INTESA SANPAOLO

"DRAFT REVISED HORIZONTAL EXEMPTION REGULATIONS AND HORIZONTAL GUIDELINES"

POSITION PAPER OF INTESA SANPAOLO
TO THE COMMISSION'S CALL FOR CONTRIBUTIONS*

Intesa Sanpaolo (*infra*, also "the Bank") would like to thank the Commission for the opportunity to provide a call for contribution on the two draft revised Horizontal Block Exemption Regulations on Research & Development ("R&D")[1] and Specialization agreements[2] (*infra* also, "R&D BER" and "Specialization BER" respectively, together "HBERs") and on the draft revised Horizontal Guidelines[3] (*infra* also, "the HGL"). As a stakeholder, Intesa Sanpaolo is pleased to participate in the process of revising rules on horizontal agreements and would like to share some short relevant points with the Commission hereof.

This contribution will be structured in three sections: 1. General comments; 2. Sustainability agreements; 3. Conclusions.

This paper, which focuses on analyzing the draft revised HGL, represents the position of Intesa Sanpaolo on specific issues and it does not intend to be a comprehensive study on the matter.

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1. General comments

For almost a decade, the HBERs[4] and the HGL[5], currently in force, have been the essential point for the regulation of horizontal cooperation agreements between undertakings.

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[1] Annex to the Communication from the Commission, Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, 01.03.2022, C(2022) 1161 final.
[2] Annex to the Communication from the Commission, Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements, 01.03.2022, C(2022) 1160 final.
[3] Annex to the Communication from the Commission, Approval of the content of a draft for a 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, 01.03.2022, C(2022) 1159 final.
[4] Commission Regulation (EU) No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, OJ L 335/36, 18.12.2010; Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements, OJ L 335/43, 18.12.2010. They will expire on 31 December 2022.
[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, 2011/C 11/01, OJ C 11/1, 14.01.2011.

Intesa Sanpaolo believes that such documents are useful tools for companies to provide self-assessment on their horizontal agreements with regard to their adherence to the Article 101 TFEU, because they offer legal certainty and cost-effective compliance. Moreover, they are also relevant for National Competition Authorities (*infra* also, "NCAs") in Member States, because they set out a procedural framework for transparent and harmonized application of European Union (*infra* also, "EU") competition law. Indeed, the HGL, although not binding on NCAs, are in practice also taken into account by all of them[6].

However, since the adoption of the HBERs and the HGL, a lot of things have changed in the business of companies, such as the advent and widespread of the internet, which has deeply modified our society and economy[7]. In fact, the process of digital transformation is radically changing the concepts and business strategies, because innovation is not only an opportunity, but it also is a challenge for companies, aimed at avoiding the risk of falling behind their competitors[8]. This requires companies to be able to **act more flexibly and cooperate with their rivals** more frequently than in the past, in order to offer innovative digital solutions for their customers, in their own interest[9].

Furthermore, the establishment of very ambitious sustainability objectives, such as those of the Green Deal, makes it essential that competition law also supports their achievement, allowing companies to collaborate to develop green solutions and reduce their environmental impact.

The increased importance of sustainability and the digitization of the economy were the two main trends for improving legislation of horizontal cooperation agreements, raised by the stakeholders. Such evidence emerged in the Staff Working Document Evaluation of the Horizontal Block Exemption Regulations[10] and in the Final Report of the Study[11] commissioned by the Commission[12] and issued last year. As a consequence, Intesa Sanpaolo appreciates the changes introduced in the draft revised HGL, as they take better account of current challenges in the digital and sustainability sectors[13].

First, the clarification regarding the application of the **"center of gravity" principle** is important, in order to understand which part of a cooperation should prevail for the

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[6] "Summary of the contributions of National Competition Authorities to the evaluation of the R&D and the Specialisation Block Exemption Regulations and the Commission Guidelines on Horizontal Cooperation Agreements", 2021, p. 1 (link).

[7] Article "How the Internet Has Changed Everyday Life" by Zaryn Dentzel, from the book "Change: 19 Key Essays on How the Internet Is Changing Our Lives" for Open Mind BBVA, 2014 (link).

