

Mind the Consumer Behaviour: Overcoming Consumer Biases in the Assessment of Sustainability Cooperation Agreements

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Introduction

‘Sustainable development’ is a term coined numerous years ago to define the achievement of an optimal level of economic development and growth that does not compromise available resources or lead to significant environmental and social costs. Over the years, however, the concept of ‘sustainability’ has been expanded to cover not only aspects of production and waste but also the quality of the output and the externalities generated by products or services.¹

An economic analysis of the concept of ‘sustainable development’ requires, among other things, a calculation of the present and future value of development, environment preservation and social welfare. For example, the Brundtland Report of the World Commission on Environment and

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1 See, eg, the United Nations General Assembly UN Resolution 70/1, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, which includes 17 sustainable development goals, including improving nutrition (goal 2), ensuring healthy lives and promoting wellbeing (goal 3) and ensuring access to affordable, reliable, sustainable and modern energy for all (goal 7).

Development defined sustainability as ‘development that meets the needs of the *present* without compromising the ability of *future* generations to meet their own needs’.² Other authors have formulated the concept in more ethical terms, namely, as a ‘moral obligation that we are supposed to have for *future* generations’.³ From both scientific and moral perspectives, therefore, the qualitative formulations of the concept of ‘sustainable development’ share the same fundamental premise: the *future* value of the environment and of social welfare cannot be compromised by the *present* value of economic development and profitability.

This premise has not always been aligned with the main objectives and purposes that drive corporations, which is to maximise shareholder value. Although corporations have increasingly come to embrace environmental, social and governance (ESG) responsibilities, including sustainability, the anticipated reactions of competitors and customers have inherently disincentivised corporations from adopting meaningful measures that could fulfil these emerging ESG responsibilities. This is the logical result of operating in an economy where boundaries are set by law and consumers are opportunistic and driven by numerous cognitive biases (including particularly biases that lead to time inconsistencies in decision-making).

It is therefore not surprising that many companies, aware that their sustainability-related efforts can be relatively easily undermined or subject to ‘free-riding’ by their more profit-seeking competitors, acknowledge the imperative for a certain level of cooperation and coordination with their competitors. This course of action might represent the most logical choice if the overarching aim is to successfully introduce a sustainable product on the market. However, in these situations, traditional competition law enforcement may represent a material obstacle to cooperation in order to achieve sustainability objectives.⁴

As part of the European Union Green Deal, the European Commission is committed to applying and enforcing EU law, including its competition rules, in an appropriate manner that takes into account the pursuit of legitimate sustainability objectives. To this end, the European Commission has included in its draft revised Guidelines on Horizontal Agreements (the ‘Draft Guidelines’) a specific chapter on sustainability agreements that aims to clarify the assessment

2 See World Commission on Environment and Development, ‘Our common future’ (1987), 43.

3 See Robert M Solow, ‘Sustainability: An Economists’ Perspective’ (1991).

4 See, eg, Inara Scott, ‘Antitrust and Socially Responsible Collaboration: A Chilling Combination?’ (Spring 2016) 53(1) American Business Law Journal 97-144; Oregon State University, ‘Antitrust laws may hinder socially-responsible business collaboration’, 10 March 2016.

of these kinds of agreement under EU competition law.⁵ Among other things, the Draft Guidelines expressly acknowledge the possible need for agreements in the context of sustainability objectives to overcome consumers' cognitive biases or to prevent free-riding.⁶

Some national competition authorities across the EU, such as the Dutch Authority for Consumers and Markets (ACM) and Greek Hellenic Competition Commission (HCC), have also issued guidelines specifically addressing sustainability issues.⁷ These guidelines put the spotlight on the application of Articles 101(1) and (3) of the Treaty on the Functioning of the European Union (TFEU) to agreements among competitors and other market players in the supply chain that are pursuing sustainability goals.⁸ However, unlike the European Commission's Draft Guidelines, the guidance given by the Dutch ACM and the Greek HCC does not address the impact of consumers' cognitive biases on the launch of sustainable products.

This article aims to analyse a range of possible legal, economic and policy arguments that may justify cooperation among competitors in order to overcome consumer bias, ensure the viable launch of sustainable products and further the sustainability objectives sought by corporations and the EU as a whole as part of the EU's Green Agenda. This is a critical aspect of

5 See European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements – Draft', 26 April 2022, ch 9.

6 See Draft Guidelines, para 586: 'An agreement may also be necessary in cases where the parties can show that the consumers in the relevant market find it difficult, due to, for example, lack of sufficient knowledge or information about the product itself or the consequences of its use, to objectively balance the future benefits they obtain from an agreement, against the immediate harm they suffer from the same agreement and that, as a result, they overestimate the importance of the immediate effect. For example, consumers may not be able to appreciate future benefits in the form of improved quality and innovation, if the immediate effect is a price increase of the product.' See also para 584: 'For example, a sustainability agreement may be necessary to avoid free-riding on the investments required to promote a sustainable product and to educate consumers (overcoming the so-called "first mover disadvantages").'

