

GREENER COMPETITION LAW VIA NEW GUIDELINES ON HORIZONTAL AGREEMENTS (?) / Mária T. Patakyová

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Abstract: *The protection of environment is mentioned already in the preamble of the Treaty on European Union, in the Maastricht Treaty version. The omnipresent climate change reminds us of the importance of this protection. Is it possible to take into account the protection of environment also during the application of competition law? If so, to what extent is this desirable? In order to answer these questions, the article focuses on horizontal agreements, namely the new Guidelines on Horizontal Agreements. After presenting the view on green horizontal agreements on the EU level, the article focuses on application of competition law in the Slovak Republic. The main finding of the article is that, first, the protection of environment may be taken into account when applying competition law. This is very desirable from the perspective of protection of environment. However, the devil is in the detail and it may prove to be a particularly difficult job for a competition authority such as the Antimonopoly Office of the Slovak Republic to enforce Article 101 TFEU with respect to a green agreement. At the same time, it is a tricky job for undertakings to stay in line with Article 101 TFEU when they conclude a horizontal green agreement.*

Key words: *Green Competition Law; Protection of Environment by Object Restrictions; Willingness-to-pay; Act No. 187/2021 Coll. on Protection of Competition; Guidelines on Horizontal Co-operation Agreements*

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1. INTRODUCTION

Protection of environment is inevitable. This is also recognised by the European Green Deal.¹ Certain fields of law, such as public procurement law, have already worked with green goals as their secondary goals frequently, although on a rather voluntary basis (Blažo, Kováčiková and Máčaj, 2021, p. 74). In any case, protection of environment should be a genuine protection, not a greenwashing in form of a pure marketing without a real impact.

If there is a lack of real and efficient effort from the public sphere, the private sphere should be able to step in. For instance, if animal welfare cannot be secured by a

¹ Communication from the Commission. The European Green Deal. Brussels, 11.12.2019 COM (2019) 640 final.

public regulation, private sector should be allowed to secure the animal welfare. Or should it not?

Apparently, if there is a wish for common movement in a sector, it will arguably take a form of a horizontal agreement between undertakings (in the form of an agreement, a concerted practice or a decision by association of undertakings). One example is the CEDEC decision² from the end of 1990s, where the members of an association (CEDEC) “agree[d] no longer to manufacture or to import washing machines that [did] not meet the criteria that they [had] agreed upon. The agreement [set] a standard of energy efficiency, with which all the washing machines that the parties manufacture[d] or import[ed] [had] to comply. By this obligation, the parties [were] no longer free to produce or to import machines under categories D to G, as they [had been] free to do, and actually [had done], before the agreement”.³ Due to the fact that the variety of the products was being limited and the prices went up due to the agreement, it was assessed as a restriction by object.⁴ However, the Commission took a view that the cumulative conditions of what is today Article 101(3) TFEU were fulfilled.

More recently, there is a well-known Dutch case, Chicken of tomorrow, which demonstrates how tricky it would be for such a private movement to be in line with Article 101 TFEU. This case has already been analysed by many scholars (Stefano, 2020; Campo Comba, 2022; Cambien, 2022).

In general, the core stone of problem between protection of competition and protection of environment is that the environmental protection is in tension with economic aspects (Blažo, Kováčiková and Mokrá, 2019, p. 262). Greener solutions in production or distribution may result in more expensive products, therefore being at odds with consumer surplus, at least pricewise.

The EU is entrusted with competition policy (exclusive competence – Article 3 (1) b) TFEU) as well as environmental policy (shared competence – Article 4 (2) e) TFEU). Article 7 TFEU prescribes that the EU “shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.” Therefore, competition policy shall be consistent with environmental policy and not go against it.

