Legal Design in Sustainable Antitrust

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Abstract

We lay out a roadmap for how the legislator could create a framework of "sustainability corridors" that would allow to rely on the ancillary restraints doctrine to make antitrust law more accommodating of sustainability considerations. We show how this avoids the pitfalls of a multi-goals approach, under which it would be left to antitrust authorities and courts to reconcile sustainability and competition objectives, while out-of-market benefits (externalities), that would escape even a broad consumer welfare approach, can still be accounted for. Our proposal sets out specific requirements for such sustainability corridors that ensure that the ensuing antitrust assessment is governed by a strict and quantifiable indispensability test. Specifically, we discuss three such instances: specific sustainability obligations placed on individual firms, which may however require collective actions; specific mandates that are targeted at the respective industry rather than individual firms; and policy objectives that are not targeted at individual firms or industries but provide a metric for the measurement of sustainability benefits (e.g., by way of conducting an abatement cost analysis).

Keywords: Sustainability; ancillary restraints doctrine

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I Motivation

The current discussion about sustainable antitrust orbits around the balancing of sustainability against economic efficiency. Several conceptual problems come along with that aim. In the present article we start from the assumption that the postulate to make antitrust law accommodating of sustainability considerations[3] must be distinguished from the methods applied to achieve that goal. Two approaches have been prominently discussed.

[3] When referring to the notion of sustainability in this article, we apply a broad concept. Although we will focus on environmental aspects, notably climate change, the general conclusions can apply to any other emanation of sustainability, such as animal welfare. This reflects the fact that the debate about the scope of sustainability as a notion in antitrust enforcement and beyond is not yet settled. In environmental economics, sustainable development is defined more formally in terms of (intertemporally) non-declining utility, non-declining wellbeing or a non-declining productive base (e.g. Robert Solow, *Intergenerational Equity and Exhaustible Resources,* 41 Review of Economics Studies 29-46 (1974)). On the notion of sustainability *see* also Roman Inderst & Stefan Thomas, *Prospective Welfare Analysis—Extending Willingness-To-Pay Assessment to Embrace Sustainability*, Journal of Competition Law & Economics, nhab021, https://doi.org/10.1093/joclec/nhab021; Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis, Journal of Competition Law & Economics, nhab016, https://doi.org/10.1093/joclec/nhab016.

In this article we elaborate on a third way of dealing with the matter. This third way might help to overcome a policy deadlock that still seems to limit legislative action in this specific context and which cannot be resolved by the other two approaches.

The one method that is being suggested is to consider sustainability as a goal in itself when enforcing the competition laws.[4] This viewpoint eventually leads to antitrust enforcement being tied to two potentially diverging aims, i.e. economic efficiency and sustainability. Agencies and courts are supposed to balance these aims, hence our reference to it as "multi goals approach". Such multi goals approach raises basically two problems, which can explain why antitrust agencies display reluctance towards it.[5] First, in the absence of a common unit of measure such balancing involves a great amount of discretion. Secondly, the balancing of incommensurable goals raises issues about its democratic legitimation, if agencies and courts substitute for the legislator when balancing diverging interests on behalf of the entire society.

The other approach relies on the consumer welfare paradigm when dealing with environmental externalities and the ways how consumers might possibly internalize them in their purchasing behavior. We have expounded in a series of articles why we think that the consumer welfare paradigm can be a more powerful tool than

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[4] For this viewpoint, *see*, e.g., from the EU Simon Holmes, *Climate change, sustainability, and competition law*, 8 J. Antitrust Enforc. 354, 377 (2020); Suzanne Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*, 16 Eur. L.J. 780 (2010). From the U.S. Norman W. Hawker & Thomas N. Edmonds, *Avoiding the Efficiency Trap: Resilience, Sustainability, and Antitrust*, 60 Antitrust BULL. 208 (2015) at 220: "For antitrust, "other than efficiency, what else counts?" asked Kenneth Elzinga nearly a half century ago. If antitrust is to avoid the efficiency trap, it might do well to follow the lead of business and consider sustainability as one of the answers." (footnote omitted); Norman W. Hawker & Thomas N. Edmonds, *Strategic Management Concepts for Antitrust: Cooperation, Stakeholders and Sustainability*, 59 Antitrust BULL. 769 (2014); Inara Scott, *Antitrust and Socially Responsible Collaboration: A Chilling Combination?*, 53 Am. Bus. Law J. 97 (2016) 143: "Simply recognizing that antitrust's goals look beyond low prices and the maximization of output could provide comfort to businesses engaging in creative sustainable collaboration."; *see* from a practitioner's perspective, Ben Steinberg & Adam Mendel, *US Antitrust Regulators Should Foster Climate Collaboration*, (April 13, 2021), available at: https://www.robinskaplan.com/-/media/pdfs/publications/us-antitrust-regulators-should-foster-climate-collaboration.pdf?la=en (last accessed 15 March 2022).

