU remarked that even those agreements deemed restrictive by object, in the case at hand a selective distribution agreement, would not be caught by Article 101(1) in the presence of an 'objective justification'.[142] This could potentially offer a solution to public interest agreements, although a great deal of analysis remains as to what would count as an *objective* justification. As always, a balance would need to be struck between legal certainty and flexibility.

As discussed above, depending on the chosen analytical procedure under Article 101 (see Chapter 4.4.3) the emphasis can either be on Article 101(1) or 101(3) or evenly distributed across the two articles. A relevant consideration is whether the examination of intent should play a bigger role in the Article 101(1) assessment, to already there allow for public interest considerations. Although

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135 Case 56/65, *Société Technique Minière (STM) v Maschinenbau Ulm* [1966] EU:C:1966:38.
136 *STM,* 250.
137 *STM,* 250.
138 Case C-309/99, *Wouters v Algmene Raad van de Nederlandse Orde van Advocaten* [2002] EU:C:2002:98.
139 Monti, 'Article 81 EC', 1088.
140 Jones and Sufrin, *EU Competition Law,* 209.
141 Case C-439/09, *Pierre Fabre v Président de l'Autorité de la concurrence* EU:C:2011:277.
142 *Pierre Fabre,* para 39.

intent would be a valid measurement, as in any area of law it gives rise to difficulties from an evidentiary perspective. Proving intent can prove a fruitless endeavour and it would also be difficult to reconcile such an approach with the statement by the CJEU in *BIDS:*

> '…even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that [Article 101(1)] provision … It is only in connection with [Article 101(3)] that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in [Article 101(1)].'[143]

4.4.3 Agreements with the effect of restricting competition

Potential competition restricting effects of an agreement are evaluated where it has been established that that was not the object of the agreement.[144] The possibility that a public interest agreement would have the effect of restricting competition and thereby be caught by Article 101(1) is perhaps a more plausible scenario than that it would be caught as restrictive by object. It is not difficult to envisage an agreement between undertakings limiting them in their activities and keeping new players from entering specific markets. Examples could include banning certain harmful materials, setting environmental goals or other decisions that e.g. may require some type of investment that not all undertakings have the possibility to realise. An illustrative example is the agreement in *European Council of Manufacturers of Domestic Appliances (CECED)*,[145] which will be discussed in 4.5.2, where an agreement to ban the most energy consuming washing machines would both lead to a narrowed choice for consumers in terms of available machines and set producers without the know-how to produce energy efficient machines at a clear competitive disadvantage. In other words, the effect of the agreement was restrictive of competition and the competition on the market was likely to look different if the agreement did not exist.

The market context plays an important part of evaluating the agreement's effect, something which was highlighted in *STM*[146] and *Brasserie de Haecht v Wilkin*

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[143] *BIDS*, para 21. Cf. however *CB* para 54 and C-32/11, *Allianz Hungária Biztosító Zrt. Generali-Providencia Biztosító Zrt v Gazdasági Versenyhivata,* [2013], EU:C:2013:160, para 36, where the CJEU stated that there is nothing barring the court from considering a party's intent.

[144] Article 101(1) TFEU catches agreements that have as their object *or* effect the restriction of competition.

[145] *European Council of Manufacturers of Domestic Appliances (CECED),* COMP. 36.718 [2000] OJ L187/47.

[146] *STM*, 250.

(No. 1).[147] This evaluation is a quantitative and qualitative exercise in understanding a particular market, the entities operating on that market, their interactions, the customer base etc.[148] The concept of 'context' in this respect, together with the stated aim of Article 101 as protecting or maximising consumer welfare, seems unlikely to take into account public policy considerations. In a similar vein to the CJEU in *STM*, the GC in *O2 (Germany) GmbH & Co OHG v Commission*[149] stated that the context analysis should consider the agreement's impact as well as what competition on the market would look like if the agreement did not exist.[150] In relation to the latter criteria, the GC pointed out that such an examination is especially important in cases where competition on the market is already compromised due to e.g. a dominant operator on a market which has been recently liberalised.[151]

The CJEU has in some cases concluded that the pursuit of a public policy objective may render an inherently restrictive agreement acceptable, already under Article 101(1); this approach is also known as the ancillary restraints doctrine.[152] In *Wouters* it was examined whether a particular national regulation, adopted by the Netherlands Bar Association, barring lawyers from establishing partnerships with accountants, was anti-competitive. The CJEU noted that these types of arrangements, i.e. the now prohibited partnerships, could in fact have a positive impact for customers who would no longer need to turn to two different service providers.[153] There was also scope for economies of scale to emerge which would be likely to lead to lower costs for the consumers.[154] Despite the obstacles it created to the identified benefits, the Court found that the implemented national regulation did not breach Article 101(1) as it was deemed reasonable by the Bar Association to consider the measure needed for the continuing 'proper practice of the legal profession'.[155] This conclusion was thereby made despite an identified likelihood of the regulation to adversely affect competition.[156] The Court stated that Article 101(1) will not necessarily catch all agreements restrictive of the freedom of action of the parties. What had to be considered was the overall context, the objectives of the measures and 'whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives'.[157] Since Article 101(1) was not in breach there was no need for analysis

[147] Case 23/67, *Brasserie de Haecht v Wilkin (No. 1),* [1967 EU:C:1967:54, 415.

[148] See e.g. Case C-243/89, *Delimitis v Henninger Bräu*, [1991] EU:C:1991:91, paras 16-19, where the CJEU explained that the approach when analysing the effects of the agreement is to firstly determine the relevant market on the basis of the economic activity and geography.

[149] Case T-328/03, *O2 (Germany) GmbH & Co OHG v Commission*, [2006] EU:T:2006:116.

