CENTRE FOR SOCIO-LEGAL STUDIES

Sustainability Challenges for EU Competition Law and Policy

Competition and Consumer Welfare in a Circular Economy



Qiandai WANG

St. Hilda's College

University of Oxford

A thesis submitted for the degree of

Master of Philosophy in Socio-Legal Research

September 2024

Word count: 28,819

Thesis Abstract

This thesis examines the intersection between sustainability and EU competition law and policy, focusing on how the recent revisions of Horizontal Guidelines 2023 (HGs 2023) and the Agricultural Guidelines 2023 may signal a shift towards DG Competition incorporating ecological concerns. The thesis analyses the challenges that arise from the focus of EU competition law and policy on safeguarding market competition, consumer welfare and economic growth, often overlooking environmental issues.

In doing so, this thesis identifies key developments in DG Competition's assessment of sustainability agreements and explores how concepts of competition and consumer welfare are evolving in a transition to a circular economy, following the European Green Deal. Using discourse analysis, the thesis analyses responses during a public consultation about the draft HGs 2023, as well as policy briefs, speeches and reports from the Commission. It reveals how DG Competition prioritised discourses while marginalising the others.

Despite acknowledging the positive environmental impact of and having introduced 'collective benefits', the HGs 2023 continue to frame environmental interests through the lens of economic efficiency and a limited consumer identity. In contrast, the Agricultural Guidelines 2023 demonstrate a more lenient approach towards tolerating limits to competition and imposing fewer requirements to compensate consumers for anticompetitive harm. A comparison with the HG 2001 shows that the earlier framework applied less stringent economic efficiency tests and had a broader view of consumer welfare to incorporate environmental interests.

Hence, this thesis highlights the limited ambition of DG Competition's efforts to integrate sustainability. The DG competition remains reluctant to address the fundamental issues of overproduction, overconsumption and a growth strategy based on neo-classical economics. The thesis contributes to the growing debate on the role of competition law in the EU's ecological transition, offering a critical perspective on the DG Competition's refusal to embrace sustainability as a key objective.

ACKNOWLEDGEMENTS

I would like to take this opportunity to express my endless gratitude to Prof. Bettina Lange who has been the most wonderful, encouraging and knowledgeable supervisor I could ever hope for. Without her patient guidance and insightful suggestions, this project would not be possible.

Moreover, I am also much obliged to my parents Jingmin Wang and Xiaoyan Xu. Without their trust, support and limitless love, I could never have applied for Oxford or taken up my MPhil offer. I hope I made them proud.

I would like to express my gratitude to Prof. Julian Nowag who devoted his time to offer me so much guidance on academics and life choices. Thanks to him, I never lost curiosity in the academic interests that we share.

Many thanks to my internal examiner Prof. Chris Decker who was also my interviewer for DPhil, whose questions and comments pushed my thoughts even further.

I owe much thanks to my professors and friends at the Centre for Socio-Legal Studies. Especially to Julia, Lisa, Marcus and Rangga who have spent so much time with me in the office.

Many thanks are due to George, Rosalie and Selena who have been my loyal library buddies, good listeners, and perfect friends. Yang and Ziyu who have been by my side for years from Paris to Oxford. Zesen, thank you for your kindness and care.

I could not be more grateful to a special person, Jean, who has offered me unlimited emotional support and comfort alongside this very challenging journey.

Finally, I have to thank all the wonderful people I met in Oxford, who have made my one-year experience in Oxford unforgettable.

TABLE OF CONTENTS

CHAPTER 1 – Introduction

A Green Reform of EU Competition Law and Policy 6

Section 1 - Topic Introduction 6
I - Context - EU Competition Law and Policy during the Climate Crisis 7
II - Starting Point - Sustainability vs. Competition Law: A False Dichotomy Rejected by the Responsive Nature of Competition Law 12
III - Thesis Objectives 17

Section 2 - Research Questions and Methodology 19
I - Research questions: 19
II - Methodology: Tracing the Greening Process of EU Competition Law and Policy through Discourse Analysis 19

Section 3 - Literature around Three Recurrent Challenges: Competition/Collaboration, Consumer Welfare and Economic Growth 22
I - A Cognitive Dissonance Between the Virtue of Market Competition and Collaboration for Sustainability Outcomes 22
II - When Conventional Consumer Welfare Meets Environmental Interests - Compromises and Frictions 24
III - Commitment to a "Circular Economy": Concepts and Challenges of the "Greener Competition Policy" 26

CHAPTER 2

Rebalancing Discourses of Competition and Collaboration for Green Outcomes in Horizontal Sustainability Agreements 29

Chapter Introduction 29

Section 1 - Discourses of "Collaboration" and "Competition" in the Context of Exempting Sustainability Agreements under the Horizontal Guidelines 2023 30
I - Facilitate green initiatives through "Collaboration" and control the risk of greenwashing through "Competition" 31
II - Translating sustainability interests into verifiable "efficiency gains": the legacy of the more economic approach 38

Section 2 - A Further-reaching "Collaboration" Discourse for Sustainability Agreements in the Past and Agriculture – An Intertextual Reading 42
I - A "less economic approach" in the Horizontal Guidelines 2001 and Past Cases 42
II - A more encouraging "Collaboration" discourse in the Agricultural Guidelines 44

Chapter Conclusion 49

CHAPTER 3

Reconceptualizing Discourses of Consumer Welfare in the Climate Crisis: Attempts to Think Beyond the Narrow Scope of Consumers 50

Chapter Introduction 50

Section 1 - An Enlarged Scope of Consumer Welfare to Integrate Environmental Interests and the Remaining Blind Spots in the HGs 2023 51
I - Expanding the frontier of consumer welfare: broader "benefits" and more than "individual consumers" 52
II – Remaining discursive blind spots - Limitations of translating environmental externalities through the lens of "consumer welfare" 57

Section 2 – Alternative Perspectives Beyond the Consumer Welfare Standard within the EU Competition Law and Policy 62

I - Incoherence traced in intertextuality: DG competition's incoherent attitude to consumer welfare in the past and the agricultural sector 62
II - Alternatives from a sociological perspective: Beyond Consumer and Beyond Market Welfare? 68

Chapter Conclusion 70

CHAPTER 4 – Concluding Discussion

The Limited Ecological Ambition of EU Competition Law and Policy in a Circular Economy 72

1. Three Key Features of the Greening Process of EU Competition Law and Policy 73
2. The Remaining Oversights 77
3. From Neoclassical Economic Growth to Green Growth: DG Competition's Remaining Silence in the "Beyond Growth" Debate 83

Table of Abbreviation

CAP	Common agricultural policy
CO_2	Carbon dioxide
CMO	Common organisation of the market
DG	Directorate-General
EU	European Union
GDP	Gross domestic product
HGs	Horizontal Guidelines
R&D	Research and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

CHAPTER 1 – Introduction

A Green Reform of EU Competition Law and Policy

> *"GDP is a measure of production and does not measure environmental sustainability, resource efficiency, social inclusion and social progress in general;[…] it can be misleading in the sense that remedial measures following certain incidents such as accidents and natural disasters are treated as a benefit instead of a cost."* [1]– European Parliament resolution of 8 June 2011

Section 1 - Topic Introduction

This introduction chapter offers the context of this MPhil thesis and foregrounds its research questions, objectives, methods and relevant literature. EU competition law and policy have always been perceived at odd with sustainability. It asserts that strong market competition pushes companies to offer various goods with high quality and low prices, it spurs innovation and ensures vibrant economic growth. This embedded neoliberal model has led to overproduction and overconsumption, followed by negative ecological consequences. Such non-competition interests and anticompetitive harms have long been assessed with "*a more economic approach*" to maximise economic efficiency.

The DG Competition has insulated itself from environmental concerns for decades until recently. In 2023, the Commission published two guidelines to offer legal certainty for private initiatives to collaborate for sustainability purposes. It declared to contribute to the "circular economy" and carbon-neutral objective of the European Green Deal. Meanwhile, the European Parliament has launched discussion around alternative economic models "beyond growth".

From a socio-legal perspective, this thesis rejects a dichotomic view of sustainability vs. competition and argues that the objectives of EU competition law and policy are subject to changes. Recent policy developments have suggested such an opening for an ecological transition. The thesis will therefore empirically trace how the EU competition law and policy have reconceptualized and incorporated emerging ecological concerns into its recently revised

[1] European Parliament resolution of 8 June 2011 on GDP and beyond – Measuring progress in a changing world (2010/2088(INI)) (2012/C 380 E/11).

Horizontal Guidelines and Agricultural Guidelines, and whether this greening process has led to a reconceptualisation of their goals beyond competition, consumer welfare and economic growth.

Inspired by Foucauldian discourse analysis, this thesis will identify and compare different discourses that emerged in the greening process of EU competition law and policy. It will thus focus on examining the power dynamic in the revision process of the two guidelines to offer a critical account of the changes and challenges.

I - Context - EU Competition Law and Policy during the Climate Crisis

Climate change poses not only an existential threat to the future of humanity but all species of the planet Earth. The European Parliament has called for immediate and ambitious action to limit global warming to 1,5°C and avoid massive biodiversity loss - such actions must involve all citizens and all sectors of society and the economy.[2] Research has confirmed the existence of a statistically significant long-run cointegration relationship between economic growth and CO_2 emissions.[3] Against this background, in 2019, the European Commission initiated a set of policies to achieve climate neutrality in 2050 - the European Green Deal, which promotes "*a new growth strategy"* that aims to transform the Union into a "*competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use'* "[4]

Competition law and policy in the European Union context are anchored within neoclassical economic theories which often associate free market competition with a series of desirable effects.[5] Strong market competition is expected to maximise social wealth and

---

[2] European Parliament, Resolution declaring a climate and environmental emergency 2019/2930 (RSP) (28 November 2019).

[3] Mihaela Onofrei, Anca Florentina Vatamanu and Elena Cigu, 'The Relationship Between Economic Growth and CO2 Emissions in EU Countries: A Cointegration Analysis' (2022) 10 Frontiers in Environmental Science <https://www.frontiersin.org/journals/environmental-science/articles/10.3389/fenvs.2022.934885/full> accessed 27 August 2024. *See also* 'Can We Have Economic Growth and Tackle Climate Change at the Same Time?' (*Grantham Research Institute on climate change and the environment*) <https://www.lse.ac.uk/granthaminstitute/explainers/can-we-have-economic-growth-and-tackle-climate-change-at-the-same-time/> accessed 27 August 2024.

[4] 'President von der Leyen on the European Green Deal' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/fr/speech_19_6749>.

[5] Hubert Buch-Hansen and Angela Wigger, *The Politics of European Competition Regulation: A Critical Political Economy Perspective* (Taylor & Francis Group 2011) <http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=668549>.

welfare, reduce poverty, incentivise innovation and generate economic growth.[6] Companies are driven to offer lower prices, better quality, and a variety of choices for consumers.[7] Competition law is therefore introduced to ensure a healthy and active market environment that helps to allocate resources more efficiently and motivate technology progress - based on a belief that "market competition" is intrinsically a standalone virtue.[8] A "perfect competition" with infinite natural resources does not exist.[9] While free market competition spurs companies to best serve consumers' needs, it also focuses on maximising shareholder value while failing to keep the public interests in mind, especially at the cost of the environment.[10] As one of the pillars of the capitalist mechanism, competition law is associated with the idea to produce a lot of "stuff" that we don't need.[11] One of the most urgent tasks for Competition law and policy is to strike a balance between the material abundance and variety we benefit from economic liberalism and the planetary boundary.[12]

In some situations, the high level of competition in the market has driven some businesses into the "race to the bottom" for goods of low environmental level just to survive instead of providing the best good quality for consumers.[13] This is particularly true in the fast-moving consumer goods industry where market competition is fierce. For instance, there is the (ultra-) fast fashion sector in which 85% of its production ends in landfills and releases 500,000 tons of microfibers into the ocean each year.[14] High-level competition and consumerism also have led to planned obsolescence - products are designed to be unsustainable, so consumers upgrade to new products quickly, which is rather prevalent in the electronic devices industry.[15]

---

[6] ibid 13.
[7] Irving Scher, 'Antitrust and Consumerism: What Is It All About' (1970) 22 Case Western Reserve Law Review 11.
[8] Maurice E Stucke, 'Is Competition Always Good?' (2013) 1 Journal of Antitrust Enforcement 162.
[9] Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354.
[10] Michelle Meagher, *Competition Is Killing Us: How Big Business Is Harming Our Society and Planet - and What to Do about It* (Penguin Business 2020) ch 2 This is your brain on shareholder value.
[11] Holmes, 'Climate Change, Sustainability, and Competition Law' (n 9) 356.
[12] Hettie O'Brien, 'The Planet's Economist: Has Kate Raworth Found a Model for Sustainable Living?' *The Guardian* (8 June 2023) <https://www.theguardian.com/environment/2023/jun/08/the-planets-economist-has-kate-raworth-found-a-model-for-sustainable-living>.
[13] Maurice E Stucke and Ariel Ezrachi, *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants* (First edition, Harper Business 2020) pt 1 When is competition toxic? First overdose: The race to the bottom.
[14] 'Fast Fashion and Its Environmental Impact in 2023 | Earth.Org' <https://earth.org/fast-fashions-detrimental-effect-on-the-environment/> accessed 17 October 2023.
[15] Mariateresa Maggiolino, 'Planned Obsolescence: A Strategy in Search of Legal Rules' (2019) 50 IIC - International Review of Intellectual Property and Competition Law 405.

Those are just the tip of the iceberg environmental externalities derived from market competition that are not always corrected in time by environmental regulations.

Today, the myths of market competition and the GDP growth bringing human prosperity no longer stand without scrutiny, particularly facing the urgent call for sustainable developments, undirected free market competition sometimes is an obstacle to achieving green outcomes.[16] One of the pillars of EU competition law, Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"), stipulates that

> "The following shall be prohibited as incompatible with the internal market: 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 […]"

One of the biggest obstacles to better responding to sustainability demand identified in the competition law doctrine is that businesses would halt their sustainability cooperation with their competitors in fear of competition law enforcement.[17] Recent debates in the competition law community have concluded that ecological concerns in competition law are a "moral imperative"[18]- more precisely, it is now beyond doubt that private environmental initiatives which may limit competition must play a significant role to ensure effective green outcomes.[19]

Competition lawyers today question *how* to translate this ecological incentive into a legal language which is theoretically and practically possible to implement in antitrust legal actions. More fundamentally, can ecology inspire a transformation of the competition law goals and push forward new legal approaches for environmental sustainability objectives? In the EU context, the debate about sustainability and competition has been going on for some time.[20]

In June 2023, the Commission adopted a revised version of the Horizontal Guidelines (HGs 2023), which has included a new chapter on Sustainability Agreements.[21] The HGs 2023

---

[16] Meagher (n 10) 81.
[17] Simon Holmes, 'Consumer Welfare, Sustainability and Competition Law Goals' [2020] Concurrences Review <https://www.concurrences.com/en/review/numeros/no-2-2020/editorial/93496> accessed 11 October 2023.
[18] Holmes, 'Climate Change, Sustainability, and Competition Law' (n 9) 361.
[19] Suzanne Kingston, 'Competition Law in an Environmental Crisis' (2019) 10 Journal of European Competition Law & Practice 517.
[20] Julian Nowag, 'Sustainability and Competition Law: An International Report' in Pranvera Këllezi, Pierre Kobel and Bruce Kilpatrick (eds), *Sustainability Objectives in Competition and Intellectual Property Law* (Springer Nature Switzerland 2024) <https://doi.org/10.1007/978-3-031-44869-0_1>.
[21] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements 2023.

have a clear objective: "*to clarify that the antitrust rules do not stand in the way of agreements between competitors that pursue a sustainability objective*" by offering more legal certainty.[22] These Guidelines claim to accommodate more private collaborative sustainability initiatives - either by categorising certain agreements outside the coverage of Article 101(1) or by enlarging the possibility to justify a block exemption of such initiatives under Article 101(3) for social interests.[23]

Shortly thereafter, in December 2023, the Commission also adopted the other Guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013 (Agriculture Guidelines). [24] Unlike Article 101(3) of TFEU which grant exemptions for agreements that are subject to Article 101(1) scrutiny, Article 210a of the Regulation (EU) No 1308/2013 ("CMO" Regulation) stipulates that certain types of joint sustainability initiatives in the agri-food sector that restrict market competition can be exempted from Article 101:

> Article 210a Vertical and horizontal initiatives for sustainability
>
> "1. Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of producers of agricultural products that relate to the production of or trade in agricultural products and that aim to apply a sustainability standard higher than mandated by Union or national law, provided that those agreements, decisions and concerted practices only impose restrictions of competition that are indispensable to the attainment of that standard. […]"[25]

The new Agriculture Guidelines therefore clarify the conditions under which collaborating Agri-operators can feel free to collaborate for sustainability purposes, these conditions are commonly considered more flexible compared to Article 101(3) and prioritise sustainability goals before competition law goals. [26] This MPhil thesis therefore takes a

---

[22] 'Antitrust: Commission Adopts New Horizontal Block Exemption Regulations and Horizontal Guidelines' (*European Commission Press Release*, 1 June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2990> accessed 16 November 2023.
[23] Article 101(3) will be discussed in detail later.
[24]Communication from the Commission – Commission guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013 2023..
[25] Article 210a, the Regulation (EU) No 1308/2013.
[26] Oliver Geiss Voss Gorka Navea, Lea-Theresa, 'Sustainability First, Antitrust Second? - The EU Commission's New Rules on Agrulture Cooperations' (*Capital Thinking*, 11 December 2023) <https://www.capitalthinkingblog.com/2023/12/sustainability-first-antitrust-second-the-eu-commissions-new-rules-on-agriculture-cooperations/>.

particular interest in examining how and why agriculture takes further measures to promote sustainability, yet such an attitude is not adopted by the DG Competition as a general principle for all sectors.

These two Guidelines resonate with the EU's willingness to reach for a new balance that is more tolerant of private sustainability initiatives within the current competition rules.[27] Namely, by facilitating private collective actions to bring green outcomes, these Guidelines acknowledge the limitation of mainstream Competition law and policy and respond to the increased demand from consumers and producers for eco-friendly businesses. [28] On top of that, in multiple press releases, the DG Competition expressed its engagement in exploring new ideas towards a "*greener competition policy*" in support of the Green Deal.[29] Particularly, the Commission's Policy Brief on Competition Policy in Support of Europe's Green Ambition[30] and annual staff working reports have also provided detailed reports of the green strategies that the institution plans to and has initiated.[31]

Nevertheless, though environmentalists have advocated for such ecological reform of the competition policy for a long time, it would be inappropriate to assume these new guidelines depict a historically linear improvement of the EU competition rules, nor should one quickly categorise it as a paradigm shift moment.

In fact, EU competition law and policy have always reserved some openings for social benefits other than competition interests and environmental interests have never been excluded from competition enforcement. As part of Polanyi's "*Double Movement*",[32] balancing various non-competition social interests, including environmental protection, public health, poverty reduction, labour protection etc., has always been a key mission of EU competition law and

---

[27] Edith Loozen, 'EU Antitrust in Support of the Green Deal. Why Better Is Not Good Enough' (2023) 12 Journal of Antitrust Enforcement 75.
[28] HG 2023 para.563-564; Agriculture Guidelines para.103.
[29] Margrethe Vestager, 'Competition Policy in Support of the Green Deal - Executive Vice-President Vestager's Keynote Speech at the 25th IBA Competition Conference, Delivered by Inge Bernaerts, Director, DG Competition' <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_7754>.
[30] European Commission. Directorate General for Competition., 'Competition Policy Brief, Competition Policy in Support of Europe's Green Ambition (1/2021)' (Publications Office 2021) 1/2021 <https://data.europa.eu/doi/10.2763/962262> accessed 17 December 2023.
[31] 'Annual Reports - European Commission' <https://competition-policy.ec.europa.eu/publications/annual-reports_en>.
[32] Karl Polanyi, Joseph E Stiglitz and Fred L Block, *The Great Transformation: The Political and Economic Origins of Our Time* (2. Beacon paperback ed., [reprinted], Beacon Press 2010).

policy.[33] In particular, Article 101(3) of the TFEU grants a channel for society to respond to the competitive market's destructive effects - an agreement that distorts competition yet pursues non-competition interests can still be exempted if it:

> *"[...]contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
>
> *(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
>
> *(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."*[34]

Then, the preliminary question here is: does the *"greener competition policy"* work within the existing framework offered by Article 101(3) TFEU to assess sustainability agreements exemptions or does it signify a paradigm shift of EU competition law and policy's goal towards a more ecological direction beyond this framework?

Given the main focus of this thesis is on the standard of scrutiny over sustainability agreements, the thesis refrains its analysis within the scope of Article 101 of the TFEU. It would not address issues around abuse of market power (Article 102 TFEU), state aid (Article 106 & 107 TFEU) and merger control.

II - Starting Point - Sustainability vs. Competition Law: A False Dichotomy Rejected by the Responsive Nature of Competition Law

To answer these questions above, the first step is to ask what the goals of EU Competition Law and Policy are - a question on which scholars and regulators have never reached a fixed consensus. Many have suggested that the EU competition law and policy goals

---

[33] Or Brook, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (Cambridge University Press 2022) ch 1 <https://www.cambridge.org/core/books/noncompetition-interests-in-eu-antitrust-law/FD3291CD6230F1767DE80BE02C4BAA97> accessed 19 March 2024.
[34] Article 101 of the Treaty on the Function of the European Union (ex-Article 81 of the TEU).

continue to evolve in a dynamic way and remain vague sixty years after the drafting of Article 101 TFEU.[35] But there is little debate about the fact that EU competition law is not monothematic but pursues an unexhausted list of goals including economic efficiency; consumer welfare; total welfare which measures the welfare for all participants in a market; fairness; European integration and economic progress etc.[36]

In line with the Guidelines on the application of Article 101(3), collaborations that restrict competition for environmental interests can only be exempted from prohibition when satisfying the four accumulative conditions stipulated above: 1)Efficiency gains; 2)pass-on to consumers; 3) the restrictions imposed on undertakings through the competition limiting co-operation must not be non-indispensable; and 4) no elimination of competition in relation to a substantial part of the products concerned. [37]

Therefore, to empirically analyse whether the DG Competition has reoriented towards a more tolerant attitude to grant a block exemption to sustainability agreements, the key is in analysing if the new HGs 2023 have de facto opened more possibilities for such agreements to satisfy these four conditions stipulated by the Treaty. Potentially openings can be observed as, for example, a wider definition of efficiencies, a less stringent requirement of indispensability conditions for sustainability purposes, a more diverse way to compensate consumers and so on. Without any change of the law, the key to creating more room for undertakings' green ambition in EU competition law and policy is therefore our approach and methods to evaluate and qualify these sustainability benefits.

The biggest obstacle, claimed by many scholars, for sustainability agreements to succeed in an exemption assessment is the so-called "*more economic approach*" following the neo-classic Law & Economics movements in competition law.[38] It refers to a formalist idea of making legal analysis more reliable "*by using universal microeconomic theory, characterised by the attributes of deterministic scientific certainty and objectivity, underpinned by robust*

[35] Brook (n 33). The scope of this MPhil thesis does not cover debate around Article 102, TFEU.
[36] Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 Legal Studies 620.
[37]Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance) 2004.
[38] Richard A Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987' (1987) 100 Harvard Law Review 761.

empiricism and mathematical methods".[39] Since the 1990s, the Commission adopted such a *"more economic approach*", which promotes a universalistic view of being capable of converting any type of social relationship into a cost-benefit calculus through complex mathematics.[40]

In our case, this approach refers to translating non-tangible environmental benefits and their consequential anti-competitive harms into quantified or qualified economic terms, such as prediction of short-term price change, production input and output, cost-benefit comparison, time, and consumers' willingness-to-pay. One typical example is the "efficiency gain" condition clarified under Guidelines of Article 101(3) TFEU in 2004.[41] These guidelines interpreted the wording "*improving the production or distribution of goods or to promoting technical or economic progress*" in Article 101(3) into two strict and narrow categories of efficiency gains – cost efficiencies and qualitative efficiencies.[42] While cost efficiencies refer to cost savings in terms of money and time,[43] qualitative efficiencies refer to improvement of product quality and innovation advances.[44] One can argue that, the "more economic approach" also leads to more attention on economic objective of EU competition law and policy, which consequently could undermine other fundamental constitutional values.[45] For instance, when sustainability benefits are evaluated by efficiency first, their effectiveness might be overlooked.[46]

Indeed and unfortunately, this reductionist cost-benefits approach led to many unresolved conflicts among competition interests and other social interests and undermined the dynamic objectives that are embedded within the EU competition law.[47] To consider social interests solely via economic terms leaves little room for antitrust to coordinate with other industrial and social policy considerations, including environmental protection, biodiversity

---

[39] Oles Andriychuk, 'EU Digital Competition Law: The Socio-Legal Foundations' [2023] Cambridge Yearbook of European Legal Studies 1. M Monti, 'A Competition Policy for Today and Tomorrow' (2000) 23 World Competition 1. See also Holmes, 'Climate Change, Sustainability, and Competition Law' (n 9). Anne C Witt, *The More Economic Approach to EU Antitrust Law* (1st edn, Hart Publishing Ltd 2016) <https://www.bloomsburycollections.com/monograph?docid=b-9781474202350>.
[40] Andriychuk (n 39).
[41] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance) (n 37).
[42] ibid, 3.2.2.1 - 3.2.2.2 .
[43] ibid, 3.2.2.1.
[44] ibid, 3.2.2.2.
[45] Witt (n 39) ch 4 A More Economic Objective.
[46] ibid, ch 4.
[47] ibid, ch 4.

preservation and carbon emission reduction when they cannot be easily quantified through maths. It also gave birth to discourses promoting intense market competitive pressure to foster "factor productivity growth" and to restore investor confidence - presuming market competition as a standalone virtue.[48] Under this reductionist influence, consumer welfare is translated into short-term low prices, while other non-price benefits such as sustainability must be justified by enough willingness to pay.[49]

As a result of the above polarity between non-economic and economic gain, it is not surprising to see a controversial debate between sustainability and competition law in mainstream antitrust scholarship. Voices against *greener competition policy* are rather prevalent, most of them share the scepticism against private initiation and agree that over-compensating environmental interests will undermine the "real" objectives and effectiveness of competition law.[50] Conventional academics thereby intend to defend a close and narrow scope of EU competition law and policy's role by discursively constructing an opposition between the two ends in the fear of doctrinal fragmentation and degradation of legal certainty.[51] These arguments leave an impression of the incompatibility between the two agendas: one cannot promote a green transition without compromising the antitrust rules.