7 See Dutch AMC 'Guidelines – Sustainability claims' www.acm.nl/sites/default/files/documents/guidelines-sustainability-claims.pdf and 'Guidelines – Sustainability agreements – Opportunities within competition law' www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf accessed 17 August 2022. See also www.epant.gr/en/enimerosi/competition-law-sustainability.html accessed 17 August 2022.

8 See Regulation 1/2003, Art 3(2): 'The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article [101(1)] of the Treaty, or which fulfil the conditions of Article [101(3)] of the Treaty or which are covered by a Regulation for the application of Article [101(3)] of the Treaty.'

the competition law analysis of such cooperative agreements, as antitrust principles are underpinned by the desire to pursue open competition in order to achieve the optimum welfare results that inure to the benefit of consumers. By the same token, the Green Agenda pursues long-term public policy goals, which also benefit consumers and all individuals as a whole. Reconciling those two positions with the information we now have regarding inherent consumer biases is an important challenge that both private industry and policy-makers must address.

Limited precedents for sustainability agreements

There are few competition law precedents at the EU level that assess the viability of sustainability-related agreements. The decisions of two cases adopted at the EU level and in the Netherlands suggest that there is anything but unanimity in the approach that should be taken to the assessment of cooperation agreements that are premised on the pursuit of sustainability goals.

The washing machines agreement ('CECED')

In one of the earliest examples of sustainability agreements assessed under EU competition law, in 2000 the European Commission approved an agreement among Europe's electronic appliances manufacturers and importers (grouped under the Conseil Européen de la Construction d'appareils Domestiques (CECED) association), covering 95 per cent of all sales, to cease the sale and import into the EU of the least energy-efficient washing machines.⁹ The purpose of the agreement was to reduce the energy consumption of domestic washing machines and reduce polluting emissions from power generation. In addition, CECED members undertook to achieve a common target of efficiency and to promote technology and awareness in the use of environmentally friendly machines. The CECED would, in turn, monitor the implementation of the agreement among its members by issuing annual reports.

Of the measures agreed within the CECED, it was only the discontinuation of production and import of certain categories of washing machines that was found to fall within the prohibition on anti-competitive agreements

9 See Case IV.F.1/36.718 – *CECED*. See also European Commission, 'Commission approves an agreement to improve energy efficiency of washing machines', *Competition Policy Newsletter*, 2000, Number 1 February.

contained in Article 101(1) of the TFEU.¹⁰ Notably, the European Commission did not take issue with the setting of sector-wide efficiency targets nor the obligation imposed on members to comply with minimum efficiency standards. The possibility that certain manufacturers of washing machines could be placed at a competitive disadvantage for their production of below-standard (but nevertheless legal) washing machines was not addressed by the European Commission in its Decision.

With regard to the obligation to stop manufacturing and importing less energy-efficient washing machines, the European Commission took into account a number of factors to assess the applicability of Article 101(3) of the TFEU. First, energy efficiency is an important purchasing criterion upon which manufacturers should focus their advertising and, therefore, an issue in relation to which competition takes place in the market. According to the European Commission, the agreement aimed to reduce the potential energy consumption of new washing machines by at least 15 to 20 per cent over a period of four years rather than eight years (the time estimated that manufacturers would achieve similar efficiency rates in the absence of an agreement).

In parallel, the European Commission concluded that the categories of washing machines targeted by the CECED agreement covered 10–11 per cent of the machines sold in the EU. However, these sales represented a considerable amount of some individual manufacturers' sales, and it was expected that these technical improvements could lead to price increases in the short term. The approximate unit-cost increase of shifting from less to more efficient washing machines was estimated to lead to price increases between approximately €6 and €60 per machine (1.2 per cent and 11.5 per cent of average selling prices in the EU), representing one to two per cent of current prices in Northern Europe and eight to 14 per cent in southern Europe and the United Kingdom.

The 'Chicken of Tomorrow' agreement

A second example of the application of EU competition rules to sustainability agreements can be found in the 'Chicken of Tomorrow' case. Back in the early 2010s, supermarkets, poultry farmers and broiler meat processors in the Netherlands entered into multiple arrangements aimed at the growth and sale of chicken under enhanced animal welfare-friendly conditions.

10 Art 101(1) of the TFEU prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between EU Member States and that have as their object or effect the prevention, restriction or distortion of competition within the EU internal market.

The main consequences of this cooperation agreement were that fewer chickens were bred, and products based on broiler meat derived from the ‘Chicken of Tomorrow’ cooperation were more expensive than regular chicken products. This drew the attention of the Dutch ACM, given that Dutch supermarkets had begun to remove regular chicken meat from their shelves.