[5] Taking a critical stance towards the consideration of sustainability as an antitrust goal in its own right, see Edith Loozen, *Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability*, 56 C.M.L.Rev. 1265 (2019); Okeoghene Odudu, *The Wider Concerns of Competition Law*, 30 Oxford J. Leg. Stud. 599 (2010); Stefan Thomas, *Normative Goals in Merger Control: Why Merger Control Should Not Attempt to Achieve 'Better' Outcomes than Competition*, in Competition Enforcement: Is there a Final Frontier? (Ioannis Kokkoris, ed., Cheltenham: Edward Elgar, forthcoming), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513098 (last accessed 15 March 2022). Concerns about a "green-washing" of cartels are raised in Maarten Pieter Schinkel, Yossi Spiegel, *Can Collusion Promote Sustainable Consumption and Production?*, 53 International Journal of Industrial Organization 371-398 (2017) and Maarten Pieter Schinkel, Lukáš Tóth, Compensatory Public Good Provision by a Private Cartel (2020), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3509062 (last accessed 15 March 2022).

commonly believed for the integration of sustainability considerations into antitrust. A thorough recognition of the dimension of time (and with it future cohorts of consumers), more progressive elicitation methods of consumers' willingness-to-pay, or the consideration of the interdependencies between sustainability agreements and social norms can extend its scope with respect to sustainability features of a product.[6] To a certain extent it might also allow for including into a consumer welfare analysis so called "within-market externalities" that arise from the consumption decision of other consumers.[7] Despite such extensions in the scope of consideration for sustainability benefits, the consumer welfare paradigm naturally imposes limits on the recognition of, notably, out-of-market effects. This concerns cases in which it is not possible to measure a willingness-to-pay for sustainability sufficiently high to offset the concomitant harm inflicted on consumers by a sustainability agreement, e.g. through higher prices.[8]

We find that much of the economic and legal thinking about sustainable antitrust got stuck at this point. Antitrust agencies and the legislator seem to be pinched between two bedrock principles of EU antitrust law. The first being that Article 101 TFEU as a piece of primary legislation is vastly immune to legislative exemptions, and the second being the fact that the consumer welfare approach does not lend itself to the recognition of per-se rules that would provide a safe haven to firms seeking guidance in their collective sustainability efforts. Therefore, the consumer welfare paradigm, even though powerful enough to pave inroads for sustainability considerations into antitrust on a case-by-case basis, leaves limited options for agencies to provide guidance on a more abstract level about the feasibility of sustainability agreements. Firms, however, are under a pressure to deal with an increasing number of potentially restrictive horizontal and vertical agreements

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[6] We have explored the time dimension in Roman Inderst & Stefan Thomas, *Prospective Welfare Analysis – Extending Willingness-To-Pay Assessment to Embrace Sustainability*, 2021 Journal of Competition Law & Economics, nhab021, https://doi.org/10.1093/joclec/nhab021; the elicitation of consumer preferences for non-use values, as associated with sustainability benefit, is dealt with in Roman Inderst & Stefan Thomas, *Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis*, 2021 Journal of Competition Law & Economics, nhab016, https://doi.org/10.1093/joclec/nhab016; on specific measurement challenges *see* Roman Inderst & Stefan Thomas, Integrating Benefits from Sustainability into the Competitive Assessment—How Can We Measure Them?, Journal of European Competition Law & Practice 705-709 (2021), https://doi.org/10.1093/jeclap/lpab077; the potential necessity to consider changes in social norms is dealt with, both conceptually and empirically, in Roman Inderst, Felix Rhiel & Stefan Thomas, *Sustainability Agreements and Social Norms,* 2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887314.

[7] We refer to this as "collective willingness-to-pay" and discuss both the potential elicitation but also the necessary boundaries in Roman Inderst & Stefan Thomas, *The Scope and Limitations of Incorporating Externalities in Competition Analysis within a Consumer Welfare Approach,* 2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3896243.

[8] On the limitations of the consumer welfare paradigm with respect to an internalization of externalities *see* Roman Inderst & Stefan Thomas, *The Scope and Limitations of Incorporating Externalities in Competition Analysis within a Consumer Welfare Approach*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3896243.

as part of an accelerating change in the industry. Even though the sheer number of published case decisions on sustainability considerations in antitrust appears somewhat limited, anecdotal evidence suggests that the actual number of cases in which firms encounter the dilemma is much higher. Take as an example the use of sustainability labels which can require an exchange of competitively sensitive information about production standards throughout the entire supply chain including horizontal supplies between downstream competitors. To participate in such a label will therefore require legal clarity about the antitrust conformity of such information exchange. Those issues can arise quickly and often, and the industry therefore needs robust guidance on these matters. While a fully fledged consumer welfare analysis can be appropriate and necessary in some cases, it will not provide a viable solution in many other instances where a more standardized type of guidance is necessary.

Against this backdrop, we will expound in the following ways how the legislator could engage in creating a guidance framework for certain types of sustainability agreements. We refer to such a framework as "sustainability corridors". By that we mean clearly defined conditions upon which the measure can be assessed net of any balancing of concrete consumer welfare effects. When investigating into the legislative scope for the creation of such sustainability corridors, we encounter two challenges.

The economic challenge lies in the dealings with "out of market externalities". This notion means all effects other than those experienced by (potential) consumers of products or services in the affected relevant market.[9] In conceptual terms, this requires the definition of such externalities and the development of methods for measuring the mitigation of them in a way that is operational in an enforcement context.