Yet when we take a step back from regarding vibrant market competition and consumer welfare as unchallenged priorities in competition law and policy and throughout its history, such opposition between sustainability and competition law is tenuous. Some scholars challenged such dichotomy and observed that the EU competition law and policy have always allowed multiple evolving purposes do co-exist.[52] They demonstrated the inherent capacity and openness of EU competition law to readjust and recalibrate to adapt to new knowledge, different values, and market contexts.[53] They distribute certain terms around such openness,

---

[48] Philip Lowe, 'Competition Policy and the Global Economic Crisis' (2009) 5 Competition Policy International Journal 5.
[49] Andriychuk (n 39) 10.
[50] Cento Veljanovski, 'The Case against Green Antitrust' (2022) 18 European Competition Journal 501. Maarten Pieter Schinkel and Leonard Treuren, 'Green Antitrust: (More) Friendly Fire in the Fight against Climate Change' (15 December 2020) <https://papers.ssrn.com/abstract=3749147> ; Pablo Ibáñez Colomo, *The New EU Competition Law* (1st edn, Hart Publishing 2023) <https://www.bloomsburycollections.com/monograph?docid=b-9781782259169> . Luc Peeperkorn, Competition and Sustainability: What Can Competition Policy Do (2020), Concurrences Vol. 2020/4.
[51] Colomo (n 50) 63.
[52] Marjolein De Backer and others, 'Sustainability and Competition Policy' [2023] Concurrences Review 0.
[53] Stavros Makris, 'EU Competition Law as Responsive Law' (2021) 23 Cambridge Yearbook of European Legal Studies 228.

such as in-built inclusiveness,[54] flexibility,[55] elasticity,[56] responsiveness to changes of *Zeitgeist*.[57] In this sense, an essentialist claim of a fixed standpoint for EU competition goals is not only false but also unhelpful to engage with a green agenda.[58]

DG Competition has affirmed its commitment to the Green Deal and has asserted its important role to contribute to "*a green, digital and resilient economy*".[59] One of the very important goals of the European Green Deal is to decouple economic growth from resource use – often referred to as "circular economy" or "green growth".[60] This is a fundamental reconsideration of the European economy model "with the aim of climate neutrality".[61] In a wider context, alternative models for the European economy "beyond growth" have become an emerging debate in the European Parliament, including "inclusive growth", "post-growth", and "degrowth"[62]. These alternatives adopt a "Doughnut Economics" framework, which takes the ecological ceiling into account for all economic activities.[63] These progressive discourses are important for the ecological transition within the EU and are highly relevant to DG competition's commitment to promote a circular economy in the internal market.

Not only in the new HGs 2023, but DG Competition on many official occasions has also emphasised the pivotal role of competition policy to contribute to the Green Deal's ambitious goals. Nevertheless, this commitment to "circular economy" arouses a fresh and fundamental question – to what extent it is legally possible and sound for competition law to distance itself from the neoclassical standpoint to promote economic progress and efficiency via market competition, which are largely brought to question in the degrowth debate? This is not a question that can be detoured in a sincere discussion for a "greener competition policy".

---

[54] Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change & Environmental Sustainability* (Institute of Competition Law 2021).
[55] Ariel Ezrachi, 'Sponge' [2016] Journal of Antitrust Enforcement jnw011.
[56] Makris (n 53).
[57] ibid.
[58] Kingston, 'Competition Law in an Environmental Crisis' (n 19).
[59] Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions - Towards a green, digital and resilient economy: our European Growth Model 2022.
[60] ibid.
[61] 'The European Green Deal - European Commission' <https://competition-policy.ec.europa.eu/sectors/energy-environment/european-green-deal_en> accessed 31 January 2024.
[62] European Parliament. Directorate General for Parliamentary Research Services., *Beyond Growth: Pathways towards Sustainable Prosperity in the EU.* (Publications Office 2023) <https://data.europa.eu/doi/10.2861/602232> accessed 24 April 2024.
[63] Kate Raworth, *Doughnut Economics: Seven Ways to Think like a 21st-Century Economist* (Penguin Books 2022).

III - Thesis Objectives

At the current stage, empirical observation and analysis remain scarce on how the Commission discusses and reformed its objectives in relation to HGs 2023 and the Agricultural Guidelines. Therefore, the overarching objective of this thesis is to analyze the dynamic process of absorbing green objectives into EU competition law and policy in recent policy development with a critical account.

This MPhil thesis is based on the socio-legal understanding that the goals of EU competition law and policy keep reconfiguring depending on the policy priority of the Union at a time - it has an embedded absorbent characteristic.[64] From this perspective, this thesis goes beyond the "sustainability vs. competition" polarity, on the contrary, it regards the emerging sustainability discussion and challenges around EU competition law as a discursive force that opens up new "spaces" of intervention for regulators and regulated, and requires the doctrine to react, respond and adapt. It does not focus on where the boundary to incorporate sustainability goals into the formal legal rules should reside, but the micro-dynamics and interaction between various actors in the greening process of EU competition law and policy.[65] It intends to describe and critically analyse the approaches and strategies the EU supranational institutions (mainly the DG Competition but also DG Agriculture and the European Parliament) have adopted to close the cognitive discrepancy between sustainability and competition.

The analysis of this thesis on the greening process EU competition law from a socio-legal perspective is inherently critical of the "*more economic approach*". It argues that law as a social phenomenon must be open to interpretation by non-legal disciplines, like environmental studies. Here, the Commission seems to have incorporated critics from a sustainability perspective to understand the major stake and challenges of *greener competition policy* in EU context. This thesis thus traces what potential adaptations have been made in the new HGs 2023 to incorporate sustainability goals, what the nuances and frictions are among and between the Agricultural Guidelines and HGs 2023, and whether potentially residual path dependencies and obsession with cost-efficiency and qualitative efficiency still exist.

---

[64] Ezrachi (n 55).
[65] Bettina Lange, 'Foucauldian-Inspired Discourse Analysis' in Andreas Philippopoulos-Mihalopoulos, *Law and Ecology* (1st edn, Routledge 2011) <https://www.taylorfrancis.com/books/9780203829691/chapters/10.4324/9780203829691-3>.

It will also analyze the impact and consequences of the revised soft law – what could its impact be on the goals of EU competition law and policy. Whether its core objectives also slightly shifted away from maintaining market competition and protecting consumer welfare at all costs, and sharing more considerations for sustainability goals when the latter might hinder the former? Substantially, it will empirically examine how the DG Competition engages with the Green Deal for a long-term sustainable growth and wellbeing for all EU citizens and a 'shift towards a sustainable, resilient and inclusive economic model'.[66]

From an initial observation, there are no clear indications that such a paradigm shift has occurred or is imminent. It is widely considered that the new HGs 2023 only provide how green collaborations can be exempted from antitrust rules, rather than actively promoting sustainable collaborations among undertakings, which is different from Agriculture Guidelines. In another word, it grants exemptions from Article 101 TFEU scrutiny for the businesses that already have ecological incentives. Therefore, this thesis will comparative analysis between these two guidelines on their attitude towards sustainability collaborations.

The new HGs 2023 have also attracted a handful of normative critics for not being green enough from an ecological perspective, mostly around lack of recognition of sustainability objectives,[67] too many preconditions for green agreements,[68] and too much focus on consumer welfare. In some public consultations for the draft of HGs 2023, Environment NGOs, National Competition Authorities (NCAs) and scholars claimed that the Commission still follows its narrow neoclassical logic and shows a strong path dependency on the economic approach of cost-benefit calculation, requiring to translate sustainability gains to economic gains.[69] How to explain that the EU Commission claims to have launched the most ambitious competition rules in support of the Green Deal, yet seems timid and restrained from addressing the profound

[66] 'The European Green Deal - European Commission' (n 61).
[67] David Little and others, 'The European Commission's New Guidelines on Sustainability Agreements - Legal Analysis and Interplay with National Regimes'.
[68] Loozen (n 27). See also Nowag (n 20). Simon Holmes, 'Sustainability and Competition Policy in Europe: Recent Developments' (2023) 14 Journal of European Competition Law & Practice 448.
[69] More detailed concerns and critics observed in the Public Consultation phase are demonstrated in the following chapters.

structural conflict between the dominant economic approach and an ecological transition that cannot easily be assessed or achieved through such economic approach? [70]

These normative critics inspired an interesting research angle for this MPhil thesis.

Section 2 - Research Questions and Methodology

The HGs 2023 apply a wide definition for the term "sustainability" - it does not only address ecological issues, but also includes human rights, ensuring a living income, limiting food waste, and protecting animal welfare.[71] This thesis restrains its analysis scope within ecological sustainability, which includes reducing carbon emissions for climate change, reducing pollution, and limiting natural resource use.[72]

With these preliminary observations, this thesis proposes to ask its main research questions in a two-tier order:

I - Research questions*:*

1/ How has the DG Competition conceptualised and incorporated emerging ecological objectives in the recent revisions of Horizontal Guidelines 2023 and the Agricultural Guidelines?

2/ Have these reforms of EU competition law and policy reoriented the fundamental objectives and priorities of EU competition law and policy beyond the scope of protecting market competition, consumer welfare and economic growth to include more ecological considerations?

II - Methodology: Tracing the Greening Process of EU Competition Law and Policy through Discourse Analysis

This thesis exercises a discourse analysis of the process of revising the Guidelines by the DG Competition. Therefore, the principal source of analysis is the final version of the Horizontal Guidelines 2023 (HGs 2023). This thesis will make a comparison between HGs 2023 and the Agriculture Guidelines in order to analyze the different extent of tolerance

[70] Multiple NCAs have expressed such critics in the public consultation phase for the draft Guidelines. The Dutch and the Spanish questioned why there is little mention of a shift of EU competition law goals towards a sustainable direction in the Guidelines despite the academic interrogation for years. Detailed argument in following chapters.
[71] HG 2023, para. 517.
[72] ibid.

towards sustainability agreements in different sectors. It needs to be clarified that the exceptional rules in agriculture only play a supportive role in this thesis. Though this thesis will refer to a few ECJ judgements and the Commission's decision, it does not analyze the enforcement practices after the publication of the two Guidelines due to the lack of cases.

In a *first* instance, Foucauldian Power/Knowledge provides a perspective to understand that the objectives and norms in EU Competition law and policy are discursively constructed in a flux.[73] The increasing discussion around climate catastrophe has allowed the entrance of new discourses, notably, the necessity to promote ecological considerations in the competition law enforcement. The Commission's "*more economic approach*" was constructed through discursive performance and therefore is also subject to challenges by such emerging sustainability discourses.[74] This thesis reflects on the abovementioned responsive nature of EU competition law and policy, the goals of which are highly contextualised amongst various discourses and the outcome of such interaction largely depends on very contemporary political priority. Foucauldian discourse analysis suggests going beyond a phenomenological approach of analysing agencies and motivations but observes how discursive practices around sustainability are brought into the debate of EU competition law and policy and how the power dynamics of the revolving regulatory reconfiguration in the current trend to green up EU competition rules played out and demonstrated in the revised Guidelines.

Second, to trace such power dynamics between different knowledge requires to identify not only different discourses, but the relationships between them by examining interdiscursivity[75] - how discourses reinforce, supersede and question each other.[76] Therefore, this paper analyses not only the discourses within the Horizontal Guidelines and the Agricultural Guidelines, but also the public consultations that directly comment on the guidelines, speech transcripts of commissioners, policy reports, and staff working papers.

---

[73] Michel Foucault, *Archaeology of Knowledge* (Taylor & Francis Group 2002) <http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=1144626> accessed 23 February 2024.
[74] ibid.
[75] Gavin Kendall and Gary Wickham, 'I'm Interested in Foucault, but Why Should I Be Interested in History?', *Using Foucault's Methods* (SAGE Publications Ltd 1999) <https://methods.sagepub.com/book/using-foucaults-methods> accessed 6 February 2024.
[76] Norman Fairclough, 'Intertextuality in Critical Discourse Analysis' (1992) 4 Linguistics and Education 269.

When one discourse is dominant, it could lead to a limited exploration of another discourse,[77] this MPhil thesis is interested in further analysing which groups of discourses have been promoted, prioritised, marginalised and silenced when the Commission conceptualises new ecological demands in the Guidelines HG 2023 and agricultural guidelines. By localising contested knowledge of achieving green outcomes, also frictions, conflicts and nuances of the discourses in these various texts,[78] it explores the circumstances in which the Commission takes its stance. It helps us understand how the legal, social, political, and economic norms of the *greener* EU *competition policy* and law. was constructed and how certain discourses become dominant. This interdiscursivity can be best examined by discourse analysis through an analysis of three types of intertextual dialogues:

1) Internal dialogue within the EU competition rules between the past and present text on sustainability agreements exemptions, which shows an evolution of DG Competition's attitude towards incorporating environmental considerations.

2) Overarching dialogue between DG Competition and other policy areas, particularly with DG Environment and European Parliament, that demonstrates a lack of intertextuality and limited coordination of DG Competition with other EU policy areas and other EU supranational institutions.

3) Bilateral dialogue between HG 2023 and Agriculture Guidelines, and on DG competition's regulatory agency by comparing it to a more permissive alternative to sustainability agreements offered by the agricultural sector.

Lastly, Gilbert and Mulkay's "*interpretative repertoire*"[79] offers a tool to analyse the regulatory strategy of the Commission and suggests a critical attitude to the taken-for-granted knowledge in relation to the neoclassic economic theories and silo-thinking in EU competition rules. The "narratives" based on neoliberal ideas of market competition prevailed in the doctrine of competition law, and this impacts their ideational inclinations and conceptual environment,[80] which determines and limits them in ways of which they cannot be aware.[81]

---

[77] Lange (n 65).
[78] Foucault Michel, *Power / Michel Foucault ; Edited by James D. Faubion ; Translated by Robert Hurley and Others* (the New Press 2000).
[79] G Nigel Gilbert and Michael Mulkay, *Opening Pandora's Box: A Sociological Analysis of Scientists' Discourse* (CUP Archive 1984).
[80] Buch-Hansen and Wigger (n 5).
[81] Gary Gutting, *Foucault: A Very Short Introduction* (Oxford University Press 2019) <https://academic.oup.com/book/28400>.

Dominant languages in EU competition policy therefore constitute a reluctance to accept propositions that prioritize sustainability objectives over competition parameters, such as cost-efficiency, low price, and variety of choice. This informs us how the European Commission incorporates and understands sustainability only through a particular angle of market economic efficiencies,[82] and explains the path dependency of EU competition law and policy that is based on the "*more economic approach*". This thesis therefore examines how the revised HGs 2023 potentially nuance the path dependency.

On top of that, this paper thus intends to examine whether there is an inertia from pro-competition legal norms which promote economic efficiency and consumer welfare to conceptualise more progressive sustainability discourses that prioritise remedying climate crisis and environmental degradation.

Section 3 - Literature around Three Recurrent Challenges: Competition/Collaboration, Consumer Welfare and Economic Growth

This MPhil thesis proposes to analyse the power dynamics among various discourses addressing the issues around sustainability and competition law and policy in and around two recent Guidelines and DG Competition policy documents for a *greener competition policy*. To do so, it primarily identifies three recurrent themes where contradiction and divergence are the most prominent in the greening process of EU competition law and policy. Discussions around these three themes which have been first identified based on academic literature also guide the analysis in the following chapters.

I - A Cognitive Dissonance Between the Virtue of Market Competition and Collaboration for Sustainability Outcomes

For over a decade, the European Commission has insulated EU competition law from environmental concerns, delegating the job to environmental laws and policies and other

[82] Buch-Hansen and Wigger (n 5).

regulatory rules that are more directly relevant to governing industrial pollution, preserving biodiversity and ecological degradation.[83] But scholars and legal professionals have challenged this restrictive scope and vision of EU competition law and policy duty and called for a new equilibrium of accommodating ecological interests into the classical EU competition law and policy.

There is no conclusion in academia whether competition or cooperation would spur more motivation for companies to take more environmentally responsive initiatives. Some literature has suggested that environmental externalities could be better addressed with cooperation.[84]

One of the biggest obstacles identified in the competition law doctrine is that businesses would halt their sustainability cooperation with their competitors in fear of competition law enforcement. Private regulation may also be a generic response from the private sector to a failure or unwillingness on the part of the nation-state and conventional international lawmaking to address cross-border environmental challenges effectively.[85] Specifically, when it comes to technological progress and innovation, which are needed for ecological transition, Schumpeter declares that market concentration is necessary to incentivise innovation and only with the big fortune could a great innovative leap occur.[86]

However, exempting sustainability agreements from Article 101 does not mean we trust the free market and the invisible hand, but to see the non-capitalist, non-profit-seeking incentives of private initiatives. They are not always only focusing on profits but do have a willingness to go green.[87] A more permissive attitude to cooperation for sustainability agreements amongst competitors can help correct one outstanding negative effect of a

---

[83] Kingston, 'Competition Law in an Environmental Crisis' (n 19).
[84] Roman Inderst and Stefan Thomas, 'Competition Policy and the Environment' (2023) 15 Annual Review of Resource Economics 199.
[85] Jotte Mulder, 'The Transformative Socio-Economic Effects of EU Competition Law: From Producerism to Consumerism' in Poul F Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) <https://www.cambridge.org/core/books/law-of-political-economy/transformative-socioeconomic-effects-of-eu-competition-law/C90548590F055B78D38B05A2648345CC>.
[86] Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (Start Publishing LLC 2012) pt 3 The process of Creative Destruction <http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=1105219> accessed 29 December 2024.
[87] Inderst and Thomas (n 84).

competition overdose: First-mover disadvantage.[88] The first competitor adopts a sustainability measure and often raises prices to cover costs, risking losing market share. Intense competition discourages firms from pursuing sustainability unless they face less pressure or can collaborate with competitors to offset this disadvantage. [89]

In the new HGs 2023, there seems to be a reconfiguration of how much sustainability collaboration could be permitted. Very little literature has addressed the issue of to what extent the pro-collaboration discourses have occupied further territory in the EU competition law and policy after the new HGs 2023. A Foucauldian-inspired discourse analysis will follow how collaboration and competition discourses interact and examine a power relationship and hierarchy between them. It will also help to trace the DG Competition's regulatory strategy to retrieve a new equilibrium in the HGs 2023.

Chapter 2 of this thesis plans to offer insights into the Commission's regulatory choice - how this ambiguous relationship between competition and collaboration became settled under the HGs 2023 in the context of greening EU competition law and policy. It will explore how this dissonance between competition and collaboration for green outcomes is governed under the new Guidelines and DG Competition policy documents. It will conduct a discourse analysis to understand which approach and with what nuance the Commission has adopted in its final draft therefore to permit sustainability agreements.

II - When Conventional Consumer Welfare Meets Environmental Interests - Compromises and Frictions

In the EU competition law doctrine, the idea of consumer welfare aligns with a proactive regulatory approach: consumers often lack information and are more vulnerable to influence. Therefore, competition law and policy need to prioritize the protection of their rights and welfare.[90] Under a Chicagoan reductionist cost-benefit method, this is calculated in price.[91]

---

[88] 'Podcast: Is Competition Law Stifling a Move to a Green Future?' (*Frontier Economics*) <https://www.frontier-economics.com/uk/en/news-and-insights/news/news-article-i9315-podcast-is-competition-law-stifling-a-move-to-a-green-future/> accessed 13 September 2024.
[89] Inderst and Thomas (n 84).
[90] Andriychuk (n 39).
[91] Max Hjärtström, 'Chapter 10: Addressing Sustainability Failures in Economics and Competition Law: Environmental Externalities, Consumers and Quantification' in Julian Nowag (ed), *Research Handbook on Sustainability and Competition Law* (2024) <https://www-elgaronline-com.ezproxy-prd.bodleian.ox.ac.uk/edcollchap-oa/book/9781802204667/book-part-9781802204667-18.xml> accessed 13 August 2024.

Today, ‘consumer welfare’ appears more often in a critical context, often regarded as transforming competition law to a servant of consumer welfare. When it comes to environmental concerns, there are mainly three groups of critiques.

First of all, the “welfare” concept under neoclassical analysis is very limited when it comes to integrating environmental interests. Current EU competition policy defines consumer welfare from a quite narrow angle: Low price, good quality and variety of choices of goods and services,[92] which are very economic-intense terms. This approach is often considered insufficient to incorporate other non-economic interests, including sustainability. Kingston pointed out that though the sustainability interests could overlap with consumer welfare when these green features could be translated into better quality, the problems arise when the channel is narrow.[93] Fernandez and Meijide have suggested that “competition goals should move towards non-economic values”[94]

Second, the measuring approach in consumer welfare is widely considered outdated and still follows the neoliberal model.[95] Consumer's willingness-to-pay standard is another recurrent issue. Often, consumers' incremental willingness to pay for more environmentally friendly products depends largely on the social norm and other's behaviours,[96] full compensation hinders a more ambitious ecological initiative.[97] Kingston distinguished environmental economics and ecological economics, while the former still uses neoclassical economic instruments to translate environmental interests into a price system, the latter regards the intrinsic ecological value as independent from economics.[98]

Lastly, the moral deficit of consumer welfare contributing to consumerism is also a widely discussed critique.[99] “A legal system orientated towards consumerism would be based around the idea that the individual as a consumer is primarily interested in low prices, product

---

[92] Suzanne Kingston, ‘Chapter 9: Competition and Sustainability in EU Law: Nearer Resolution of the Old Debate?’ (2024) <https://www-elgaronline-com.ezproxy-prd.bodleian.ox.ac.uk/edcollchap-oa/book/9781802204667/book-part-9781802204667-17.xml> .
[93] ibid.
[94] Cani Fernández and Adriana Meijide, ‘Chapter 13: Competition Law and the New Regulatory Landscape: What Lies Ahead?’
[95] De Backer and others (n 52). See also Svend Albaek, ‘Consumer Welfare in EU Competition Policy’ (2013).
[96] Inderst and Thomas (n 84).
[97] Holmes, ‘Sustainability and Competition Policy in Europe’ (n 68).
[98] Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011) <http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=807315> accessed 10 April 2024.Chp 5.
[99] Jean Baudrillard, *The Consumer Society: Myths and Structures* (Revised edition, Sage 2017).

choice, and access to credit."[100] By prioritising consumer welfare in a narrow way, we are still contributing to a consumer society, and potentially also overconsumption and overproduction.[101] There has been a long-standing belief that market competition is good because it protects consumers, which could be separated from ecological concerns. Horton reckons this belief is discursively performed, and consumer welfare has been somehow situated in a moral vacuum, a moral zombie, and a detachment from environmental interests.[102] Scholars like Hammer suggest moving towards a 'total welfare' regime.[103]

Foucauldian discourse analysis could help illustrate the ambiguous relationship between economic knowledge, the approach to calculating consumer welfare or total welfare and the legal knowledge approach to assessing consumer benefits. There is little discussion on whether the new HGs 2023 and recent policy developments have suggested a paradigm shift to deprioritise consumer benefits for ecological cases. This thesis leans on discourse analysis to explain, if they did, how discourses around consumer benefits changed over time and the discursive evolvement of considering consumer welfare as a competition policy priority.

Chapter 3 inquires to what extent the priority of consumer welfare standards has been re-curated by the Commission in the recent guidelines. Specifically, on questions of whether the new Guidelines consider environmental gain as efficiency gain. Does the Guidelines suggest a less "economic approach" to incorporate sustainability interests while they cannot be easily substantiated under article 101(3) evaluation?