Further to its investigation, in 2015, the ACM decided that, on balance, there were a variety of reasons why consumers did not benefit from these arrangements. First, the agreement was market-wide and foreclosed access to the shelves of lower-quality, cheaper, but legally produced chicken-based products. Second, the agreement prevented consumers’ access to cheap chicken-based products, from which they extracted more utility (in economic terms) than by consuming better-quality chicken-based products. In light of the lack of support from the ACM, the sector-wide ‘Chicken of Tomorrow’ initiative was terminated. Although the ACM supported its finding with an economic analysis based on, among others, consumer feedback,¹¹ the way in which the survey questions were framed cast some doubt on the robustness of the results of this analysis.

The measurement of benefits related to the introduction of sustainable products

In order to develop a coherent standard to assess the competition law implications of sustainability agreements, there is a need to perform a cost-benefit analysis of these types of agreements by reference to a reliable metric that can identify the benefits generated by such cooperation.

A metric that has often been considered in the past is the willingness to pay of consumers, which is then compared to the price increase that the agreement will generate. This was, for example, the metric followed by the Dutch ACM in its decision in the ‘Chicken of Tomorrow’ case. If this metric is adopted, the issue then becomes one of how to estimate accurately consumers’ willingness to pay. This estimation usually results from the econometric analysis of surveys performed with consumers.

However, even if consumers recognise the value of pursuing sustainability goals, a number of cognitive biases may have an impact on their responses to such surveys; consequently, this will have an impact on the econometric analysis of cooperation agreements. As Sustain and Thaler explain:

‘research by psychologists and economists over the past three decades has raised questions about the rationality of the judgments and decisions that

11 See Machiel Mulder, Sebastiaan Zomer and Thomas Benning, ‘Economic effects of the “Chicken of Tomorrow” – Costs and benefits to consumers of a collective agreement in the poultry sector’, 2014, CentERdata and Economic Bureau ACM.

individuals make. People do not exhibit rational expectations, fail to make forecasts that are consistent with Bayes' rule, use heuristics that lead them to make systematic blunders, exhibit preference reversals (that is, they prefer A to B and B to A) and make different choices depending on the wording of the problem.¹²

The way in which surveys are framed and conducted therefore plays a crucial role in the estimation of consumers' willingness to pay. The development of surveys that underestimate consumers' willingness to pay may ultimately lead to a negative consumer-benefit analysis in the context of Article 101(3) of the TFEU, thereby hindering the introduction of sustainable products.

For example, in the 'Chicken of Tomorrow' case, survey respondents were not informed about factors that influence the welfare of chickens, in particular the way they are bred and grown. While the ACM's cost-benefit analysis of the agreement purported to take account of environmental benefits, respondents were not informed about these benefits. Therefore, their willingness to pay for these benefits was not capable of being measured. Instead, the ACM measured the potential environment benefits using the concept of a 'shadow price'.¹³ One can legitimately wonder what the respondents' willingness to pay would have been in exchange for the environmental benefits if they had been informed and surveyed with regard to those benefits.

In this regard, the European Commission has very recently taken a positive step forward to remove such biases by acknowledging in its Draft Guidelines the need to fully inform survey respondents of the circumstances of their enquiries. It explains that 'to mitigate... biases related to hypothetical choices in surveys, the surveys need to provide useful and appropriate context. In addition, the questions posed may need to take into account societal norms, consumer knowledge and habits, or expectations about the behaviour of others'.¹⁴

In order to prepare surveys adequately so that their results are capable of supporting and defending a sustainability cooperation agreement, it is important to assess in advance what cognitive biases might influence consumers' behaviour. Of all the recognised forms of cognitive bias, two could play a crucial role in the assessment of agreements with a sustainable

12 See Richard H Thaler and Cass R Sunstein, 'Libertarian paternalism', 2003, AEA Papers and proceedings, 175–179.

13 A shadow price is the monetary value assigned to an intangible good (eg, pollution) that is not traded in a market.

14 See Draft Guidelines, para 598.

development character: (1) time inconsistency (or present bias); and (2) the impact of salience on decisions.¹⁵ We turn to each of these forms of bias below.

Present bias

‘Present bias’ (otherwise referred to as ‘hyperbolic discounting’) refers to the tendency of people to give stronger weight to cash inflows and outflows that are closer to the present time when considering trade-offs between two future moments.¹⁶ The concept is often used more generally to describe impatience or immediate gratification in decision-making. For example, a present-biased person might prefer to receive \$10 today over receiving \$15 tomorrow, but would not mind waiting an extra day if the choice were to receive the same amounts one year from today versus one year and one day from today.

This kind of bias occurs because waiting makes the satisfaction appear to be worth less, even if future satisfaction would be objectively more significant. In terms of mental accounting, this leads to a higher discounting rate for cashflows occurring in the near future relative to cashflows occurring in a more distant future.