In legal terms, the problem lies in the fact that Article 101 TFEU does not contain a specific sustainability clause, and it seems unlikely that this will change by way of an amendment of the Treaty soon (as opposed to national antitrust laws, such as in Austria, which can be changed by the national legislator alone[10]). Therefore, with respect to EU antitrust law the question arises whether under the existing primary law of Article 101 TFEU there is room for a direct consideration of sustainability externalities. This question is important for

[9] As we have discussed elsewhere (cf. footnote 6), this comprises also future cohorts of consumers. We are also aware of the possibility that a merger or cooperation may affect different markets (some of which may be connected, e.g., in the case of multi-sided markets). Here, we can abstract from these issues that still fall within the consumer welfare approach.

[10] The amendment of the Austrian Cartel Act, which entered into force in September 2021, explicitly mentions sustainability benefits alongside consumer welfare: *"Consumers shall also be considered to be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress contributes to an ecologically sustainable or climate-neutral economy"* (original text: *"Die Verbraucher sind auch dann angemessen beteiligt, wenn die Verbesserung der Warenerzeugung oder -verteilung oder die Förderung des technischen oder wirtschaftlichen Fortschritts zu einer ökologisch nachhaltigen oder klimaneutralen Wirtschaft beiträgt."* Available at: https://www.bmj.gv.at/dam/jcr:fae4ab6e-1876-41dd-ada0-0fa156ca584d/KaWeR%C3%84G_2021_Gesetzestext.pdf (last accessed 15 March 2022).

enforcement agencies and national legislators. If a sustainability agreement has the ability to impact on trade between member states, it falls within the scope of Article 101 TFEU so that national laws cannot create exemptions. Any national provision about sustainability in antitrust, such as in Austria, will therefore only apply to the degree to which it reconciles with the governing principles of Article 101 TFEU.

When it comes to defining a working hypothesis, we do not see that mere policy postulates, according to which the urgency of sustainability can justify out and in itself any restriction of competition, make a viable concept (on the "multi goals approach", *see* our brief comments above). On the other hand, it might be wrong to assume that Article 101 TFEU is agnostic about considerations of effects that lie outside economic efficiency so that any further reflection about dealing with sustainability externalities would become a moot exercise. Instead we furnish the hypothesis that, depending on the context in which a sustainability agreement is made, Article 101(1) TFEU can accommodate sustainability effects without compromising its nature as a rule of primary law. This idea is not tantamount to a multi goals approach. Whereas under the latter one would assume that antitrust law, under any circumstances and in any regard, must pay deference to sustainability considerations, the working hypothesis of our article is that the predominance of Article 101 TFEU hinges on the specific circumstances in which a sustainability agreement is enacted and which can be shaped by EU-legislation and/or national legislation.[11] That would bestow an important role on the legislator in awarding it the power to design such contexts through legal rules. Before we proceed we will address the underlying idea for such a doctrine, which, in its roots, is not unknown to EU-antitrust law.

While it is commonly held that Article 101 TFEU does not entail a "rule of reason"[12], closer scrutiny reveals that it can accommodate legal and societal imperatives from outside the realm of antitrust or economic efficiency. The jurisprudence has recognized that agreements between firms and decisions of associations of undertakings restrictive of competition may fall outside the scope of Article 101(1) TFEU if they are necessary within a recognized legal context, which includes the attainment of main operations that represent a legitimate objective. Such an exemption has been applied in a variety of contexts.[13]

In this article we argue that this doctrine, which we will analyze more closely below, can grow into significance with respect to the development of a more sustainable antitrust law in the EU for the following reasons: To

[11] In the following, we will talk about the national legislator, but what is said in this regard applies in the same way to EU-secondary legislation.

[12] Court of 13 July 1966, Case 56 and 58/64 [Consten and Grundig] ECLI:EU:C:1966:41; Court of First Instance of 21 February 1995, Case T-29/92, T-29/92 [SPO] ECLI:EU:T:1995:34 para. 96; Court of First Instance of 2 May 2006, Case T-328/03 [O2 Germany] ECLI:EU:T:2006:116, para 69 et seq.

[13] *See*, e.g., Court of 19 February 2002, Case C-309/99 [Wouters] ECLI:EU:C:2002:98, para. 97. Court of 18 July 2006, Case C-519/04 [Meca-Medina] ECLI:EU:C:2006:492, para. 17; Court of 21 September 1999, Case C-67/96 [Albany] ECLI:EU:C:1999:430, paras. 54 et seqq.

the extent that there is scope for this exemption, an elaborate case-by-case analysis in the framework of Article 101(3) TFEU becomes dispensable. This can help the legislator to facilitate sustainability agreements in specific branches or contexts. The doctrine might therefore constitute a realm in which the EU or national legislators can shape the framework for industry initiatives by stipulating legitimate sustainability goals to which the doctrine then tethers. We have already introduced the notion of "sustainability corridors" to describe such frameworks.