III - Commitment to a "Circular Economy": Concepts and Challenges of the "Greener Competition Policy"

[100] Mulder (n 85).
[101] Maggiolino (n 15); Mulder (n 85).
[102] Thomas Horton, 'Fairness and Antitrust Reconsidered: An Evolutionary Perspective' (2013) 44 McGeorge Law Review 823.
[103] Peter J Hammer, 'Antitrust beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs' (2000) 98 Michigan Law Review 849.

Many scholars have argued that European economic competition law is rooted in shadow neoliberalism.[104] This entails that competition is closely associated with the idea of promoting economic progress and technological advancement:[105] Competition followed a neoclassical growth model, which regards competition as a route to progress and modernity, in the meantime, also a strong tool to contribute to economic growth.[106]

On the other hand, the "beyond growth" debate first found its appearance in the EU in 2003. Recently, "prosperity without growth",[107] degrowth,[108] and 'Green Growth' emerged in recent public debates and policy documents. The discourse of degrowth becomes highly relevant in the current post-capitalist context, though not shared by EU public policymakers, which might also offer some insights into the competition law, given economic efficiency has been more frequently called into question as the goal of competition law, a "prosperity without growth" discourse might gain more space in the public debate. Garver went further advocating for an overhaul of legal methodologies to transit towards an ecological law regime. The remaining question would be, to what extent is it legally possible for competition law to distance itself from growth-centrism and actively address environmental struggles that have long been oversimplified as "externalities"?

Why would and should the degrowth perspective come into this debate? Precisely because the DG Competition commits to contribute to a circular economy transition, in accordance with the European Green Deal.[109] Yet a primary observation indicates that there are very few discursive links in the new HGs 2023 to this new economic model.

---

[104] Buch-Hansen and Wigger (n 5). Jonathan Hearn, 'Reframing the History of the Competition Concept: Neoliberalism, Meritocracy, Modernity' (2021) 34 Journal of Historical Sociology 375. Z Umut Türem, '"The Market" Unbound: Neoliberalism, Competition Laws and Post Territoriality' (2016) 19 Journal of International Relations and Development 242.

[105] Alexander Gillespie, *The Illusion of Progress: Unsustainable Development in International Law and Policy* (Earthscan Publications 2001).

[106] Hubert Buch-Hansen and Martin B Carstensen, 'Paradigms and the Political Economy of Ecopolitical Projects: Green Growth and Degrowth Compared' (2021) 25 Competition & Change 308.

[107] Tim Jackson, *Prosperity without Growth: Economics for a Finite Planet* (Earthscan 2011).

[108] Giorgos Kallis, Riccardo Mastini and Christos Zografos, 'Perceptions of Degrowth in the European Parliament' [2023] Nature Sustainability 1; FEDERICO DEMARIA and others, 'What Is Degrowth?: From an Activist Slogan to a Social Movement', *The Environment in Anthropology (Second Edition)* (NYU Press 2016); Romain Mauger, 'Finding a Needle in a Haystack? Identifying Degrowth-Compatible Provisions in EU Energy Law for a Just Transition to Net-Zero by 2050' (2023) 41 Journal of Energy & Natural Resources Law 175.

[109] 'The European Green Deal' <https://competition-policy.ec.europa.eu/sectors/energy-environment/european-green-deal_en> accessed 16 December 2022.

There is a fundamental difference between green growth discourse and degrowth discourse:[110] While green growth incorporates sustainability interests into its discourse, the primary goal remains to boost GDP growth. [111] Degrowth/post-growth discourse decentralisation and defocus on economic growth as a per se goal. [112] Promoting green growth risks sidelining the degrowth discourse demanding a detachment from a ceaseless pursuit of higher productivity.

To examine the ecological ambition of the DG Competition, the question therefore remains if the Commission has adopted a green growth discourse or is more open to the idea of degrowth/post-growth discourse in a circular economy. How do the new guidelines address the circular economy issue? Has it responded to how to relate to circular economy policy? There is no discussion on this connection yet. Very few literature directly engage with an empirical observation on the HGs 2023 from a degrowth/post-growth angle.

The final ***Chapter 4*** will go beyond the scope of the two guidelines and engage with a wider range of discourses that engage DG competition to adapt to the circular economy goal mentioned in the Green Deal. It intends to trace the adaptation in HGs 2023 to achieve the circular economy goals, and the potential frictions between DG competition's green agenda manifested in its speeches, policy briefs, staff working papers and annual reports.

[110] Hubert Buch-Hansen and Martin B Carstensen, 'Paradigms and the Political Economy of Ecopolitical Why Projects: Green Growth and Degrowth Compared' (2021) 25 Competition & Change 308.
[111] Mike Joy, 'The Idea of "green Growth" Is Flawed. We Must Find Ways of Using and Wasting Less Energy' (*The Conversation*, 27 May 2021) <http://theconversation.com/the-idea-of-green-growth-is-flawed-we-must-find-ways-of-using-and-wasting-less-energy-160432> accessed 7 November 2023.
[112] Serge Latouche, *Farewell to Growth* (Polity 2009).

CHAPTER 2

Rebalancing Discourses of Competition and Collaboration for Green Outcomes in Horizontal Sustainability Agreements

"The Commission is mindful that there may be instances where companies need to get together in order to override a first mover disadvantage and nudge consumers towards using more expensive sustainable products, instead of cheaper but polluting ones."[113]

"The EU cannot in the name of sustainability "turn a blind eye" to agreements that hurt competition." [114] *--DG Competition Commissioner Margrethe Vestager*

Chapter Introduction

The HGs 2023 revitalised the discussion about rebalancing competition with collaboration and put forward some new thoughts on an ecological transition of EU competition law and policy. The previous version of HGs 2001 had a chapter on Environmental Agreements, but this chapter was removed in the HGs 2004 and HGs 2010, which deemed that environmental interests can be sufficiently considered under a general balancing procedure of public interests. The return of a sustainability agreement chapter can be regarded as a re-appreciation of the importance of satisfying environmental interests via collaboration. Previous Horizontal Guidelines and Agricultural Guidelines suggest that the efficiency gain approach in the past was never stable - the underlying "more economic approach" experienced "up and down" in the past. Agricultural Guidelines which were published around the same time as the HGs 2023 offers an alternative angle to look at to what extent the "Competition" discourse remains central when the sustainability standard is more stringent in specific sectors, therefore offering an insight into the knowledge the HGs 2023 have marginalised. This chapter therefore engages with a close analysis of a shifting balance between the "Collaboration" discourses and

[113] Vestager (n 29).
[114] Margrethe Vestager, 'Speech - The Green Deal and Competition Policy'.

the “Competition” discourses identified in the recently revised HGs 2023 and the Agricultural Guidelines.

Section 1 sets its observation within the scope of HGs 2023, noting that they acknowledged the positive impact of private collaborative actions on delivering sustainability outcomes and have opened up more space, the “*shield*”, for sustainability agreements. Yet, the “Competition” discourses remain dominant and play the role of “*sword*” that asserts the importance of market competition in the pursuit of green objectives. However, we see friction and ambiguity between these two discourses on certain occasions.

DG Competition adopted two strategies to govern the two co-existing discourses. On the one hand, a hierarchy of competition over collaboration to assess sustainability agreements is clear. On the other hand, this hierarchy is affirmed by a “*verifiable, objective and substantial*” economic efficiency assessment of the agreement in question. They are justified by the necessity to prevent greenwashing and to protect consumer welfare.

Section 2 offers a critical account of this shift of balance by offering a perspective beyond the HGs 2023 and compares it with the past guidelines and agricultural guidelines. First, it observes that the past Horizontal Guidelines 2001 and a few jurisprudences did not resort to an exhaustive economic approach to evaluate the efficiency gains of environmental gains. Second, the Agricultural Guidelines have a more encouraging and lenient attitude towards sustainability agreements. Therefore, this section demonstrates that different conceptions of competition are invoked by DG Competition in different time period and different sectors.

Therefore, this chapter argues that despite an observable advancement of the Collaboration discourses for sustainability purposes, there is a limited qualification of the “Competition” discourse and “*a more economic approach*” to assess environmental benefits remains central.

Section 1 - Discourses of "Collaboration" and "Competition" in the Context of Exempting Sustainability Agreements under the Horizontal Guidelines 2023

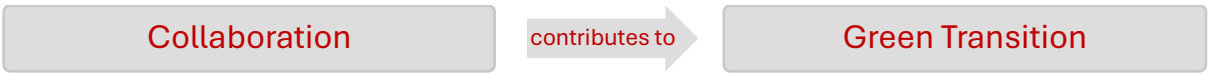
Both "Collaboration" and "Competition" discourses exist at the same time within the HGs 2023 to provide insights on how to better accommodate sustainability initiatives. However, empirical analysis suggests various nuances and frictions between them despite DG Competition's efforts to rebalance

When it comes to what extent the Commission should permit sustainability agreements that restrict competition, two sets of concurrent discourses, both "collaboration" and "competition" discourse present in the HGs 2023, which arouses some tensions and frictions. (I) This ununified regulatory duality is governed by the DG Competition through deliberative discursive practice to emphasise non-elimination of competition and relying on claimed objective assessment of sustainability agreements via efficiency gain. (II)

I - Facilitate green initiatives through "Collaboration" and control the risk of greenwashing through "Competition"

Confining market competition for environmental interests is not a new concept, but before such sacrifice has always been carried out via environmental regulations and direct government intervention. The emerging collaboration discourses suggest that public regulation could only go so far, and it is time to invest more trust in private initiative to carry out ambitious sustainability projects via collaborations without worrying about breaking competition law. Therefore, the difficulty now is to find a new balance between collaboration and competition.

a. Emerging "Collaboration" discourses support more private green initiatives



The emerging "Collaboration" constitutes the first branch of the duality, it argues that the conflict between the environment and economy could be remedied by exempting joint actions between competitors for sustainability purposes that are restrictive of competition.[115] The European Green Deal advocates for a transition to a circular economy. To achieve large-scale circularity, as some suggested, requires businesses to collaborate with each other and move away from the habit of competing constantly. This suggests a new model of both market

[115] Holmes, Middelschulte and Snoep (n 54). Maurits Dolmans, Wanjie Lin and Jessica Hollis, 'Sustainability and Net Zero Climate Agreements – a Transatlantic Antitrust Perspective' <https://www-elgaronline-com.ezproxy-prd.bodleian.ox.ac.uk/view/journals/clpd/8/2/article-p63.xml> accessed 2 July 2024.

and social practice – it might be time to expect less competition and even allow certain sectors to prioritise collaboration over competition. [116]

As many suggested, we should have more trust to private sustainability initiatives and *Collaboration* should act as a "*shield*" for sustainability agreements to be exempted from antitrust scrutiny when necessary.[117] There is a clear implementation of such "Collaboration" Discourse in the HGs 2023 which acknowledges the need to permit more sustainability collaborations to combat both demand-side market failure and governmental failure.

On a general note, the HGs 2023 recognise that cooperation agreements between undertakings promoting sustainable production and consumption have a positive impact on sustainability development by correcting the negative externalities resulting from severe competition.[118] This point was seconded by Commissioner Vestager said private initiatives are important in combatting climate change:

> "Businesses have a vital role, in helping to create markets that are sustainable in many different ways. And competition policy should support them in doing that."[119]

This also means, that the Commission has accepted certain suggestions in the public consultation to the Draft of the Revised Horizontal Guidelines 2022 ("Draft")[120] and conceded to agree that mainstream antitrust has a deterring effect on companies which have motivations to engage with ambitious green outcomes that would require collaboration.[121]

In terms of sustainability agreements that restrict market competition, HGs 2023 consider two conditions where joint private initiatives can correct market failure and such restriction on competition is indispensable. First, it recognises exempting collaboration can incentivise companies to initiate green actions to overcome the so-called first-mover disadvantage:

---

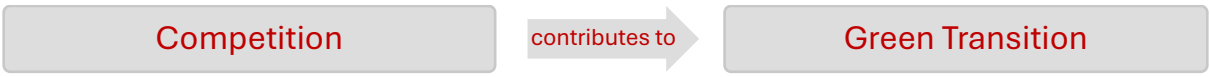
[116] Iana Nesterova and Hubert Buch-Hansen, 'Degrowth and the Circular Economy: Reflecting on the Depth of Business Circularity' (2023) 414 Journal of Cleaner Production.
[117] Holmes, 'Climate Change, Sustainability, and Competition Law' (n 9). Nowag (n 20).
[118] HGs 2023, [519]-[521].
[119] GCLC Conference on Sustainability and Competition Policy, Brussels, Speech of Commissioner Vestager, 24 October 2019.
[120] EU Commission, draft Guidelines on the applicability of art 101 of the Treaty on the Functioning of the EU to horizontal co-operation agreements (EU Guidelines), 1 March 2022 C(2022).
[121] Edith Loozen, 'EU Antitrust in Support of the Green Deal. Why Better Is Not Good Enough' [2023] Journal of Antitrust Enforcement jnad005.

> "[...] a sustainability agreement may be necessary - in an initial phase - to avoid free-riding on the investments required to promote a sustainable product and to provide information to consumers (overcoming the so-called 'first mover disadvantage). "[122]

Second, it also considers that a restrictive agreement may also be necessary "to achieve economies of scale, in particular to reach a sufficient scale to cover the fixed costs of setting up, operating and monitoring a sustainability label or standard."[123] Hence, the Commission acknowledged that the particularity of the climate crisis requires the economy to adopt an "all hands on the table" method to adapt fast and on a big scale.

In addition, on the other hand, the final version of HG 2023 recognised the indispensability of private initiatives to correct governmental failures where "*residual market failures are not fully addressed by public policies and regulations.*"[124] For example, it recognises some large-scale market failures cannot be targeted by regulation in a timely matter while private initiatives amongst transnational firms are capable of addressing issues on a wider scope.[125]

b. Limited Subordination of the "Competition" discourses to safeguard fairness and prevent "greenwashing"



On the other hand, the "Competition" discourse constitutes the other half of the duality, it argues that "antitrust enforcement contributes to the pursuit of sustainability objectives by promoting and protecting competitive markets." [126] It regards sustainability aspects, such as the long duration, the use of environmentally responsible material and energy efficiency of a product as part of the quality performance of a good or service, therefore they can be a parameter under which undertakings compete.[127] It conveys a belief that in a competitive market, companies are pressured to keep the low price, which incentivises them to use less raw material and energy, and also makes it easier to purchase and invest in greener products.[128]

---

[122] HGs 2023, 566.
[123] HGs 2023, 567.
[124] HGs 2023, 520.
[125] Comments of the American Bar Association Antitrust Law Section and International Law Section on the European Commission's Consultation Document on the Revision of the Eu Competition Rules in Relation to Horizontal Agreements Between Companies, April 2022.
[126] European Commission. Directorate General for Competition. (n 30).
[127] Nowag (n 20) 17.
[128] Vestager (n 114).

Therefore, it addresses the role of competition law as a "sword" - where protecting competition is expected to be beneficial to sustainability.[129] The "Competition" as a sword discourse is located at the centre of the HGs 2023 as a key to ensuring sustainability development by association to a series of positive outcomes "spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare." [130]

In the context of the Sustainability Agreement Chapter of HGs 2023, the "Competition" discourse plays a role as a gatekeeper to prevent anticompetitive harm brought by sustainability collaborations. Such a narrative reminds the public that the top duty of competition policy is still to keep a fair and levelled playing field between undertakings. Therefore, the "Competition" discourse calls for vigilance on undertakings' incentives to engage with sustainability collaborations - businesses cannot use sustainability as cover to hide cartels which provide minimal sustainability benefits for maximum price increases (known as greenwashing).[131] The "Competition" discourses claim to unveil the suspicious agenda of private initiatives to maximise their profits rather than promoting sincere sustainable outcomes. It thus grants a glorious standalone virtue to terms like "*vibrant competition*", "*competitive market*" and "*market competition*".

It needs to clarify that collaboration and competition are not two sets of discourses that preclude each other under EU competition law and policy – they are not in total opposition as stipulated under Article 101(3) of the TFEU. Yet, the increasing incorporation of Collaboration discourses has changed the previous proportion between the two discourses. In view of this changing equilibrium, the difficulty today is that this conventional understanding of what competition law should serve to the market is challenged, and new frictions and unresolved disagreements emerged in the co-existence of the two sets of discourses.

Collaboration as a "*shield*" for genuine green initiatives and competition as a "*sword*" to combat greenwashing, both strategies seem very plausible, and they formed a duality mode of governance.

---

[129] Nowag (n 20) 17.
[130] HGs 2023, 518.
[131] Jurgita Malinauskaite and Fatih Buğra Erdem, 'Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities' (2023) 61 JCMS: Journal of Common Market Studies 1211.

c. Difficulties and frictions to find the new balance between Collaboration and Competition in Practice

Nevertheless, the boundary between "Collaboration" and "Competition" remains unclear on certain critical issues. When the two discourses overlap, they enter into disagreements and contradictions, especially when it comes to evaluating whether the restrictions in a sustainability agreement that limits competition are indispensable.

This reflects what Foucault called **"**points of diffraction".[132] This refers to when multiple discourses exist in the same field of question, or under the same theme, the rules of discourse do not appear to favour one over another, but the acceptance of both would be contradictory and even problematic.

Such contestation and friction between two sets of knowledge - the need to quickly overcome a market failure via more collaboration and combatting the risk of greenwashing via competition, are very much present in both the public consultation for the Draft guidelines, and within the official texts themselves produced by the Commission.[133]

One contestation between the Collaboration discourses and the Competition discourses occurs on the question of whether sustainability cooperation is indispensable when EU or national (environmental) laws and regulations are in place. HGs 2023 adopted a conventional "Competition" discourse suggesting that when public regulations oblige companies to comply with concrete sustainability goals, cooperations that distort competition "*cannot be deemed indispensable for the goal to be achieved"* unless the standard in the agreement is higher or the goals can be achieved quicker or more cost-efficiently. [134] They also asserted that environmental externalities should be primarily mitigated or cured through public policies and only secondarily through collaborative agreements between undertakings.[135] Such statements highlighted DG Competition's lack of trust in businesses' incentives to go green and to self-regulate at the cost of less profit. Several commentators in the public consultation seconded this sceptical position and emphasised that regulation should be a primary resort, and that competition law should not overstep environmental governance:

---

[132] Michel Foucault, 'The Formation of Strategies", Archaeology of Knowledge (Taylor & Francis Group 2002) <http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=1144626>.
[133] European Commission. Directorate General for Competition. (n 30). See also 'Commission Staff Working Document - Report from the Commission on Competition Policy 2023'.
[134] HGs 2023, 565.
[135] HGs 2023, 519.

> "Competition law must however be careful not to overstretch its legitimacy here. Whereas democratically elected governments have legitimacy to weigh up different economic priorities, and benefits and harms to different groups, competition authorities do not have a mandate to do this beyond what is enshrined in the law." [136]

On the other hand, however, "Collaboration" discourses suggest that to preclude joint efforts just because national law has required is also problematic. They strongly oppose prioritising regulation over private collaborative actions, warning that it is not helpful to spur faster and more impactful solutions amongst undertakings:

> "In fact, agreements that enforce common legal standards, actually lead to a level playing field and therefore contribute to the well-functioning of the internal market. [137]

They argued that national or international obligations should not restrict collaboration, furthermore, collaborations that are concluded to conform to international obligations should fall outside of Article 101(1) in the first place.[138]

Consequently, the term "greenwashing" is perceived very differently by two discourses. Though the "Collaboration" discourse agrees that greenwashing is a serious and growing issue, it also points out an abusive usage of such a term. It overshadows the situations in which firms enter into sustainability agreements not solely motivated by profit.[139] Also, it downplays the sustainability benefits of collaborations to impose green behaviours on consumers where the market and regulations fail to provide enough incentives.[140] It criticises the cynical attitude of the "Competition" discourse which shows little trust in private sectors[141] and its *"deliberate misuse to create an unwarranted reluctance to take a more robust approach in relation to sustainability agreements*."[142]

The different levels of trust in public regulation and private collective initiatives generated by the two discourses put the Commission in an uneasy spot. Hence, the Commission partially adjusted its position in the final HGs 2023 to reconcile the polarised positions. The Commission eventually qualified sustainability agreements that set a higher environmental standard than national laws, or help to reach the sustainability goals more cost-efficiently and

---

[136] BEUC's response to the public consultation in relation to Sustainability Agreements.
[137] 'Public Consultation on the Draft Revised Horizontal Block Exemption Regulations and Horizontal Guidelines Response from Natuur & Milieu (Netherlands)'.
[138] ClientEarth and Simon Holmes' contribution to the Commission's public consultation for the Draft.
[139] Inderst and Thomas (n 84).
[140] idem (n 138). See also Dolmans, Lin and Hollis (n 115).
[141] ibid.
[142] idem (n 138).

quicker, as indispensable.[143] In one of the policy briefs, the Commission claimed that "*it would be useful to shed more light on when existing (environmental) regulation already incentivises companies to produce sustainably and therefore obviates the need for cooperation, and when such incentives are not sufficient to do so*."[144] Without being precise about how to decide when regulation provides sufficient incentives, it leaves much interpretative space and ambiguity. Therefore, it highlights the difficulty, or impossibility, for the DG Competition to have a clear position on where to draw the line between positive collaboration for sustainability and anticompetitive harm, as they claimed, the exercise must be carried out case-by-case.

A second discursive incoherence example arose in the discussion around green innovation. The Commission's perception of whether competition or collaboration will stimulate more green innovation for ecological transition is unstable and self-contradictory within HGs 2023, policy brief and speeches. On the one hand, HGs 2023 explicitly incorporates a "*collaboration for innovation*" discourse, indicating that it will bring down the cost and avoid significant delays of necessary green innovations in the market to allow more collaborations amongst competitors to share development costs and overcome the first-mover disadvantage.[145] In addition, the innovation and technological progress resulting from such green collaboration should be taken into account as efficiency gains in a broad term.[146] Furthermore, it also reflects on the demand-side market failure when consumers cannot appreciate the value of green innovation, sustainability collaboration becomes indispensable.[147]

On the other hand, however, DG competition also promotes a pro-competition approach to encourage innovation. It discursively emphasises the importance of market competition by leaning on discourse such as "*ensuring effective competition spurs innovation*",[148] "*vibrant competition, strong innovation and a well-functioning Single Market are mutually*

[143] HGs 2023, 565.
[144] European Commission. Directorate General for Competition. (n 30).
[145] ibid. HGs 2023, 557. "*By cooperating, undertakings may be able to create efficiencies that would not have been possible without the restrictive agreement or would have been possible only with substantial delay or at higher cost."*
[146] HGs 2023, 557.
[147] HGs 2023, 563.
[148] Commission Policy Brief – *"Vibrant competition, strong innovation and a well-functioning Single Market are mutually reinforcing*".

reinforcing"[149], and " *strong competition safeguards and enforcement as part of a smart industrial policy enabling innovation and ensuring a level playing field*".[150]

The contested yet co-existing discourses of pro-collaboration and pro-competition for innovation are confusing, this interdiscursive friction on green innovation captures an internal contradiction in the duality model of governance between "*sword"* and *"shield*.

These frictions on the use of a term between "Collaboration" and "Competition" discourses inform us of DG competition's non-homogeneous strategy to promote sustainability and therefore the main difficulty is to clarify the extent to which environmental concerns can justify collective initiatives when two discourses co-exist for the "greener competition policy".

II - Translating sustainability interests into verifiable "efficiency gains": the legacy of the more economic approach

HGs 2023 relies strongly on an economic approach to overcome the legal uncertainty of incorporating environmental benefits to translate them into "efficiency gains".[151] More precisely, the economic efficiency gains that contribute to "*improving the production* ***or*** *distribution of goods* ***or*** *to promoting technical* ***or*** *economic progress*" as Article 101(3) stipulated.

On the one hand, HGs 2023 demonstrate a visible attempt to enlarge the interpretation of efficiency gains so as to incorporate more environmental benefits generated by sustainability agreements. For instance, the new HGs 2023 clarified that environmental benefits can fall into both cost-efficiencies and qualitative efficiencies, such as reducing costs in production and distribution through exploiting less raw material, reducing pollution in the production and distribution process, providing sustainable products as improvement in variety and quality and applying greener technologies as increases in innovation.[152] They agree with "Collaboration" discourses that when private joint initiatives achieve green outcomes faster and more cost-efficient than regulations, it contributes to economic efficiency.[153] They also clarified that

[149] Vestager (n 29).
[150] ibid.
[151] HGs 2023, 9.4.1.
[152] HGs 2023, 557-559.
[153] HGs 2023, 565.

sustainability benefits that "are likely to materialise" in the future are considered efficiency gains.[154]

However, HG 2023s did not entitle sustainability benefits as a new efficiency category but only enlarged the channel to translate environmental interests into conventional economic efficiency languages. Therefore, DG Competition deliberately sidelined the discourses in public consultations that propose to qualify environmental gains in their own right.[155] For instance, the Dutch environmental NGO Natuur&Milieu said:

> "We warn against an approach that would practically prohibit horizontal agreements that strive to protect wildlife and biodiversity on its own merits."[156]

Some others suggest effectively add sustaianbility as a new efficiency category. For example, the French Association of Competition Studies (AFEC) support an "*inclusion in the definition of 'efficiency gains' of criteria of sustainability, resilience and the use of cleaner technologies".*[157] These suggestions to emancipate environmental interests from contributing to cost-efficiency or qualitative progress were not accepted.