[8] Regarding the "Antitrust Innovation Paradox", see Aurelien Portuese, "Principles of Dynamic Antitrust: Competing Through Innovation", 14.06.2021 (link).

[9] For a wider analysis, see: Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, "Digital Platform and Antitrust", Working Paper, Issue 06, 23.11.2020 (link).

[10] European Commission, Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulations, SWD(2021) 103 final, 06.05.2021, p. 83 (link).

[11] "Evaluation support study on applicable to horizontal the EU competition rules cooperation agreements in the HBERs and the Guidelines", Final report, 06.05.2021, p. 235 (link).

[12] See also: press release "Antitrust: Commission publishes findings of the evaluation of rules on horizontal agreements between companies", European Commission, 06.05.2021 (link).

[13] European Parliament, P9_TA(2021)0275 Competition policy – annual report 2020, European Parliament resolution of 9 June 2021 on competition policy – annual report 2020 (2020/2223(INI)), paragraph 65 (link).

purposes of the applicable framework[14]. In fact, this indicator will help companies in their self-assessment of their horizontal cooperation agreements.
The same result is pursued by the explanation according to which, where the parent companies exercise decisive influence over the **joint venture** (*infra*, also "JV"), the Commission will usually not apply Article 101(1) to agreements and concerted practices between the parent companies and the joint venture concerning their activity on the relevant market or markets on which the JV is active. It reflects EU jurisprudence, which states that parent companies will form a single undertaking with a subsidiary, if there is sufficient evidence that they have the ability to exercise decisive influence over the subsidiary's behavior and have actually applied it[15]. This inclusion is useful, because joint ventures between competitors are very common, in order to benefit from the know-how and the expertise of the parent companies.

Intesa Sanpaolo also appreciates certain clarifications regarding the exchange of confidential information, included in the draft revised HGL. In fact, sharing of data is essential to increase efficiency in certain areas of the banking sector such as, for example, improving cyber security or providing more personalized advice to clients also on sustainable investments and financial instruments related to the Environmental, Social and Governance ("ESG") sector. In this context, the provision on **algorithms** is important, as it could lead to the risk of a collusive outcome[16] in the market, taking into account some indicators such as, the specific design of the algorithms, a high frequency of interactions, a limited purchasing power and the presence of homogeneous products/services. The inclusion of which specific behavior could raise antitrust concerns is essential, because algorithms can benefit consumers and promote competition by enabling faster and more informed decision-making. However, the Commission should consider, under Article 101(3) TFEU, the efficiencies generated by such systems, given that innovation is an important feature of the digital economy.
Similarly, the possibility of using the tool of **clean teams**, which is generally applied in M&A activities[17], also with regard to horizontal cooperation agreements, in order to ensure the segregation of the information being exchanged, is welcome.

The Bank also considers the clarification regarding the **data pooling** to be extremely useful[18], given the growing need to share data, including with one's competitors, associated with

[14] Draft revised HGL, paragraph 6. See also Slaughter and May, "The EU competition rules on horizontal agreements", January 2018, p. 2 (link).
[15] For example, Case C-882/19, Sumal, S.L. v Mercedes Benz Trucks España, S.L., Opinion of Advocate General Pitruzzella delivered on 15 April 2021, ECLI:EU:C:2021:293, paragraph 42; Case T-104/13, Toshiba v Commission, Judgment of the General Court (Third Chamber) of 9 September 2015, ECLI:EU:T:2015:610, paragraph 94; Case C-179/12 P, The Dow Chemical Company v Commission, Judgment of the Court (Ninth Chamber) of 26 September 2013, ECLI:EU:C:2013:605, paragraph 56. See also the particular case: IV/32.009 — Elopak/Metal Box — Odin, Commission decision of 13 July 1990 relating to a proceeding under Article 85 of the EEC Treaty, 90/41 0/EEC, OJ No L 209/15.
[16] For a wider analysis see: OECD, "Algorithms and Collusion: Competition Policy in the Digital Age", 2017, p. 34 (link).
[17] CMS, "Information sharing concerns in transactions - Central and Eastern Europe", March 2019.
[18] Bjorn Lundqvist, "Data Collaboration, Pooling and Hoarding under Competition Law", Faculty of Law, Stockholm University Research Paper No. 61, 2018, p. 11 (link).