[150] *O2,* para 71.

[151] *O2,* para 72.

[152] Holmes, 'Climate change', 370.

[153] The so called 'one stop shop advantage'; see *Wouters*, para 87.

[154] *Wouters,* para 89.

[155] *Wouters*, para 110.

[156] *Wouters,* para 86.

[157] *Wouters,* para 97.

under Article 101(3). Reasoning similar to that in *Wouters* can be seen in *Meca-Medina,*[158] where certain rules were found to be restrictive, but not restrictive within the meaning of Article 101(1) since they were 'justified by a legitimate objective'.[159]

The approach in *Wouters* clashes with the one advised in the Article 101(3) Guidelines and by the CJEU in *M6* (see Chapter 4.3.1 above); this would more likely have seen the Court deem the agreement restrictive under Article 101(1) and then move on to an analysis under Article 101(3) to determine a potential exemption. This was in fact the approach in *Laurent Piau*,[160] where the implementation of a requirement of a licence to undertake specific occupational activities was in fact found to be restrictive and any counterarguments would, according to the court, need to be evaluated under Article 101(3). Similar reasoning was seen in *BIDS*, mentioned above in 4.4.2. Jones and Sufrin remark that the CJEU in *Wouters* balanced the competition restricting consequences of the regulation against benefits that were not of an economic efficiency nature and suggest that the case can still be said to set a precedent for weighing restrictive practices against legitimate objectives within the scope of Article 101(1) (in other words not only under Article 101(3)).[161] This view can be contrasted to Attorney General (AG) Léger's Opinion in *Wouters*, where he argues that the only 'legitimate goal' which could be considered within the scope of Article 101(1) would have to be 'exclusively competitive in nature'.[162] Any arguments connected to the public interest should therefore, according to the Opinion, only be appraised under Article 101(3).[163] It should however be noted that the *Wouters* ruling precedes Regulation 1/2003, which enabled national competent authorities to rule on Article 101(3), something which at the time was the exclusive competence of the Commission. Had the CJEU in *Wouters* ruled that the agreement was anti-competitive and that any justifications should be brought up under Article 101(3), the referring national court would have had to rule the national regulation void.[164]

Whether or not *Wouters* establishes an exception, and if so under which circumstances, has been widely discussed and debated in articles and legal literature. Whish and Bailey suggest that where the restriction concerns reasonable regulatory aims, *Wouters* applies.[165] Arguments along the same lines cite the case as an example where a public interest could be achieved within the scope of the law, specifically as a consequence of a public sector decision, if the restriction was deemed proportionate, non-discriminatory and necessary due to the absence of

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158 Case C-519/04 P, *Meca-Medina v Commission* [2006] EU:C:2006:492.

159 *Meca-Medina,* para 45.

160 Case T-193/02 *Laurent Piau v Commission*, [2005] EU:T:2005:22, para 101.

161 Jones and Sufrin, *EU Competition Law,* 233.

162 Opinion of Advocate General Mr Léger, delivered on 10 July 2001, Case C-309/99, *Wouters*, para 104.

163 Opinion of Advocate General Mr Léger, *Wouters*, para 113.

164 Jones and Sufrin, *EU Competition Law,* 233.

165 Richard Whish and David Bailey, *Competition Law,* (Oxford University Press, 2015), 138-142.

other, less restrictive, options.[166] The *Wouters* exception, or perhaps it is more diplomatic to call it 'option', has not yet been applied in a court case concerning environmental agreements. It has been argued that this could present an opportunity in the climate change area.[167]

4.4.4 Summary and concluding remarks regarding the appraisal under Article 101(1)

In accordance with Article 101(1), agreements which have as their object or effect the restriction of competition are prohibited. Despite the general sentiment that the object restriction category should be restrictively interpreted in order to avoid catching agreements that should not fall into this scope, the object or effect analysis conducted under the article relies on certain principles and assumptions established in case law. One example of this is activities which are inherently considered object restrictions, such as market sharing agreements. *Prima facie,* it is difficult to see how a public interest agreement based on settled object restriction arrangements, or clearly harming competition, would be able to escape the claws of Article 101(1) just because of its public interest nature. This was also underlined in *CB* as described above. The analysis would need to be continued under Article 101(3). Another solution would be to always refer public interest agreements to an effects analysis, which may provide for some consideration of public interest related benefits to be taken into account. However, this would suggest a rule of reason style analysis already under Article 101(1), which in irreconcilable with both the Court's, the Commission's and academic perception of the rule, which is that it has no established place in EU Competition law.

Could a rule of reason resolve the difficulties of reconciling acceptance of public interest agreements with the blanket ban approach of agreements restrictive by object under Article 101(1) in EU competition law? As reasoned above, the rule has consistently been rejected by the EU courts and others, while it simultaneously has been argued that the Article 101(3) analysis in fact corresponds to the rule of reason. There is a chance that such a balancing activity already under Article 101(1) would add value to the appraisal of public interest agreements, however, with the approach not being directly compatible with the Article 101 text it is difficult to argue for it under the current legal framework.

Another aspect which has been emphasised is the context consideration. This could potentially provide some space for a more holistic assessment of public interest agreements. An agreement's aim and context could lead to its exclusion from the scope of the prohibition if it is evident from the agreement's purpose that 'an assumption of anti-competitive effect is not warranted'.[168] If, in the process of evaluating an agreement, more focus is put on establishing the objective

[166] Jones and Sufrin, *EU Competition Law,* 233.
[167] Holmes, 'Climate change', 371.
[168] Jones and Sufrin, *EU Competition Law,* 200.

public interest aims contra its aim to limit competition, there would be more leeway for such agreements. However, these types of assessments may appear too arbitrary in nature and thereby too uncertain to implement such an approach.