On the other hand, evaluating environmental benefits through the lens of economic efficiency gains reinforces the discourse around the Commission's *"more economic approach*". The abovementioned nuances between the final HGs 2023 and public consultations are justified by the necessity to tether restrictive sustainability agreements within the current EU competition law and policy scope which claims to be "*objective, concrete and verifiable*" in order to avoid the risk of greenwashing:[158]

> "Such efficiencies cannot simply be assumed; they must be capable of being substantiated. They also need to be objective, concrete and verifiable." [159]

This stress on an **objectivity** justification imposes a rigid burden of proof on participants of a sustainability agreement, which demonstrates an even higher level of caution compared to the

---

[154] Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance) 2004, para.56.
[155] Comments of the American Bar Association, (n 125)
[156] Natuur & Milieu (n 104).
[157] Association française d'étude de la concurrence, AFEC, *Contribution de l'AFEC sur la consultation publique de la Commission relative aux accords de coopération horizontaux.*
[158] HGs 2023, 559.
[159] HGs 2023, 559.

Horizontal Guidelines 2011.[160] This is a response to certain public consultations and scholarships arguing that it would be "*legally wrong and unhelpful to classify environmental (or any other benefits) as somehow 'non-economic' or as (only) 'indirect economic benefits' (or 'non-competition issues')*".[161] Instead, commentators suggest refraining within the existing non-arbitrary economic methods such as 'cost savings, innovation, improved quality and efficiency' as 'direct economic benefits' which are 'typically recognised in competition law analysis'.[162]

Such a "*more economic approach*" suggests that the environmental benefits from sustainability agreements would likely fall into one or several of these recognized efficiency gains categories. Moreover, it is essential to carefully control which types of environmental interests are considered and to apply a proportionality assessment to determine the appropriate weight they should carry. The HGs 2023 reflect a cautious approach, avoiding arbitrary sustainability labels in this context. Arguably, this assumption of economic terms offers a clear scope to incorporate environmental benefits is discursively constructed, such **remedy** seeking to reassure objectivity among contested discourses is still based on neoliberal regulation of competition.[163]

However, this caution against greenwashing by relying on economic measures did not allow the Commission to go beyond two residual limitations.

First, when an environmental goal cannot be translated into efficiency gains, the chance of succeeding in an efficiency justification becomes low.[164] Contributors raised worries when marginalised environmental gains and harm cannot be easily counted or predicted in any of these efficiency parameters. For instance, *"the efficiencies may not be concrete immediately but will materialise over time*".[165]

---

[160] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevancflabele 2011.
[161] Holmes, 'Climate Change, Sustainability, and Competition Law' (n 9).
[162] OFT–OECD, OFT Contribution to the OECD Policy Roundtable on Horizontal Agreements in the Environmental Context 2010 (24 November 2011) 11.
[163] Buch-Hansen and Wigger (n 5).
[164] Kingston, *Greening EU Competition Law and Policy* (n 98).
[165] Comment of the German Insurance Association (GDV) on the public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, 10.

Second, environmental benefits might enter into conflicts or even would diminish efficiency gains and require EU competition policy to compromise its goals.[166] For instance, if a sustainability agreement applies an output restriction or limits resource extraction, it will neither contribute to cost-efficiency nor qualitative efficiency, should DG Competition exempt such an agreement? The question remained unanswered and unresolved in the HGs 2023.

> 'The agreement must contribute to improving the production or distribution of products or contribute to promoting technical, or economic progress, or contribute to sustainability objectives, that is to say, lead to efficiency gains.'[167]

This path dependency of evaluation based on economic efficiency could be explained from a Foucauldian perspective that there is a set of implicit rules that govern the DG Competition's thinking, which offers a conceptual environment that determines and limits the thinking behaviours without it being aware of them.[168] Efficiency discourse is a choice preferring the "more economic approach" discourses which claims to offer an objective assessment.

To summarise, this section observed that the "*Greener Competition Policy*" adopts both the emerging "Collaboration" discourses and the dominant "Competition" discourses. On the one hand, the introduction of a new Sustainability Agreements chapter in the HGs 2023 acknowledges the positive impact of private collaboration to achieve green outcomes in the context of climate change. On the other, the "Competition" discourses remain a dominant tool to stimulate green innovation and avoid the risk of greenwashing. This section argues that the inclusion of more Collaboration discourses into the sustainability agreements exemption assessment has changed its dynamic with Competition discourses, which has also led to unresolved frictions on a few detailed issues.

DG Competition governed these frictions by discursively limiting the qualification of Competition discourses and emphasised on multiple occasions that "*Competition law is green enough*". It highlighted the need to enforce competition law in a more vigorous way to stimulate companies to act green in market competition. On top of that, there are also some extra efforts to translate environmental benefits generated from agreements into efficiency gains, to make

---

[166] Kingston, *Greening EU Competition Law and Policy* (n 98).
[167] ETNO response to the public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, April 2022.
[168] Kendall and Wickham (n 75).

them "verifiable and objective". This demonstrates a continuation of the "more economic approach" despite the critiques from public consultations.

To further examine whether such limited qualification on competition is a prevalent phenomenon, the next section will analyse the power dynamics between Collaboration and Competition discourses in the past guidelines and cases and the agricultural sector.

Section 2 - A Further-reaching "Collaboration" Discourse for Sustainability Agreements in the Past and Agriculture – An Intertextual Reading

I - A "*less economic approach*" in the Horizontal Guidelines 2001 and Past Cases

23 years ago, the *Commission's Horizontal Cooperation Guidelines 2001* (HGs 2001) had a whole chapter on Environmental Agreements, which takes a positive stance on how Environmental Agreements can help achieve European environmental policy goals. [169] However, in 2004, the Commission turned to a more economic approach by publishing the *Guidelines on the application of Article 81(3),*[170] which shed more light on a pro-competition, pro-economic efficiency assessment of environmental benefits. By the logic that regulators should only focus on economic gains and eliminate market distortion,[171] the chapter dedicated to Environmental Agreements was eliminated in the following Horizontal Guidelines 2010 (HGs 2010). The commission then considered environmental interests just as ordinary as other public interests and can be assessed under other chapters.[172] By doing so, the DG Competition de facto excluded environmental benefits to be considered as efficiency gain in its own rights, insofar as they can be valued economically.[173]

[169] Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, 192.
[170] ibid, pp.97.
[171] Kingston, idem.
[172] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance (n 160).
[173] Kingston, *Greening EU Competition Law and Policy* (n 98). 269.

However, HGs 2001 has addressed the issue of whether environmental benefits may satisfy the first condition of Article 101(3) TFEU *in themselves*:[174]

> "Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, **there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken**. In other words, the expected economic benefits must outweigh the costs."[175]

That is to say, the Commission at that time was open to going beyond a narrow conception of economic benefits in analysing the overall environmental benefits, but to regarding the "*reduced environmental pressure*" as an efficiency gain *per se*, without further referral into monetary terms.[176] This approach significantly differs from the one in HGs 2023, which precisely requires sustainability gains to be translated into objective economic efficiency gains.[177]

Compared to HGs 2023, HGs 2001 also has less exactingness on an objective assessment of economic gains. It deliberately carved out a space allowing environmental gains to be incorporated in a qualitative way, which lowers the threshold for making these agreements lawful:

> "Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, **there is no need for the aggregate environmental benefits to be objectively established**." [178]

This statement is a direct contrast to the demand in HGs 2023 that environmental benefits be reasonably economically quantifiable,[179] and 'be objective, concrete and verifiable'. An interesting finding is that both the HGs 2001 and HGs 2023 reference an example of a phasing-out agreement between washing machine manufacturers aimed at introducing more eco-friendly machines to consumers. The reasoning in HGs 2023 places greater emphasis on detailed price calculation, including comparisons of machine life expectancy and the time required for consumers to recover the higher initial costs from the raised product price. [180]

---

[174] ibid.269.
[175] HGs 2001, para. 193, emphasis added.
[176] Kingston (n 18) 269.
[177] Chapter 2, Section 1, II - Translating sustainability interests into verifiable "efficiency gains": the legacy of the more economic approach.
[178] Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (Text with EEA relevance) 2001. para. 194, emphasis added.
[179] ibid. cf Kingston, *Greening EU Competition Law and Policy* (n 98). 163.
[180] HGs 2001, 198. HGs 2023, 603.

Therefore, this thesis argues that in the past HGs 2001, the DG Competition was already adopting a more welcoming attitude towards sustainability agreements, exercising less rigid scrutiny over efficiency gains but taking a more flexible view on the environmental benefits. This contrasts with the current economic efficiency centric approach in the HGs 2023.

II - A more encouraging "Collaboration" discourse in the Agricultural Guidelines

Though the EU Agri-Food sector is not a competition-free zone, the Common Agricultural Policy (CAP) has granted it an exceptional position when it comes to competition law and policy.[181] As the ECJ has recognized, the CAP enjoys precedence over the Competition law objectives.[182] In accordance with Article 42 TFEU, production and trade of agriculture products is only indirectly subject to competition law – to the extent determined by the European Union Parliament and the Council of the EU.[183] Consequently, comparing to the exempting conditions in HGs 2023, Agricultural Guidelines provide more lenient framework for exempting far-reaching cooperations for sustainability purpose in agriculture, which would otherwise deem unlawful under Article 101(1).[184]

a. Incentivising rather than scrutinising sustainability agreements in agriculture

First, significantly different from the tolerating and cautious attitude for sustainability collaborations in HGs 2023, Agricultural Guidelines have a more encouraging attitude towards collaborative efforts for sustainability purposes:[185]

> "Given the challenges faced by operators in the agricultural sector and the urgent need to advance on sustainability, the Union adopted Article 210a to create a framework excluding the application of Article 101(1) TFEU **to incentivise operators to enter into such agreements,** provided that certain conditions are met". [186]

---

[181] 'Common Agricultural Policy - European Commission' (25 July 2024) <https://agriculture.ec.europa.eu/common-agricultural-policy_en>.
[182] Case C 671/15, APVE and Others, EU:C:2017:860, para. 37.
[183] Article 42 of the TFEU:
"The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.[…]"
See also Agricultural Guidelines footnotes 38.
[184] Public consultation on the draft Guidelines on the application of Article 210a of regulation 1308/2013, Response from the Netherlands Authority for Consumers & Markets.
[185] 'New EU Antitrust Guidelines for Food & Agri Sustainability Agreements | Global Law Firm | Norton Rose Fulbright'<https://www.nortonrosefulbright.com/en/knowledge/publications/d7060076/new-eu-antitrust-guidelines-for-food--agri-sustainability-agreements> .
[186] Agricultural Guidelines, 89, emphasis added.

> Agriculture guidelines "aim(s) to stimulate the wide-scale adoption of sustainability standards without the risk of intervention by competition authorities unless a certain high degree of negative market effects is experienced."[187]

In other words, Article 210a and the Agricultural Guidelines intend to provide legal certainty to stimulate a wide range of Agri-operators to engage with sustainability agreements as much as possible without running afoul of EU competition law and policy.[188]

Second**,** the indispensability condition under the Agriculture Guidelines is significantly lower than the one in HGs 2023 for Article 101(3) TFEU:

> "for the purposes of Article 210a restrictions that would be considered to be serious restrictions for the purposes of Article 101(1) TFEU, such as **agreements on price fixing or reducing output, may be considered as indispensable if the conditions described in Sections 5.3 and 5.4 are satisfied whereas such restrictions are unlikely to satisfy the conditions of Article 101(3)."** [189]

Concretely, unlike HGs 2023, Agricultural Guidelines do not require the sustainability agreement to translate the sustainability benefits into efficiency gains, nor do they demand the benefits to be "verifiable, objective and concrete". In addition, the Agriculture Guidelines do not require the agreement to provide a fair share to consumers, which is a key difference. This point will be discussed in detail in the next chapter.

Based on these empirical observations, this thesis therefore argues that it is perceived crucial for competition authorities to do less in agriculture, in order to better achieve the sustainability goals that are higher than regulation. The agricultural sector goes further than HGs 2023 to relax sustainability agreements from the scrutiny of competition law and policy.[190]

b. Discursively justify the exceptional status of agriculture to benefit leniency from competition law and policy

Above all, this lenient attitude toward green collaborations is justified by discourses that emphasize the unique ecological challenges in the milieu of agriculture. The latest CAP discursively emphasised the high dependency of agricultural production on climate, natural resources, and biodiversity:

---

[187] Agricultural Guidelines 130, emphasis added.
[188] Idem (n 159).
[189] Agricultural Guidelines, 89, emphasis added.
[190] Netherlands Authority for Consumers & Market (ACM), Public consultation on the draft Guidelines n the application of Article 210a of regulation 1308/2013 (24 April 2023).

> Farming is unlike most other businesses, […] agriculture depends more on the weather and the climate than many other sectors; [191]

Therefore, farmers are particularly vulnerable facing the uncertainties and risks caused by unpredictable weather conditions, climate change, and unpredictable plant and animal diseases.[192] Moreover, farmers have weak bargaining power on the supply chain due to their chronically low income, which will be further discussed in the next chapter:

> despite the importance of food production, farmers' income is around 40% lower compared to non-agricultural income.[193]

Because of a higher survival burden and unpredictable production conditions in agriculture, to collaborate for sustainability objectives is not described as a question of "better or worse", but a matter of "to be or not to be". This argument is stated in the Commission's Agricultural Market Task Force Report:

> "Incentives to act collectively relate to commercial or other benefits (landscapes, sustainability, climate change, and animal welfare) that are achieved less efficiently—or not at all—by acting alone";[194]
> and in public consultations: "[…] retailers and wholesalers cannot act alone and cooperation with other partners in the food supply chain (processors, food manufactures, primary producers) is necessary to leave a mark."[195]

Therefore, by discursively highlighting the sectorial difficulties faced by agri-food operators to act unilaterally compared to other sectors, the sectorial exception and a corresponding leniency to sustainability collaborations is not only justified but considered essential.

Furthermore, Agricultural Guidelines discursively distinguish its policy priority of promoting "*the transition to a sustainable food system*" from the priorities of competition law

---

[191] 'CAP at a Glance - European Commission' (25 July 2024) <https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-glance_en>.
[192] KJ Cseres, '"Acceptable" Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic, and Social Dimensions of (Strengthening Farmers') Bargaining Power' (2020) 65 The Antitrust Bulletin 401.
[193] Idem (n 191).
[194] 'Agricultural Markets Task Force - European Commission' (23 July 2024) <https://agriculture.ec.europa.eu/common-agricultural-policy/agri-food-supply-chain/agricultural-markets-task-force_en>, pp 39.
[195] EuroCommerce, Position paper 23 May 2022, Guidelines on antitrust derogations for sustainability agreements in agriculture: call for evidence.

and policy.[196] To do so, at the beginning of the Agricultural Guidelines,[197] they immediately foreground the significance of sustainability in the agri-food sector by depicting its close association with two key Green Deal strategies – the Farm to Fork Strategy,[198] and the Biodiversity Strategy.[199] The CAP also contributes to a narrative of how the Agri-food sector is more concerned with various ecological interests:

> "Three out of ten of the CAP's specific objectives directly concern the environment and climate – covering climate change, management of natural resources, and biodiversity."[200]

Arguably, by establishing a closer association with policies whose main goal is to achieve environmental sustainability, the agricultural sector strengthens its legitimacy and urgent need to negotiate, reshape, and even exclude certain competition policy stipulations in order to advance a sustainability agenda:

> "Given the challenges faced by operators in the agricultural sector and the urgent need to advance on sustainability, the Union adopted Article 210a to create a framework excluding the application of Article 101(1) TFEU to incentivise operators to enter into such agreements, provided that certain conditions are met."[201]

Here, we can say that the extent to which a restrictive sustainability agreement could be deemed lawful and encouraged is much larger in agriculture due to its distinctive policy priorities manifested in Agricultural Guidelines than in general sectors. Besides, as argued by Chérot, the fundamental principles of Competition law do not revolve around environmental protection or biodiversity preservation, but it is eminently an economic law – even "the heart of economic law".[202]

Nevertheless, to use the words of Chaiehloudj, this is not a sufficient argument to ignore more progressive ecological transition discourses in other sectors and reject an "*aggiornamento*"

---

[196] Agricultural Guidelines, 2.
[197] Agricultural Guidelines, 4.
[198] Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions A Farm to Fork Strategy for a fair, healthy and environmentally friendly food system (COM(2020) 381 final).
[199] Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions EU Biodiversity Strategy for 2030 Bringing nature back into our lives (COM(2020) 380 final
[200] European Commission, "Factsheet – a greener and fairer CAP" (24 February 2022).
[201] Agricultural Guidelines, 89, emphasis added
[202] Jean-Yves Chérot, 'Gérard Farjat , Pour Un Droit Économique (For an Economic Law), PUF, Coll. Les Voies de Droit, 2004': (2005) Volume 55 Revue interdisciplinaire d'études juridiques 279.

of Competition law in view of the growing importance of ecological issues.[203] In fact, commentators refer to this progressive position taken in the agri-food sector as a critique and contradiction of the very limiting requirements under HGs 2023.[204] On top of that, a handful of public consultations, and commentators of different backgrounds propose to expand the more permissive derogation scheme adopted by the Agricultural Agreements to the general horizontal guidelines. For instance, the fast-moving consumer goods company Unilever suggested that is it not unimaginable to adopt an empowering approach towards sustainability collaborations:

> "The (Horizontal) Guidelines should instead draw inspiration from the example of article 210a which empowers agricultural products producers to enter into agreements that aim to apply a higher sustainability standard than is mandated by law.[205]

European Brand Association (AIM) provided another far-reaching example which suggests adopting block exemption for climate change abatement agreements reflecting the essence of Article 210a of the CMO Regulation.[206] That is to exclude the application of Article 101(1) TFEU for all sectors, not just in agriculture, which are engaged with "climate change abatement standards agreements below a 30% market share ceiling".[207] More importantly, it considers consumers are compensated by "*the reduction of an existential threat to our society, economy, and security*."[208]

Nevertheless, none of these proposals to liberate all undertakings that intend to engage with a more ambitious sustainability agreement was accepted by the Commission in the final version of HGs 2023. It reveals the reluctance of the Commission to adopt a general rule that permits collaborations to take restrictive measures that impose sustainability standards on consumers and society as a whole.

---

[203] Walid Chaiehloudj, 'Un exemple de résistance à la transversalité : le droit de la concurrence' (2023) t.XXXVII Revue internationale de droit économique 61. 'Aggiornamento': update, upgrade.
[204] Linklaters, Position Paper HBERs and Horizontal Guidelines Consultation Response, A47545441/26 Apr 2022. See also, ClientEarth's public consultation submission (n 138).
[205] Unilever, 'Unilever Response to Draft HGL Consultation Sustainability Submission'.
[206] AIM, 'AIM's Comments on the Draft Horizontal Cooperation Guidelines and R&D Block Exemption Regulation of 1st March 2022.'
[207] Ibid.
[208] Ibid.

Chapter Conclusion

This chapter has demonstrated a power relationship between the emerging Collaboration and Competition discourses, where the latter clearly demonstrated its dominance. This chapter observed that the sustainability interests generated from agreements remain subject to conditions under the economic efficiency test to compensate for the anticompetitive harm in the HGs 2023. Though the HGs 2023 have clarified and facilitated the process of assessing environmental concerns in terms of economic gains, this approach to translating sustainability gains into economic terms remains rigid. These environmental gains are not considered stand-alone interests. The chapter, therefore, illustrated that there is a limited qualification for competition in the HGs 2023.

However, this chapter also demonstrated that in the past HGs 2001, the DG Competition was already adopting a more welcoming attitude towards sustainability agreements, exercising less rigid scrutiny over efficiency gains but taking a more flexible view on the environmental benefits. This contrasts with the current economic efficiency-centric approach in the HGs 2023. In agriculture, we have seen more leeway than the general sector, where the Commission showed a more encouraging and lenient attitude towards green collaborations amongst Agri-Food operators due to its different policy priorities.

Therefore, this chapter illustrated that DG Competition's stance on the equilibrium between Collaboration and Competition discourses is not uniform. In certain sectors, DG Competition can go further to compromise competition for sustainability interests.

CHAPTER 3

Reconceptualizing Discourses of Consumer Welfare in the Climate Crisis: Attempts to Think Beyond the Narrow Scope of Consumers

'Competition policy is about applying rules to make sure businesses and companies compete fairly with each other. This encourages enterprise and efficiency, creates a wider choice for consumers and helps reduce prices and improve quality.' – DG Competition[209]

Chapter Introduction

Consumer welfare has always been a central and inevitable topic in competition law. Ever since Bork's influential work *The Antitrust Paradox,* the goal of competition law discipline has been heavily articulated as consumer welfare.[210] Nevertheless, the consumer welfare standard has been increasingly challenged in the 21st century, mainly criticised by its ambiguous definition, limited scope, and the omission of promoting non-economic social interests influenced by "the more economic approach", [211] including environmental protection.[212]

In the context of reforming EU competition towards a more sustainable direction, the consumer welfare standard was under much scrutiny. The new HGs 2023 is regarded as the Commission's engagement to address the conceptual and practical difficulty to incorporate ecological considerations into traditional consumer welfare framework. This chapter intends to ground the observations of in Chapter 2 even further into the concrete theme of consumer

[209] 'Why Is Competition Policy Important for Consumers? - European Commission' <https://competition-policy.ec.europa.eu/about/why-competition-policy-important-consumers_en> accessed 13 April 2024.
[210] Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978). Bork has also extended the definition of 'consumer welfare' in his works:
[211] Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (2019) 64 The Antitrust Bulletin 172, 173.
[212] Hjärtström (n 91) 163–165.

welfare. It discusses the new approaches to assess sustainability gains and their anticompetitive harms to consumers in HGs 2023 and the Agricultural Guidelines.

Section 1 focuses on the three categories of consumer benefits adopted in the HGs 2023 to assess the "*fair share to consumers*" condition for sustainability agreements and their remaining limitations. It observes that the introduction of "*collective benefits*" significantly enlarged the scope of both benefits and beneficiaries, which is distinct from the previous price-focused approach. Yet, as observed in public consultation, this approach is subject to extensive critiques for restraining the environmental benefits within the narrow scope of consumer compensation. This section argues that the DG competition reserves from further separating sustainability benefits from consumers' benefits. The Commission anchors the end goals of EU competition law and policy to protect consumers.

Section 2 employs an intertextual reading of consumer welfare and extends the discussion to the past texts and the Agricultural Guidelines. It first noticed that consumers' fair share had been interpreted in a broad sense in the HGs 2001 and a few cases, "union's benefits" and "total welfare". It also discovers that the Agricultural Guidelines have little requirement to pass the sustainability gains to consumers of any type, but rather focus on agri-food operators' benefits. It demonstrates alternative approaches to assess sustainability gains distancing from consumers within the scope of EU competition law and policy do exist. This section also offers critiques in academia to consider consumer welfare from a sociological perspective beyond market welfare and proposes to consider the citizen-consumer's ecological demand.

Hence, this chapter argues that the HGs 2023 enlarged its scope of consumer welfare to incorporate more environmental interests but significant reservations to further detach sustainability gains from a consumer-centric perspective remain. However, it is clear from what Section 1 has argued, that there are still significant reservations to give more emphasis to sustainability gains in their own right, rather than considering them from an individual consumer-centric perspective.

Section 1 - An Enlarged Scope of Consumer Welfare to Integrate Environmental Interests and the Remaining Blind Spots in the HGs 2023

I - Expanding the frontier of consumer welfare: broader "benefits" and more than "individual consumers"

a. New approaches – a three-tier classification of consumer benefits

The new HGs 2023 have classified the environmental gains into three categories that could be attributed to consumers: individual use value benefits, individual non-use value benefits and collective benefits.

- *Individual use value benefits*

Sustainability agreements may generate traditional benefits, which are termed 'individual use value benefits'. These benefits may include '*improved product quality or product variety resulting from qualitative efficiencies or take the form of a price decrease as a result of cost efficiencies*.'[213] This is not new, the HGs 2023 clarified how the feature of sustainability embedded in product quality is considered individual use benefits. The positive impact on the environment can directly be appreciated by the individual consumer. For instance, a wooden toy is better than a plastic one because it lasts longer and pollutes less when discarded.[214]

- *Individual non-use value benefits*

'Individual non-use value benefits' refers to the sustainability benefits from which consumers indirectly benefit, thanks to their consumption behaviour, while such benefits are not manifested in the usage of this product. [215] The sustainable qualities of the product do not improve the quality or reduce the price, but the benefits result from consumers '*appreciation of the impact of their sustainable consumption on others.'* [216] For instance, a product that does not give rise to deforestation or habitat loss thanks to its responsible sourcing does not improve the user experience, but only because consumers appreciate their engagement to a more ecological cause. [217]

---

[213] HGs 2023, 571.
[214] HGs 2023, 572-574.
[215] HGs 2023, 575-581.
[216] HGs 2023, 575.
[217] Holmes, 'Sustainability and Competition Policy in Europe' (n 68) 450.