While legislators and agencies might currently feel inhibited by the predominance of Article 101 TFEU as a piece of primary law, a clear definition of the scope of the doctrine in a sustainability context can help to unleash legislative impulses to transform the economy. It is here that we see also the need for clear guidance by policy. As we argue in this contribution, such guidance could be contained in specific legislation that clearly defines a (measurable) sustainability main operation. Such precisely defined concept of sustainable restraints might possibly allow delineating confined spaces in which sustainability can be accepted as an overriding principle without the agency our court being forced to engage in a wider balancing of societal goals, as it would be characteristic for the multi goals approach described at the outset.

In the following we want to outline why and under which circumstances such sustainability corridors would reconcile with the basic principles of Article 101 TFEU. We also want to expound ways to design such sustainability corridors that are governed by a coherent metric. This ensures that the antitrust assessment is governed by a strict and quantifiable indispensability test rather than an open balancing, as characteristic for the multi goals approach.

The further contribution is organized as follows: In a first section, sub II., we will establish the legal principles of the doctrine which can make Article 101 TFEU accommodating of societal goals, such as sustainability, under certain circumstances. At III. we will then home in on three distinct types of sustainability corridors that can follow from our analysis. At IV. we will conclude.

II The Dealings with Societal Goals under the Cartel Prohibition

II.i Conceptual Propositions

The EU-jurisprudence has recognized in certain cases that reasons outside economic efficiency may override Article 101(1) TFEU to the extent that restrictive collusion is necessary to attain a legitimate goal. Even though the jurisprudence has dealt with the specific requirements for such exemptions in a variety of cases, it has been reluctant to provide an overarching theory for it. Yet we find common characteristics of all these cases on which we will focus in the present context. One common denominator of all judgments is that the jurisprudence recognizes that interests outside the realm of economic efficiency can mandate the acceptance of competitive

restraints. In all these cases, those interests were directly or indirectly recognized in the European legal order. All cases provide the characteristic that the jurisprudence steered clear of a weighing and balancing of interests. Rather it applied an indispensability test that related to the interest for which the competitive restraint must be conditional. Moreover, the jurisprudence made clear that this exemption is not a case of Article 101(3) TFEU therefore being agnostic about the economic effects on consumer welfare.

Legal scholarship has undertaken considerable efforts to develop a taxonomy for this case law. The term "ancillary restraints" is used to describe the nature of the problem in some cases, while others are sometimes referred to as unwritten exceptions without a specific terminology or merely referenced by the name of the decision. The doctrine is not exclusive to Article 101 TFEU. It is also recognized under the national antitrust regimes in the EU, such as in Germany or Austria. There, legal scholarship and practice deal with similar cases under the notion of "Immanenztheorie" ("immanence theory").[14] We think that such characterization as a type of restraint that "is immanent to the achievement of a recognized goal" captures the essence of the doctrine well, also with respect to the existing EU-case law. Yet for the purpose of this article, such terminological questions are immaterial. Rather, we focus on the criteria as set out by the EU-courts in the various decisions and then analyze what they mean for the construal of Article 101(1) TFEU in view of sustainability interests. It is only for the sake of simplification that we refer to the entirety of the aforementioned case law as emanations of the "ancillary restraints doctrine" or "ancillary doctrine" in the present article. We are aware of the fact that some practitioners and scholars suggest a more differentiated terminology. Yet, as mentioned just before, we do not find any reason for why the use of a more complex terminology will yield any substantive gain in clarity or precision for our further analysis.

To explore the capabilities of the ancillary doctrine as well as its limitations, it is mandatory to come forward about the legal motivation behind it. This legal motivation has never been discussed prominently in the jurisprudence. Rather, the EU-courts subscribe to the vernacular of Article 101 TFEU steering clear of any rule of reason, whilst accepting societal goals outside the realm of economic efficiency to override the prohibition in the occasional exceptional case. The courts have recognized a wide range of legitimate main operations or societal institutions that qualify as a justification to exempt necessary restraints from the cartel prohibition, yet stopped short of explaining in what way the nature of the doctrine distinguishes itself from the despised rule of reason. Conclusions on those cardinal questions, therefore, can only be drawn by analyzing the determinants of the doctrine as mirrored in the case law.

A key determinant is the courts' adherence to an indispensability test. The jurisprudence makes clear that the doctrine is not an open balancing exercise. Rather, the Court of Justice stipulates mainly two sets of criteria that

[14] See MICHAEL KLING & STEFAN THOMAS, KARTELLRECHT, (Munich: Verlag Franz Vahlen, 2nd. Ed. 2016), p. 582.

limit the scope of the doctrine: That is (1) the legitimacy of the main operation, and (2) the indispensability of the measure for the attainment of that that main operation.

The problem, however, is that the courts have never provided a clear philosophy on how to determine both criteria. It can be understood from the jurisprudence, however, that for a main operation to be recognized, it must bring about some benefit to society. The jurisprudence therefore requires "legitimate objectives"[15] for a main operation to justify a restriction of competition. From there it can be concluded that the recognition of a specific goal as legitimate in terms of the ancillary doctrine hinges on the degree to which it is reflected in the EU legislation itself. For if it were upon the parties to define their own legitimate objectives, the court would need to engage in a weighing and balancing of those interests, which it, however, refuses to do.