Hyperbolic discounting constitutes a highly relevant cognitive bias that should be taken into account with regard to the assessment of sustainability cooperation agreements. For example, in the ‘Chicken of Tomorrow’ case, respondents to the ACM’s survey were not provided with an expanded horizon in which to assess their welfare. On the contrary, they ‘were instructed to imagine that they were doing the daily shopping and to keep their own budget in mind’ and were asked ‘the maximum price [they are] willing to pay for the “chicken of tomorrow” (Euros per 500g)’.¹⁷

The framing of the ACM’s question, by asking consumers to take into account present spend behaviour in connection with the potential evolution of future prices, is thus not immune to criticism. This is because the question blended present spending behaviour and budget with future price increases deriving from the ‘Chicken of Tomorrow’ initiative, without factoring in its benefits.

One can speculate what the survey responses would have been if respondents had been asked for the maximum price that they would be

15 The issue of time inconsistency of consumers’ decision is implicitly acknowledged by the European Commission, which states in the Draft Guidelines, para 586, that ‘consumers may not be able to appreciate future benefits in the form of improved quality and innovation if the immediate effect is a price increase of the product.’

16 See Ted O’Donoghue and Matthew Rabin, ‘Doing it now or later’ (1999) 89 *American Economic Review* 103–124.

17 See n 11 above.

willing to pay in one year's time. It is possible that, by framing the question in these terms, consumers would have at least been in a better position to factor into their response other factors that would have overcome or compensated for their present bias. For example, in their responses, consumers could have considered the health and environmental benefits of eating higher-quality broiler meat in one year, potentially leading to a higher willingness to pay.

Even respondents exhibiting a present bias would have shown a higher willingness to pay for high-quality chicken in one year's time compared to their willingness to pay today, and the result of the cost-benefit analysis of the ACM could have been different. This suggests that, when companies and competition authorities assess the effects of an agreement that includes a sustainable development dimension, consumer surveys need to be designed carefully. In particular, these surveys should measure consumers' costs and benefits in a manner that allows them to control their present bias over time.

Sensitivity to salient product attributes

Another form of bias that arguably also drives consumers to adopt and retain purchasing practices adverse to sustainable products, despite being prejudicial to their long-term interests, is the sensitivity to so-called salient product attributes (price or quality).

Broadly speaking, individuals are exposed to salience when their attention is differentially directed to one portion of the environment rather than to others, and the information contained in that portion receives disproportionate weighting when compared to subsequent judgments.¹⁸ It is important to acknowledge that the exercise of consumer choice usually depends on the particular environment in which that choice is made. The same problem may lead to different decisions depending on the environment in which the decision is made, including the manner in which products and prices are presented, and which product or service attributes are more salient.¹⁹

18 See Shelley E Taylor and Suzanne Thompson, 'Stalking the elusive vividness effect' (1982) 89 *Psychological Review* 155–181.

19 See Pedro Bordalo, Nicola Gennaioli and Andrei Shleifer, 'Salience and consumer choice' (2013) 121 *Journal of Political Economy* 803–843. A widely taught example is the following: 'Imagine yourself in a wine store, choosing a red wine. You are considering a French syrah from the Rhone Valley, selling for \$20 a bottle, and an Australian shiraz, made from the same grape, selling for \$10. You know and like French syrah better; you think it is perhaps 50 percent better. Yet it sells for twice as much. After some thought, you decide the Australian shiraz is a better bargain and buy a bottle. A few weeks later, you are at a restaurant, and you see the same two wines on the wine list. Yet both of them are marked up by \$40, with the French syrah selling for \$60 a bottle and the Australian shiraz for \$50. You again think the French wine is 50 percent better, but now it is only 20 percent more expensive. At the restaurant, it is a better deal. You splurge and order the French wine.'

In the recent past, natural experiments have been run to study the effect of price salience on whether a product is purchased and, conditional on purchase, the quality of the product being purchased. For example, some scholars have analysed a common pricing strategy used by online vendors (ie, 'drip pricing') where mandatory fees are disclosed at a later stage in the consumer's purchasing process than the base price of a good.²⁰ This practice may be considered to be analogous to the sale and purchase of sustainable products, as it is also based on the change in behaviour over the time in which a rational consumer is offered different prices for objective, qualitative, elements of a purchase.

As part of the aforementioned experiment, consumers visited the StubHub website – a platform for secondary market ticket sales – in order to purchase tickets for events. Final prices of tickets on StubHub were made up of two components: a list price set by sellers and fees set by StubHub. The analysts took due account of two salience conditions under which consumers make purchase decisions in such a situation: the first is the 'upfront fee' condition, where the final purchase price, including all fees, is shown to consumers at the outset when they search for available tickets ('upfront'). The second is the 'back-end fee' condition, where consumers observe only list prices set by sellers when searching for tickets, with the fees imposed by StubHub being revealed only after the consumer proceeds to the checkout stage with a particular ticket.