It is worth noting that, consumers' appreciation of the ecological impact is measured by investigating their willingness to pay:

> Consumers who are willing to pay more for such products may perceive them to be of a higher quality precisely because of the benefits accruing to others. From an economic perspective, such indirect qualitative benefits are no different from the quality-enhancing benefits that increase the direct use value of a product, as discussed in Section 9.4.3.1.Such indirect, non-use value benefits can in some cases be measured by **investigating consumers' willingness to pay,** for instance, through customer surveys.[218]

Here, both individual use and non-use value benefits pertain to the valuation that a consumer places on a sustainability benefit via consumers' willingness- to pay. However, this willingness-to-pay measurement is not adopted when assessing the collective benefits.

• *Collective Benefits*

The biggest development of the 'consumer welfare' standard is reflected in the incorporation of 'collective benefits'. 'Collective benefits' here refer to the sustainability impact generated from individual consumption, which accrued not necessarily to the consuming individual but to a wider section of society.[219] Therefore, this category goes beyond the scope of viewing individual consumers as the sole beneficiaries and can occur irrespectively of the consumers' individual appreciation of the product.[220]

For example, such collective benefits could be the improvement of air quality in the neighbourhood, derived from a local habitant's choice to purchase a less polluting fuel. Cleaner air not only benefits the purchaser him/herself but also contributes to the collective health of the neighbourhood which cannot be quantified into monetary terms.[221]

Different from the individual non-use benefits, the Commission recognised the limitation of relying on individual consumers' appreciation when the targeted environmental benefits generated from a sustainability agreement contribute to a wider audience:

> 'However, not all negative externalities can be cured through voluntary, individual consumer actions. As the sustainability impact from individual consumption accrues not necessarily to the consuming individual but to a larger group, a joint initiative, such

[218] HGs 2023, 578 emphasis added.
[219] HGs 2023, 582.
[220] HGs 2023, 582.
[221] HGs 2023, 585.

> as a cooperation agreement, may be needed to internalise negative externalities and bring about sustainability benefits for a wider section of society.'[222]

Therefore, even if there is no evident individual willingness to pay, an agreement fosters sustainability benefits that could benefit a wider group would still contribute to collective benefits.[223]

Nevertheless, there is an outstanding condition to satisfy, which is the beneficiary of collective benefits must '*substantially overlap'* with the consumers in the relevant market:

> Although the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, provided that the group of consumers that are affected by the restriction and that benefits from the efficiencies are substantially the same.[224]

That means that if there is little overlap between the consumers who purchase the product and those who benefit from the environmental gains – often because of geographical distance- the requirement for collective benefits would not be met. In this case, the willingness-to-pay scheme still applies. The HGs 2023 offers an example where this situation:

> Consumers may buy clothing made of sustainable cotton that reduces the use of fertilisers and water on the land where the cotton is cultivated. Such environmental benefits could in principle be taken into account as collective benefits. However, in this case, there is unlikely to be any substantial overlap between the consumers of the clothing and the beneficiaries of the environmental benefits, **as these occur only in the area where the cotton is grown**. Therefore, it is unlikely that these collective benefits would accrue to the consumers in the relevant market. [225]

From this point, it is clear that the environmental benefits cannot stand independently from a concrete tangible consumer in the relevant market. The range of "a wider section of society" has to contain the purchaser in question, yet how far the boundary of this collective community can extend is not clarified under HGs 2023.

b. A consumer-centric approach - valorising consumer full compensation over sustainability concerns

---

[222] HGs 2023, 582.
[223] HGs 2023, 582.
[224] HGs 2023, 583.
[225] HG 2023, 585.

This thesis observes that there is a strong attachment to anchoring competition law within the framework of consumer protection, where consumer welfare remains the primary objective over sustainability concerns.

It is worth noting that though the HGs 2023 clarified the possibility of considering non-use benefits and collective benefits, these benefits are still required to be reflected in the relevant market and its consumers. Though the benefits to non-consumers can contribute to the exemption reasoning under Article 101(3), they must still be fairly closely tied to the consumers of the specific product.

Historically, the focus on consumer welfare has always been central. As the former vice-president of the DG Competition Almunia said '*All of us here today know very well what our ultimate objective is: Competition policy is a tool at the service of consumers.'.* [226] This reflects the deeply ingrained priority of consumer protection within EU competition law and policy. Such discourses emphasising consumer welfare as the end goal continue to be prevalent in competition policy today:

> 'Our rules make sure those sustainability agreements are done in a way that doesn't undermine competition, and harm Europe's consumers'[227]

> 'the essential role of competition policy is to "protect consumers, by defending competition'.[228]

The emphasis on consumer protection reflects the strong EU legal foundation to protect consumers as stipulated in Article 4(2)(f), 12, 114 and 169 of the TFEU:

> 'Shared competence between the Union and the Member States applies in the following principal areas:[….] (f) consumer protection;'[229]

> 'Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.' [230]

> 'In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.'[231]

---

[226] Joaquín Almunia, Competition and consumers: the future of EU competition policy, speech at European Competition Day, Madrid, 12 May 2010.
[227] Vestager (n 114).
[228] 'Why Is Competition Policy Important for Consumers? - European Commission' (n 209).
[229] Article 4(2)(f) of the Treaty on the Functioning of the European Union (TFEU).
[230] Article 12 of the TFEU.
[231] Article 169(1) of the TFEU.

> ‘The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection[…]’[232]

In the same vein, this thesis also constates that the DG Competition repeatedly emphasise a full compensation strategy, ensuring that sustainability agreements must guarantee that consumers are not negatively affected:

> ‘The trouble is that to get a better environment for everyone, a limited set of consumers have to pay more. That could mean those agreements contradict a fundamental principle of the competition rules – the principle that restricting competition for a product can only be justified if the consumers of that product are not worse off on balance. That's why we think that these agreements should only be legal if the consumers of the product get a fair share of the benefits they produce – a share that outweighs the extra price that they pay.’[233]

The HG 2023 also emphasises the full compensation principle:

> "the benefits deriving from the agreement outweigh the harm caused by the agreement, so that the overall effect on consumers in the relevant market is at least neutral. "[234]

However, this thesis also discovered some dissonance regarding how much compensation consumers should receive. Some respondents emphasise that “fair competition” is sufficiency, rather than full compensation:

> ‘The Commission should not insist that, for an agreement to benefit from Article 101(3) TFEU, consumers must be fully compensated for reduction of choice or price increases (if there are any). Article 101(3) refers to a “fair share”, not “full compensation”.[235]

These discourses have implied that clearly reflected that consumer welfare remains where restricting competition for a product can only be justified if the users of that product are not, on balance, worse off.”[236]

Therefore, the assessment of the sustainability agreement remains anchored to the consumer welfare standard. This ensures that sustainability agreements do not undermine competition or harm Europe’s consumers. However, environmental gains that do not directly

---

[232] Article 114(3) of the TFEU.
[233] Vestager (n 107).
[234] HG 2023, para 569.
[235] AIM (n 206).
[236] Jurgita Malinauskaite, ‘Competition Law and Sustainability: EU and National Perspectives’ (2022) 13 Journal of European Competition Law & Practice 336.

benefit consumers or their communities cannot be properly evaluated, raising questions about how broadly "the consumer" is defined in these assessments—a topic explored in the following sub-section.

II – Remaining discursive blind spots - Limitations of translating environmental externalities through the lens of "consumer welfare"

As previously discussed in Chapter 2, translating environmental benefits into efficiency gains confronts serious limitations. Furthermore, for these environmental benefits to be passed on to consumers, this attracts similar critiques which will be briefly analysed here. This dominant discourse in the EU competition law and policy insists that sustainability gains need to be precisely and objectively translated into efficiency and consumer welfare in order to be evaluated and proven - only when sustainability and environmental consideration become the objective of economic activity, should it be a concern of competition authority.[237] This arises two difficulties when it comes to consumer welfare.

First, not all the environmental gains could be counted or predicted to benefit consumer welfare in any way. [238] For instance, the inherent value of biodiversity, and the stability of the ecosystem are not contributing to the product's quality or variety. Under the requirement of the HGs 2023, those ecological qualities can only be incorporated through individual consumers' appreciation or a contribution to collective benefits overlapping the consumers in a relevant market. These channels are still very narrow to holistically consider long-term sustainability.

Second, environmental interests might enter into conflicts with efficiency gains, which means the pursuit of ecological interests might diminish consumers' welfare. For instance, reducing product variety may release burdens on the environment and reduce emissions, but will potentially increase product price and reduce consumers' material enjoyment. Specifically, some respondents in the public consultation pointed out that the sacrifice of current consumers' benefits of material variety will benefit future generations:

> A reduced choice of car engines means short term consumer harm for car buyers today but will benefit the grandchildren and future generations of those same car buyers. [239]

---

[237] Chaiehloudj (n 203).
[238] Kingston, *Greening EU Competition Law and Policy* (n 98).
[239] Szecskay Attorneys at law, 'Consultation Response to European Commission Draft Revised Horizontal Block Exemption Regulations and Horizontal Guidelines – HT.5454 – R'.

This part presents a few outstanding and recurrent critiques of the remaining limitations of the 'pass-on to consumer' condition raised in the public consultation for the HGs 2023 draft. These following critiques were not reflected in the final version of HGs 2023.

a. Unreliable Consumers' 'Willingness-to-pay' for an ecological cause

In the public consultation responses, the willingness-to-pay approach adopted to assess individual non-use value benefits is widely considered an unsuitable measure to assess individual benefits for its weakness in accurately capturing negative environmental externalities.

First of all, some responses suggest it is very hard to satisfy the "willingness to pay" condition under individual non-use benefits in reality, because it potentially contradicts the indispensability condition. For instance, the restrictive measures in a sustainability agreement could pass the indispensability test if consumers lack appreciation of "future benefits in the form of improved quality of innovation where immediate effect of the agreement is an increase in the price of the product".[240] If such an agreement intends to provide individual non-use benefits, nevertheless, undertakings in the agreement must prove that the same consumers, who don't have enough appreciation for the more expensive but more sustainable products, would have enough appreciation to be willing to pay for these non-use benefits,[241] – this is practically very hard if not impossible.

Second, a classical critique of consumers' willingness to pay is that relying on consumers' will and knowledge makes it hard to achieve ecologic progress. Consumer may claim to care about the environment when they cast their response in the survey, but are very likely to sacrifice it 'to obtain small benefits and convenience'.[242] Furthermore, if consumers themselves want to purchase unsustainable goods, willingness-to-pay would be an obstacle for companies to take any action against consumers' will:

---

[240] HGs 2023, 563.
[241] Unilever (n 205). See also HGs 2023, footnote 395: 'In this case, possible benefits to consumers could be shown using evidence of their "willingness to pay".
[242] Maurits Dolmans, 'Sustainable Competition Policy Hot Topic: Environment & Competition' (2019) 5 Competition Law & Policy Debate 4.

> "companies are prevented from taking small sustainability steps (e.g. slowing down deforestation) if consumers would prefer to pay lower prices for non-sustainable products."[243]

Moreover, consumers are often not well informed about the ecological stake in their consumption behaviour:

> "the majority of consumers still have little knowledge of the environmental impact of their consumption habits and lifestyles, a large number of consumers are unable to tell which producers make environmentally friendly products." [244]

Specifically, consumers might not fully comprehend the environmental benefits and the negative ecological consequences that extend to the future:

> 'There is generally a disconnect between consumers' stated preference and their actual purchasing behaviour. Furthermore, it is very difficult to fully appreciate future benefits that are enjoyed by consumers. It is even more difficult to appreciate benefits enjoyed by others such as non-users or future generations.'[245]

However, these critiques were not fully taken into account by the Commission in the HGs 2023. These critiques around future benefits critiques also arouse critiques of the 'substantial overlap' condition in 'collective benefits'.

b. Narrow coverage of 'collective benefits'

First, the intergenerational justice issue was mentioned in many responses, criticising the narrow scope of beneficiaries the Commission had envisaged which excludes the future generation. The main argument is that the requirement that the beneficiaries of the collective benefits have to overlap with the consumer would exclude future generations, simply because they are yet to be born. Many public consultation respondents expressed their disappointment:

> "benefits to future users are not taken into consideration given that the very clear driver for sustainability is driven by future needs."[246]
> 'Since future generations often bear the burden of our current consumption patterns, it is important to clarify that the benefits for the consumer's (grand)children will be accounted as benefits for the consumer himself.' [247]

---

[243] European Round Table of Industry, 'ERT Response to European Commission's Draft Horizontal BERs and Guidelines - 30 April 2022'.
[244] 'American Bar Association Comments Horizontal BERS and GLs_final'.
[245] 'LTO, Response LTO Barentskrans Public Consultation Horizontal Guidelines 26 April 2022'.
[246] European Round Table of Industry (n 243).
[247] 'Public Consultation on the Draft Revised Horizontal Block Exemption Regulations and Horizontal Guidelines Response from Natuur & Milieu (Netherlands)' (n 136).

Second, some public consultations have suggested the notion "a larger section in the society" should be open to a wider interpretation and the frontier of such wider group could be extended further. For instance, some have expressed their incomprehension of why the people who are connected with the end consumer on the supply chain could not be counted as the beneficiary of 'collective benefits':

> "unclear why European consumers would not also benefit from clean cotton production elsewhere in the world – chemicals used in cotton production pollute rivers, which in turn pollute the oceans, which are all connected."[248]

Some even expressed their unsatisfaction that the Commission seems to have taken a very Eurocentric view of who should benefits from cleaner product, but not every citizen of the globe who are all fighting against climate change:

> 'if cleaner air for European citizens counts as a legitimate excuse for an otherwise anti-competitive agreement, than a less hazardous working environment for cotton pickers should count in the same way […] such matters should be left to legislators (while possibly even more serious concerns, such as fighting climate change – which affects every citizen of the globe –, could still act as a legitimate excuse under Article 101(3) TFEU."[249]

These discourses calling for an even wider range of beneficiaries under the "collective benefits" are sidelined in the HGs 2023. This thesis argues that the HGs 2023 largely maintain the default that consumer interests always take priority over the interests of non-consumers when it comes to assessing sustainability agreements.

c. Sidelined consumer responsibility

In contrast to the consumer welfare discourse, there are recurrent critiques in the public consultation suggesting focusing more on the consumer's responsibility to take care of the environment in their daily consumption, which seems to be ignored in the HGs 2023. These critiques could be divided into two groups.

---

[248] European Round Table of Industry (n 240).
[249] Jan Blockx, 'Should European Competition Law Only Care about Clean Air for Europeans - a Comment on Para 604 of the Draft Horizontal Guidelines'.

The first group criticised the "polluters must be compensated" mentality implied in the consumer welfare standard persisted in the HGs 2023. Some responded that *the polluter-must-benefit" requirement is very undesirable",*[250] because it disregards the protection of the people who would suffer from the ecological consequences of unsustainable consumption yet who cannot change the behaviours of other consumers. It ignores that in many cases the costs of an unsustainable product may only or largely be felt by those who do not consume it." [251]

They also argue that the "fairness" concept in the 'fair share to consumer' requirement should involve the entire society, which requires the full social cost of production and consumption to be internalised in transactions with the consumer, which includes the costs of climate change, large scale pollution and loss of biodiversity. Consumers are also polluters in certain cases, and the "polluter pays" principle enshrined in Article 191(2) TFEU should be reflected here[252]:

> 'It would be unfair – and therefore inconsistent with Article 101(3) TFEU – to carry o ut the analysis assuming that producers and consumers should be allowed to impose such significant costs on society (or on individuals who do not consume), or to insist that producers and consumers be paid or compensated for avoiding.' [253]

The second group of critiques pointed out that the consumers should start to pay the "true cost" of the products since the environmental externalities usually are not fully incorporated in the product price.[254]. Competition policy is inadequate in its pursuit of consumer welfare if market failures like price externalities are ignored:

> "we should consider exemption of any environmental agreement that leads to prices closer to the "true price" of a product or service, including the cost of pollution."[255]

Some public consultations suggest that incorporating the "true cost" method is not only more reasonable to let the consumer share the environmental consequence, but more reliable:

> 'Using true cost accounting may yield far more reliable results regarding costs and benefits of sustainable production than using willingness-to-pay methodologies. More and more experience with true cost accounting is gained.'[256]

---

[250] Unilever (n 205).
[251] European Round Table of Industry (n 243).
[252] Article 191(2) of the TFEU.
[253] AIM (n 206).
[254] Holmes, 'Climate Change, Sustainability, and Competition Law' (n 9).
[255] Dolmans (n 242).
[256] 'LTO, Response LTO Barentskrans Public Consultation Horizontal Guidelines 26 April 2022' (n 245).

Yet this discourse is very much ignored in competition policy, the HGs 2023 did not mention consumer duty. Arguably, there is an unavoidable moral question about how much responsibility should consumers share for the climate crisis, and whether they should still be compensated for the environmental gains. Are consumers the only person who should benefit in a sustainability agreement and be compensated for the anticompetitive harms? We might think there is no alternative to the consumer welfare standard, but the empirical findings of this thesis suggest otherwise. The past experience in previous Horizontal Guidelines and cases, and in the agricultural sector could offer some inspiration.

Section 2 – Alternative Perspectives Beyond the Consumer Welfare Standard within the EU Competition Law and Policy

Section 2 presents a surprising contrast with the empirical findings generated from HGs 2023 presented in Section 1, this section suggests that the DG competition had been or is prepared to assess consumer welfare in alternative ways in other contexts. This Section will start by introducing DG Competition's incoherent attitude towards 'consumer welfare', in the earlier version of Horizontal Guideline 2001 and in Agricultural Guidelines, which differ significantly from the approach taken in HGs 2023. (I) It will briefly open the discussion of consumer identity and its benefits to a sociological context beyond the scope of competition law and policy. (II)

I - Incoherence traced in intertextuality: DG competition's incoherent attitude to consumer welfare in the past and the agricultural sector

a. Alternatives in past experiences

The tradition of putting 'consumer welfare' as one of the central objectives of EU competition policy has existed for quite some time. For instance, dated back to previous mandates, former European Commissioner for Competition Policy Mario Monti and former Vice-President of the DG Competition Almunia have declared similar positions:

> 'This focus on the competitive performance of industry should not deflect from the positive impact of competition policy on consumer welfare.'[257]

[257] Mario Monti, Proactive Competition Policy and the role of the Consumer, speech at European Competition Day, Dublin, 29 April 2004.

> 'Competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions.'[258]

Nevertheless, this thesis observes that this hegemonic presence of the term "consumer welfare' in DG Competition's publications was never the case before the Commission adopted the Guidelines on the application of Article 81(3) of the Treaty in 2004, which for the first time stated '[*t]he objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'*[259] Before then, *a fair share to consumer'* had been evaluated in a less stringent and more flexible and dynamic way - sometimes beyond the rhetoric framework of 'consumers'.

For instance, HGs 2001 in its Environmental Agreement Chapter addressed the 'fair share to consumer' issue with a softer and more flexible tone, compared to the 'objective, substantial and verifiable' requirement in HGs 2023. Echoing with the efficiency test discussed above in Chapter 2, it did not require a complicated mathematical demonstration, but only a qualitative analysis:

> Cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are **likely under reasonable assumptions**.[260]

Furthermore, HGs 2001 had been conceptualising the beneficiated 'consumer' of an environmental agreement in a collective sense. It indicated that an environmental agreement could be exempted if it brings benefits on an 'aggregate consumer level', rather than just individual consumers in a relevant market:

> 'Environmental agreements caught by Article 81(1) may attain economic benefits which, either **at individual or aggregate consumer level**, outweigh their negative effects on competition.'[261]

The consumer identity implied in the "aggregate consumer level" is interesting. Some argued that the French version '*soit à celui de la société dans son ensemble*' tells more clearly the Commission's intention to cover consumers of the entire society, not just the ones situated in

[258] Almunia (n 226).
[259] Guidelines on the application of Article 81(3) of the Treaty (n 37). See also Buch-Hansen and Wigger (n 5) .
[260] HGs 2001, 194, emphasis added.
[261] HGs 2001, 193.

the relevant market.[262] Arguably, this coverage is even wider than what 'collective benefits' envisage in HGs 2023. It does not require the consumers in the relevant market to substantially overlap with the entire society,[263] nor does it fix on geographical proximity.

As some scholars have reminded us, when considering protecting consumers from anticompetitive harms, Competition law and policy departed from a different point than the economists.[264] Most of the policy documents in the EU talked about 'consumers' and 'customers' from a perspective of their social attribute,[265] rather than referring to the term 'consumer welfare'.[266]

Consequently, As we go back and trace the use of expressions in some past judgments, this thesis observed that their analysis of 'welfare' was discursively associated with beneficiaries much broader than just consumers.[267]

In the *TeliaSonera* judgment, the Court of Justice of the European Union emphasised that competition objectives rules have not only objectives to protect consumers but also wider interests of the EU: [268]

> 'The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring **the well-being of the European Union**.'[269]

Similarly, in the case of *Roquette Frères*, the Court has also pronounced that competition policy has the objective to ensure *"economic well-being in the Community."* [270] In these two cases, consumer welfare constitutes only part of a bigger concern – the EU's economic well-being.

In the same vein, *CECED* has been widely considered a milestone case which extends the scope of consumer welfare to total welfare by recognising collective environment benefits.[271] The Commission determined that the coordination amongst undertakings saved

---

[262] Chaiehloudj (n 161) 66.
[263] HGs 2023, 587, footnote 409: 'In cases where collective benefits are dispersed among a large section of society, it is less likely that the overlap with the consumers in the relevant market will be substantial.'
[264] There are emerging literature on this opinion, here refers to just a few: Kingston, *Greening EU Competition Law and Policy* (n 98). Colomo (n 50). Inderst and Thomas (n 84). Albaek (n 95).
[265] Caron Beaton-Wells, 'Antitrust's Neglected Question: Who Is "The Consumer"?' (2020) 65 The Antitrust Bulletin 173.
[266] Albaek (n 95).
[267] Buch-Hansen and Wigger (n 5).
[268] Chaiehloudj (n 203).
[269] *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECJ Case C-52/09.
[270] *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities* [2002] ECJ Case C-94/00.
[271] Holmes, 'Climate Change, Sustainability, and Competition Law' (n 9).

water and electricity for consumers, and emissions reductions of carbon dioxide, sulphur dioxide and nitrous oxide contribute to benefits for the society collectively:[272]

> 'Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.'[273]

The above empirical findings suggest that the concept of 'consumer welfare' was understood more flexibly and inconsistently in the past. The Commission had already been considering broader forms of welfare, including 'aggregate consumers' benefits', 'union's welfare' and 'total welfare', rather than focusing solely on individual consumer gains. We also see a wider opening in the Agricultural Guidelines 2023 to sideline the importance of consumer welfare.

b. Absence of consumer welfare standard in the Agriculture Guidelines

In the HGs 2023, it seems that the Commission is still reluctant to take into account benefits to out-of-market consumers, no matter how significant. This hinders companies' ability to enter into sustainability agreements that could result in higher prices for downstream products.[274] In contrast, the Agricultural Guidelines have suggested an alternative approach where sustainability comes first, and consumer welfare comes second. [275]

As argued above, there is a more encouraging attitude towards green collaborations under Agricultural Guidelines. Chiming with this more flexible approach, another remarkably lower burden of proof in the Agricultural Guidelines compared to HGs 2023 is that nowhere do they mention how consumers should be compensated for the anticompetitive harm. Therefore, the "full compensation to consumer" principle is not guaranteed in the agricultural sector, which means operators collaborating for sustainability purposes do not need to prove

---

[272] *2000/475/EC: Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IVF1/36718CECED) (notified under document number C(1999) 5064) (Only the English text is authentic) (Text with EEA relevance)*.
[273] ibid. 56.
[274] Jay Modrall, 'New EU Antitrust Regime for Agricultural Cooperation – Green Shoots' (*Kluwer Competition Law Blog*, 20 December 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/12/20/new-eu-antitrust-regime-for-agricultural-cooperation-green-shoots/>.
[275] Oliver Geiss Voss Gorka Navea, Lea-Theresa, 'Sustainability First, Antitrust Second? - The EU Commission's New Rules on Agriculture Cooperations' (*Capital Thinking*, 11 December 2023) <https://www.capitalthinkingblog.com/2023/12/sustainability-first-antitrust-second-the-eu-commissions-new-rules-on-agriculture-cooperations/> accessed 19 December 2023.

such agreement provides "*consumers a fair share of the resulting benefits*" as required under the HGs 2023.