the digitization of companies' business. Indeed, data pools are potential opportunities[19], which banks could exploit in practice to improve customer experience, enhance cybersecurity and consumer protection, and strengthen risk management[20]. It is therefore crucial that such agreements take place in line with competition law, so as to preserve the confidentiality of information, shared for the implementation of a legitimate purpose, without preventing participation in them. The main risk is, in fact, the creation of a barrier to entry in a market for companies, that do not have access to it[21].

2. Sustainability agreements

Intesa Sanpaolo appreciates that the Commission has included an entire section addressing sustainability agreements, as in the previous Horizontal Guidelines issued in 2001. This is necessary because antitrust law should support the achievement of the sustainability objectives of the Green Deal action plan[22], in order to increase resource efficiency by moving towards a clean circular economy, restore biodiversity and decrease pollution. It aims at reducing emissions by at least 55% by 2030 and make Europe the first climate neutral continent by 2050[23].

While pro-environment legislation and regulation can bring important benefits in terms of transparency and legal certainty, they may not be effective in pursuing the EU's sustainability objectives[24], due to lengthy legislative procedures and because they may hinder the initiative of market actors to innovate[25]. Therefore, in order to overcome the high investments that an individual company would have to bear, especially if its competitors continue to adopt less sustainable standards (the so-called "first mover disadvantage"), it is necessary that the public initiative is integrated with private actions, such as horizontal co-

[19] Martina Anzini, Anne-Carine Pierrat, "Data Pools as Information Exchanges between Competitors: An Antitrust Perspective", cepInput, 05 | 2020, p. 3 (link).
[20] Speech, Executive Vice-President Vestager "Defending competition in a digital age", Florence Competition Summer Conference, 24 June 2021, 24.06.2021 (link): "*Insurance companies, for instance, need access to claims data to set the right price for policies – and to protect themselves from fraud. So, by pooling their data, they can make better judgments – which means that consumers pay less*".
[21] Draft revised HGL, paragraph 442. See also: Case AT.40511 - Insurance Ireland; Italian Competition Authority ("ICA"), Case I844 – Progetto Antifrode ANIA.
[22] Regarding Antitrust and the Consumer Welfare, Sustainability Balance, please see: Julian Nowag, "Antitrust and Sustainability: An Introduction to an Ongoing Debate", ProMarket, 23.02.2022 (link).
[23] Communication from the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A new Circular Economy Action Plan – for a cleaner and more competitive Europe", 11.03.2020, COM (2020) 98 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission work programme 2022, "Making Europe stronger together", 19.10.2021, COM(2021) 645 final, p. 3; the 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015; Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, "The European Green Deal", 11.12.2019, COM(2019) 640 final.
[24] OECD, Policy Roundtables, "Horizontal Agreements in the Environmental Context", 2010, pp. 97-98 (link).
[25] In this regard, see: Victor Sand Holmberg, "EU Competition law and Environmental Protection – Integrate or Isolate?", Master thesis, Lund University, p. 16 (link).

operation with the aim of boosting innovation[26]. As a consequence, companies should be able to identify at an early stage the **borderline between legitimate agreements and anti-competitive collusion** (the so-called "greenwashing"), so as to reduce the costs associated legal uncertainty[27]. Furthermore, national and EU competition authorities need to remove actual and perceived competition law barriers to legitimate industry cooperation.