Visitors to the United States site of StubHub were provided with two ticket selection and purchasing processes on StubHub: either the 'upfront fee' group or the 'back-end fee' group. Consumers assigned to the pre-experimental 'upfront fee' group were shown conspicuous onsite announcements confirming that the prices they saw up-front included all charges and fees. On the other hand, users in the 'back-end fee' group were shown only the base price when they perused available listings. Once a user in the 'back-end fee' group selected a ticket, they were taken to a ticket details page, where they could log in to purchase the ticket and then review the purchase. It is at this point in time that the 'back-end fee' group was shown the total price (ticket cost plus fees and shipping charges). Users could then check-out or abandon the purchase.

Under the assumption that economic agents are rational and sophisticated in their ability to discern a product's true price (implying that purchase decisions should take full account of any fees, taxes or add-on features), the two groups would have paid the same price for the ticket.

If economic agents are sensitive to salient attributes, the prediction would be that if price components are made more salient – that is, fees are listed

20 See Tom Blake, Sarah Moshary, Kane Sweeney and Steve Tadelis, 'Price Salience and Product Choice' (2020) 40 *Marketing Science* 619–636.

clearly up-front – consumers are not only less likely to purchase any goods but, conditional on purchasing, they are likely to purchase lower-quality goods. The reason for this is that the fee they would pay increases the price without increasing the quality of the product, which results in fee salience reducing the number of purchases.

The StubHub analysis showed that consumers in the ‘back-end fee’ group, where fees were obfuscated, were willing to spend on average almost 21 per cent more than those assigned to the ‘upfront fee’ group, and price obfuscation increased the transaction rate over the full course of the experiment by 14.1 per cent, consistent with theoretical predictions that making the full purchase price salient to consumers reduces both the quality and quantity of goods purchased. The analysis also shows that the effect of salience on quality accounts for at least 28 per cent of the overall revenue decline, and that the effects persist beyond the first purchase and have an impact even on experienced users.

These conclusions are likely to be highly relevant to the analysis of pricing of sustainable products. They point to the idea that consumers’ willingness to pay for sustainable products could increase if consumers become acquainted with: (1) the benefits relating to the improvement in quality, so that it is quality rather than price that becomes the salient feature of the product; and (2) the incremental production cost that is necessary to switch from non-sustainable products to sustainable products.

However, this process may also necessitate an increase in marketing costs, and may not guarantee that even a minimum number of consumers will adopt new sustainable products. In this context, as is explained in ‘Restrictions are necessary’ below, coordination among competitors to introduce minimum amounts of a new sustainable product might be the most effective means of ensuring consumers’ adoption of sustainable products.

Overcoming consumer bias in compliance with Article 101(3) of the TFEU

In light of the above findings, we need to explore how cooperation among competitors that has the object or effect of introducing a significant number of sustainable products at increased prices compared to non-sustainable alternatives may be necessary in order to overcome the biases set out above and introduce sustainable products successfully. This needs to be accomplished against the backdrop of the four conditions set forth in Article 101(3) of the TFEU²¹ that must be satisfied if such cooperation agreements

21 Art 101(3) of the TFEU declares inapplicable the prohibition contained in Art 101(1) to agreements, concerted practices or decisions of associations of undertakings that contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and that do not: (1) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and (2) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

are to benefit from the exception to antitrust liability that is established under Article 101(1) of the TFEU.

Efficiency gains

According to the first condition of Article 101(3) of the TFEU, a restrictive agreement can only escape the Article 101(1) prohibition if it is shown to contribute to improving the production or distribution of goods or to promoting technical or economic progress in order to benefit from the individual exemption. As the respective *CECED* and ‘Chicken of Tomorrow’ cases demonstrate, competitors active in a sector may enter into an agreement, either on a larger or more limited scale, in order to improve the production and supply of a particular product (eg, the efficiency of washing machines or the quality of broiler meat, as the case may be). However, different competition authorities disagreed on whether those efficiencies outweighed competitive detriments.

In its Draft Guidelines issued earlier this year, the European Commission finally identified a number of sustainability-related objectives in the 2030 United Nations Agenda for Sustainable Development, to which the EU is committed to achieving. These objectives provide a sound basis upon which to identify and measure efficiencies. They range from addressing the climate crisis (eg, through the reduction of greenhouse gas emissions), limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, and ensuring animal welfare.²² In practice, these objectives have translated into more specific sustainability goals that may be targeted by companies entering into cooperation agreements. For example, competitors may agree to sell products using only cleaner production or distribution technologies, to utilise improved conditions of production and distribution, to adopt more resilient infrastructure or supply chains, and to apply better quality manufacturing processes. Cooperation agreements can also aim at avoiding supply chain disruptions, reducing the time it takes to bring sustainable products to market and improving consumer choice.²³ Because these objectives have been agreed at the global level, they provide an unambiguous source to support an efficiency defence.

²² See Draft Guidelines, para 543.

²³ *Ibid*, para 578.

Consumers to receive a fair share

Under the second condition of Article 101(3) of the TFEU, consumers must be able to receive a fair share of the efficiencies generated by the otherwise restrictive agreement.