But that is not to say consumers are not protected, the Commission and NCAs are still equipped with an ex-post intervention mechanism in case a sustainability agreement leads CAP objectives to jeopardise, notably unreasonable prices:

> 'In accordance with Article 42 TFEU, competition rules only apply to the production of, and trade in, agricultural products, to the extent determined by the co-legislators in accordance with Article 43(2) TFEU, taking into account the five objectives of the CAP laid down in Article 39(1) TFEU. […] (e)to ensure that supplies reach consumers at reasonable prices.' [276]

Furthermore, under Article 210a of the 'CMO' regulation, a sustainability agreement is also required not to exclude competition, specifically when there is significant consumer demand:

> 'where a sustainability agreement prevents the introduction of alternative products that comply with a higher sustainable standard than the one set out in the sustainability agreement and for which there is substantial consumer demand.'[277]

Therefore, sustainability agreements in the Agri-Food sectors still need to prove that the consumers are not hurt, but it does not require sustainability interests to pass on to consumers. This significantly differs from the Commission's generally stringent condition that consumers must benefit under Article 101 TFEU.

Furthermore, the Agricultural Guidelines avoid languages of price and costs but put the resilience of agricultural production and farmers' survival at the centre. :

> "transition to sustainable food system in the Union and to strengthen the position of producers in the agri-food supply chain." [278]

This could be explained by the policy priority of Article 210a of the CMO Regulation, which is inherently different from Article 101(3) TFEU – they respond to different groups of audiences.

The priority in agriculture is not consumers, but farmers who are the more vulnerable on the supply chain. The imbalance in bargaining power between farmers and purchasers has

---

[276] Agricultural Guidelines, 176.
[277] Agricultural Guidelines, 188.
[278] 'Communication from the Commission – Commission Guidelines on the Exclusion from Article 101 of the Treaty on the Functioning of the European Union for Sustainability Agreements of Agricultural Producers Pursuant to Article 210a of Regulation (EU) No 1308/2013', para. 2.

led farmers, for many years, to consider organizing cartels and using collective action and horizontal cooperation to achieve common interests related to their agricultural businesses: [279]

> 'despite the importance of food production, farmers' income is around 40% lower compared to non-agricultural income; there is an inevitable time gap between consumer demand and farmers being able to supply – growing more wheat or producing more milk inevitably takes time.'[280]

Therefore, the policy priority in the agricultural sector is not to prevent market power of undertakings, on the contrary, to strengthen the bargaining power of agri-food operators in the supply chain. When there is no immediate risk of abusive market power, it is crucial to put consumer interests secondary to dispel farmers' fear of competition law since farmers' collaborations are important to achieve sustainable farming objectives. This thesis therefore argues that the assumption that consumer welfare always outweighs sustainability no longer holds true in the Agricultural Guidelines.

Certainly, the same arguments of policy exceptionalism could apply here, but this thesis wants to highlight the alternative perspective inspired by the Agricultural Guidelines to reconsider the central position of consumers in the climate crisis – who else than consumers should benefit from a sustainability agreement? For small-scale farmers, collaborations for sustainability purposes is not a question of "better or worse", but a matter of survival.[281]

The contrasts illustrated above indicate the Commission's heterogeneous understanding of 'consumer welfare' in different sectors and in different periods. DG Competition could prioritize different kinds of benefits which go beyond the consumer-centric ones, and different beneficiaries who are not necessarily the direct consumers of the products in question. This finding confirmed the responsive nature of EU competition law and policy, whose objectives and priorities are subject to changes in response to the wider socio-economic considerations.[282]

---

[279] Cseres (n 192).
[280] 'CAP 2023-27 - European Commission' (4 September 2024) <https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-2023-27_en> accessed 13 September 2024.
[281] FairTrade Public Consultation Agri
[282] See Chapter 1, 1, II - Starting Point - Sustainability vs. Competition Law: A False Dichotomy Rejected by the Responsive Nature of Competition Law.

II - Alternatives from a sociological perspective: Beyond Consumer and Beyond Market Welfare?

In this light, it leads us to reconceptualise the term 'consumer' and their benefits. The necessity to address an alternative perception of 'consumer' is not only due to its hegemonic presence under Article 101(3) TFEU. But more importantly, as we discovered, the sustainability agreements and the ecological interests they captured have gone beyond the narrow scope of consumers in the economic system but highlighted the common goods from an aspect of a social life[283]- cleaner air, less pollution, preservation of biodiversity which are not necessarily beneficial to the collective and individual consumers in any sense, but for people elsewhere, the future generation and for nature itself. [284]

In the context of climate change, EU competition law and policy are also in front of external academic critiques of a particular conception of consumer welfare that DG Competition is promoting - what are the roles of competition in the market from a sociological perspective rather than an economic perspective? This question entails reflections in two dimensions: first, who are the 'consumers? Second, what benefits are these consumers seeking?

First, in the context of sustainability transition, the citizen-consumer movement suggests that individual citizen-consumer possesses an 'ecological citizenship', through which people, as ecological citizens, claim rights for 'environmental security' and a safe and clean living environment for themselves and their children.[285] Spaargaren and Oesterveer discuss 3 ideal types of environmental commitments of citizens: environmental citizens, political consumers and individual moral agents. In this sense, reducing emissions and pollution, and preserving biodiversity are essentially citizen-consumers rights derived from their ecological citizenship, which cannot be or should not be quantified by merely their "willingness to pay".[286]

---

[283] Michele Cangiani, 'Karl Polanyi's Institutional Theory: Market Society and Its "Disembedded" Economy' (2011) 45 Journal of Economic Issues 177.
[284] In a similar vein, Polanyi had criticized the economists' homo oeconomicus presumption that people consume in an individualist and utilitarianist manner. Karl Polanyi, 'The Economy as Instituted Process' in Mark Granovetter and Richard Swedberg (eds), Mark Granovetter, *The Sociology of Economic Life* (3rd edn, Routledge 2018) <https://www.taylorfrancis.com/books/9780429962882/chapters/10.4324/9780429494338-2>.
[285] Gert Spaargaren and Peter Oosterveer, 'Citizen-Consumers as Agents of Change in Globalizing Modernity: The Case of Sustainable Consumption' (2010) 2 Sustainability 1887.
[286] ibid.

Second, 'Consumer' as an identity does not only exist in the sphere of the economy, but consumers are also citizens exercising political powers via their choices made in consumption, including the choice not to consume.[287] As Heilbrunn suggests - an essential function of consumption is to produce meaning. [288] Substantially, that means people are not just rational consumers in a microeconomic term that are sensitive to prices, but care about climate change and the environment. In this context, some citizen-consumers have already chosen to consume less and to exercise material "sobrieté": not to consume excessively more than they need.[289]

Reflecting on the HGs 2023, 'collective benefits' referred to in the HGs 2023 have valued consumers' role as both consumers and citizens – well-being rather than price, and prosperity other than material enjoyment are referred to in the HGs 2023 occur in the discussion.[290] But this engagement with the social aspect remains modest.

In the same light, this thesis also suggests that DG Competition does not screen the goods and services available to the consumers. As argued at the beginning of this thesis, fierce market competition could push businesses to 'race to the bottom'.[291] Products born in this process are very likely to generate negative social consequences, including environmental damage. Yet, public regulations are often too slow to offer remedy. While focusing on ensuring lower prices and product variety, Competition law and policy care little about this potentially negative social impact generated.[292]

That is to say, by relying on *a more economic approach* to evaluate sustainability agreements, DG Competition largely focuses on guaranteeing the utility and efficiency of products and services but might omit the long-term sustainability impact. By letting regulation take precedence to remove 'bad' choices and to eliminate negative externalities, competition policy, on the other hand, promotes consumer welfare by maintaining choice without saying which options are 'good' or 'bad' for the environment. [293] Consequently, Competition law

---

[287] ibid.
[288] Benoît Heilbrunn, 'Le monde des biens ou la naissance de l'anthropologie de la consommation' (2014) 44 Revue du MAUSS 108.
[289] 'Sobriété, pénurie : la stratégie de la culpabilisation - GREENWATCHING #7' (*Greenpeace France*) <https://www.greenpeace.fr/sobriete-ecologique-solidaire/>.
[290] Jackson (n 107).
[291] Stucke and Ezrachi (n 13).
[292] Dolmans (n 98) 8.
[293] ibid.8.

thereby risks becoming a servant of consumer welfare and excuses itself from guarding the well-functioning of the market, which is problematic.[294]

Though Article 101 does not require DG Competition to actively promote ecological choices to consumers, this thesis intends to highlight the necessity to reconsider the objectives and responsibility of competition law today. Viewing the emerging ecological consequences associated with neoliberal production and consumption, an absence of a reconsideration of the 'consumer welfare' standard from a sociological angle is unaffordable.

Chapter Conclusion

This chapter has argued that HGs 2023 have somewhat expanded the scope of what the DG Competition had previously considered to constitute consumer welfare. The HGs 2023 now recognise that consumer welfare extends beyond narrow individual use benefits. The DG Competition enabled a wider possibility for environmental interests to be qualified as individual non-use benefits and collective benefits, which cover a broader community in society.

However, as outlined in Section 1, significant reservations remain regarding the shift from the idea that consumers themselves must directly benefit. If we consider alternatives that prioritise environmental interests as a value of their own, we see that HGs 2023 still demonstrate a reluctance to fully embrace this perspective.

Nevertheless, past experiences, both in HGs 2001 and case judgements, and the Agricultural Guidelines show that it is possible to move beyond this narrow view. These experiences highlight that sustainability agreements can benefit not only consumers, but also the broader population who do not consume.

These findings lead this thesis to consider consumer identity and its benefits from an alternative angle. DG Competition remains anchored in a consumer-centric approach, neglecting consumers' roles as ecological citizens and the growing political demand for sustainable markets. This demand is not only reflected in their willingness to pay but also in

[294] Andriychuk (n 39).

citizen-consumers engaging in activities pushing for sustainability as a fundamental market principle.

The chapter has thus broadened the discussion about objectives and priorities of EU competition law and policy into a social-environmental aspect. It encourages a critical reexamination of consumer welfare. It encourages a critical examination of its impact on ecology by prioritizing consumer welfare mainly through economic factors. It suggests moving beyond a purely economic focus on consumer welfare to explore the broader implication for environmental sustainability. The next concluding chapter will further situate the empirical findings within a wider consideration.

CHAPTER 4 – Concluding Discussion

The Limited Ecological Ambition of EU Competition Law and Policy in a Circular Economy

' We know that our children's future depends not only on GDP indicators but on the foundations of the world we build for them. That economic growth is not an end in itself. That growth must not destroy its own foundations. That growth must serve people and future generations.'— Ursula von der Leyen, European Commission President[295]

'Fundamental changes in lifestyles, production and consumption, knowledge and education are needed for Europe to transition towards sustainability.' – European Environment Agency[296]

Chapter Introduction

This concluding chapter proceeds in three steps to offer a comprehensive answer to the two research questions. First, it sums up the three key features of how the DG competition conceptualises and incorporates emerging ecological interests based on the empirical findings presented in Chapters 2 and 3. It reckons that despite some opening up, the DG competition has shown a clear path dependency to rely on an economic approach to access environmental interests instead of viewing them in their own right. Chapters 2 and 3 observed discursive efforts to consolidate the DG Competition's institutional agency to contribute to an ecological transition via conventional competition measures and a strong refusal to be instrumentalised by other policy areas. Consequently, there is a reluctance to engage with a fundamental and

[295] 'Speech by the President at the Beyond Growth Conference' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/speech_23_2761>.
[296] 'Exiting the Anthropocene? Exploring Fundamental Change in Our Relationship with Nature' (*European Environment Agency*) <https://www.eea.europa.eu/publications/exiting-the-anthropocene/exiting-the-anthropocene-exploring-fundamental>.

challenging issue, which is to reconsider the economy for tomorrow as required by the Green Deal.

Second, this chapter bridges these empirical findings to a conceptual discussion of the current European green transition to a circular economy to inform the readers of the remaining oversights of DG competition's "*greener competition policy"* It points out a missed opportunity for the DG competition to take private collective initiatives seriously for sustainability development. It indicates that the problem of overproduction and overconsumption is undermined in the HGs 2023 despite its importance in the green transition.

Finally, it offers a general critique of DG competition's green growth strategy. It points out the potentially negative ecological consequences disguised under green innovation. By contrasting it with the European Parliament's "beyond growth" discussion, it points out the lack of ecological ambition of EU competition law and policy.

1. Three Key Features of the Greening Process of EU Competition Law and Policy

I - Path Dependency of an economic approach to translate environmental gains into efficiency gain and consumer welfare

Chapters 2 and 3 have demonstrated DG Competition's tendency to rely on an economic approach to assess ecological benefits arising from sustainability agreements. This thesis observed that the HGs 2023 have recognised not only the positive impacts on the environment of these agreements but also their necessity to overcome first-mover disadvantages. DG Competition has shown a more tolerant attitude towards sustainability agreements, acknowledging that they can deliver greater efficiency and faster solutions than environmental regulations. Nevertheless, while sustainability interests are considered, DG Competition tends to translate them into (a) economic efficiency, which includes cost-effectiveness and dynamic efficiency meaning innovation; and (b) consumer benefits, which include individual use-benefits, individual non-use benefits and collective benefits.

However, DG Competition did not recognise environmental interests as standalone values. The HGs 2023 have facilitated and clarified the process of translating environmental interests into economic benefits, yet the focus remains on two factors: efficiency and consumer welfare. DG Competition assumes that efficiency calculations provide an '*objective, concrete*

and verifiable' way to compare the anticompetition harm and sustainability gains under Article 101(3) TFEU.[297] Translating these verifiable benefits into 3 categories of consumer benefits ensures that consumers are not harmed. This economic approach leans heavily on environmental economic instruments, which aim to internalise negative environmental externalities into market actors' decision-making procedure – normally involving placing a price on pollution.[298] In this sense, the Commission is still using old market-based tools to address market failures caused by the very same market dynamics.[299]

The DG Competition acknowledge the limits of this approach and attempts to create space for environmental gains beyond individual consumer utility through the new category of 'collective benefits'.[300] However, these benefits are still reinterpreted to ensure that they still cover the consumers who paid for the products – essentially, the reasoning remains consumer-centric rather than genuinely considering environmental gains independently.

However, comparing this with past HGs 2021, case judgments and the Agricultural Guidelines, this thesis notes that the requirements for objectivity and verifiability have been less rigid. Consumers were not always required to be fully compensated, nor was consumer welfare the central focus. Case judgements have shown that total welfare and European Union welfare, including broader societal benefits, were also objectives. In the agricultural sector, the conditions are even less restrictive – 'pass-on to consumers' was not even a condition.

Therefore, this thesis concludes that although there are some openings for Collaboration discourses for sustainability in HGs 2023, significant limitations remain. DG Competition's efforts to translate environmental benefits into efficiency gains and consumer welfare still fall within the confines of neoclassical economics. This path dependency is not only unintentional but actively performed.

II - Agency building and refusal to be instrumentalised for environmental gains

On top of the first feature, this thesis concludes that though the DG Competition is enabling green transitions in various ways presented in Chapters 2 and 3, the discourse it

[297] HGs 2023, para 559.
[298] Kingston (n 150), Chp 5 - Why environmental protection goals should play a role in EU competition policy: an economic argument.
[299] ibid 186.
[300] HGs 2023, para 582.

employed is quite institution-bound, in the sense of being shaped by DG Competition's institutional identity. It distances itself from more flexible interpretations, maintaining a focus on market competition. Despite the past leniency under Article 101(3) TFEU for private collaborations, and the more encouraging stance toward cooperation in the agricultural sector, the qualification of competition remains limited overall.

DG Competition's stance can be characterized by a "self-content" attitude, believing that "*competition policy is already green"*:

> Competition drives the innovation that develops new technologies which can help us do more, with less harm to the environment. Competition also helps to keep prices down, so we can more easily afford to invest in going green. And competition gives industry a powerful incentive to use our planet's scarce resources efficiently. In a market that's competitive, companies have no choice but to keep down the costs of doing business – which includes using less resources, like raw materials and energy.[301]

This belief stems from the idea that competition fosters innovation and economic efficiency, which in turn contribute to environmental progress. The guiding principle—that competition is inherently beneficial for sustainability—remains unchanged.

There isn't much change from the wording in previous Guidelines. This reflects what Chaiehloudj called the "doctrinal inertia",[302] that competition law limits itself from taking a more active role to include more "collaboration" discourses, but only accepts those that do not contradict or hinder competition law to carry out its tasks to promote a competitive and open market:

> The starting point here is that a green competition policy still has to be – well, a competition policy. We still need to carry out our fundamental task, of keeping markets open and competitive – not least, because competition helps to make our economy greener.[303]

Hence, HGs 2023 upholds the principle that sustainability agreements must not go beyond what is necessary to achieve their objectives, ensuring that ambitious actions don't undermine

[301] Vestager (n 114).
[302] Walid Chaiehloudj, 'Un exemple de résistance à la transversalité : le droit de la concurrence' (2023), Revue internationale de droit économique 61.
[303] Vestager (n 29) amphsis added.

competition.[304] Thus, the Commission took a distance from the call from the EU parliament that the EU competition law needs an overhaul.[305]

Although collaborative agreements can address market failures, DG Competition's stance is that environmental policy, not competition law, should take precedence to tackle climate change. This aligns with the policy exceptionalism for agriculture, which allows the sector more flexibility to pursue higher sustainability standards, while competition law stays focused on its role in promoting competition for general sectors. This is questionable also from the perspective of Article 11 TFEU, which requires European institutions to integrate environmental protection into their policies:

> Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.[306]

DG Competition therefore maintains a distance from taking a more active role in promoting environmental sustainability, resisting being instrumentalized for sustainability goals which are deemed priorities of other policy areas such as environment and agriculture. Instead, it justifies its contribution to the green agenda by emphasizing that a competitive market naturally drives environmental progress. This approach reflects a desire to safeguard the competition doctrine while acknowledging the need for exceptions in sectors requiring more room for sustainability initiatives.

III - Reluctance to engage with a profound sustainability agenda beyond neoliberalism

The last key feature is found in DG competition's silence in addressing critiques of the embedded neoliberal framework, avoiding significant paradigm shifts. The DG Competition has not engaged in criticism of the capitalist model it upholds.

The European Green Deal calls for a transition to a circular economy, which requires a fundamental overhaul of the European economic model, aiming to move Europe towards a sustainable economic model that decouples growth from material consumption and achieves

---

[304] HGs 2023, 9.4.4 *No Elimination of Competition* section requires a degree of residual competition on the relevant markets to be maintained. See also Kingston, 'Competition Law in an Environmental Crisis' (n 19).
[305] EU: MEPs demands fundamental overhaul of competition policy, CPI February 4, 2019.
[306] Article 11 of the Treaty on the Function of the European Union (ex-Article 81 of the TEU).

net-zero emissions by 2050.[307] Nevertheless, these objectives are only referenced rhetorically and potentially superficially, without concrete points of how EU competition law and policy would contribute to the new concept of 'circularity' by continuing to rely on an established neo-classical economic approach,

This lack of engagement with a fundamental reform for ecological demands is particularly reflected in the critiques from the citizen-consumer movement - what benefits competition law and policy should prioritize and who should benefit from them? Furthermore, questions around the future of the economy, such as whether continuous economic growth and consumerism are compatible with addressing climate change are not addressed.

DG competition law only did so by relying on old tools (economic efficiency and consumer welfare) and old discourses ('*competition law is green enough'*) to respond to this treaty requirement. Therefore, there is no sign from the DG Competition to elevate environmental concerns as a policy priority in the EU competition law and policy architecture:

> The more intense the competitive pressures, the higher the total 'factor productivity growth', and the faster the economic recovery. To date, restoring investor confidence and a competitive business climate continues to be a top priority on the Commission's agenda.[308]

Therefore, as suggested by some public consultation, HGs 2023 remain restrictive and fails to address key sustainability-driven initiatives, such as cleaner supply chains and ethical sourcing.[309] The institution's resistance to a paradigm shift limits its ability to contribute meaningfully to the ecological transition envisioned by the Green Deal, this thesis will follow by suggesting two remaining oversights.

2. The Remaining Oversights

I - A missed opportunity to explore the full potential of private environmental governance

Though the HGs 2023 have considered the positive impact of private collaborations by incorporating the "Collaboration" discourse, this master thesis argues that the requirements to translate the environmental benefits into economic efficiency and consumer benefits remain

---

[307] 'The European Green Deal' (n 109).
[308] Angela Wigger and Hubert Buch-Hansen, 'Explaining (Missing) Regulatory Paradigm Shifts: EU Competition Regulation in Times of Economic Crisis' (2014) 19 New Political Economy 113.127.
[309] European Round Table of Industry (n 243).

timid to explore the full potential of private initiatives to participate in environmental governance. [310]

On the one hand, private coordination amongst undertakings may take less time to develop than public law environmental regulation in the form of Regulations and Directives which have to be agreed by all 27 EU Member States. Private coordination amongst undertakings can offer fast actions that we need to tackle sustainability issues.[311] As many commentators have also suggested, private initiatives to coordinate amongst themselves could facilitate sustainable production when "*certain market failures may not be solved, in a timely manner, through competition."*[312] Being too slow to target urgent climate crises is also a critique of public regulation and national law.[313]

On the other hand, the advantage of large-scale coordination via private initiatives is crucial.[314] When it comes to ecological transition, it is not enough for a small portion of the market to change their way of production, or a few businesses to act unilaterally, but we need to transform our whole economy moving production and consumption onto a sustainable footing. [315]

In reality, there is increasing evidence that businesses coordinate not to maximise their profits and harm consumers, but to "collude to kill carbon".[316] As some scholars suggested, "private environmental regulation has well and truly arrived."[317] Businesses are currently actively coordinating together to impose higher environmental standards in the market than the national law requires, such initiatives are based on the profound realization that it is no longer good enough to sit back and wait for the legislature to act. [318] Agricultural Guidelines have offered a good example, on certain occasions, encouraging private collaboration is not only

---

[310] Michael P Vandenbergh, 'Private Environmental Governance' (2013) 99 Cornell Law Review 129.
[311] ibid 176.
[312] 'LTO, Response LTO Barentskrans Public Consultation Horizontal Guidelines 26 April 2022' (n 245).
[313] Simon Holmes, 'Chapter 20: Cartels Harming Sustainability (and Those That Don't) in Europe' (2024) <https://www-elgaronline-com.ezproxy-prd.bodleian.ox.ac.uk/edcollchap-oa/book/9781802204667/book-part-9781802204667-30.xml> accessed 13 August 2024.
[314] Vandenbergh (n 221) 165.
[315] Holmes, 'Chapter 20' (n 224) 350.
[316] Maurits Dolmans, 'The Need to Integrate Externalities, Market Failures, and Collective Action Problems in Antitrust Analysis—Thoughts on the US House Judiciary Committee Report on ESG Investigation and the Rebuttal Report | Compliance and Enforcement' (22 June 2024) <https://wp.nyu.edu/compliance_enforcement/2024/06/22/the-need-to-integrate-externalities-market-failures-and-collective-action-problems-in-antitrust-analysis-thoughts-on-the-us-house-judiciary-committee-report-on-esg-investigation-and-the-rebu/>.
[317] Kingston, 'Competition Law in an Environmental Crisis' (n 19).
[318] ibid.

necessary to overcome the first-mover disadvantages but also the only way possible if we want to achieve wide-scale sustainability.

Therefore, DG Competition's stance to let public law environmental regulations take precedence and only allow private when the former is less rapid and efficient might hinder the endeavour and motivation of private environmental governance that is already on its way. As Holmes put it: "*We must stop squabbling over whether regulation or private action is best. We need both – and we need them now."*[319]

II - A missed opportunity to target overproduction and overconsumption issues

This thesis also argues that the greener competition policy has largely overlooked the overproduction and overconsumption problem, which is nevertheless central to the current climate activist movement.

As discussed in Chapter 3, to regard material abundance and variety as consumer welfare is not only problematic but also no longer convincing to certain consumers. In public debate, it is widely recognised that excessive production and immoderate consumption pose great challenges to the planetary boundary.[320] Yet, there is little discursive shift from regarding quantity restriction as a "hardcore restriction" under Article 101(1).[321] And the DG Competition is committed to pro-active competition policy and enforcement as a means of enhancing productivity of the EU.[322]

The ecological question of the overproduction and overconsumption stimulated by fierce market competition was nevertheless raised in the public consultation. For instance, concerns involving waste and redundancy point out that '*consumers also benefit from standards through the reduction of redundancy and waste*'.[323] Some commentators also suggest that certain types of advertising are designed to increase output but harm consumers.