II.ii Legitimate Main Operation

A wide range of legitimate main operations has been recognized or at least discussed in the European decisional practice. Non-compete clauses can be necessary in M&A-contracts or joint venture agreements, as recognized in the jurisprudence[16] and in the Commission's ancillary restraints notice.[17] There, the legitimacy of the main operation can be seen in the fact that the European Common Market includes the freedom of firms to merge so that competitive restrictions that are necessary to protect the interests of the parties involved, must be accepted under Article 101 TFEU without more. The same is true for certain competitive restrictions that are necessary to collaborate in a cooperative.[18]

The ancillary doctrine, however, is not reserved for such clauses that ensure the workability of mergers or the operation of corporations. Courts and Commission define it in a broad manner. It can apply to any restraint, vertical or horizontal, that is necessary and proportionate to attain a legitimate main operation, even if it qualifies as hardcore.[19] The jurisprudence has mentioned the possibility that road safety could possibly constitute a

[15] Court of 18 July 2013, Case C-136/12 [Consiglio Nazionale dei Geologi] ECLI:EU:C:2013:489, para. 54; Court of 4 September 2014, Joint Cases C-184/13 et. al. [API] ECLI:EU:C:2014:2147, paras. 47 et seq.

[16] Court of 11 July 1985, Case 42/84 [Remia] ECLI:EU:C:1985:327.

[17] Commission Notice on restrictions directly related and necessary to concentrations, OJ 2005 C 56 p. 24.

[18] Court of 15 December 1994, Case C-250/92 [Gøttrup-Klim] ECLI:EU:C:1994:413, para. 35.

[19] *See* Commission Guidelines on Vertical Restraints, Guidelines on Vertical Restraints, OJ 2010 C 130, p. 1, para. 60: "Hardcore restrictions may be objectively necessary in exceptional cases for an agreement of a particular type or nature and therefore fall outside Article 101(1)." (footnote omitted).

legitimate goal exempting a competitive restraint if necessary.[20] The Commission has considered reasons of safety or health as potentially legitimate main objectives in that sense.[21]

In *Wouters*, the Court of Justice held that a restrictive decision in an association of undertakings in the legal profession had the objective to "ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience".[22] Such legitimate main operation was found sufficient to let the decision fall out of the scope of the cartel prohibition. In a similar vein, the Court of Justice has considered the aim to safeguard the proper conduct of competitive sport as a legitimate main operation that justifies ancillary restraints.[23]

In any event, however, the legitimacy of the main operation must be rooted in the European legal order, as it was the case in all the aforementioned instances. Conversely, the Court of Justice denies the parties the privilege to define their own legitimate objectives. In *Kunsten B.V.*, for example, the Court of Justice ruled that Article 101 TFEU did not allow for self-employed musicians to be included in "collective labour agreements" that were concluded between employees and employers and by which the latter were obliged to adhere to the negotiated minimum fees also in relation to self-employed musicians. With self-employed musicians qualifying as undertakings, the Court of Justice found this agreement to restrict competition in terms of Article 101 TFEU. The Court of Justice denied the ancillary exemption in relation to self-employed musicians. While collective bargaining between employers and employees was considered a legitimate main operation under EU-law, in the Court's view the same could not be said about collective agreements involving self-employed persons. The Court of Justice explicitly made reference to the Treaty, notably to Articles 153 TFEU and 155 TFEU, when highlighting the distinction between the self-employed and the employed, with EU-primary law endorsing collective bargaining only in regard to the latter.[24]

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[20] That was left open in Court of 4 September 2014, Joint Cases C-184/13 et. al. [API] ECLI:EU:C:2014:2147, paras. 50 et seq.

[21] Commission, Guidelines on Vertical Restraints, OJ 2010 C 130, p. 1, para. 60; *see* also Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101, p. 97, para 18. Although the general purpose of the latter guidelines is to define the scope of the exemption laid out in Article 101(3) TFEU, the Commission also deals with the notion of restriction of competition in terms of Article 101(1) TFEU.

[22] Court of 19 February 2002, Case C-309/99 [Wouters] ECLI:EU:C:2002:98, para. 97.

[23] Court of 18 July 2006, Case C-519/04 [Meca-Medina] ECLI:EU:C:2006:492, para. 45.

[24] Court of 11 September 2014, Case C-413/13 [FNV Kunsten Informatie en Media] ECLI:EU:C:2014:2411, para 29: "It should also be added that, although the Treaty encourages dialogue between management and labour, it does not, however, contain provisions, like Articles 153 TFEU and 155 TFEU or Articles 1 and 4 of the Agreement on social policy (OJ 1992 C 191, p. 91), encouraging self-employed service providers to open a dialogue with the employers to which they provide services under a works or service contract and, therefore, to conclude collective agreements with a view to improving their