In *STM* and *O2,* the courts stated that the competition in the specific case would need to be assessed against the situation as it would look had the agreement never been made. If this mode of reasoning is to be followed, it may create certain obstacles in the case of public interest agreements where an effect on competition may indeed exist, but where on the balance of things the agreement is in the public interest to promote.

In *Wouters* the CJEU managed to avoid a situation whereby the national court in question would have to deem the agreement void as a consequence of it being barred from applying Article 101(3), by essentially incorporating that analysis within the scope of Article 101(1). This could be argued to either be a reflection of the pre-Regulation 1/2003 procedures or it could be argued that both *Wouters* and *Meca Medina* support an interpretation which makes it possible to salvage agreements taken in the public interest, by mitigating the risk of that agreement not being held in breach of Article 101 and promoting judicial economy by skipping the step in Article 101(3). Another view is that they reflect the court's inclination to decide in accordance with whatever public policy topic that was on the agenda at the time; this could potentially provide relief for currently trending topics like climate change.[169] *Wouters* comes across as a case where the objectively preferable decision was in fact reached, but the reasoning leaves scope for improvement. The arguments supporting the *Wouters* decision as promoting proportional, necessary and reasonable aims raise the question if different rules should apply to different public interest agreements and who is then to determine what should be deemed a 'reasonable regulatory aim'? This would again risk further politicising of the issue and force a constructed prioritisation of public interests; are e.g. regulatory rules in the sports sphere more important (or perhaps less controversial?) to 'defend' than climate change measures?

As indicated in e.g. *Pierre Fabre, Wouters* and *Meca Medina*, several concepts have been cited over the years as potential solutions to exempting public interest agreements. However, whether these are based on a 'rule of reason', 'legitimate aim', 'objective justifications' or 'reasonable regulatory aims' seems less helpful than focussing on what it is that is actually sought to be achieved and what the aim of Article 101(1) in fact is. This implies an approach centred around the teleological interpretative method, a mode of construing the law based on what the legal provision under examination aims to achieve. This is in no way a new method of interpretation for the CJEU; already in *van Gend & Loos*[170] it was explained that legal provisions should be interpreted in 'the spirit, the general

[169] Holmes, 'Climate change', 371.

[170] Case 26-62*, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963], EU:C:1963:1.

scheme and the wording of the Treaty'.[171] This was repeated in the seminal case of *Continental Can*,[172] where the court also added that consideration should be had to 'the system and objectives of the Treaty'.[173] The public interest aims of an agreement should form part of the consideration in the interpretation exercise and especially against the backdrop of the wider aims of EU competition law.

4.5 Appraisal of agreements to promote a public interest under Article 101(3)

4.5.1 Introduction to Article 101(3)

The function of Article 101(3) is to allow restrictive agreements that on balance are found to be more pro-competitive than anti-competitive to continue to exist. The theory is that the pro-competitive effects in terms of efficiency gains trickle down to the consumer (e.g. in the form of lowered prices), offsetting any negative competition effects.[174] A finding as to an agreement's fulfilment of the criteria in Article 101(1), regardless if due to restriction by object or effect, therefore triggers an assessment under Article 101(3). In its Article 101(3) Guidelines, the Commission refers to this simply as 'the assessment of the positive economic effects of restrictive agreements'.[175] The prospective beneficiary of the exemption has the burden of proof[176] and must show that all four criteria in the article are fulfilled.[177] Consequently, it must be shown that the agreement:

1. contributes to improving the production or distribution of goods or to promoting technical or economic progress,
2. allows consumers a fair share of the resulting benefit,
3. does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and
4. does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

When it comes to agreements restrictive by object, the perception of *per se* illegality renders it difficult to justify public interest agreements under Article

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[171] *Van Gend & Loos,* 13.

[172] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities* [1973] EU:C:1973:22.

[173] *Continental Can*, para 22

[174] Article 101(3) Guidelines, para 34.

[175] Article 101(3) Guidelines, para 32.

[176] Article 2, Reg 1/2003.

[177] Article 101(3) Guidelines, para 34 ('The application of the exception rule of Article 81(3) is subject to four *cumulative* conditions' (emphasis added)). Also see e.g. Cases T-528, 542, 543 and 546/93 *Métropole Télévision SA v Commission* [1996] EU:T:1996:99, para 93.

101(3).[178] The assessment approach under Article 101(3) may therefore become crucial to a potential exemption of such agreements. In this section, the criteria will be analysed to see whether public interest agreements could fulfil them.

4.5.2 Criterion 1: the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress

The first criterion requires evidence of efficiency gains in the form of an objective benefit deriving from the agreement between the parties and offsetting the harm that it may cause to competition.[179] The parties themselves cannot be the sole recipients of the identified benefits.[180] According to the Article 101(3) Guidelines, in arguing for an agreement's efficiency gains, the parties must in detail explain the nature of the efficiency, its likelihood and magnitude, how it will be achieved as well as the causal link between the agreement and the efficiency.[181] Typically, the efficiency will entail cost reductions or quality improvements resulting from e.g. the development of new production methods[182] or sharing of assets or technologies.[183]

The Article 101(3) Guidelines briefly touch upon the significance of claims of 'wider efficiency enhancing effects within the relevant market' and arguments based on 'indirect effects', concluding that the former may be taken into account in the efficiency gains assessment,[184] whereas the latter is generally not a reliable or defined enough measurement to be considered.[185] The Guidelines furthermore state that aims promoted in other Treaty articles can be taken into account if they can be 'subsumed' under the four criteria in the sub-article.[186] In addition to this, it was clearly provided in the White Paper that the purpose of Article 101(3) was to create 'a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because