---

[319] Holmes, 'Chapter 20' (n 313).
[320] Gabriella Wulff, 'The Challenge of Overproduction and Overconsumption' in Kristina Bäckström, Carys Egan-Wyer and Emma Samsioe (eds), *The Future of Consumption: How Technology, Sustainability and Wellbeing will Transform Retail and Customer Experience* (Springer International Publishing 2024) <https://doi.org/10.1007/978-3-031-33246-3_13> accessed 2 September 2024.
[321] European Commission, 'Hard Core Restrictions - Concurrences' (28 August 2024) <https://www.concurrences.com/en/dictionary/hard-core-restrictions> accessed 6 September 2024.
[322] David Bailey and Laura Elizabeth John, 'Competition Law and Policy in the EU' in David Bailey and Laura Elizabeth John (eds), *Bellamy & Child: European Union Law of Competition* (Oxford University Press 2018) <https://doi.org/10.1093/law-ocl/9780198794752.003.0001> accessed 7 September 2024.
[323] Response Of Clifford Chance LLP To The European Commission's Consultation On The Revised Horizontal Guidelines And Horizontal Block Exemption Regulations, Apr 2022.

Collective agreements to boycott or stop these advertisements should not be deemed anticompetitive.[324] But these propositions to decouple welfare from output were overshadowed by the overwhelming "outputism" tradition of EU antitrust.

The "outputism" and "productivism" discourses here indicate the contemporary EU competition law and policy tradition of the "*maximisation of output*" paradigm,[325] which promotes the idea that the overall goal of antitrust is markets that maximize output, which is believed to increase consumer welfare by offering more varieties of choices and lower prices.[326] Under this traditional paradigm, output restriction is harmful to competition *per se* and is therefore outlawed. In the HGs 2023, this outputism paradigm does not change, the limitation of output remains a violation of Article 101 TFEU by object:

> "This is not the case where the agreement is used to disguise a by object restriction of competition such as price fixing, market sharing or customer allocation, **or limitation of output** or innovation."[327]

Concretely, it specifically indicated that:

> "agreements between competitors that limit the participating undertakings' output of the products concerned do not qualify as sustainability standardisation agreements."[328]

Though the HGs 2023 indicate that a sustainability agreement without the intention to restrict output but is likely to lead to a reduction of output can still be justified under Article 101(3),[329] a deliberate restriction of output to combat overproduction for ecological reasons is not exempted from Article 101(1) scrutiny under the "soft safe harbour".[330]

Terms such as "*overproduction*", "*oversupply, "redundancy" and* "*overconsumption"* do not appear once in HGs 2023. The "*waste*" related issues are only mentioned in two contexts: food waste,[331] which is subject to Agricultural Guidelines; and excessive packaging and its recycling,[332] which is rather marginal to the ecological consequence caused by low price driven

---

[324] European Round Table of Industry (n 243).
[325] John M Newman, 'The Output-Welfare Fallacy: A Modern Antitrust Paradox' (2021) 107 Iowa Law Review 563.
[326] ibid.
[327]HGs 2023, 534.
[328]HGs 2023, 538. See also see footnote 377 of HGs 2023 "such agreements therefore require an individual assessment under Article 101".
[329] HGs 2023, 555. "In cases where a sustainability standardisation agreement is likely to lead to a significant increase in price or reduction in output, product variety, quality or innovation, the agreement may nonetheless fulfil the conditions of Article 101(3)"
[330] HGs 2023, 549
[331] HGs 2023, 517.
[332] HGs 2023, 538.

overcapacity. Thus, the limitation of output for ecological purposes remains explicitly carved out from the exemptible anticompetitive sustainability standardisation practices.

In contrast, the agri-food sector puts combating food waste and promoting sustainable food consumption at the centre of its sustainability objectives: '*environmental objectives including […] the transition to a circular economy, including the reduction of food waste.*'[333] It recognises that agri-food producers in a sustainability agreement might be engaged to '*adjust its planting plans to avoid overproduction that would lead to food waste*.'[334]

As a result, the Agriculture Guidelines allow more flexibility and tolerance for sustainability agreements that intentionally restrict output to combat overproduction and food waste as sustainability objectives though they are likely to restrict competition. Certain output restrictions that are indispensable to achieving the sustainability goals in an agreement are explicitly granted exemption from Article 101 of the TFEU by Article 210a of the CMO Regulation. They have specifically indicated their nuanced approach to treating sustainability agreements that restrict output with more tolerance than the conditions under Article 101(3):

> "[…] among others, that for the purposes of Article 210a restrictions that would be considered to be serious restrictions for the purposes of Article 101(1) TFEU, such as agreements on price fixing or **reducing output**, may be considered as indispensable if the conditions described in Sections 5.3 and 5.4 are satisfied whereas such restrictions are unlikely to satisfy the conditions of Article 101(3) TFEU."[335]

This approach chimes with an increased role of private actors in environmental governance which co-exists with public regulation. So far, lawful output restrictions have been achieved in the EU via public regulation. Land lying fallow policies such as the "set aside" scheme before 2008,[336] and the current "good agricultural and environmental conditions" (GAEC),[337] were put in place to reduce the production of arable crops for nature conservation by setting aside part of the land from exploitation. Yet, this does not stop CAP from encouraging private actions to coordinate to reduce food waste in the agri-food sector as discussed in Chapter 2. The specific rules in the agricultural sector offer some inspiration for the general ones who are not yet willing to liberate output-restricting private collaborations. Nevertheless,

---

[333] Agriculture Guidelines, pp12, 43.
[334] Agriculture Guidelines, pp 57.
[335] 'Communication from the Commission – Commission Guidelines on the Exclusion from Article 101 of the Treaty on the Functioning of the European Union for Sustainability Agreements of Agricultural Producers Pursuant to Article 210a of Regulation (EU) No 1308/2013', pp. 20, para.89.
[336] Commission Regulation (EEC) No 1272/88 of 29 April 1988 laying down detailed rules for applying the set-aside incentive scheme for arable land.
[337] Commission Implementing Regulation (EU) 2024/587 of 12 February 2024.

there are emerging private collaborations to address the environmental consequences of overproduction. For instance, undertakings in the fashion industry have started collaborating to reduce or slow down textile production and foster recycling, which is essential to reduce carbon emissions and transition to a circular economy.[338]

This oversight of overproduction and overconsumption problems leads the discussion to the heart of the European Green Deal – achieving a carbon-neutral and circular economy where economic growth is decoupled from resource use.[339] This vision requires more than rhetorically translating sustainability interests into efficiency gains and consumer welfare. In the HGs 2023, DG Competition does not seem to have addressed a fundamental inquiry on the role of material abundance, and technical/economic progress in a circular economy.

However, to exit a productivist logic for economic progress is no longer a silenced issue outside the EU Competition law and policy sphere. In March 2023, the European Environmental Agency addressed the issue of the Anthropocene,[340] which highlights that what drives environmental impacts today is increased consumption.[341] This is not a new subject - Club of Rome's Limits to Growth in 1972 has warned about the danger of an overshoot of resources and a collapse in global human population and welfare under a 'business-as-usual scenario'.[342] To reduce production and consumption is therefore crucial, it poses a fundamental challenge to the neoclassical growth model embedded in the EU competition law and policy and requires a fundamental overhaul of its objectives in a climate crisis. As French President Macron has publicly addressed, '*the age of abundance must come to an end to save the planet*'.[343]

---

[338] Bruna Villa Todeschini, Marcelo Nogueira Cortimiglia and Janine Fleith de Medeiros, 'Collaboration Practices in the Fashion Industry: Environmentally Sustainable Innovations in the Value Chain' (2020) 106 Environmental Science & Policy 1. A good example would be NGO Textile Exchange's membership scheme which requires its member brands to comply with an output reduction goal. See Beatrice, 'Mapping Out the Road to a 45% GHG Reduction for Fibers and Raw Materials' (*Textile Exchange*, 26 January 2023) <https://textileexchange.org/megan-stoneburner-45-percent-reduction-strategic-materials/>.

[339] 'The European Green Deal - European Commission' (n 61).

[340] Will Steffen and others, 'The Trajectory of the Anthropocene: The Great Acceleration' (2015) 2 The Anthropocene Review 81.

[341] 'Exiting the Anthropocene? Exploring Fundamental Change in Our Relationship with Nature' (n 296).

[342] ibid.

[343] Letters, 'This Age of Abundance Must Come to an End to Save the Planet' *The Guardian* (30 August 2022) <https://www.theguardian.com/environment/2022/aug/30/this-age-of-abundance-must-come-to-an-end-to-save-the-planet> accessed 2 September 2024.

3. From Neoclassical Economic Growth to Green Growth: DG Competition's Remaining Silence in the "Beyond Growth" Debate

I - Competition for 'green growth': pros and cons

Competition has long been regarded as a route towards progress and economic growth.[344] EU competition law and policy have been employed as one of the major tools to promote economic growth,[345] as President Juncker said:

> 'competition policy is one of the areas where the Commission has exclusive competence and action in this field will be key to the success of our jobs and growth agenda.'[346]

Nevertheless, this neoclassical linear growth is no longer compatible with a 'green revolution' as Commissioner Vestager said: '*We're going to have to transform the way that we power our lives. We'll have to replace a linear economy with a circular one*.'[347]

Indeed, to satisfy the circular economy goal of the Green Deal, the commission adopted *'green growth'* discourses which refer to achieving economic growth while preserving a healthy environment, combining a GDP with a shrinking material footprint and decreasing (or net-zero) carbon emissions.[348]

Hence, this thesis argues that the DG Competition constitutes its contribution to green growth mainly by promoting green innovation and technological solutions. It conveys the idea that vibrant competition supports the smart industrial policy, which spurs innovation in green technologies, green production processes or green products:[349]

> Competition policy has an important role to play in delivering the Green Deal objectives, driving green innovation and bringing about the technological revolution required to have sustainable jobs and growth, in line with EU rules and values.[350]

---

[344] Gillespie (n 105).
[345] Buch-Hansen and Wigger (n 5) chp 5.
[346] See the Mission Letter from President Juncker to Commissioner Vestager of 1 November 2014.
[347] Vestager (n 29).
[348] Eamonn Noonan and Stepano Vrizzi, 'Decoupling Economic Growth from Environmental Harm' European Parliamentary Research Service.
[349] European Commission. Directorate General for Competition. (n 30).
[350] Vestager (n 29) emphasis added.



On top of that, much attention is given to the '*twin green & digital transition'*. It implies DG Competition's rather optimistic attitude towards technological and innovative solutions - leaning on technological advancement to decouple economic progress from carbon emission and relying on the digital economy development to decouple from material use: [351]

> The principal challenge is to transform Europe's entire economy to carbon-neutrality by 2050. This implies nothing less than a new economic model – a sustainable economy in balance with our natural environment. This transformation – going hand in hand with the digital transition and the economic recovery from the pandemic – must make Europe's economy not only more sustainable but also more competitive and resilient.[352]

This twin transition endorsed by the Commission has answered part of the expectation in the circular economy via '*digital solutions in slashing emissions*'.[353] At the heart of the "green growth" strategy, it believes that technologies will enable us to continue enjoying the comforts to which we've become accustomed while doing our bit for the planet. [354] Therefore, "competition for growth**"** discourses not only remain unchallenged but are further entrenched by the "green growth" discourse. [355]

Nevertheless, the Commission downplayed the critiques of climate impact generated by technological advancement. The risks of techno-solutionism relying on digital means to adapt to climate change with overconfidence are not fully considered. [356] For instance, generative AI tools are powered by high-powered chips which consume enormous amounts of water and energy, and the devices are hard to recycle. [357] Microsoft's emissions in 2023

---

[351] 'Digital Technologies Can Cut Global Emissions by 20%. Here's How | World Economic Forum' <https://www.weforum.org/agenda/2022/05/how-digital-solutions-can-reduce-global-emissions/>.
[352] 'The Twin Green & Digital Transition: How Sustainable Digital Technologies Could Enable a Carbon-Neutral EU by 2050 - European Commission' <https://joint-research-centre.ec.europa.eu/jrc-news-and-updates/twin-green-digital-transition-how-sustainable-digital-technologies-could-enable-carbon-neutral-eu-2022-06-29_en> emphasis added.
[353] 'Measuring the Impact of Digital Solutions on the Climate | Shaping Europe's Digital Future' (25 April 2024) <https://digital-strategy.ec.europa.eu/en/news/measuring-impact-digital-solutions-climate>.
[354] Chris McMahon, 'Low-technology: why sustainability doesn't have to depend on high-tech solutions' (*The Conversation*, 18 February 2022) <http://theconversation.com/low-technology-why-sustainability-doesnt-have-to-depend-on-high-tech-solutions-176611> accessed 9 September 2024.
[355] 'Competition Policy | Fact Sheets on the European Union | European Parliament' (31 March 2024) <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>.
[356] 29ter, 'Le techno-solutionnisme, maladaptation au changement climatique ?' <https://www.socialter.fr/article/technosolutionnisme-maladaptation-changement-climatique-megabassines> 4.
[357] Chris Stokel-Walker, 'TechScape: Turns out There's Another Problem with AI – Its Environmental Toll' *The Guardian* (1 August 2023) <https://www.theguardian.com/technology/2023/aug/01/techscape-environment-cost-ai-artificial-intelligence> accessed 8 September 2024.

increased by 30%.[358] The Commission recognises that one technology attempting to solve one environmental problem might generate others:[359]

> 'Digitalisation uses electricity, and many digital technologies are resource-intensive and create waste. Unintended consequences can crop up, such as owners of hybrid cars driving more because it is cheaper.'[360]

Yet, neither the Twin Transition Report nor the HGs 2023 has explained how competition law and policy could mitigate this clash. Simply put, "*it doesn't make sense to burn a forest and then use AI to track deforestation.*"[361] For example, the low-tech movement prioritises simplicity and durability, local manufacture, as well as traditional or ancient techniques instead.[362] Nevertheless, there is no indication of how DG Competition would screen and promote the technologies that are positive to the ecological transition, and how to avoid contributing to the environmental hazard from the beginning.

In addition, some scholars have suggested that a transition to a digital economy is not a complete green transition because decoupling economic growth from environmental degradation is likely to fail.[363] They shed light on the fact that the decoupling up to date is relative but not absolute, meaning the reduction of material dependency is temporary, local, and not sufficient to avoid the starkest scenarios.[364] As Dolman has pointed out, we need effective and efficient cooperation with the existing tools, we cannot wait for engineers to produce a *deus ex machina*,[365] "Innovation may save us, but we cannot just bet on that."[366]

---

[358] Camilla Hodgson, 'Microsoft's Emissions Jump Almost 30% as It Races to Meet AI Demand' (15 May 2024) <https://www.ft.com/content/61bd45d9-2c0f-479a-8b24-605d5e72f1ab> accessed 8 September 2024.
[359] 'Cutting Through Environmental Issues: Technology as a Double-Edged Sword' (*Brookings*) <https://www.brookings.edu/articles/cutting-through-environmental-issues-technology-as-a-double-edged-sword/>.
[360] 'The Twin Green & Digital Transition: How Sustainable Digital Technologies Could Enable a Carbon-Neutral EU by 2050 - European Commission' (n 352).
[361] Chris Stokel-Walker, 'TechScape: Turns out There's Another Problem with AI – Its Environmental Toll' *The Guardian* (1 August 2023) <https://www.theguardian.com/technology/2023/aug/01/techscape-environment-cost-ai-artificial-intelligence>.
[362] McMahon (n 354).
[363] Volker Mauerhofer, 'Lose Less Instead of Win More: The Failure of Decoupling and Perspectives for Competition in a Degrowth Economy' (2013) 22 Environmental Values 43. See also 'Decoupling Debunked – Evidence and Arguments against Green Growth as a Sole Strategy for Sustainability - EEB - The European Environmental Bureau' <https://eeb.org/library/decoupling-debunked/>.
[364] Tim Jackson and Robin Webster, "Limits Revisited: a review of the limits to growth debate", UK All Party Parliamentary Group (April 2016), available at: https:/ /limits2growth.org.uk/wp-content/uploads/Jackson-and-Webster-2016-Limits-Revisited.pdf.
[365] Dolmans (n 242).
[366] Maurits Dolmans, Article 101(3) TFEU : the roadmap for sustainable cooperation in Holmes, Middelschulte and Snoep (n 54).

II - Going further: Competition law and policy in a degrowth/post-growth economy?

These abovementioned critical perspectives against techno-solutionism echo the anticapitalism critiques: there is no evidence that "*green growth*" and the digital economy would escape from a neoclassical growth pattern of 'bigger, more, better, faster'.[367] Instead, the "*green growth*" narrative does not require DG Competition to significantly shift from its growth pattern, as long as circularity, product sustainability, material decoupling and green innovation are implicated in the growth process.[368]

In fact, the Commission's latest Protecting Competition in a Changing World Report in 2024 has implied such reluctance to distance itself from a productive growth trajectory.[369] Hence, this thesis has empirically traced that DG Competition is still promoting discourses around stimulating consumer demand with low prices and competition for a higher level of productivity growth without moderation for ecological concerns:

> 'there are two main channels through which an increase in competition is supposed to positively affect the macroeconomic performance. First, the reduction in markups and the associated **decline in price levels stimulates consumer demand**. To satisfy this greater demand, firms invest in production capacity and hire more workers leading to an increase in private investment and employment. Second, the reallocation of resources towards more productive firms and the **increase in innovation stimulates business dynamism and productivity and thus longer-term GDP growth**.'[370]

Meanwhile, terms such as "climate change", "carbon neutrality", and "environmental degradation" and discussions around sustainability were also nowhere to be found. Nor has it mentioned how the economic growth model entrenched within EU competition law and policy is no longer considered a sustainable solution.[371]

---

[367] Paz Peña, 'Bigger, More, Better, Faster: The Ecological Paradox of Digital Economies' Global Information Society Watch 2020.
[368] Riccardo Mastini, Giorgos Kallis and Jason Hickel, 'A Green New Deal without Growth?' (2021) 179 Ecological Economics 106832. See also Marios Iacovides, 'Why Aligning Antitrust Policy With Sustainability Is a Moral Imperative' (*ProMarket*, 22 March 2022) <https://www.promarket.org/2022/03/22/sustainability-antitrust-policy-anticompetitive-climate-change/> accessed 5 April 2024.
[369] European Commission. Directorate General for Competition., *Protecting Competition in a Changing World: Evidence on the Evolution of Competition in the EU during the Past 25 Years.* (Publications Office 2024) <https://data.europa.eu/doi/10.2763/089949>.
[370] ibid 157 emphasis added.
[371] European Parliament. Directorate General for Parliamentary Research Services. (n 62).97.

This is in contrast with the emerging degrowth/post-growth movement which believes that the current economic growth model is not only incapable of solving the ecological crisis but contributes to such crises by design [372]- GDP omits environmental common goods, such as water quality, biodiversity and a stable climate.[373] It conveys the idea that the lower the rate of economic growth, the easier it is to achieve emissions reductions,[374] therefore we should stop producing and consuming fossil fuels and other environmentally damaging products.[375] It distrusts the green growth model, advocating for an economy designed to achieve environmental and social goals in the long run which is agnostic about growth.[376]

From this perspective, it would require the DG Competition to reimagine its policy for "a post-growth welfare standard in which short-term consumer price effects are no longer the only indicator of economic welfare and social progress,"[377] but the emphasis is 'to reduce production and consumption and define goals other than economic growth'.[378] As Latouche has claimed, a society of degrowth should be understood as a 'society built on quality rather than on quantity, on cooperation rather than competition' [379] Nevertheless, empirical observations in this thesis suggest that the DG competition is not prepared to engage with such a degrowth/post-growth strategy to reduce production and consumption for sustainability which is radically different from its objectives, the degrowth/post-growth discourses have thus been side-lined and silenced in recent EU competition law and policy greening process.

However, degrowth/post-growth is not so far-fetched in the EU context, instead, it is already on its way. The European Parliament and the European Environment Agency have gone much further in the seek for systemic change, declaring that '*economic activities and lifestyle are Europe's most important environmental challenges*'.[380]

---

[372] Kallis, Mastini and Zografos (n 108).
[373]European Parliament. Directorate General for Parliamentary Research Services. (n 62) .
[374] Mastini, Kallis and Hickel (n 368).
[375] Geoffrey Garver, 'The Rule of Ecological Law: The Legal Complement to Degrowth Economics' (2013) 5 Sustainability 316; Parrique Timothée, *Ralentir ou périr: l'économie de la décroissance / Timothée Parrique* (Éditions du Seuil 2022).
[376] Tim Jackson, *Post Growth: Life after Capitalism* (Polity Press 2021).
[377] Andrea Renda, 'The EU Industrial Strategy: Towards a Post-Growth Agenda?' (2021) 56 Intereconomics 133.
[378] FEDERICO DEMARIA and others (n 108).
[379] Latouche (n 112).
[380] 'EU Environmental Policy to 2030: A Systemic Change' (*Topics | European Parliament*, 5 July 2021) <https://www.europarl.europa.eu/topics/en/article/20210701STO07544/eu-environmental-policy-to-2030-a-systemic-change> accessed 9 September 2024.

The European Parliament has launched a series of discussions on moving towards a 'beyond growth' society – 'the emphasis is on achieving an environmentally sustainable and equitable society, rather than on endless economic growth'.[381] In its recent resolution in 2022 on 'Implementation and Delivery of the Sustainable Development Goals', it calls on the Commission to deliver an alternative measure of progress "*Beyond GDP*" to monitor the economy of well-being.[382]

Degrowth/post-growth discourse is also in line with what the European Environmental Agency has in mind now, which is more vocal on the issue of growth itself in its *Growth without economic growth*.[383] The eighth General Union Environmental Action Programme (EAP) to 2030 prioritises minimizing the environmental pressure from excessive production and consumption rather than simply regulating environmental damages such as pollution and emission on the surface:

> Member states shall further integrate sustainability and environmental aspects within their national plans under the European Semester by developing indicators in that sense that goes "beyond GDP"'.[384]

Therefore, this thesis argues that the DG Competition holds a very divergent opinion from the European Parliament and the European Environmental Agency on more radical approaches that consider capitalist markets to be the very problem.[385] This divergence between European supra institutions is yet to be mitigated, and as the Parliament has pointed out, '*any steering by the EU towards the beyond growth perspectives is likely to run up against the wall of a revision of the Treaties'*.[386] That is way beyond the scope of this thesis.

Nevertheless, this thesis hopes to shed light on the urgent need for EU competition law and policy to exit the mindset of incorporating and conceptualising environmental interests into its existing framework of economic efficiency and consumer welfare, which can only go so far as this thesis has analysed. It calls for a philosophical transition to decouple EU competition law and policy's goals from ceaseless productivist growth and to reconsider its role in **ensuring**

---

[381] European Parliament. Directorate General for Parliamentary Research Services. (n 62).95.
[382] European Parliament resolution of 23 June 2022 on the implementation and delivery of the Sustainable Development Goals (SDGs), 2022/2002(INI).
[383] 'Growth without Economic Growth' (*European Environment Agency*) <https://www.eea.europa.eu/publications/growth-without-economic-growth> accessed 9 September 2024.
[384] 'New EU Environment Programme to Address Challenges Facing People and Planet | News | European Parliament' (15 June 2021) <https://www.europarl.europa.eu/news/en/press-room/20210610IPR05916/new-eu-environment-programme-to-address-challenges-facing-people-and-planet> accessed 9 September 2024.
[385] Mauerhofer (n 281) 50.
[386] European Parliament. Directorate General for Parliamentary Research Services. (n 62) 99.

consumers' benefits in order to comprehend the ecological stake. As Mauerhofer suggests, viewing the constraints in a climate crisis, EU competition law and policy should redirect its objective with a greater focus on 'lose less instead of win more'.[387]

[387] Mauerhofer (n 281) 50.

Bibliography

29ter, ‘Le techno-solutionnisme, maladaptation au changement climatique ?’ <https://www.socialter.fr/article/technosolutionnisme-maladaptation-changement-climatique-megabassines> accessed 8 September 2024

‘Agricultural Markets Task Force - European Commission’ (23 July 2024) <https://agriculture.ec.europa.eu/common-agricultural-policy/agri-food-supply-chain/agricultural-markets-task-force_en> accessed 26 August 2024

AIM, ‘AIM’s Comments on the Draft Horizontal Cooperation Guidelines and R&D Block Exemption Regulation of 1st March 2022.’