Consequently, the Court of Justice in *Albany* accepted collective agreements between firms and employees about the mandatory membership in a social security system. The Court of Justice concluded on the inapplicability of the cartel prohibition since collective bargaining between employers and the workforce are recognized as an important element of social security in EU-primary law. The Court of Justice made reference to several provisions from which it could be concluded that associations and collective bargaining between employers and workers were recognized, and even encouraged, in EU-primary law, which, in the Court's view, were an element of an aim to promote a high level of employment and social protection as defined as a policy goal in the EC-Treaty.[25] In addition the Court of Justice referenced the "Agreement on social policy"[26] for corroboration. The Court then concluded "from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty."[27]

II.iii Indispensability Test

Since the EU-jurisprudence has made clear that Article 101 TFEU does not entail a rule of reason, the ancillary restraints doctrine hinges on a strict causality test. The antitrust agencies and courts do not engage in a weighing and balancing of interests. Instead they confine themselves to the assessment of the indispensability, which is a matter of causality. It does not suffice that the restriction merely contributes to the "commercial success" of the cooperation. Rather, for the ancillary doctrine to apply, the main operation must be "difficult or even impossible to implement" without the particular restraint.[28]

As to this requirement of the doctrine, one must behold that the indispensability test is inextricably linked to the definition of the legitimate main operation. That has to do with the degree to which it follows from the main operation that a restrictive agreement is indispensable.

In some cases, the nature of the objective makes a restrictive coordination necessary. Non-compete clauses in M&A-contracts cannot be substituted for by any other mechanism in order to protect the interests of the parties so that they are willing to engage in the corporate restructuring in the first place. The same is true in cases where a policy goal is directly related to a type of restrictive coordination, such as in regard to collective bargaining of

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terms of employment and working conditions (see, by analogy, judgment in *Pavlov and Others*, EU:C:2000:428, paragraph 69)."

[25] Court of 21 September 1999, Case C-67/96 [Albany] ECLI:EU:C:1999:430, paras. 54 et seqq.

[26] OJ 1992 C 191, p. 91.

[27] Court of 21 September 1999, Case C-67/96 [Albany] ECLI:EU:C:1999:430, para. 60.

[28] General Court of 24 May 2012, Case T-111/08 [MasterCard] ECLI:EU:T:2012:260, para. 80.

employees and associations vis-à-vis the employers. That was characteristic for the situation in *Albany*. The ECJ thus concluded that collective negotiations in that context must, "by virtue of their nature and purpose", fall outside the scope of Article 101 TFEU.

Against this background, the question arises whether sustainability necessitates coordination "by virtue of its nature' in a similarly clear fashion as it was the case in *Albany* with respect to collective bargaining between employers and workers. EU-primary law does not mention or even foster collective actions to attain greater sustainability. An analogy to Albany, to that end, would therefore be brittle.[29]

Yet it would be unconvincing to make the ancillary privilege conditional upon EU-primary law explicitly endorsing or even fostering collusion in the industry, as in *Albany*. That can be deduced from other cases where the Court of Justice accepted the ancillary privilege, especially *Wouters*, even though EU-primary law did not give any indication as to the necessity of horizontal restraints.[30]

In *Wouters*, the Court of Justice relied on the ancillary doctrine even though it did not follow from the nature of the policy goal itself that restrictive agreements were necessary. There, the Court of Justice looked into the concrete legal framework within the national jurisdiction in order to find out about the indispensability of the horizontal restriction for the attainment of the policy goal. The case was about a decision taken by a self-governing body in the legal service branch prohibiting the formation of partnerships between lawyers and accountants. The power to take such decisions with binding effect on all professionals in the field had been bestowed on that body by the Dutch laws dealing with the rendering of legal services ("Advocatenwet").[31] Upon request for a preliminary ruling, the Court of Justice stated that the restriction fell out of the scope of the cartel prohibition for it contributed to the "proper practice of the legal profession". What is remarkable is the reasoning behind the conclusion on the necessity of the restriction. The Court of Justice did not state anywhere that it followed from the 'nature and purpose' of a proper practice of the legal profession as such that restrictive

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[29] The German Bundeskartellamt has voiced the opinion that whereas in *Albany* the restriction of competition among the parties was inherent in the policy objective as enshrined in EU primary legislation, which was collective bargaining, such is not the case with respect to EU sustainability policy goals. While the Bundeskartellamt therefore rejects an analogy to the *Albany* case, it voices skepticism as to whether the ancillary doctrine as emerging from other cases would apply to a sustainability agreement, albeit without rejecting this idea categorically. The Bundeskartellamt does not voice any statement as to whether the ancillary doctrine can apply in a sustainability context or not. It makes reference to Simon Holmes, *Climate Change, sustainability, and competition law, Journal of Antitrust Enforcement*, 2020 (8), p. 370 et seq., who argues so, yet it does not endorse this view.

[30] Court of 19 February 2002, Case C-309/99 [Wouters] ECLI:EU:C:2002:98, para. 108. Another case where the ancillary privilege was applied even though EU-primary law did not suggest any type of horizontal collusion was *Meca-Media*, which was about an anti-doping regulation in professional sports, Court of 18 July 2006, Case C-519/04 P [Meca-Medina] ECLI:EU:C:2006:492, para. 45.