There are many voices calling for greener understanding of competition law (Campo Comba, 2022, p. 2; Monti, 2020, p. 131). A profound analysis of green possibility for competition law by Derdak suggests that “sustainability cannot be considered an aim of current competition law [but] there is nothing inherent in antitrust legislation that would prevent making sustainability its goal” (Derdak, 2021, p. 63). Although the consumer welfare is considered to be a main objective of EU competition law (Campo Comba, 2022, p. 2; Cambien, 2022 p. 2); is not in itself an obstacle for greener interpretation of competition rules. Consumer welfare, understood in its broader sense, taking into account all the parameters of competition he/she/it can benefit from (e.g., price, output, product quality, product variety or innovation), may encompasses certain green considerations. Similar finding was reached by Campo Comba (2022, p. 7).

Despite the fact that analysing the goals of competition law would be an interesting topic for a paper, we will not look into it further. The centrepiece of this article lies elsewhere.

² 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 IV.F.1/36.718. CECED).

³ *Ibid.*, p. 30.

⁴ *Ibid.*, p. 37.

In this article, we are asking the following questions: is it possible to take into account the protection of environment also during the application of competition law? If so, to what extent is this desirable? Naturally, an exhaustive answer to these questions would surpass the limits of an article. Therefore, we will try to answer them with respect to a rather practical topic - a green view within the assessment of horizontal agreements. Thus, the article will dive into the New Horizontal Guidelines⁵ (the "**NHG**").

The article is organised as follows. First, it will deal with the presented questions from the perspective of EU competition law. It will present the Chapter 9 of the NHG and analyse several aspects of it. Second, the attention is moved to the Slovak Republic, i.e., how the Antimonopoly Office of the Slovak Republic (the "**AMO**") would address the identified issues of application of Article 101 to green (sustainable) agreements. Main findings are summarised in the conclusion.

2. NEW HORIZONTAL AGREEMENTS GUIDELINES – EU LAW PERSPECTIVE

In this part, we will analyse a specific application of competition law to horizontal agreements. Naturally, agreements aiming at green goals may arise also in vertical relations, as tested by Picht, however, we will focus on the horizontal ones, mainly for the sake of comprehensiveness of this article (Picht, 2023).

The NHG are a highly current topic as they were issued just very recently. The question of sustainability agreements had been vividly discussed when the draft of the NHG circulated. Several critiques may be identified, e.g., such as problematic quantification of sustainability parameters (Picht, 2023, p. 10), many sustainability agreements not being able to fit in within the 101(3) TFEU as interpreted by the NHG (Campo Comba, 2022, p. 6), lack of clarification for certain notions and overshooting the mark in several respects (Kalben, 2022, p. 20).

With respect to green competition law, there are two important parts of the NHG we shall cover next: first, application of 101(3) TFEU to sustainability agreements (with certain considerations with respect to 101(1) TFEU); second, non-application of the ancillary restraints doctrine.

2.1 Application of Article 101(3) TFEU to Sustainability Agreements

As put by Andriychuk, Article 101(3) TFEU is not only about consumer welfare, but about balancing competition with other legitimate societal values (2021, p. 29). The adopted version of the NHG understands sustainability in relation to terms: economic, environmental and social.⁶ Therefore, it covers wider spectrum of objectives than purely green ones. Judging from this definition of sustainability agreements alone, one would believe that, since the adoption of the NHG, many horizontal agreements are compatible with EU competition law. However, the situation is not so straightforward. The NHG, para. 519 reminds that negative externalities of competition shall be primarily addressed by public policies or sector-specific regulation.⁷ Cooperation between undertaking is only a secondary way of elimination of negative externalities.

In order to allow (certain) types of sustainability agreements, the NHG promotes the use of Article 101(3) TFEU. Therefore, even agreements promoting sustainability

⁵ 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/C 259/01).

⁶ NHG, para. 517.