Albaek S, ‘Consumer Welfare in EU Competition Policy’ (2013)

‘American Bar Association Comments Horizontal BERS and GLs_final’

Andriychuk O, ‘EU Digital Competition Law: The Socio-Legal Foundations’ [2023] Cambridge Yearbook of European Legal Studies 1

‘Annual Reports - European Commission’ (2023) <https://competition-policy.ec.europa.eu/publications/annual-reports_en> accessed 23 July 2024

‘Antitrust: Commission Adopts New Horizontal Block Exemption Regulations and Horizontal Guidelines’ (*European Commission Press Release*, 1 June 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2990> accessed 16 November 2023

Bailey D and John LE, ‘Competition Law and Policy in the EU’ in David Bailey and Laura Elizabeth John (eds), *Bellamy & Child: European Union Law of Competition* (Oxford University Press 2018) <https://doi.org/10.1093/law-ocl/9780198794752.003.0001> accessed 7 September 2024

Baudrillard J, *The Consumer Society: Myths and Structures* (Revised edition, Sage 2017)

Beaton-Wells C, ‘Antitrust’s Neglected Question: Who Is “The Consumer”?’ (2020) 65 The Antitrust Bulletin 173

Beatrice, ‘Mapping Out the Road to a 45% GHG Reduction for Fibers and Raw Materials’ (*Textile Exchange*, 26 January 2023) <https://textileexchange.org/megan-stoneburner-45-percent-reduction-strategic-materials/> accessed 7 September 2024

Blockx J, ‘Should European Competition Law Only Care about Clean Air for Europeans - a Comment on Para 604 of the Draft Horizontal Guidelines’

Bork RH, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978)

Brook O, *Non-Competition Interests in EU Antitrust Law: An Empirical Study of Article 101 TFEU* (Cambridge University Press 2022) <https://www.cambridge.org/core/books/noncompetition-interests-in-eu-antitrust-law/FD3291CD6230F1767DE80BE02C4BAA97> accessed 19 March 2024

Buch-Hansen H and Carstensen MB, 'Paradigms and the Political Economy of Ecopolitical Projects: Green Growth and Degrowth Compared' (2021) 25 Competition & Change 308

Buch-Hansen H and Wigger A, *The Politics of European Competition Regulation: A Critical Political Economy Perspective* (Taylor & Francis Group 2011) <http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=668549> accessed 10 June 2024

'Can We Have Economic Growth and Tackle Climate Change at the Same Time?' (*Grantham Research Institute on climate change and the environment*) <https://www.lse.ac.uk/granthaminstitute/explainers/can-we-have-economic-growth-and-tackle-climate-change-at-the-same-time/> accessed 27 August 2024

Cangiani M, 'Karl Polanyi's Institutional Theory: Market Society and Its "Disembedded" Economy' (2011) 45 Journal of Economic Issues 177

'CAP 2023-27 - European Commission' (4 September 2024) <https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-2023-27_en> accessed 13 September 2024

'CAP at a Glance - European Commission' (25 July 2024) <https://agriculture.ec.europa.eu/common-agricultural-policy/cap-overview/cap-glance_en> accessed 26 August 2024

Chaiehloudj W, 'Un exemple de résistance à la transversalité : le droit de la concurrence' (2023) t.XXXVII Revue internationale de droit économique 61

Chérot J-Y, 'Gérard Farjat , Pour Un Droit Économique , PUF, Coll. Les Voies de Droit, 2004': (2005) Volume 55 Revue interdisciplinaire d'études juridiques 279

Colomo PI, *The New EU Competition Law* (1st edn, Hart Publishing 2023) <https://www.bloomsburycollections.com/monograph?docid=b-9781782259169> accessed 18 June 2024

Commission E, 'Hard Core Restrictions - Concurrences' (28 August 2024) <https://www.concurrences.com/en/dictionary/hard-core-restrictions> accessed 6 September 2024

'Commission Staff Working Document - Report from the Commission on Competition Policy 2023'

'Common Agricultural Policy - European Commission' (25 July 2024) <https://agriculture.ec.europa.eu/common-agricultural-policy_en> accessed 26 August 2024

'Competition Policy | Fact Sheets on the European Union | European Parliament' (31 March 2024) <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy> accessed 7 September 2024

Cseres KJ, '"Acceptable" Cartels at the Crossroads of EU Competition Law and the Common Agricultural Policy: A Legal Inquiry into the Political, Economic, and Social Dimensions of (Strengthening Farmers') Bargaining Power' (2020) 65 The Antitrust Bulletin 401

‘Cutting Through Environmental Issues: Technology as a Double-Edged Sword’ (*Brookings*) <https://www.brookings.edu/articles/cutting-through-environmental-issues-technology-as-a-double-edged-sword/> accessed 8 September 2024

De Backer M and others, ‘Sustainability and Competition Policy’ [2023] Concurrences Review 0

‘Decoupling Debunked – Evidence and Arguments against Green Growth as a Sole Strategy for Sustainability - EEB - The European Environmental Bureau’ <https://eeb.org/library/decoupling-debunked/> accessed 8 September 2024

‘Digital Technologies Can Cut Global Emissions by 20%. Here’s How | World Economic Forum’ <https://www.weforum.org/agenda/2022/05/how-digital-solutions-can-reduce-global-emissions/> accessed 8 September 2024

Dolmans M, ‘Sustainable Competition Policy Hot Topic: Environment & Competition’ (2019) 5 Competition Law & Policy Debate 4

——, ‘The Need to Integrate Externalities, Market Failures, and Collective Action Problems in Antitrust Analysis—Thoughts on the US House Judiciary Committee Report on ESG Investigation and the Rebuttal Report | Compliance and Enforcement’ (22 June 2024) <https://wp.nyu.edu/compliance_enforcement/2024/06/22/the-need-to-integrate-externalities-market-failures-and-collective-action-problems-in-antitrust-analysis-thoughts-on-the-us-house-judiciary-committee-report-on-esg-investigation-and-the-rebu/> accessed 2 September 2024

Dolmans M, Lin W and Hollis J, ‘Sustainability and Net Zero Climate Agreements – a Transatlantic Antitrust Perspective’ <https://www-elgaronline-com.ezproxy-prd.bodleian.ox.ac.uk/view/journals/clpd/8/2/article-p63.xml> accessed 2 July 2024

‘EU Environmental Policy to 2030: A Systemic Change’ (*Topics | European Parliament*, 5 July 2021) <https://www.europarl.europa.eu/topics/en/article/20210701STO07544/eu-environmental-policy-to-2030-a-systemic-change> accessed 9 September 2024

European Commission. Directorate General for Competition., ‘Competition Policy Brief, Competition Policy in Support of Europe’s Green Ambition (1/2021)’ (Publications Office 2021) 1/2021 <https://data.europa.eu/doi/10.2763/962262> accessed 17 December 2023

——, *Protecting Competition in a Changing World: Evidence on the Evolution of Competition in the EU during the Past 25 Years.* (Publications Office 2024) <https://data.europa.eu/doi/10.2763/089949> accessed 22 July 2024

European Parliament. Directorate General for Parliamentary Research Services., *Beyond Growth: Pathways towards Sustainable Prosperity in the EU.* (Publications Office 2023) <https://data.europa.eu/doi/10.2861/602232> accessed 24 April 2024

European Parliament, Resolution declaring a climate and environmental emergency 2019/2930 (RSP) (28 November 2019)

European Parliament Resolution of 8 June 2011 on GDP and beyond – Measuring progress in a changing world (2010/2088(INI)) (2012/C 380 E/11).

European Round Table of Industry, 'ERT Response to European Commission's Draft Horizontal BERs and Guidelines - 30 April 2022'

'Exiting the Anthropocene? Exploring Fundamental Change in Our Relationship with Nature' (*European Environment Agency*) <https://www.eea.europa.eu/publications/exiting-the-anthropocene/exiting-the-anthropocene-exploring-fundamental> accessed 7 September 2024

Ezrachi A, 'Sponge' [2016] Journal of Antitrust Enforcement jnw011

Fairclough N, 'Intertextuality in Critical Discourse Analysis' (1992) 4 Linguistics and Education 269

'Fast Fashion and Its Environmental Impact in 2023 | Earth.Org' <https://earth.org/fast-fashions-detrimental-effect-on-the-environment/> accessed 17 October 2023

FEDERICO DEMARIA and others, 'What Is Degrowth?: From an Activist Slogan to a Social Movement', *The Environment in Anthropology (Second Edition)* (NYU Press 2016)

Fernández C and Meijide A, 'Chapter 13: Competition Law and the New Regulatory Landscape: What Lies Ahead?'

Foucault M, *Archaeology of Knowledge* (Taylor & Francis Group 2002) <http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=1144626> accessed 23 February 2024

Foucault Michel, *Power / Michel Foucault ; Edited by James D. Faubion ; Translated by Robert Hurley and Others* (the New Press 2000)

Garver G, 'The Rule of Ecological Law: The Legal Complement to Degrowth Economics' (2013) 5 Sustainability 316

Gilbert GN and Mulkay M, *Opening Pandora's Box: A Sociological Analysis of Scientists' Discourse* (CUP Archive 1984)

Gillespie A, *The Illusion of Progress: Unsustainable Development in International Law and Policy* (Earthscan Publications 2001)

'Growth without Economic Growth' (*European Environment Agency*) <https://www.eea.europa.eu/publications/growth-without-economic-growth> accessed 9 September 2024

Gutting G, *Foucault: A Very Short Introduction* (Oxford University Press 2019) <https://academic.oup.com/book/28400> accessed 6 May 2024

Hammer PJ, 'Antitrust beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs' (2000) 98 Michigan Law Review 849

Hearn J, 'Reframing the History of the Competition Concept: Neoliberalism, Meritocracy, Modernity' (2021) 34 Journal of Historical Sociology 375

Heilbrunn B, ‘Le monde des biens ou la naissance de l’anthropologie de la consommation’ (2014) 44 Revue du MAUSS 108

Hjärtström M, ‘Chapter 10: Addressing Sustainability Failures in Economics and Competition Law: Environmental Externalities, Consumers and Quantification’ in Julian Nowag (ed), *Research Handbook on Sustainability and Competition Law* (2024) <https://www-elgaronline-com.ezproxy-prd.bodleian.ox.ac.uk/edcollchap-oa/book/9781802204667/book-part-9781802204667-18.xml> accessed 13 August 2024

Hodgson C, ‘Microsoft’s Emissions Jump Almost 30% as It Races to Meet AI Demand’ (15 May 2024) <https://www.ft.com/content/61bd45d9-2c0f-479a-8b24-605d5e72f1ab> accessed 8 September 2024

Holmes S, ‘Consumer Welfare, Sustainability and Competition Law Goals’ [2020] Concurrences Review <https://www.concurrences.com/en/review/numeros/no-2-2020/editorial/93496> accessed 11 October 2023

——, ‘Climate Change, Sustainability, and Competition Law’ (2020) 8 Journal of Antitrust Enforcement 354

——, ‘Sustainability and Competition Policy in Europe: Recent Developments’ (2023) 14 Journal of European Competition Law & Practice 448

——, ‘Chapter 20: Cartels Harming Sustainability (and Those That Don’t) in Europe’ (2024) <https://www-elgaronline-com.ezproxy-prd.bodleian.ox.ac.uk/edcollchap-oa/book/9781802204667/book-part-9781802204667-30.xml> accessed 13 August 2024

Holmes S, Middelschulte D and Snoep M (eds), *Competition Law, Climate Change & Environmental Sustainability* (Institute of Competition Law 2021)

Horton T, ‘Fairness and Antitrust Reconsidered: An Evolutionary Perspective’ (2013) 44 McGeorge Law Review 823

Iacovides M, ‘Why Aligning Antitrust Policy With Sustainability Is a Moral Imperative’ (*ProMarket*, 22 March 2022) <https://www.promarket.org/2022/03/22/sustainability-antitrust-policy-anticompetitive-climate-change/> accessed 5 April 2024

Inderst R and Thomas S, ‘Competition Policy and the Environment’ (2023) 15 Annual Review of Resource Economics 199

Jackson T, *Prosperity without Growth: Economics for a Finite Planet* (Earthscan 2011)

——, *Post Growth: Life after Capitalism* (Polity Press 2021)

Joy M, ‘The Idea of “green Growth” Is Flawed. We Must Find Ways of Using and Wasting Less Energy’ (*The Conversation*, 27 May 2021) <http://theconversation.com/the-idea-of-green-growth-is-flawed-we-must-find-ways-of-using-and-wasting-less-energy-160432> accessed 7 November 2023

Kallis G, Mastini R and Zografos C, ‘Perceptions of Degrowth in the European Parliament’ [2023] Nature Sustainability 1

Kendall G and Wickham G, 'I'm Interested in Foucault, but Why Should I Be Interested in History?', *Using Foucault's Methods* (SAGE Publications Ltd 1999) <https://methods.sagepub.com/book/using-foucaults-methods> accessed 6 February 2024

Kingston S, *Greening EU Competition Law and Policy* (Cambridge University Press 2011) <http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=807315> accessed 10 April 2024

——, 'Competition Law in an Environmental Crisis' (2019) 10 Journal of European Competition Law & Practice 517

——, 'Chapter 9: Competition and Sustainability in EU Law: Nearer Resolution of the Old Debate?' (2024) <https://www-elgaronline-com.ezproxy-prd.bodleian.ox.ac.uk/edcollchap-oa/book/9781802204667/book-part-9781802204667-17.xml> accessed 13 August 2024

Lange B, 'Foucauldian-Inspired Discourse Analysis' in Andreas Philippopoulos-Mihalopoulos, *Law and Ecology* (1st edn, Routledge 2011) <https://www.taylorfrancis.com/books/9780203829691/chapters/10.4324/9780203829691-3> accessed 27 January 2024

Latouche S, *Farewell to Growth* (Polity 2009)

Letters, 'This Age of Abundance Must Come to an End to Save the Planet' *The Guardian* (30 August 2022) <https://www.theguardian.com/environment/2022/aug/30/this-age-of-abundance-must-come-to-an-end-to-save-the-planet> accessed 2 September 2024

Little D and others, 'The European Commission's New Guidelines on Sustainability Agreements - Legal Analysis and Interplay with National Regimes'

Loozen E, 'EU Antitrust in Support of the Green Deal. Why Better Is Not Good Enough' (2023) 12 Journal of Antitrust Enforcement 75

Lowe P, 'Competition Policy and the Global Economic Crisis' (2009) 5 Competition Policy International Journal

'LTO, Response LTO Barentskrans Public Consultation Horizontal Guidelines 26 April 2022'

Maggiolino M, 'Planned Obsolescence: A Strategy in Search of Legal Rules' (2019) 50 IIC - International Review of Intellectual Property and Competition Law 405

Makris S, 'EU Competition Law as Responsive Law' (2021) 23 Cambridge Yearbook of European Legal Studies 228

Malinauskaite J, 'Competition Law and Sustainability: EU and National Perspectives' (2022) 13 Journal of European Competition Law & Practice 336

Malinauskaite J and Erdem FB, 'Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities' (2023) 61 JCMS: Journal of Common Market Studies 1211

Mastini R, Kallis G and Hickel J, 'A Green New Deal without Growth?' (2021) 179 Ecological Economics 106832

Mauerhofer V, ‘Lose Less Instead of Win More: The Failure of Decoupling and Perspectives for Competition in a Degrowth Economy’ (2013) 22 Environmental Values 43

Mauger R, ‘Finding a Needle in a Haystack? Identifying Degrowth-Compatible Provisions in EU Energy Law for a Just Transition to Net-Zero by 2050’ (2023) 41 Journal of Energy & Natural Resources Law 175

McMahon C, ‘Low-technology: why sustainability doesn’t have to depend on high-tech solutions’ (*The Conversation*, 18 February 2022) <http://theconversation.com/low-technology-why-sustainability-doesnt-have-to-depend-on-high-tech-solutions-176611> accessed 9 September 2024

Meagher M, *Competition Is Killing Us: How Big Business Is Harming Our Society and Planet - and What to Do about It* (Penguin Business 2020)

‘Measuring the Impact of Digital Solutions on the Climate | Shaping Europe’s Digital Future’ (25 April 2024) <https://digital-strategy.ec.europa.eu/en/news/measuring-impact-digital-solutions-climate> accessed 8 September 2024

Modrall J, ‘New EU Antitrust Regime for Agricultural Cooperation – Green Shoots’ (*Kluwer Competition Law Blog*, 20 December 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/12/20/new-eu-antitrust-regime-for-agricultural-cooperation-green-shoots/> accessed 27 August 2024

Mulder J, ‘The Transformative Socio-Economic Effects of EU Competition Law: From Producerism to Consumerism’ in Poul F Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) <https://www.cambridge.org/core/books/law-of-political-economy/transformative-socioeconomic-effects-of-eu-competition-law/C90548590F055B78D38B05A2648345CC> accessed 13 April 2024

Nesterova I and Buch-Hansen H, ‘Degrowth and the Circular Economy: Reflecting on the Depth of Business Circularity’ (2023) 414 Journal of Cleaner Production

‘New EU Antitrust Guidelines for Food & Agri Sustainability Agreements | Global Law Firm | Norton Rose Fulbright’ <https://www.nortonrosefulbright.com/en/knowledge/publications/d7060076/new-eu-antitrust-guidelines-for-food--agri-sustainability-agreements> accessed 15 April 2024

‘New EU Environment Programme to Address Challenges Facing People and Planet | News | European Parliament’ (15 June 2021) <https://www.europarl.europa.eu/news/en/press-room/20210610IPR05916/new-eu-environment-programme-to-address-challenges-facing-people-and-planet> accessed 9 September 2024

Newman JM, ‘The Output-Welfare Fallacy: A Modern Antitrust Paradox’ (2021) 107 Iowa Law Review 563

Nowag J, ‘Sustainability and Competition Law: An International Report’ in Pranvera Këllezi, Pierre Kobel and Bruce Kilpatrick (eds), *Sustainability Objectives in Competition and Intellectual Property Law* (Springer Nature Switzerland 2024) <https://doi.org/10.1007/978-3-031-44869-0_1> accessed 9 April 2024

O'Brien H, 'The Planet's Economist: Has Kate Raworth Found a Model for Sustainable Living?' *The Guardian* (8 June 2023) <https://www.theguardian.com/environment/2023/jun/08/the-planets-economist-has-kate-raworth-found-a-model-for-sustainable-living> accessed 4 July 2024

Onofrei M, Vatamanu AF and Cigu E, 'The Relationship Between Economic Growth and CO2 Emissions in EU Countries: A Cointegration Analysis' (2022) 10 Frontiers in Environmental Science <https://www.frontiersin.org/journals/environmental-science/articles/10.3389/fenvs.2022.934885/full> accessed 27 August 2024

Parrique Timothée, *Ralentir ou périr: l'économie de la décroissance / Timothée Parrique* (Éditions du Seuil 2022)

Peña P, 'Bigger, More, Better, Faster: The Ecological Paradox of Digital Economies' Global Information Society Watch 2020

'Podcast: Is Competition Law Stifling a Move to a Green Future?' (*Frontier Economics*) <https://www.frontier-economics.com/uk/en/news-and-insights/news/news-article-i9315-podcast-is-competition-law-stifling-a-move-to-a-green-future/> accessed 13 September 2024

Polanyi K, 'The Economy as Instituted Process' in Mark Granovetter and Richard Swedberg (eds), Mark Granovetter, *The Sociology of Economic Life* (3rd edn, Routledge 2018) <https://www.taylorfrancis.com/books/9780429962882/chapters/10.4324/9780429494338-2> accessed 10 September 2024

Polanyi K, Stiglitz JE and Block FL, *The Great Transformation: The Political and Economic Origins of Our Time* (2. Beacon paperback ed., [reprinted], Beacon Press 2010)

Posner RA, 'The Decline of Law as an Autonomous Discipline: 1962-1987' (1987) 100 Harvard Law Review 761

'President von der Leyen on the European Green Deal' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/fr/speech_19_6749> accessed 16 July 2024

'Public Consultation on the Draft Revised Horizontal Block Exemption Regulations and Horizontal Guidelines Response from Natuur & Milieu (Netherlands)'

Raworth K, *Doughnut Economics: Seven Ways to Think like a 21st-Century Economist* (Penguin Books 2022)

Renda A, 'The EU Industrial Strategy: Towards a Post-Growth Agenda?' (2021) 56 Intereconomics 133

Scher I, 'Antitrust and Consumerism: What Is It All About' (1970) 22 Case Western Reserve Law Review 11

Schinkel MP and Spiegel Y, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) 53 International Journal of Industrial Organization 371

Schinkel MP and Treuren L, 'Green Antitrust: (More) Friendly Fire in the Fight against Climate Change' (15 December 2020) <https://papers.ssrn.com/abstract=3749147> accessed 23 July 2024

Schumpeter J, *Capitalism, Socialism, and Democracy* (Start Publishing LLC 2012) <http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=1105219> accessed 29 December 2024

'Sobriété, pénurie : la stratégie de la culpabilisation - GREENWATCHING #7' (*Greenpeace France*) <https://www.greenpeace.fr/sobriete-ecologique-solidaire/> accessed 2 September 2024

Spaargaren G and Oosterveer P, 'Citizen-Consumers as Agents of Change in Globalizing Modernity: The Case of Sustainable Consumption' (2010) 2 Sustainability 1887

'Speech by the President at the Beyond Growth Conference' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/speech_23_2761> accessed 11 September 2024

Steffen W and others, 'The Trajectory of the Anthropocene: The Great Acceleration' (2015) 2 The Anthropocene Review 81

Stokel-Walker C, 'TechScape: Turns out There's Another Problem with AI – Its Environmental Toll' *The Guardian* (1 August 2023) <https://www.theguardian.com/technology/2023/aug/01/techscape-environment-cost-ai-artificial-intelligence> accessed 8 September 2024

Stucke ME, 'Is Competition Always Good?' (2013) 1 Journal of Antitrust Enforcement 162

Stucke ME and Ezrachi A, *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants* (First edition, Harper Business 2020)

Stylianou K and Iacovides M, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42 Legal Studies 620

Szecskay Attorneys at law, 'Consultation Response to European Commission Draft Revised Horizontal Block Exemption Regulations and Horizontal Guidelines – HT.5454 – R'

'The European Green Deal' <https://competition-policy.ec.europa.eu/sectors/energy-environment/european-green-deal_en> accessed 16 December 2022

'The European Green Deal - European Commission' <https://competition-policy.ec.europa.eu/sectors/energy-environment/european-green-deal_en> accessed 31 January 2024

'The Twin Green & Digital Transition: How Sustainable Digital Technologies Could Enable a Carbon-Neutral EU by 2050 - European Commission' <https://joint-research-centre.ec.europa.eu/jrc-news-and-updates/twin-green-digital-transition-how-sustainable-digital-technologies-could-enable-carbon-neutral-eu-2022-06-29_en> accessed 8 May 2024

Todeschini BV, Cortimiglia MN and de Medeiros JF, 'Collaboration Practices in the Fashion Industry: Environmentally Sustainable Innovations in the Value Chain' (2020) 106 Environmental Science & Policy 1

Türem ZU, '"The Market" Unbound: Neoliberalism, Competition Laws and Post Territoriality' (2016) 19 Journal of International Relations and Development 242

Turner V, 'HORIZONTAL BLOCK EXEMPTION REGULATIONS AND HORIZONTAL GUIDELINES'

Unilever, 'Unilever Response to Draft HGL Consultation Sustainability Submission'

Vandenbergh MP, 'Private Environmental Governance' (2013) 99 Cornell Law Review 129

Veljanovski C, 'The Case against Green Antitrust' (2022) 18 European Competition Journal 501

Vestager M, 'Competition Policy in Support of the Green Deal - Executive Vice-President Vestager's Keynote Speech at the 25th IBA Competition Conference, Delivered by Inge Bernaerts, Director, DG Competition' <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_7754> accessed 13 April 2024

——, 'Speech - The Green Deal and Competition Policy'

Voss OG Gorka Navea, Lea-Theresa, 'Sustainability First, Antitrust Second? - The EU Commission's New Rules on Agriculture Cooperations' (*Capital Thinking*, 11 December 2023) <https://www.capitalthinkingblog.com/2023/12/sustainability-first-antitrust-second-the-eu-commissions-new-rules-on-agriculture-cooperations/> accessed 19 December 2023

'Why Is Competition Policy Important for Consumers? - European Commission' <https://competition-policy.ec.europa.eu/about/why-competition-policy-important-consumers_en> accessed 13 April 2024

Wigger A and Buch-Hansen H, 'Explaining (Missing) Regulatory Paradigm Shifts: EU Competition Regulation in Times of Economic Crisis' (2014) 19 New Political Economy 113

Witt AC, *The More Economic Approach to EU Antitrust Law* (1st edn, Hart Publishing Ltd 2016) <https://www.bloomsburycollections.com/monograph?docid=b-9781474202350> accessed 23 July 2024

Witt AC, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (2019) 64 The Antitrust Bulletin 172

Wulff G, 'The Challenge of Overproduction and Overconsumption' in Kristina Bäckström, Carys Egan-Wyer and Emma Samsioe (eds), *The Future of Consumption: How Technology, Sustainability and Wellbeing will Transform Retail and Customer Experience* (Springer International Publishing 2024) <https://doi.org/10.1007/978-3-031-33246-3_13> accessed 2 September 2024

Konkurrensverket v TeliaSonera Sverige AB [2011] ECJ Case C-52/09

Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities [2002] ECJ Case C-94/00

Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (Text with EEA relevance) 2001

Communication from the Commission – Commission guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013 2023

Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements 2023

Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance 2011

Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance) 2004

Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions - Towards a green, digital and resilient economy: our European Growth Model 2022

Article 101 of the Treaty on the Function of the European Union

2000/475/EC: Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IVF1/36718CECED) (notified under document number C(1999) 5064) (Only the English text is authentic) (Text with EEA relevance)