According to the European Commission's separate Guidelines on the application of Article 101(3) of the TFEU, the concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 101(1) of the TFEU. The net effect of the agreement must at least be neutral from the viewpoint of those consumers directly or likely to be affected by the agreement. If consumers are worse off following the agreement, the second condition of Article 101(3) is not fulfilled.²⁴

In applying this condition, it is not required that consumers receive a fair share of each and every efficiency gain identified. It is sufficient that a sufficiently large share of the benefits are passed on to compensate for the potentially restrictive effects of the agreement.²⁵ For example, if an agreement is likely to lead to higher prices, consumers can be fully compensated through increased quality or other benefits.²⁶ There are two types of agreements that should be distinguished when conducting this exercise. First, there are certain agreements that may lead to the production and offering of sustainable products that coexist with non-sustainable products. Second, there are other types of agreements that may aim to set a benchmark or standard for the offering of sustainable products that are of a higher quality or that include different attributes when compared to those products currently available to consumers:²⁷

- Agreements falling within the first category should be considered to be generally pro-competitive, as the offering of products available for consumers increases and the sustainable products can exert a price pressure on existing low-quality products.
- Agreements falling within the second category may lead to the removal of non-sustainable (low-quality and/or low-price) products from the market, which calls for a cost-benefit assessment. As the Dutch ACM explains in its guidelines on sustainability, 'undertakings are to conduct a self-assessment first in order to find out whether or not their agreement restricts competition'.²⁸

24 See European Commission, 'Guidelines on the application of Article [101(3)] of the Treaty', OJ C 101, 27 April 2004 ('Guidelines on the Application of Article 101(3)'), pp 97–118, para 85.

25 See in this respect Case 75/84 *Metro SB-Großmärkte GmbH v European Commission (Metro I)*, EU:C:1986:399, para 48.

26 See Guidelines on the Application of Article 101(3), para 86.

27 These agreements are labelled 'sustainability standardization agreements' in the draft of the revised horizontal guidelines of the European Commission.

28 See ACM Guidelines on Sustainability Agreements, para 19.

An often-critical factor for the estimation of consumer benefits is the set of consumers that are taken into account for the purpose of quantifying the benefits. In this regard, the Dutch ACM's guidelines on sustainability distinguish between 'environmental-damage agreements' and other types of agreements. For the earlier type of agreement, the Dutch approach will be to consider benefits for society on the whole as an integral part of the cost-benefit analysis. However, for the latter type of agreements, the ACM will only consider it appropriate to assess the impact of the agreement on consumers rather than society at large.

The approach of the European Commission appears to be slightly different to that of the ACM, as it presupposes a significant overlap between the consumers/users of the sustainable product (who will be paying a higher price as a result of the sustainability agreement) and the actual beneficiaries of the agreement. Only under these circumstances will the European Commission take into account any benefits of the agreement on non-users.²⁹

From a consumer behaviour perspective, an estimation of consumers' receipt of a fair share of efficiency gains requires that a cost-benefit analysis and an assessment of consumers' willingness to pay be conducted. As explained in 'Present bias' above, consumers may be more prone to consider the benefits of a sustainable product if they are asked to put a price tag on it over a timeframe where they may be expected to appreciate the attributes and positive effects of the product. Accordingly, the precise framing of the questions when conducting consumer surveys to support a sustainability agreement may be critical in being able to obtain positive (and accurate) consumer feedback.

Furthermore, it may be appropriate to consider the likely evolution of the market after the introduction of sustainable products, in order to estimate the impact of the increased product offering on quality and prices post-agreement. As explained in 'No elimination of competition' below, even if a number of competitors agree to progressively replace approximately

29 See Draft Guidelines, paras 602 and 603. As an instance of the absence of overlap, the Draft Guidelines provide the following example: 'consumers may buy clothing made of sustainable cotton that reduces chemicals and water use on the land where it is cultivated. Such environmental benefits could in principle be taken into account as collective benefits. However, there is likely no substantial overlap between the consumers of the clothing and the beneficiaries of these environmental benefits that 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. To the extent that consumers are willing to pay more if their clothing is made of sustainably grown cotton, the local environmental benefits can be taken into account as individual non-value benefits for the consumers of the clothing' (see para 604).

60 per cent of the total market offering with sustainable products, it is likely that the market would evolve towards a form of segmentation where price-sensitive and sustainability-agnostic consumers would still be able to purchase non-sustainable, cheap products. In this way, sustainability-minded consumers could receive a fair share of the efficiencies aimed at by a cooperation agreement, while price-sensitive and sustainability-agnostic consumers that do not receive such a fair share would also not bear the associated costs.

Restrictions are necessary

The third condition of Article 101(3) of the TFEU requires restrictive agreements to be indispensable to attain the efficiencies created by the agreement in question. This condition includes a twofold test, insofar as both the restrictive agreement and the restriction of competition that follows from such an agreement must be *reasonably necessary* in order to achieve its identified efficiencies.