⁷ This is further confirmed by NHG, para. 564 with respect to indispensability of a sustainability agreement.

goals are considered to be against 101(1) TFEU (provided, of course, that other conditions of application of the provision of Article 101(1) TFEU are met). Naturally, there are sustainability agreements that will not have as their object or effect restriction of competition. This is the case when parameters of competition, such as price, quality, quantity, choice or innovation are not affected. For instance, sector-wide awareness campaigns are considered to be outside of Article 101(1) TFEU.⁸

With respect to Article 101(1) TFEU, it is important to note that for the determination of whether the agreement restricts competition by object, sustainability objective is taken into account.⁹ Therefore, genuine (i.e., not fake or pretended) sustainability agreements will mostly escape their designation as by object agreements. This is a crucial point, since, firstly, the agreement may benefit from the De Minimis Notice.¹⁰ If an agreement restricts competition by object, the De Minimis Notice is not applicable.¹¹ Secondly, enforcement of Article 101 TFEU towards agreements restricting competition by effect is more difficult for competition authorities.

If an agreement is anticompetitive pursuant to Article 101(1) TFEU, there is a possibility to pass through the individual exemption provided for by Article 101(3) TFEU. However, there are four cumulative conditions which apply to all agreements, sustainability agreements included. The NHG provides details on how this should work in practice.

First, efficiency gains. The agreement is required by the Article 101(3) to contribute *“to improving the production or distribution of goods or to promoting technical or economic progress”*. Para. 558 of the NHG gives examples to efficiencies produced by sustainability agreements: *“use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, better quality products”*, and reduction of supply chain disruptions, shortening the time it takes to bring sustainable products to the market, facilitation the comparison of products.

Although the acceptable efficiency gains look broad, they are not without limits. First, they must be objective, concrete and verifiable. That is easy to accept. However, the very wording of Article 101(3) as primary law of the EU can be stretched only to certain extent. For instance, it is doubtful whether improving the animal welfare, without direct link to improvement of the quality of the (final) product could be subsumed under efficiency gains.

Second, indispensability.¹² Article 101(3) TFEU requires the agreement to *“impose on the undertakings concerned [only such] restrictions which are [...] indispensable to the attainment of these objectives”*. Para. 562 of the NHG takes the view that *“[i]n principle, each undertaking should decide for itself how to achieve sustainability benefits, and insofar as consumers value such benefits, the market will reward good decisions and sanction bad ones”*. Consequently, sustainability agreement may be indispensable if, e.g., consumers find it difficult to objectively assess the value of greener products,¹³ it is necessary to avoid free-riding on the investments in advertising of greener products by a

⁸ NHG, paras. 527-531.

⁹ NHG, para. 534.

¹⁰ Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01) (**“De Minimis Notice”**).

¹¹ De Minimis Notice, para. 13.

¹² We follow the systematic of the NHG, not the wording of the 101(3) TFEU.

¹³ NHG, para. 563.

pioneer undertaking;¹⁴ otherwise economies of scale would not be reached, such as with respect to a sustainability label.¹⁵

In our view, to meet the indispensability criterion together with the pass-on to consumers will be a tough task for undertakings. If consumers are enlightened enough, they will buy the more sustainable version of a product on their own. If they are not, it will be difficult to meet the pass-on to consumers criterion, as mentioned below.

Third, pass-on to consumers. Article 101(3) TFEU requires the agreement to allow “consumers a fair share of the resulting benefit”. This part of the NHG (paras. 569-591) is arguably the most interesting one. The Commission presents three types of benefits, through which an agreement can fulfil this criterion.