The Bank welcomes the broad notion of sustainability objective, which is not limited to the reduction of greenhouse gas emissions and pollution[28], but is extended to the respect of human rights, the promotion of resilient infrastructure, innovation and animal welfare, and the reduction of food waste. Moreover, the **clarification**, also by way of examples, that sustainability agreements only fall **under Article 101(1) TFEU**, if they significantly restrict competition by object or have significant negative effects on competition, is welcome. Thus, those agreements that do not affect the main parameters of competition, such as price, quality and innovation are, in general, admitted under the antitrust rules[29].
Likewise, Intesa Sanpaolo appreciates the definition of a non-binding **soft safe harbor**, irrespective of the coverage of a certain market threshold and market share, for **sustainability standards** fulfilling certain requirements: (1) the procedure for developing the sustainability standard is transparent and open; (2) participation is voluntary; (3) participating companies should be free to exceed the sustainability standard; (4) information exchange is limited to what is strictly necessary for the sustainability standard[30]; (5) access to the results of the sustainability standard is non-discriminatory; (6) the sustainability standard should not lead to a significant increase in prices or a significant reduction in product choice; and (7) there should be a monitoring system, in order to ensure that participating companies comply with the requirements of the standard. This is because sustainability standards are the most common form of cooperation in this area and significant economies of scale can only be achieved, if a substantial part of the market adopts the standard[31].

Key issue in the discussion of sustainability agreements is the definition and interpretation of whether the four cumulative **conditions of Article 101(3) TFEU** are met. In this regard, Intesa Sanpaolo argues that the **requirements**, for benefiting from this individual exemption, should be applied **extensively**.

Firstly, therefore, as regards efficiency gains, it would be appropriate to recognize the achievement of long-term economic benefits[32], such as improved environmental or social

[26] Maha Zöhrer and Anna Sofia Reumann, "Sustainability and competition law: green light for sustainable cooperation agreements", 03.01.2022, Schoenherr (link).
[27] Speech, Executive Vice-President Vestager, "Competition and sustainability", 24.10.2019 (link). OECD, Directorate for Financial and Enterprise Affairs Competition Committee, Cancels & replaces the same document of 15 October 2020, "Sustainability & Competition Law and Policy – Background Note", Julian Nowag, December 2020, DAF/COMP(2020)3, 07.01.2021, paragraph 95 (link).
[28] For a wider analysis, see: Intergovernmental Panel on Climate Change, "Climate Change: The IPCC Scientific Assessment", World Meteorological Organization United Nation Environment Programme – Intergovernmental Panel on climate change, 2018 (link).
[29] Draft revised HGL, paragraph 551.
[30] For example, European Commission, decision of 8 July 2021, Case AT.40178 – Car Emissions.
[31] Draft revised HGL, paragraph 573.
[32] Zsofia Tari, "Competition or environmental protection: is it necessary to choose?", Iustum Aequum Salutare VI. 2010/4, p. 281 (link).

conditions. For this purpose, the inclusion of the relevance not only of reductions in production and distribution costs, but also of increases in product, variety and quality, improvements in production or distribution processes and gains in innovation is therefore to be appropriate. Similarly, the interpretation of "no elimination of competition" is welcomed, because it can be fulfilled even if the agreement restricting competition covers entire sector, as long as the parties involved continue to face on at least one important aspect of competition.

In relation to the term "consumers", under the second condition, Intesa Sanpaolo supports that all direct or indirect users of the products covered by the agreement are to be considered as included[33], given that they would all benefit not only from low prices, but also from less pollution and better health. The promotion of a **more inclusive standard of consumer welfare** is indeed important for the pursuit of the sustainability goals of the Green Deal. In addition, it is useful the clarity regarding the three categories of benefits relevant to the assessment: (i) individual use value benefits (e.g. improved product quality or variety); (ii) individual non-use value benefits (when consumers assess the impact of their sustainable consumption on others); and (iii) collective benefits (when a broader group of consumers outside the relevant market also benefits).

If consumers in the relevant market substantially overlap with, or are part of, beneficiaries outside the relevant market, the collective benefits to consumers in the relevant market, occurring outside it, may be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered. In this way, however, sustainability initiatives, that can only lead to "out-of-market" efficiencies, could not be unfairly exempted, as discussed below.