[31] For details *see* Court of 19 February 2002, Case C-309/99 [Wouters] ECLI:EU:C:2002:98, paras. 3 et seqq.

decisions of associations of independent lawyers were necessary in they way that they had been adopted in the Netherlands. Quite to the contrary, the Court of Justice emphasized that other Member States dealt with the issue in different ways without this heterogeneity compromising the applicability of the ancillary doctrine in relation to the Dutch case.[32] To render the ancillary doctrine applicable, the Court of Justice conceived of the policy goal to provide a proper practice of the legal profession in the concrete design which it had been given by the Dutch legislator. The Court of Justice therefore, even in the operative part of the judgment, emphasized that the necessity of the restrictive decision related to this specific national legal framework.[33] In its legal reasoning, the Court of Justice made clear that, with respect to the necessity in relation to the policy goal, "(a)ccount must be taken of the legal framework applicable in the Netherlands."[34] The Court of Justice put its deliberations about the applicability of the cartel prohibition in the context of the fact that the "current approach of the Netherlands" was that "Article 28 of the Advocatenwet" entrusted the Dutch Bar "with responsibility for adopting regulations designed to ensure the proper practice of the profession".[35] The restrictive decision was (only) "considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned"[36], yet still it was exempt from the EU-cartel prohibition despite the fact that other Member States managed to sustain proper practice without such a legal framework.

In focusing on the particular legal order in the Member State, the Courts of Justice finds a sufficiently concrete operation in relation to which the indispensability test can then be performed. This line of jurisprudence therefore supports the approach hypothesized in this article that the national legislator can concretize generally accepted policy goals within the realm of its own jurisdiction even to the extent that restrictive agreements become necessary. Such 'corridors' will then be assessed under the ancillary doctrine even if the legal framework in other Member States aimed at pursuing the same legitimate objective might deviate from it. What also becomes clear from the aforementioned jurisprudence is that, irrespective of the framework under national law, the ancillary doctrine still requires the indispensability of the measure for the attainment of the goal within the national framework. The national legislator, therefore, is not free in creating exemptions from the EU cartel

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[32] Court of 19 February 2002, Case C-309/99 [Wouters] ECLI:EU:C:2002:98, para. 108.

[33] Court of 19 February 2002, Case C-309/99 [Wouters] ECLI:EU:C:2002:98, at 2: "A national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite effects restrictive of competition, that are inherent in it, is necessary for the proper practice of the legal profession, **as organised in the Member State concerned**." (emphasis added).

[34] Court of 19 February 2002, Case C-309/99 [Wouters] ECLI:EU:C:2002:98, para. 89.

[35] Court of 19 February 2002, Case C-309/99 [Wouters] ECLI:EU:C:2002:98, para. 100.

[36] Court of 19 February 2002, Case C-309/99 [Wouters] ECLI:EU:C:2002:98, para. 107.

prohibition in its own unfettered discretion. Yet the legislator may shape the national legal order around recognized policy goals without Article 101 TFEU interfering to the extent that the necessity of the competitive restraint follows from the respective national framework.

For the remainder of the article, we will briefly outline why sustainability is a legitimate goal as enshrined in EU-primary legislation, and, secondly, in what ways the national legislator could design sustainability corridors in which necessary competitive restraints could be accepted under the ancillary doctrine of Article 101 TFEU.

II.iv The Legitimacy of Sustainability in EU-Primary Legislation

As to environmental sustainability, we think that sufficient endorsement has percolated into the primary legislation for it to be recognized as a legitimate objective. We first want to point to Article 3 TEU (ex Article 2 TEU), which sets out in its paragraph 3 Sentence 2 that the EU shall "work for the sustainable development of Europe based on […] a highly competitive social market economy, aiming at […] a high level of protection and improvement of the quality of the environment." It is added in Article 3(5) Sentence 3 TEU that the Union shall contribute to a "sustainable development of the Earth". This demonstrates that, from a policy standpoint, the aims of a competitive market economy on the one hand, and sustainability and environmental protection on the other, must be reconciled. In addition, Article 191 TFEU (ex Article 174 TEC) sets out, in its first paragraph, that "Union policy on the environment shall contribute to the pursuit of the following objectives: - preserving, protecting and improving the quality of the environment, - protecting human health, - prudent and rational utilisation of natural resources, - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change". This statement demonstrates, again, that sustainability is an enforcement paradigm that is embedded in the wider convictions shared by Union law.

Above all, the cross-section-clause of Article 11 TFEU (ex Article 6 TEC[37]) defines that "(e)nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development." The relevance of Article 11 TFEU exceeds that of a mere policy statement in that it mandates a thorough consideration of sustainability when applying EU-law. Even though Article 11 TFEU is without prejudice on the concrete ways how law enforcement integrates sustainability, the provision carries a normative weight that bears on all kinds of EU

[37] Its predecessor was introduced in the EC-Treaty by 1987 as Article 130r(2) Sentence 2, and by the Maastricht Treaty slightly amended and transferred to Sentence 3, which read: "Environmental protection requirements must be integrated into the definition and implementation of other Community policies."