According to the European Commission, the decisive factor when applying this condition is whether or not the restrictive agreement and the restrictions of competition that flow from it make it possible to perform the activity in question more efficiently than would likely have been the case in the absence of the agreement or the restriction concerned. The question is not whether in the absence of the restriction the agreement would not have been concluded, but whether more efficiencies are produced with the agreement or restriction in place than in the absence of the agreement or restriction.³⁰

As explained above, however, the existence of a series of consumer biases prevents de facto the individual launch of more expensive sustainable products, including present bias and price salience, given their impact on consumer decision-making based on perceived present and deferred welfare. Thus, even if a sustainable product proved to be better value for money than a non-sustainable product, a unilateral strategy by a single company to introduce a sustainable, yet more expensive, product would run a serious risk of being undermined by these consumer biases. Present bias and salience effects may distort consumers' evaluations of the price-to-quality ratio of a sustainable product relative to that of non or less-sustainable substitutes.

In order to overcome this consumer aversion, and to promote the long-term benefits of consuming sustainable products, companies could develop marketing strategies focusing on the advertising of quality rather than price.

30 See Guidelines on the Application of Article 101(3), para 74.

However, this type of marketing exercise can be expensive for smaller companies and does not guarantee that all targeted consumers will adopt the sustainable product. Furthermore, unlike other industrial products (eg, electric vehicles), sustainable consumable products (eg, predominantly food-based) do not carry operational costs or repair costs whose savings can be readily quantified. Sustainable consumable products also do not have characteristics that can appeal to a significant number of early adopters (eg, sporty performance).³¹

Faced with this situation, one of the few ways in which companies in a given sector may be able to introduce their sustainable products is by jointly committing themselves to producing and selling in the market a significant share of their production, so that a shift in the average quality of the product supply shifts attention from price to quality.³² By way of example, one can consider a market where there are five suppliers, each of which has a 20 per cent market share. Initially, they all sell the same non-sustainable product at a price of €10. In response to this market reality, we can envisage two relevant scenarios:

- *Scenario one:* One producer decides unilaterally to replace 100 per cent of its supply of a standard product (20 per cent of the market) with a sustainable expensive product sold at a price of €15.
- *Scenario two:* Four producers coordinate to replace 80 per cent of their supply of the standard product (64 per cent of the market) with sustainable but expensive products sold at a price of approximately €15. This agreement is likely to be considered as possibly anti-competitive, as it results in binding commitments for individual companies.

Under scenario one, the average market price would be equal to €11,³³ and the price difference between the sustainable product and the average market price would be €4. The sustainable products are not highly visible (20 per cent of the supply), and their price will appear high to consumers who are used to prices equal to €10 (80 per cent of the product being sold at this price) or €11 (the average price of products on the shelf). It is therefore likely that consumers, on average sensitive to products' most salient attributes, will continue to buy low-priced, non-sustainable products.

Under scenario two, however, the average price in the market is €13.2,³⁴ and the price difference between the sustainable product and the average

31 See John D Graham and Eva Brungard, 'Consumer Adoption of Plug-In Electric Vehicles in Selected Countries' (2021).

32 See, eg, Pedro Bordalo, Nicola Gennaioli and Andrei Shleifer, 'Competition for attention' (2016) 83 *Review of Economic Studies* 481–513.

33 Eighty per cent of the products are sold at a price of €10 and 20 per cent are sold at a price of €15 (80 per cent × €10) + (20 per cent × €15) = €11.

34 Thirty-six per cent of the products are sold at a price of €10 and 64 per cent are sold at a price of €15 (36 per cent × €10) + (64 per cent × €15) = €13.2.

market price is €1.8. Moreover, 64 per cent of the products that consumers observe are high-quality/high-price products, and the average price in the market (€13.2) is only €1.8 lower than that of high-quality products. We can therefore expect that the high visibility of the sustainable product and its relative price will set in motion a dynamic that will lead to the (faster) adoption of the sustainable product under scenario two.

In conclusion, the successful introduction of sustainable (expensive) products may require cooperation among competitors to commit to the launch and the production of minimum amounts of a sustainable product for a minimum specified amount of time. The effects of price salience will be more limited when a price increase (for an improved, sustainable product) is rolled out by suppliers representing a larger share of the shelf space (eg, 60 per cent rather than just 20 per cent). In other words, a price increase resulting from a commitment to produce and sell sustainable products will be more likely to be acceptable to consumers if it is closer to what is perceived to be a 'normal price'. This means that cooperation is a suitable basis upon which to pursue a policy objective of increasing the consumption of sustainable products.