[178] Jones and Sufrin, *EU Competition Law,* 209.
[179] *Consten and Grundig*, 348.
[180] *Consten and Grundig*, 348.
[181] Article 101(3) Guidelines, para 51.
[182] Article 101(3) Guidelines, para 64
[183] Article 101(3) Guidelines, para 65
[184] Article 101(3) Guidelines, para 53
[185] Article 101(3) Guidelines, para 54.
[186] Article 101(3) Guidelines para 42. See further T-17/93, *Matra Hachette v Commission* [1994], EU:T:1994:89 para 139, which the Commission relies upon.

of *political considerations*'.[187] This stands in contrast to a statement by the Commission in a report on competition policy from 1995,[188] where it, in relation to agreements with environmental objectives, describes its own process under Article 101(3) in individual cases as balancing any restrictions on competition resulting from such agreements with any environmental aims that such agreement may have. It concludes that the aspect of environmental improvements contributes to first criterion.[189] On the other hand and as has already been mentioned in this thesis, it could be argued that the consumer welfare benchmark makes it difficult to take other matters than only that into account in the balancing exercise that is Article 101(3). Furthermore it has been argued that the decentralisation of the enforcement of EU Competition law, which came about as a result of reforms in 2004, 'made the exclusion of other considerations expedient'.[190] It is indeed difficult to reconcile the positions and contradictory statements made by the same public bodies, expert commentary and case law in the area.

So where does this leave us in the analysis of efficiency claims in the form of public interest benefits and could they ever be justified under the first criteria in Article 101(3)? The Commission's approach seems primarily concerned with economic efficiency, with other considerations having some impact, but not taking centre stage in any sense. The modernisation reform must also be kept in mind in any discussion on the topic, as it represents a dichotomy in the Commission's approach. Pre-modernisation, the Commission decision in *Ford/Volkswagen* indicated that public policy considerations, in this case investment in a poor region of the EU and significant job creation, was a relevant consideration although not adequate to exempt an agreement under Article 101(3).[191] Other pre-modernisation examples from the European courts also signalled that public policy was a relevant factor in the exemption assessment; in *Metro I*,[192] the particular efficiency related to labour market improvements and was in the view of the CJEU relevant to the Article 101(3) assessment. In *Métropole*,[193] the CJEU stated that '[a]dmittedly, in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty.'[194]

In *CECED,* the agreement at hand concerned a prohibition on production and import of washing machines that did not fulfil a certain energy standard. This would on the one hand lead to more environmentally friendly products and on

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[187] White Paper, para 57 (emphasis added).

[188] European Commission, XXVth Report on Competition Policy 1995 (Published in conjunction with the 'General Report on the Activities of the European Union – 1995'), Brussels, Luxembourg, 1995.

[189] XXVth Report on Competition Policy, para 85.

[190] Jones and Sufrin, *EU Competition Law,* 43.

[191] *Ford/Volkswagen,* para 36.

[192] Case 26/76, *Metro-SB-Grossmärkte GmbH v Commission (Metro I)* [1977] EU:C:1977:167, para 43.

[193] Case T-528, 542, 543 and 546/93, *Métropole Télévision SA v Commission*, [1996] EU:T:1996:99.

[194] *Métropole Télévision*, para 118.

the other to less choice of and more expensive products. This was held to be restrictive of competition under Article 101(1) which prompted analysis under Article 101(3). In assessing the promotion of technical progress, the court noted that the reduced electricity and water consumption which the new, more efficient machines resulted in, equalled increased technical and cost efficiency. The reduction would also indirectly lead to reduced pollution from electricity generation while the washing machines would still provide the same service, resulting in increased economic efficiency. Furthermore, it was likely to lead to more future development and research on energy efficiency in the area and consequently increased product differentiation.[195] It has been suggested that this signifies a change in the Commission's approach, in that equating the environmental benefit with efficiency gives more weight to the public interest dimension.[196] Similar reasoning can be gathered from the Commission decision in *Exxon/Shell*,[197] and *Philips/Osram*.[198] In the former, reducing plastic waste, raw material use and environmental risks were factors deemed as promoting technical and economic progress.[199] In the latter, reducing energy consumption and the potential for waste emission programs led to the same conclusion.[200] In none of the cases however were the environmental gains isolated factors in finding that the requirements for the technical and economic progress criteria were fulfilled.

Despite the Commission's focus on the economic element of the agreement, the sub-criteria under criterion 1 are not cumulative; 'economic progress' is only one aspect that can be taken into account ('the agreement contributes to improving the production *or* distribution of goods *or* to promoting technical or economic progress' (emphasis added)). This raises another question: does the concept of economic progress only relate to straight forward economic considerations such as cost savings and price reductions? A narrow interpretation would effectively dismiss other benefits that could have indirect or potential economic efficiencies. Although the general conclusion, in line with the discussion above, continues to be that non-economic benefits (e.g. environmental benefits only) are not adequate to exempt an agreement, it is interesting to explore what could be encompassed under the economic progress umbrella. Two practical examples of this were raised in the OECD Roundtable. An agreement between providers of public transport services, which had positive effects on traffic in terms of reduced congestion, was seen as conferring a direct economic benefit, and would be taken into consideration in the competition law analysis. Any effects on environmentally harmful emissions however were of such non-economic character that the benefits could not be taken into account in such analysis, despite the potential

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195 *CECED,* para 50.
196 Monti, 'Article 81 EC', 1074.
197 *Exxon-Shell* (COMP/33.640) [1994] OJ L144/21.
198 *Philips/Osram* (COMP/34.252) [1994] OJ L378/37.
199 *Exxon-Shell*, paras 67-68.
200 *Philips/Osram,* para 25.

public benefit. Similarly, an agreement between companies on using packaging made from biodegradable materials would be considered an economic benefit only if it could be proved that the biodegradable product characteristic was an important quality to consumers. In the Roundtable report, the OECD considers that the economic benefits encompassed by competition law analysis include 'cost savings, innovation, improved quality, and other efficiencies',[201] a relatively broad or open-ended definition.