- Individual use value benefit. This is a traditional type of benefit that improves the product for the user, e.g., it improves its quality or decreases its prices. For instance, bio apples have better taste and are healthier than apples growing using chemicals.¹⁶
- Collective benefit. In this case, even though the product itself is not better, it is more sustainable - not only for the consumers on the relevant market, but also for a wider part of society. What is important here is that consumers *qua* beneficiaries either substantially overlap with the consumers on the relevant market, or their form part of it.¹⁷ As an example we may imagine the use of organic fertiliser which does not improve the quality of the apples, but is less polluting for soil and air. Buyers of the apples are people living in the area, therefore, they will benefit from better soil and air.¹⁸
- Individual non-use value benefit. In our view, this category is very similar to the collective benefit, however, there is a lack of the substantial overlap between the beneficiaries and consumers. For instance, if apples grow on trees using less water where these apple trees are in a different area/state than the buyers of the apples.¹⁹ What is important, this type of benefit is acceptable only if consumers are willing to pay for it. “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”.²⁰ Undertakings wishing to benefit from this type of benefit in order to subsume their agreement under 101(3) TFEU must prove the actual preferences of the consumers, their willingness-to-pay.

As we can see, the individual use value benefit and the collective benefit are not such a novelty in competition law, at least from a principal perspective. The former one improves the product and the latter improves the position of consumers of the product, although it is also beneficial for others, non-consumers of the product. Here, we may refer to the CEDEC decision mentioned above, where the Commission took into account individual economic benefits (saving on electricity bills) and collective environmental benefits, where the Commission referred to the Community objective of a rational

¹⁴ NHG, para. 566.

¹⁵ NHG, para. 567.

¹⁶ NHG, paras. 571 and 572.

¹⁷ NHG, para. 584.

¹⁸ The Commission uses the example of less polluting fuel. The buyers (drivers) are to a substantial extent the citizens and therefore they are breathing cleaner air. NHG, para. 585.

¹⁹ The Commission uses the example of clothes made from sustainable cotton using less fertilisers and water. The cotton grows in a different place than where the consumers (buyers of the clothes) are. NHG, para. 585.

²⁰ NHG, para. 578.

utilisation of natural resources, namely saving in marginal damage from (avoided) carbon dioxide emissions.²¹ However, it is not clear from the CEDEC decision whether the collective environmental benefits would be enough on their own.

The novelty might have come in the individual non-use value benefit. This, however, did not happen. The requirement of the willingness-to-pay makes it a hardly possible route for undertakings. Moreover, if we take into account the indispensability condition mentioned above, one may wonder how consumers may be willing to pay extra money for more sustainable product and at the same time the agreement between undertakings is necessary. If consumers are willing to pay, why the undertakings do not choose this more sustainable product on their own? Of course, there might be a need to solve certain first-mover-disadvantage issues.²² None the less, in our view, the application of this type of benefit is limited.

Fourth, and last, no elimination of competition. In the wording of 101(3) TFEU, this criterion requires the agreement not to "afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." Importantly, the Commission states in para. 593 of the NHG that "[t]his last condition may be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important parameter of competition". Consequently, this requirement will be possibly the least difficult to fulfil.

2.2 Non-Application of the Ancillary Restraints Doctrine

As it flows from discussion above, if undertakings wish to conclude a sustainability agreement and to fulfil the requirements of Article 101(3) TFEU, they have a tough journey ahead of them. There would be a possibility of how this journey might have been shortened to a significant extent. That is through ancillary restraints doctrine based on the case-law of *Wouters*²³ and *Mecca-Medina*²⁴.

The essence of the ancillary restraints doctrine lies in the agreement having its goal outside of competition, however, there is some ancillary restriction of competition related to the agreement. A legitimate objective (public policy) may justify non-application of Article 101 TFEU (Jones, Sufrin and Dunne, 2019, pp. 252-256). These agreements need to meet only two conditions:

- to have and objective goal. This would be relatively easy task for sustainability agreements, as their very purpose (if they are genuine sustainability agreements and not fake ones) is to protect environment, promotes sustainable solutions, etc.;
- to fulfil the proportionality test.

This is a different assessment from the two-fold assessment of Article 101 (para. 1 followed by para. 3). The ancillary restraints doctrine asks whether the main operation of an agreement, which does not restrict competition, is likely to happen if the ancillary restriction of competition caused by this main operation did not occur (Torre and Fournier, 2017, p. 127).