Nevertheless, with regard to the notion of "fair share of the benefits", Intesa Sanpaolo does not agree that consumers should be fully compensated for the harm suffered and, so, the gains resulting from the agreement outweigh the harm caused by the same agreement. Indeed, contrary to what expressed in the Competition Policy Brief[34], a flexible interpretation of the notion of "fair share" is desirable to allow the benefits of a sustainability agreement can be exempted, even if they **do not fully compensate the damage** suffered by consumers in the market.

In fact, the need for companies to demonstrate that consumers are fully compensated for any effect, such as an increase in price or loss of choice, quality or innovation, **seems to conflict** with both the literal **wording of Article 101(3) TFEU and** the EU **environmental policy objectives.** This is because, firstly, the second condition refers to a fair share for consumers, and not of full compensation, nor is it specified that this fair share concerns a specific group of consumers in a particular market. In addition, this interpretation would be consistent with EU law[35], which states that environmental considerations, such as pollution reduction or

[33] In this regard, see: European Commission, decision of 24 January 1999, case IV.F.1/36.718 – CECED, paragraph 56. In this regard, see also Simon Holmes, "Climate change, sustainability and competition law", Concurrences.com, p. 24 (link).

[34] Competition Policy Brief, "Competition Policy in Support of Europe's Green Ambition", 2021-01, September 2021, p. 6.

[35] Article 7 TFEU: "*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers*". Article 11 TFEU: "*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*

climate change costs, must be taken into account in the definition and implementation of EU policies and activities, including competition rules.

The argument, according to which "*[…] the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement*"[36], would not **even be supported by case law.** For example, in Consten and Grundig, the Court merely ruled that the improvement within the meaning of the first condition of Article 101(3) must show appreciable objective advantages, in order to compensate for the disadvantages they cause in the field of competition[37]. Thus, it was not specified, even later in 2002[38], that there must be net advantages at the level of consumers, nor that consumers in each relevant market must be assessed individually.
Furthermore, the interpretation, according to which "*the assessment […] is in principle made within the confines of each relevant market to which the agreement relates*"[39], seems unfairly restrictive in the context of, for example, the decisions of Compagnie Générale Maritime and GlaxoSmithKline. In such cases, the Court of First Instance stated that Article 101(3) TFEU does not require the benefits concerned to be tied to a specific market[40] and held that benefits could occur in different markets[41]. It is also doubtful whether the MasterCard case can support the view whereby only objective advantages, directly related to consumers in the relevant market and of such an extent as to fully compensate those consumers[42], are relevant for the purposes of Article 101(3) TFEU. In fact, the Court merely stated that such "out-of-market" efficiencies cannot "in themselves" compensate

sustainable development". See also: Chris Townley, "Is There (Still) Room for Non-Economic Arguments in Article 101 TFEU Cases?", Forthcoming, DJØF Publishing 2013, The Conference on Aims and Values in Competition Law, Copenhagen, September 20, 2012, 17.10.2012, pp. 9-10 (link). For a wider analysis, see also: Maurits Dolmans, "Sustainable Competition Policy", Competition Law and Policy Debate CLPD, Vol 5, Issue 4 and Vol 6 issue 1 March 2020, 22.03.2020 (link).

[36] Communication from the Commission, Notice - Guidelines on the application of Article 81(3) of the Treaty, 2004/C 101/08, C 101/97, 27.4.2004, paragraph 85.

[37] Joined cases 56 and 58-64 - Consten and Grundig v Commission, Judgment of the Court of 13 July 1966, ECLI:EU:C:1966:41, paragraph 85.

[38] Case T-131/99 - Michael Hamilton Shaw and Timothy John Falla v Commission of the European Communities, Judgment of the Court of First Instance (Third Chamber) of 21 March 2002, ECLI:EU:T:2002:83, paragraph 163. See also Case C-238/05, Asnef-Equifax, Judgment of 23 November 2006, ECLI:EU:C:2006:734, paragraph 72.

[39] Communication from the Commission, Notice - Guidelines on the application of Article 81(3) of the Treaty, cit. paragraph 43.

[40] Case T-86/95, Compagnie Générale Maritime and others, Judgment of 28 February 2002, ECLI:EU:T:2002:50, paragraph 343: "*regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market […], but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement*".