In the European Commission's 2001 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation[202] (the 2001 Guidelines, replaced by the Horizontal Guidelines in 2011), what was referred to as 'Environmental Agreements' had been given a separate section of the document. They were defined as agreements with the aim of reducing pollution (and not where the reduction was a consequence or side effect of other measures).[203] Under the 2001 Guidelines it was provided that these agreements were unlikely to restrict competition in accordance with then Article 81(1) if they constituted a less strict commitment on behalf of the parties,[204] where product and production diversity was not affected appreciably[205] or if they would bring about 'genuine market creation'.[206] This section was removed in the updated Horizontal Guidelines which could be interpreted as a fairly aggressive or indicative move on behalf of the Commission. On the other hand, the updated Horizontal Guidelines do contain a few references to environmental considerations; e.g. introducing environmental standards in products is cited as being an enabler for increased product quality, something which in turn fulfils the efficiency requirements under Article 101(3).[207]

4.5.3 Criterion 2: the agreement allows consumers a fair share of the resulting benefit

The first issue to note about the second criterion is that the definition of 'consumer' is limited to the specific users of the products.[208] The notion of a 'public' interest is thereby from the outset challenged by the criteria's focus on the particular consumer.

In terms of the 'resulting benefit' envisaged by the Article, this has been broadly interpreted to include 'the beneficial nature of the effect on all consumers

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[201] OECD Roundtable, 11.
[202] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation Agreements (2001/C 3/02).
[203] The 2001 Guidelines, para 179.
[204] The 2001 Guidelines, para 185.
[205] The 2001 Guidelines, para 186.
[206] The 2001 Guidelines, para 187.
[207] The Horizontal Guidelines, para 308.
[208] Article 101(3) Guidelines, para 84.

in the relevant markets' rather than individual effects.[209] There is no indication that the resulting benefit would be purely economical, e.g. relate to lower prices. Rather, a benefit can also include quality improvements in products which may in fact make up for an increase in price.[210] Holmes refers to the requirement as 'flexible' with the potential to include sustainability aspects.[211]

Finally, on the concept of 'fair share', the Article 101(3) Guidelines provide that the benefits of the agreement to the consumers must be offset against any negative impact.[212]

To what extent can public benefits then be considered under criterion 2? The Article 101(3) Guidelines, in discussing the concept of 'fair share', provide that '*society as a whole* benefits where the efficiencies lead either to fewer resources being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources'.[213] As argued under criterion 1, any public benefit must be directly tied to efficiencies. The public interest will therefore never be a standalone factor – it will always need to be tied to a concrete benefit under the criteria. In the *CECED* case, had the benefit in terms of the environment remained on the abstract level, i.e. not provided the particular efficiencies that could be translated to technical progress, it is difficult to see how this would have been justifiably balanced in accordance with the law and Guidelines against the increased prices for consumers in terms of more expensive washing machines. The analysis would have had to be stretched, to include potential future benefits, rendering the exercise highly hypothetical and the benefits presumably difficult to prove.[214] Furthermore, as stated in the Guidelines, '[a] gain for consumers in the future … does not fully compensate for a present loss to consumers of equal nominal size.'[215] The fair share criteria was also discussed in *CECED* with the court noting that the agreement had the potential of producing benefits for individual consumers as well as the collective group.[216] The joint environmental benefits were considered to result in a fair share of benefits to the consumers, regardless of whether individual consumers were reaping the benefits.[217] Again, the societal aspect was considered, but it remains unclear what weight it would have been given had not all the other efficiencies been fulfilled. The public benefit on its own would presumably not have been enough to fulfil the fair share criteria.

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[209] *Asnef-Equifax*, para 70.
[210] Article 101(3) Guidelines, para 102.
[211] Holmes, 'Climate change', 378.
[212] Article 101(3) Guidelines, para 85.
[213] Article 101(3) Guidelines, para 85 (emphasis added).
[214] Jones and Sufrin, *EU Competition Law,* 248.
[215] Article 101(3) Guidelines, para 88.
[216] *CECED*, para 50.
[217] *CECED*, para 56.

In discussing the relevance of environmental factors, the recent case of 'Car Emissions' offers an interesting perspective. In April 2019, the European Commission delivered a so called 'Statement of Objection' to car manufacturers BMW, Daimler and VW where it set out its view that the manufacturers, over a period of eight years, had colluded with the aim of restricting competition on clean technology:

> '[t]he Commission's preliminary view is that the car manufacturers' behaviour aimed at restricting competition on innovation for these two emission cleaning systems and in doing so, denied consumers the opportunity to buy less polluting cars, despite the technology being available to the manufacturers.'[218]

Positive environmental development in this case is thereby seen as a competition concern by the Commission, in that consumers were denied certain products, which they would otherwise have wanted. A logical conclusion should be that the environmental factors, at least where there is a consumer demand for them, can become a resulting benefit, in line with the requirement in criterion 2.[219] The consumer demand in this scenario may however hold the clue to any conclusion: if the more environmentally friendly product results in e.g. higher prices for the consumers, it makes it more difficult to designate the category of sustainability as necessarily constituting a resulting benefit. To illustrate, a recent report by the European Consumer Organisation on attitudes towards sustainable foods showed that whereas two thirds of consumers would consider changes in their food habits to accommodate for environmental factors, not as many are willing to actually pay more for sustainably produced food.[220] Cultural, societal and personal factors weigh heavily on a consumer's attitude toward sustainability and the environment.