There are scholars advocating that application of *Wouters* route might have been useful, such as Costa-Cabral (2021, p. 7). On the other side, while analysing the case law

²¹ 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 IV.F.1/36.718. CEDEC), pp. 47-57.

²² NHG, para. 578 and the footnote no. 402.

²³ ECJ, judgement of 19 February 2002, *Wouters and Others*, case C-309/99, EU:C:2002:98.

²⁴ ECJ, judgement of 16 July 2006, *Meca-Medina and Majcen v Commission*, case C-519/04 P, EU:C:2006:492.

of the ancillary restraints doctrine, Kalben claims that the application of this doctrine to sustainability agreements is not so straightforward (2022, p. 6). Mainly, the previous cases were set into a different legal and factual background. In *Wouters*, there was a delegated legislation and in *Meca-Medina*, the case was aiming to eventual pro-competitive framework. On the other hand, it seems that Kalben accepts the ancillary doctrine if the legitimate aim that sustainability agreements were to pursue would be set by national legislator (2022, p. 7).

Anyhow, the Commission, in a very laconic way, denies the applicability of the ancillary restraints doctrine to sustainability agreements.²⁵ There is no explanation to this effect. We may only assume that it would be difficult to apply by competition authorities (not being environmental agencies).

In our view, the application of ancillary doctrine would solve many issues presented above with respect to Article 101(3) TFEU. There would be no need for fitting the agreement within narrowly constructed efficiency gains, or finding how different types of benefits serve consumers or whether they are willing to pay for them. On the other hand, the threat of pure greenwashing of agreements will be much higher. Moreover, competition authorities are hardly competent for assessing whether a sustainability goal is or is not proportional in a setting of a particular agreement. This assessment is definitely less economic and arguably more arbitrary than what the Commission presented in the NHG. Although, as we will show in the next part, there is sometimes little room for economic approach even under the NHG.

3. NEW HORIZONTAL AGREEMENTS GUIDELINES – SLOVAK PERSPECTIVE

In the Slovak Republic, the AMO is the national competition authority (“*NCA*”). It applies EU competition law, empowered by Regulation 1/2003²⁶ as well as Slovak law pursuant to APC. The wording of Section 4 para. 1 and para. 4 of the APC is basically the same as the wording of Article 101 para. 1 and para. 3. The AMO follows the Commission and EU rules when it comes to the application of competition law (Patakyová, 2020).

The Slovak competition legislation, the APC in particular, does not contain any specific provision on sustainability agreements. Slovakia is not a pioneer as its western neighbour Austria, which has a specific “green exemption” (Robertson, 2022).

When it comes to practice of the AMO, we are not aware of any specific case related to green agreements. No such case has happened in near past, at least pursuant to annual reports of the AMO.²⁷

Due to these specificities of Slovak competition law (or rather the lack of them), Slovakia, and the AMO in particular, serves as a great field for testing of how the Chapter 9 of the NHG may work in practice. In the following part, we will consider what can be problematic from the practical perspective. We will give three examples.

3.1 *On by Object Restrictions*

In the past decade, we may identify important shifts and movements in the assessment of by object restrictions. This article does not provide a suitable room for a

²⁵ NHG, para. 521 *in fine*: “[a]greements that restrict competition cannot escape the prohibition laid down in Article 101(1) simply by referring to a sustainability objective”.

²⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

²⁷ Antimonopoly Office of the Slovak Republic. Annual reports. Available at: <https://www.antimon.gov.sk/vyrocnne-spravy/?csrt=952048084485701238> (accessed on 30.10.2023).

thorough discussion on these developments. It would be also inappropriate taking into account the research questions discuss herein. Hence, suffice it to say that, there has been a tendency to see by object restrictions in a broader context (e.g., C-32/11 *Allianz Hungária*²⁸), although this analysis may be minimalistic (C-373/14 P *Toshiba*³⁰; C-469/15 P *FSL Holdings*³¹), however certain aspects typical for the assessment of by effect restrictions may be relevant (C-228/18 *Budapest Bank*³²). The last mentioned case was already referred to by e.g., C-306/20 *Visma Enterprise*³³.