[41] Case T-168/01, GlaxoSmithKline, Judgment of 27 September 2006, ECLI:EU:T:2006:265, para 248. Confirmed on appeal in Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others*, Judgment of 6 October 2009, ECLI:EU:C:2009:409.

[42] Case C-382/12 P, MasterCard Inc, Judgment of 11 September 2014, ECLI:EU:C:2014:2201, paragraph 242: "*the advantages flowing from the restrictive measure on a separate but connected market cannot, in themselves, […] compensate for the disadvantages resulting from that measure in the absence of any proof of appreciable objective advantages […] in the relevant market, in particular, […] where consumers on the two markets are not essentially the same*".

for the lack of appreciable objective advantages in the relevant market, if the two groups of consumers are not substantially the same. As a consequence, the benefits, directly affected by the consumers concerned, should be appreciable and objective, regardless of whether they are conferred within the relevant market or not.
Moreover, in another case[43], the General Court had recognized that significant objective advantages could occur not only for the relevant market, but also for every other market on which the agreement might have beneficial effects, and even, in a more general way, for any service whose quality or efficiency might be improved by the existence of that agreement.

The case law supporting this view is analyzed in detail in a memo issued by the Dutch Competition Authority (*infra*, also "the ACM")[44], which is the first authority to address the relationship between competition and sustainability[45]. According to the document, the correct interpretation of the second condition of the individual exemption is the "fair share" approach and not to pursue a "full compensation" theory, in line with the wording of Article 101(3) TFUE and the **"polluter pays" principle**, under Article 191(2) TFEU[46]. Under this provision, which is a key tool for delivering Europe's environmental objectives in an efficient and fair manner, the costs of negative externalities should be borne by the direct beneficiaries of pollution and, conversely, the benefits of addressing these externalities should not be limited to such direct beneficiaries. The application of the "polluter pays" principle, in the context of antitrust law, would justify a fair share for direct consumers, which amounts to appreciable objective benefits, but **does not correspond to their full compensation**[47].

To sum up, according to Intesa Sanpaolo, the draft revised HGL should also give relevance for the exemption under Article 101 (3) TFEU to sustainability agreements, that **do not fully compensate consumers** for any detrimental effects, such as price increases. It is also important, with regard to the collective environmental benefits, to recognize **efficiencies that affect other markets** as well, because environmental benefits often accrue society in general and not just a small group of consumers.

The need to improve the section on sustainability agreements has also been, recently, highlighted by the ACM, which has expressed its position as follows: "*[…] worried that more leeway is needed to eliminate any reluctance companies have to enter into urgently needed meaningful sustainability initiatives to speed up the energy transition from carbon*

[43] Case T-111/08, MasterCard, Inc. and Others v European Commission, Judgement of the General Court (Seventh Chamber) of 24 May 2012, ECLI:EU:T:2012:260 , paragraph 228.
[44] ACM, Legal Memo, "What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?", 27.09.2021 (link).
[45] Regarding the consumers' willingness to pay, see the ACM's analysis of the sustainability arrangements concerning the "Chicken of Tomorrow" (link). More recently, see: ACM, press release "ACM favors collaborations between businesses promoting sustainability in the energy sector", 28.02.2022 (link): "*However, ACM concludes that, also with a higher price for CO2, the sustainability gains outweigh the potential costs for users. All energy users benefit from the agreement if CO2 emissions are reduced. In addition, ACM sees that cooperation is necessary to realize this benefit, and that sufficient competition will remain*".
[46] For a wider analysis, see: Special Report 12/2021, "The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions", 2021 (link).
[47] ACM, Legal Memo, "What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?", cit., p. 4.

to renewables"[48]. In its 2021 Guidelines, the ACM considered that agreements, concerning the reduction of negative environmental externalities, would be able to avoid the full compensation, caused by the restriction of competition, because consumer demand for the products concerned essentially creates the problem for which society should find solutions. Thus, the agreement must efficiently help to prevent such environmental damage, either through compliance with an international or national standard, or help to achieve a concrete policy objective[49].