4.5.4 Criterion 3: the agreement does not impose restrictions which are not indispensable to the attainment of these objectives

The Article 101(3) Guidelines provide that the indispensability of a restriction can be shown if the absence of the restriction would have a negative impact on

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[218] European Commission, 'Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology', 5 April 2019 https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008 accessed 10 November 2020.

[219] Holmes, 'Climate change', 379.

[220] BEUC The European Consumer Organisation, 'One Bite At A Time: Consumers And The Transition To Sustainable Food', June 2020, https://www.beuc.eu/publications/beuc-x-2020-042_consumers_and_the_transition_to_sustainable_food.pdf, accessed 20 December 2020.

the efficiencies, i.e. that they would be reduced or be less likely to materialise.[221] If the efficiencies can be achieved by other, less restrictive measures, the restrictions cannot be said to be indispensable; in other words they should not be more restrictive that what is necessary.

The Commission summarises the test in two steps: 'First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.'[222] The assessment boils down to a proportionality assessment.

In the now almost infamous (at least in the sustainability/competition circles and not least for its amusing name) 'Chicken-of-Tomorrow' decision, the Netherlands Authority for Consumers and Markets (ACM) was faced with an agreement between retail, farm and meat processing actors, aimed at promoting animal welfare and sustainability in the chicken industry. The envisaged result of the agreement was however not only to offer Dutch supermarket consumers more sustainable chicken meat, but *only* sustainable chicken meat; the supermarkets privy to the agreement would only be allowed to purchase and sell chicken meat that fulfilled the Chicken-of-Tomorrow standards, effectively reducing the choice for consumers. In order to provide further guidance to companies seeking to enter into sustainability oriented agreements, the ACM published an analysis of the case under Article 101(1) as well as all four criteria in Article 101(3).[223] The agreement was found restrictive of competition and in breach of Section 6, paragraph 1 of the Dutch Competition Act, prohibiting cartel activity, as well as Article 101(1). Detailing the analysis under Article 101(1), the ACM concluded that the agreement did not meet the requirements of either criteria. In relation to criterion 3, the assessment was framed as a proportionality assessment, scrutinizing the sustainability agreement and determining whether it was necessary to attain the benefits. In finding that is was not, the ACM highlighted that there were many other ways that supermarkets could promote sustainable production methods, rendering the agreement neither necessary or proportional.[224] We will have reason to come back to the ACM in the next chapter, as it during the autumn of 2020 released draft guidelines on applying EU competition rules to sustainability agreements for consultation.

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[221] Article 101(3) Guidelines, para 79.

[222] Article 101(3) Guidelines, para 73.

[223] ACM, 'ACM's analysis of the sustainability arrangements concerning the "Chicken of Tomorrow"', 26 January 2015, reference: ACM/DM/2014/206028, https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf, accessed 19 November 2020.

[224] ACM, 'ACM's Analysis', 7.

4.5.5 Criterion 4: the agreement must not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The Article 101(3) Guidelines provide that the potential elimination of competition depends on what the market looked like before the agreement in question was entered into and to what level competition is reduced as a result of that agreement.[225] A public interest agreement including most (or all) market participants could e.g. limit choices for consumers due to banning certain materials or ingredients on the market. In its 'Chicken-of-Tomorrow' analysis, the ACM found that in the case at hand, participation in the new product arrangements encompassed 95% of the sale outlets in the Netherlands meaning consumers would no longer be able to buy certain chicken meat from these outlets. In noting that 'some residual competition will continue to exist', the ACM did however not specify whether this residual competition was sufficient or considered to constitute an elimination of competition.[226]

If the ultimate aim is to reach a healthy balance between competition law and the possibility to accommodate public policy, it would appear that criterion 4 will continue to provide a measure of balance and an acceptable limitation for any agreement to pass through the Article 101(3) assessment.

4.5.6 Summary and concluding remarks regarding the appraisal under Article 101(3)

From the cases cited in Chapter 4.5.2, including *Ford/Volkswagen* and *CECED,* it could be seen that public interest aspects were relied upon to motivate fulfilment of Article 101(3), however, had those aspects not led to clear efficiencies, the court would not have been able to motivate fulfilment of the first criteria. In other words, public interest is not in itself an argument to allow an agreement to pass the test, but is assessed, as any other arguments under criteria 1, by its contribution to technical or economic progress.

The bigger question of course is: even if a public interest agreement is found to restrict competition, by object or by effect, where does this leave us in our endeavour to try to promote public interest enhancing measures? Only allowing big companies to take public interest measures on their own accord, i.e. without interacting or collaborating would of course give more power to competition rules and the analysis under them would not have to be changed or tweaked to suit the public policy agenda. However, the starting point of this paper was that we actually want such collaborations to take place – through team work, and industry spanning, market and geography crossing collaborations we can achieve

[225] Article 101(3) Guidelines, para 107.
[226] ACM, 'ACM's Analysis', 8.

more as a society.[227] In fact some such collaborations may directly restrict competition – although in accordance with criterion 4 it will never be allowed to completely eliminate competition.