In any case, we agree with Bergqvist that currently, it is important to distinguish between obvious and less obvious by object agreements, where the latter requires more profound analysis (Bergqvist, 2020, p. 14). Subsequently, competition authorities investigating a possible by object infringement of EU competition law may be in doubts as to what extent the analysis is necessary.

It is in this state of affairs that the NHG is introduced. Naturally, the aim of a possible by object agreement is taken into account in general. For instance, in a very recent case C-331/21 *EDP – Energias de Portugal and Others*³⁴, the CJEU held in para. 103 that *“where the parties to an agreement rely on its procompetitive effects, those effects must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a ‘restriction by object’, in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition and, consequently, of whether it should be characterised as a ‘restriction by object’”*.

Combining the current tendency of the assessment of by object agreements with para. 534 of the NHG³⁵ leads to the conclusion that it will be difficult for competition authorities such as the AMO to prove that a green agreement is a by object agreement. If so, it will be probably only the “less obvious by object” category. Therefore, the AMO, being quite a small competition authority with a strong need to prioritise,³⁶ will probably not be keen on enforcing agreements which are green. This may be good news for the genuine green agreements. However, it may easily lead to greenwashing of anticompetitive agreements.³⁷

²⁸ CJEU, judgement of 14 March 2013, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, case C-32/11, ECLI:EU:C:2013:160.

²⁹ This tendency has been criticized Nagy (2013) and Patakyova (2015).

³⁰ CJEU, judgement of 20 January 2016, *Toshiba Corporation v European Commission*, case C-373/14, ECLI:EU:C:2016:26.

³¹ CJEU, judgement of 27 April 2017, *FSL Holdings and Others v European Commission*, case C-469/15 P, ECLI:EU:C:2017:308.

³² CJEU, judgement of 2 April 2020, *Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others*, case C-228/18, ECLI:EU:C:2020:265.

³³ CJEU, judgement of 18 November 2021, *SIA „Visma Enterprise” v Konkurences padome*, case C-306/20, ECLI:EU:C:2021:935.

³⁴ CJEU, judgement of 26 October 2023, *EDP – Energias de Portugal SA, EDP Comercial – Comercialização de Energia SA, MC retail SGPS SA, formerly Sonae MC SGPS SA, Modelo Continente Hipermercados SA v Autoridade da Concorrência*, case C-331/21, ECLI:EU:C:2023:812.

³⁵ *“Where the parties to an agreement substantiate that the main object of an agreement is the pursuit of a sustainability objective, and where this casts reasonable doubt on whether the agreement reveals by its very nature, having regard to the content of its provisions, its objectives, and the economic and legal context, a sufficient degree of harm to competition to be considered a by object restriction (371), the agreement’s effects on competition will have to be assessed. 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.”*

³⁶ It shall be noted that although the AMO as an NCA shall have autonomy in setting its priorities, this is not limitless. *“Cartels can be hardly excluded from ‘top priorities’ of a NCA”* (Blažo, 2020, p. 125).

³⁷ Although, certain authors do not see a reason to be afraid of greenwashing (Costa-Cabral, 2021).

3.2 On Efficiency Gains

We have already pointed out that the application of ancillary restraints doctrine on sustainability agreements would solve certain issues, but would open the others. The unsuitability of competition authorities to assess sustainability objectives was one of them. However, even in the current version of the NHG, there is a problem of assessment of sustainability objectives.