This seems to be the direction taken by the Austrian legislator who, with the amendment of the Cartel Act[50] which entered into force in September 2021, extends the application of the exemption to national anti-competitive agreements, that improve the production or distribution of goods or promote technical or economic progress for environmental purposes. Specifically, the amended provision allows for the presumption of a fair share of the efficiency benefits to consumers, and thus they have been fairly compensated for the harm caused by the agreement, whenever it significantly contributes to an ecologically sustainable or climate-neutral economy[51].

Therefore, the thesis[52] according to which the promotion of sustainable development through antitrust law leads to a reduction in consumer welfare, due to a possible increase in prices, is not acceptable. Sustainability and antitrust law are not in conflict with each other but tend towards the same objective: effective competition is part of the solution since sustainability requires innovation, which itself emerges only in a competitive environment[53].

In this context, divergence between the position of some NCAs, such as those mentioned above, and the Commission can therefore be observed: it is, consequently, of paramount importance that the final version of the HGL reflects these national positions, in order to

[48] Andrew Boyce, "EU sustainability cooperation guidance welcome but needs more leeway, Dutch antitrust watchdog says", MLex, 02.03.2022 (link). See also: ACM, "Public consultation on the draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines – Response from the Netherlands Authority for Consumers & Markets", 18.03.2022 (link).

[49] ACM, Guidelines, "Sustainability agreements – Opportunities within competition law", 2021, paragraph 45.

[50] Federal Act amending the Cartel Act 2005 and the Competition Act (Cartel and Competition Amendment Act 2021 - KaWeRäg 2021, BGBl I 176/2021), section 2 (1).

[51] "*Consumers are granted a fair share of the benefit resulting from the improved production of goods, its distribution or the promotion of the technical and economic progress if the agreement significantly contributes to an ecologically sustainable and climate neutral economy*".

[52] Michał Derdak, "Square Peg in a Round Hole? Sustainability as an Aim of Antitrust Law", Yearbook oh antitrust and regulatory studies Vol. 2021, 14(23), 07.12.2021, p. 64 (link).

[53] Speech, Andreas Mundt, President of the Bundeskartellamt, "Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives", 18.01.2022 (link). See also: Speech, Executive Vice-President 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, 10.09.2021: "*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*" (link).

ensure legal certainty and predictability for undertakings[54]. As the HGL are not binding on NCAs, the **risk of conflicting** interpretations and **case law** is not remote[55].

Moreover, it would be **difficult** for companies **to quantify** the resulting sustainability **benefits**[56] for consumers, because such benefits would have to be measured on the basis of objective methodologies and criteria. However, in some cases it is important that also a **qualitative assessment of the benefits** is conducted by the Commission, for the purpose of granting an exemption under Article 101(3) TFEU.

In this context, customer surveys could be used to verify whether consumers are willing to pay more for sustainable products or not[57]. Such surveys should be carefully designed to mitigate the risk of biasing consumers, in estimating their preferences for hypothetical sustainable choices[58]. In fact, it should be noted that considering only the **revealed preferences of consumers**, without taking into account information asymmetries or possible behavioral biases, may lead to underestimating the value consumers assign to sustainability effects and to **making arbitrary decisions**[59]. Indeed, not all "green" benefits are quantifiable in monetary or non-monetary terms and, as mentioned above, not all positive effects will directly benefit everyone. In this regard, Intesa Sanpaolo hopes that these considerations will be addressed by the Commission, when drafting its guidance on quantifying sustainability benefits[60].

It also seems unduly restrictive for undertakings to have to demonstrate that the restrictions in the agreement should be reasonably necessary for the alleged sustainability benefits to materialize and that there are no other economically feasible and less restrictive means of achieving them, in order to fulfil the indispensability condition for the exemption under Article 101(3) TFEU.

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[54] Further guidance on the relationship between sustainability and antitrust law has been issued by other competition authorities. For example, Competition & Markets Authority ("CMA)", Guidance, "Environmental sustainability agreements and competition law", 27.01.2021 (link); CMA "Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government", 14.03.2022 (link). Hellenic Competition Commission ("HCC"), "Technical Report on Sustainability and Competition", January 2021, jointly commissioned by ACM and the HCC (link); HCC, "Draft Staff Discussion Paper on Sustainability issues and competition law - Staff Discussion Paper" (link).