It could (and has) been questioned whether the narrow definition of 'consumer' under criterion 2 is reconcilable with the wider EU goals, as described in Chapter 2; if requirements pertaining to environmental protection must be 'integrated into the definition and implementation of the Union's policies and activities', as provided in Article 11 TFEU, this may well provide room for the argument that the consumer concept should be broadened.[228]

[227] See e.g. Seafood Business for Ocean Stewardship, a collaboration between a relatively low number of major seafood industry actors, in control of high market shares, committing to achieving sustainable seafood production and a healthy ocean.
[228] Holmes, 'Climate change', 375.

5 Recent developments

5.1 Background

There are currently several activities, proposals and ideas circulating on national and international levels, on the topic of how competition law should be applied in public interest issues. As the trending topic of the past few years, inevitably there is a particular focus on environmental and sustainability issues. Although these activities may warrant an elaborate discussion on their own, the scope of this thesis only allows for an overview. This chapter will outline some recent activity, with the aim of contributing to the concluding remarks of this thesis on what the next steps in this area could be.

5.1.1 Draft Guidelines by the Netherlands Authority for Consumers and Markets on applying EU competition rules to agreements promoting sustainability

In the summer of 2020, the ACM launched their draft Sustainability Guidelines for consultation. The purpose of the guidelines is to explain how sustainability agreements can be formed within the ambit of the law as well as where competition law sets its boundaries. The guidelines are clearly a commitment by the ACM to further the development in the sustainability area; among other things the authority highlights its endeavour to cooperate and advise companies in their sustainability agreements and that fines will be waived e.g. where the guidelines have been applied in good faith but the outcome regardless leads to a prohibited restriction of competition.

In terms of structure, the Sustainability Guidelines start by explaining the concept of sustainability agreements for the purpose of the guidelines and then provide information on how companies should approach the entering of such agreements. The information is expressed as three 'opportunities' for acceptable agreements or collaboration. The first opportunity relates to situations where the actual impact on competition is low; one of the many examples offered by the guidelines is a category of agreements that 'incentivize undertakings to make a positive contribution to a sustainability objective *without* being binding'.[229] The second opportunity is based on the statutory exemptions (Article 101(3) TFEU as well as the corresponding national legal provision). Here, the guidelines are to

[229] ACM, Sustainability Guidelines, para 19 (emphasis added).

a large extent reliant on the Article 101(3) Guidelines and existing national and EU case law on the subject, however with some deviations. In relation to the requirement of users receiving a 'fair share' of the benefits (see Chapter 4.5.3; criterion 2 of Article 101(3)), the European Commission eschews the idea of individual benefits for those of a specific group of consumers. The Sustainability Guidelines on the other hand open for a broader interpretation in certain circumstances, what is referred to as 'environmental-damage agreements', whereby users are not necessarily the only relevant target beneficiaries of the resulting benefit. According to the guidelines, this principle will apply if the purpose of the agreement is to prevent environmental damage *and* it assists in the compliance of environmental standards. A referenced example is initiatives taken to reduce greenhouse gas emissions, something that will benefit the consumers, the society and help realise governmental environment policy objectives.[230] The third one provides 'other options'; e.g. where a sustainability initiative cannot meet the criteria in opportunity 1 and 2, the companies can opt to convert the agreement to law, thereby removing it from the scope of the competition law.

5.1.2 Hellenic Competition Commission Staff Discussion Paper on Sustainability Issues and Competition Law

In September 2020 the Hellenic Competition Commission (HCC) published a Staff Discussion Paper[231] and held a conference on the topic of competition law and sustainability. The starting point of the HCC's analysis is that competition law indeed can be used as a tool to manage sustainability issues. The paper makes several proposals and remarks, including a call for competition law to interact more with national and international constitutional sustainability policy. Other suggestions include an 'Advice Unit' made up of various bodies and authorities with the aim of guiding parties that want to collaborate on sustainability issues.

5.1.3 The European Commission's review of two block exemption regulations

In a response to the ACM's Sustainability Guidelines, the European Commission expressed support for the effort of providing more guidance on sustainability agreements. [232] Furthermore, it noted that in the recent public consultation in connection to the revision of the two horizontal Block Exemption Regulations[233]

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[230] ACM, Sustainability Guidelines, paras 38-40.

[231] Hellenic Competition Commission, 'Staff Discussion Paper on Sustainability Issues and Competition Law', September 2020.

[232] European Commission, Statement on ACM public consultation on sustainability guidelines, https://ec.europa.eu/competition/antitrust/news.html accessed 14 November 2020.

[233] The Research & Development Block Exemption Regulation and the Specialisation Block Exemption Regulation.

and the Horizontal Guidelines, some stakeholders commented on the need for clearer guidance on matters of sustainability in order to increase the level of legal certainty provided by the guidelines.[234] For this reason the Commission is currently reviewing sustainability related issues as part of the revision.

5.1.4 The European Commission's public consultation of competition policy and the Green Deal

The European Green Deal was briefly touched upon in Chapter 2.2.5 above as one of the main priorities of the Commission, both short term and long term. As part of this focus area the Commission recently released a public consultation on the topic of how competition policy can support the Green Deal.[235] The consultation questions are very specific and among other things aim at understanding in which situations companies would abstain from cooperating due to competition concerns and how cooperation rather than competition can lead to positive outcomes from an environmental perspective. The results from the consultation are expected in February 2021. Interestingly, one of the questions in the consultation is 'how should we define positive environmental benefits?', indicating the ever-present struggle in formalising the meaning of these concepts.

5.2 Concluding remarks on the recent developments

The ACM's endeavour with the Sustainability Guidelines speak to the importance of the 'tone at the top' (why it was also symbolic that the European Commission followed suit with a statement welcoming the venture). With the significant increase in consumer awareness of environmental matters, the motivation of undertakings to enhance their own operations, services and products in a sustainable manner is also likely to increase. By competition authorities providing guidance and encouragement and fostering an environment of acceptance of sustainability focussed agreements, companies may also become more inclined to seek new avenues of collaboration in the area. Furthermore, the deviation from the Article 101(3) Guidelines in terms of the relevant interest group for the 'fair share of the benefit' should be seen as a strong statement in favour of the collective interest society has (or should have) in protecting the environment.