Pursuant to para. 558 NHG, the Commission understands the efficiency gains as: *"the use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, better quality products"*. How could this be applied by the AMO? For instance, is the purchase and use of electric cars less polluting than the use of older fuel cars with low consumption? The former might seem more ecological, however, the production of a new car is definitely less polluting than the use of existing car. Is the AMO in a position to assess this? And what about more subjective questions, such as animal welfare?

Naturally, the efficiency gains are part of the 101(3) assessment, therefore, it is for the parties of the agreement to prove that the agreement meets the conditions. In our view, it is easy to produce evidence that your solution is less polluting (e.g., electric cars are less polluting), however, is this also an objective true in a broader context? This would be for the AMO to control.

3.3 On Willingness to Pay Method

Within Article 101(3) TFEU, the criterion of pass-on to consumers in particular, three forms of benefits have been identified: individual value benefits; collective benefits; individual non-value benefits. As mentioned above, the last one may be applied only if consumers are willing to pay for this more sustainable solution.

We would like to point out that the assessment of the willingness to pay method would be very difficult for the AMO, as it would be arguably proved by a survey. To name but a few problems. First, consumers may be unaware about the impact of their actions. Second, the answer to a question depends on the wording of the question. Third, the location or the type of the consumer is important for the answer. Richer consumers might be less sensitive to a small increase in price for the benefit of environment than socially disadvantaged consumers. Fourth, and last, the fact that surveys are not always reliable may be seen on the exit polls compared to real outcomes of the elections.³⁸ In our opinion, to assess a survey provided by undertakings will be difficult by the AMO.

4. CONCLUSION

The deterioration of environment and the ongoing climate change call for an immediate and strong solution. In a situation where these problems are not properly addressed by the public sphere, the private sphere may be called to stepped in. These considerations inspired us to find answers to questions: Is it possible to take into account the protection of environment also during the application of competition law? If so, to what extent is this desirable?

In order to answer these questions, we dived into a practical rather than theoretical field, as we partially analysed the new guidelines on horizontal agreements (the NHG). We found out that the Commission preferred the environmental

³⁸ In Slovak parliament elections 2023, the difference between exit poll and real outcome was substantial (23,5% vs. 17,96% for a particular political party), see Filo (2023) and Statistical Office (2023).

considerations to occur mainly in the 101(3) assessment. Looking into the particularities of the NHG from the perspective of the AMO, we may establish that it will be a real challenge to apply the NHG. Green agreements blur the waters of by object infringements, they may be pursuing objectives which are hardly assessed by the AMO *qua* economic and not environmental institution and that even "hard evidence" such as consumer surveys may prove to be difficult for the assessment in practice.

Therefore, our answer to the first question is that it is indeed possible to take into account the protection of environment, also during the application of competition law. However, is this desirable? From the environmental perspective, it is desirable indeed. However, from the practical perspective, we may be afraid of greenwashing of anticompetitive agreements, as well as of persecution of genuine green agreements, because they will not be able to provide enough objective evidence, which could be easily assessed by the AMO within 101(3) assessment.

In the current state of affairs, we consider competition authorities, such as the AMO, to be ill-placed for the assessment of environmental issues. An easy solution would be for the AMO to ask for cooperation other institutions, such as the Ministry of Environment or the Ministry of Economy. However, there is a risk that these institutions would prefer their agenda, e.g., the Ministry of Environment would support all green solutions. Moreover, Ministries are political institutions, whereas the AMO is an independent authority. Therefore, this easy solution would be hardly a panacea for the assessment of sustainability agreements.

In our view, a welcome solution would be if public institutions (possibly the Commission) provided more guidance on these questions.³⁹ Which efficiency gains are considered within the first criterion of 101(3)? What are the good practices of the surveys necessary for proving the willingness to pay? Clearer rules would enhance legal certainty as well as promote green approach to horizontal agreements.

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³⁹ This finding is in line with findings of other scholars. For instance, Kamiński presents that more guidance and ways for consultation is the correct way how to implement the European Green Deal by NCAs (2021, p. 119).

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