No elimination of competition

According to the fourth condition of Article 101(3) of the TFEU, an agreement must not afford the undertakings concerned the possibility of *eliminating competition* in respect of a substantial part of the products concerned. This condition reflects the fact that the European Commission considers rivalry and the competitive process to have priority over potentially pro-competitive efficiency gains that might result from restrictive agreements. This is because rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the shape of innovation.³⁵

The capacity of actual competitors to compete and their incentive to do so needs to be assessed by reference to factors beyond the mere assessment of market shares. If, for example, competitors face capacity constraints or have relatively higher costs of production, their competitive response will necessarily be more limited. The assessment of the impact of a cooperation agreement on competition is also relevant to examining its influence on the various parameters of competition. The last condition for exception under Article 101(3) is not fulfilled if the agreement eliminates competition in one of its most important expressions, such as price competition, but a restriction of competition in respect of innovation and the development of new products

35 See Guidelines on the Application of Article 101(3), para 105.

also provides a valuable reference point for determining whether competition is being eliminated by a particular form of cooperation agreement.³⁶

An important part of an assessment of whether a cooperation agreement restricts competition also includes the market coverage of the agreement. In this regard, the Dutch ACM's Guidelines on sustainability establish a combined market share threshold at 30 per cent for the parties to the agreement. Below this threshold, the ACM will not undertake a quantitative assessment of the agreement and will presume that the cooperation agreement is compatible with Article 101 of the TFEU.³⁷ While establishing such a quantitative threshold adds to legal certainty, there will be many instances where one could conclude that a cooperation agreement among competitors covering an even larger share of the market would also be unlikely to eliminate competition. If one considers, for example, scenario two set out in 'Restrictions are necessary' above (where four producers replace 80 per cent of their non-sustainable production capacity with sustainable products), at least four competitors would co-exist and operate two competing business lines. These competitors would likely be competing on prices for each business line, possibly to increase their market share in each market segment. By the same token, there would be an alternative independent competitor only operating one competing business line (non-sustainable products). Moreover, this last competitor, that is not a party to the sustainability agreement, could also have an incentive to launch sustainable products, increasing competition in that segment. In the short term, it is likely that both sustainable and non-sustainable products would coexist. As market evolution leads to segmentation between these two types of products, the preservation of competition on both segments would lead to a differentiation of the attributes offered by these products and valued by consumers. Competition among non-sustainable product suppliers would in all likelihood focus on prices rather than product quality, while competition among sustainable products will in all likelihood be focused on cost-efficiency and product quality (sustainability).

Conclusions

It is undeniable that the introduction of certain sustainability measures has positive outcomes for consumers and society in general. Notwithstanding this, and despite the support by the international community and the EU of sustainability objectives, the empirical analysis of consumers' cognitive biases

³⁶ See Guidelines on the Application of Article 101(3), para 110.

³⁷ See ACM Guidelines on Sustainability Agreements, para 47.

indicates clearly that they may nevertheless hinder the launch and adoption of more sustainable business practices and, thus, more sustainable products.

The European Commission's position in its recently released Draft Guidelines regarding consumer preferences and the impact of in-built biases confirms that the ability to take due account of these biases constitutes a relevant piece of the economic analysis that needs to be performed in any antitrust investigation of cooperation agreements. The relevance of the impact of cognitive biases such as present bias or consumers' sensitivity to salient product attributes appears to be even more significant in the case of cooperative agreements relating to the production and promotion of sustainable products. The European Commission's clarifications in this regard are therefore very important and timely if companies are to play their part in satisfying the EU's Green Agenda goals without fear of infringing EU antitrust rules.

In this article, we have highlighted that these two biases, which are well documented in academic literature, may have a significant impact on consumers' responses to surveys solicited or relied upon by competition authorities and the estimation of their willingness to pay for sustainable products. In order to offset the existence of present bias, surveys assessing the impact of a sustainability cooperation agreement should be designed to control the time consistency of the responses. In this way, companies and competition authorities could ensure that medium-term and long-term benefits are correctly compared to present costs and/or cost incurred in the short run.

As regards the sensitivity to salient attributes, consumers should be informed about: (1) all the benefits of sustainable products; and (2) the incremental cost of developing such products relative to standard products. This information can be critical in either shifting attention from price to the quality of the sustainable products and/or creating a price reference that could influence consumers' willingness to pay. However, these efforts can be expensive and might not generate the results expected by companies if sustainable products are introduced independently. In these cases, coordination among competitors to commit to a minimum level of production capacity to sustainable products might be necessary to acclimatise consumers accustomed to the new product offering, and to overcome their bias against price salience and low-price expectations.

As we have seen, understanding the way in which certain biases influence consumer behaviour plays a significant role in addressing the four key legal criteria of Article 101(3) of the TFEU, discussed above, that need to be satisfied if sustainability cooperation agreements are to be deemed compatible with EU competition rules.

In conclusion, both private companies and competition authorities have the potential economic tools with which to structure and justify cooperation agreements pursuing sustainability goals, especially when harnessing the learning that has developed on consumer behaviour. In light of the clear political objective at the EU level that aims to facilitate and even foster this type of cooperation, industrial and institutional stakeholders should not shy away from relying on this relatively new body of economic thought in order to recognise the merits of sustainability-related projects and to facilitate the attainment of their goals.