[55] See for example: Or Brook, "Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities", Common Market Law Review 56: 121-156, 2019, Forthcoming, 01.11.2018 (link).

[56] For a wider analysis, see: Adina Claici and Jasper Lutz, "Beyond the policy debate: How to quantify sustainability benefits in competition cases – Lessons learned from environmental economics" (link).

[57] For a wider analysis, see: Guzhen Zhou, Wuyang Hu and Wenchao Huang, "Are Consumers Willing to Pay More for Sustainable Products? A Study of Eco-Labeled Tuna Steak", 23.05.2016.

[58] Freshfields Bruckhaus Deringer LLP, "European Commission publishes updated draft rules for cooperation between competitors - with new draft guidelines for sustainability agreements", 03.03.2022 (link).

[59] OECD, Directorate for Financial and Enterprise Affairs Competition Committee, Cancels & replaces the same document of 5 November 2021, "Environmental Considerations in Competition Enforcement - Background Paper by the Secretariat", 1 December 2021, DAF/COMP(2021)4, paragraph 82 (link). See also "Incorporating Sustainability into an Effects-Analysis of Horizontal Agreements", Expert advice on the assessment of sustainability benefits in the context of the review of the Commission Guidelines on horizontal cooperation agreements, 2022, p. 58 (link).

[60] Draft revised HGL, paragraph 608.

Moreover, section 9 of the HGL, which deals with sustainability agreements, should also include some recommendations regarding "**green syndicated loans**". That would be useful for banking institutions and for the economy[61]. Indeed, through syndicated loans, there would be advantages both for banks in terms of reduced risk exposure, but especially for companies, which would benefit from lower transaction costs, the possibility of obtaining a higher value loan and certainty of disbursement[62]. However, the close cooperation between the credit institutions, participating in the syndicated loan, may raise risks of anti-competitive collusion between those entities, which are in competition with each other and will inevitably have to exchange certain information, in the interest of the customer.
Intesa Sanpaolo believes that the inclusion of guidance, including examples, to help in understanding the **borderline between a legitimate green syndicated loan and a cartel**, prohibited under Article 101(1) TFEU[63], would be desirable and boost competition and the achievement of the sustainability objectives set by the legislator at EU level.

3. Conclusions

As briefly explained above, Intesa Sanpaolo believes that the draft revised HGL provide legal certainty for companies. However, in order to better address the current challenges to antitrust law, a **revision** of the rules regarding **sustainability agreements**, taking into account a flexible interpretation of Article 101(3) TFEU, would be **desirable**.

Intesa Sanpaolo would like to thank the Commission again for the opportunity and is available to further discuss the proposed issues.

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[61] Intesa Sanpaolo joined the European initiative EeMap - Energy Efficient Mortgage Action Plan (link), which aims to create a standardized green mortgage at European level, in order to encourage the renovation of buildings and the purchase of energy-efficient properties, through favorable financial terms. The initiative is driven by a consortium led by the European Mortgage Federation - European Covered Bond Council (EMF-ECBC), which is the platform that brings together covered bond market participants (link). Within Eemap, during the 2021, the Bank also joined the project EEML - Energy Efficient Mortgage Label (link), aimed at identifying in a clear and transparent way in the portfolios of credit institutions - for the benefit of possible investors – mortgages, intended to finance the purchase/construction and/or renovation of energy-efficient buildings.
[62] Intesa Sanpaolo appreciated the study commissioned by the European Commission on loan syndication, "EU loan syndication and its impact on competition in credit markets", Final report, 2019 (link).
[63] For example, CNMC, S/DC/0579/16, "Financial Derivatives", Resolution of 13 February 2018. Four financial entities have been fined for coordinating to fix supra-competitive prices in the contracting of financial derivatives used to hedge the interest rate risk in syndicated credits for project finance.