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[234] European Commission, 'Factual summary of the contributions received during the public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreement', (2019), 8, https://ec.europa.eu/competition/consultations/2019_hbers/HBERs_consultation_summary.pdf, accessed 15 November 2020.

[235] European Commission, DG Competition, 'Competition Policy supporting the Green Deal - Call for contributions', 13 October 2020, https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf, accessed 12 December 2020.

As noted in 5.1.4, there is not yet an established definition of sustainability and environmental benefits, which adds further complexity to the analysis. On the other hand, the Sustainability Guidelines do not introduce any intricate definition of 'sustainability' but rather lean on a relatively broad description in a UN resolution from 2012,[236] establishing that these agreements are aimed at the 'identification, prevention, restriction or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature'.[237] It remains to be seen whether this approach will be beneficial in term of its flexibility, or rather lead to undertakings attempting to stretch the concept of sustainability to cover more ambiguous agreements.

The focus by stakeholders on sustainability in the European Commission's consultation further signals the interest and need to clarify the guidance in this area. It will be interesting to see whether the feedback results in clarification being provided in the already existing regulations and guidelines, or if the Commission follows in the footsteps of the ACM and proposes guidance specifically targeting sustainability (or other public interest measures). Perhaps public interest agreements could warrant their own block exemption, although the challenge of defining a public interest would remain. Even if the agreements were limited to sustainability focussed measures, the challenge would be to produce an exemption wide enough to encompass relevant agreements, but narrow enough to prevent abuse of the exemption.

[236] UN General Assembly, Resolution A/Res/66/288 of 27 July 2012, para 1.
[237] ACM, Sustainability Guidelines, para 6.

6 Concluding remarks

The goal of this thesis has been to explore the dynamics and the relationship between public interest and competition law in the present and in the future. It has described the potential aims of competition law and how these could impact the significance attributed to public interest matters within the scope of competition as well as how competition law has managed and is managing these matters. Article 101 has been awarded extra attention and has been analysed systematically to assess how and when public interest agreements may fall within or outside of the article. Some recent developments have been described to show that there is significant interest in this area and a willingness to prove that there is scope for public policy considerations without threatening the integrity of competition law.

Arguments have been made for the following:

a) The overarching purpose of general EU policy and of competition law leaves substantial scope for public policy to be taken into account when developing and applying EU law, including competition rules. Furthermore, if the consumer welfare and outcome for the consumer is what should drive competition law, then public policy could even be scoped into the notion of consumer welfare. The decision in *Albany* and the string of case law that followed bore the clear hallmarks of public interest considerations, although they leave open the question of whether various areas of public policy is ascribed differing levels of importance. In addition to this, the CJEU has in several cases over the years emphasised that the general aim and spirit of the EU Treaties should be the guiding principles in any analysis. The public interest aims of an agreement should form part of the consideration in the interpretation exercise and especially against the backdrop of the wider aims of EU competition law.

b) There are a number of areas and exceptions, even under the current competition law framework, that rely on balancing the traditional notion of the consumer welfare purpose of competition law with wider public interests, e.g. in the area of public health, intellectual property and the environment. Public policy can therefore already be seen as a vital benchmark, even when it comes to competition law. However, these exceptions do not follow a clear structure and their application is rather case-by-case based. This compromises legal certainty and is therefore not the preferable way forward. Regulation on the other hand would

promote legal certainty but comes with other challenges, including harmonisation on an EU and industry level. In the current climate, regulation, e.g. in areas like the environment, is likely to increase, but in the meantime the question of how public policy and competition law interacts remains topical.

c) The analysis under Article 101 can be tweaked even under the current analytical framework to allow for collaborations between undertakings. However, public interest is not in itself an argument to allow an agreement to pass the test but would typically be assessed as any other agreements under Article 101(3), by its contribution to technical or economic progress. In the Sustainability Guidelines the ACM states that '[c]onsumers often see sustainability as a quality improvement in a product';[238] in other words there seems to be scope for a broad definition of technical progress which would encompass e.g. sustainability parameters. The difficulty appears to stem more from definitions – a public interest for one party is not necessarily a public interest for another party.

d) The strong emphasis over the last few years on climate change and environmental matters as well as stated national and international goals set in this field will make it difficult for competition law to ignore such developments. Furthermore, concessions made in the wake of the 2020 pandemic show that there is imminent need and potential to find solutions in the public interest, at the very least in times of crisis.

Change is likely to emanate from political pressure and prioritisation, as can be inferred from the significantly increasing focus on climate change. Whereas price aspects may up until now have had a disproportional focus in consumer welfare discussions, the whole notion of consumer welfare is changing. A new generation of sustainable corporations and sustainability focussed consumers is rising, challenging notions like economic efficiency e.g. by taking into account the future costs generated through unsustainable activities. The *CECED* approach, with its considerations of future effects of reduced electricity use and water consumption, could be construed as a nod to this type of thinking. Furthermore, if we are serious about committing to the promotion of sustainability within the EU it may be time to reconsider the governance frameworks in this area; both the ACM and the HCC have expressed their willingness to provide bilateral guidance to undertakings that consider entering into agreements – perhaps this is the (expensive) way forward to ensure the possibility of taking measures to promote public interest agreements and at the same time not compromise competition in the internal market.

[238] ACM, Sustainability Guidelines, para 2.

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