legislation and its enforcement.[38] According to the Court of Justice, the "protection of the environment constitutes one of the essential objectives of the Community", and Article 11 TFEU "emphasises the fundamental nature of that objective and its extension across the range of those policies and activities".[39] This reflects the underlying principle that EU-law must be construed so as to yield a coherent system.[40] The cross-section clause of Article 11 TFEU, therefore, can gain relevance in the construal[41] as well as the application of EU law.[42] We do not share the view that Article 11 TFEU prioritizes sustainability under all circumstances

[38] *See*, e.g., Opinion of Advocate-General (AG) Kokott of 18 November 2003, Case C-304/01 [Spain v Comm'] ECLI:EU:C:2003:619, para. 68: "Finally, the contested regulation is also proportionate in a more narrow sense. In adopting the measure the Commission had to reconcile several aims. The measure primarily provides for conservation of fish stocks in the interest of their further sustainable exploitation and for environmental protection, which under Article 6 EC must also be taken into account in the area of fisheries policy. This aim would have been best achieved by a total closure of fisheries." (footnote omitted); Opinion of AG Jacobs of 30 April 2002 in Case C-126/01 [Ministre de l'économie, des finances et de l'industrie v GEMO] ECLI:EU:C:2002:273, para. 65 mentioning Article 6 TEC as point of reference for his legal argumentation; Opinion of AG Alber of 4 July 2002 in Case C-444/00 [The Queen on the application of Mayer Parry Recycling Limited v Environment Agency et al.] ECLI:EU:C:2002:420, para. 124: "The objective of attaining a high level of environmental protection accords with the requirements of Article 174(2) EC. Article 6 EC requires environmental protection requirements to be integrated also when measures to harmonise laws are adopted. The Court has deduced from that objective, which the Waste Directive also serves, that the concept of waste is to be interpreted broadly." (footnote omitted); Opinion of AG Ruiz-Jarabo Colomer of 26 May 2005 in Case C-176/03 [Comm' v Council] ECLI:EU:C:2005:311, para. 56 and 59. *See* also Suzanne Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*, supra note 4 at 780, 787.

[39] Court of 15 November 2005, Case C-320/03 [Comm' v Austria] ECLI:EU:C:2005:684, paras. 72, 73.

[40] To that end with respect to sustainability Suzanne Kingston, *Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special*, supra note 4 at 780, 783, *see* also PIERRE PESCATORE, THE LAW OF INTEGRATION (Leiden: A.W. Sijthoff, 1974), at 41.

MICHAEL KLING & STEFAN THOMAS, KARTELLRECHT, (Munich: Verlag Franz Vahlen, 2nd. Ed. 2016), p. 582.

[41] On that specifically Martin Nettesheim in MARTIN NETTESHEIM (ed.), GRABITZ, HILF & NETTESHEIM, DAS RECHT DER EUROPÄISCHEN UNION (The Law of the European Union) (Munich: C.H. Beck, 7th ed 2020) Article 11 para. 31.

[42] Court of 17 September 2002, Case C-513/99 [Concordia Bus Finland et al.] ECLI:EU:C:2002:495, ¶ 57 (in relation to procurement law): "In the light of that objective and also of the wording of the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, transferred by the Treaty of Amsterdam in slightly amended form to Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender."; *see* also Court of 13 March 2001, Case C-379/98 [PreussenElektra v Schleswag] ECLI:EU:C:2001:160, para. 76; Court of 14 July 1988, Case C-284/95 [Safety Hi-Tech v S. & T.], ECLI:EU:C:1998:352, paras. 36, 37.

above any other policy goal, notably competition.[43] Yet it is a strong legal statement about a sustainability oriented development of European policies.[44] This conviction is further supported by Article 37 of the EU Charter of fundamental Rights, which states that "(a) high level of environmental protection and improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

II.v Corollary

At this point, we find it expedient to briefly summarize, and to state what can and what cannot be concluded from the afore.

The first conclusion is that, as shown above, the national legislator can concretize general policies on a national level even if such national regulatory framework eventually carries in itself the inherent necessity to collude. As seen in *Wouters*, such will not exclude the agreements and decision taken therein from the ancillary privilege.

Secondly, the indispensability test must not be confused with a balancing of interests in the concrete case. Rather, the necessity of the restrictive practice must present itself clearly within the context of the national legislation around the legitimate objective. It is here where we find that more in depth analysis of different legal

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[43] To that effect Giorgio Monti, *Article 81 EC and Public Policy*, 39 CMLRev 1057, 1078 (2002): "Another possible argument […] is that the duty imposed by Article 6 EC to integrate environmental protection in the Community policies and activities referred to in Article 3 EC means that environmental protection is normatively superior to the core values of EC competition law, and may thereby act as a 'trump' to justify even anticompetitive environmental agreements if these are necessary to safeguard the environment."; Suzanne Kingston, Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special, supra note 4 at 787: "policy makers must prioritise environmental protection in defining and implementing EU policies at all stages, including the stage of initial policy formulation.", *see* also Martin Wasmeier, *The integration of environmental protection as a general rule for interpreting Community law*, 38 CMLRev 159, 160 (2001): "Essentially, the Community cannot adopt any measures that lead to deterioration of the quality of the environment."

[44] Christian Calliess, in EUV/AEUV (CHRISTIAN CALLIESS & MATTHIAS RUFFERT (eds.)), (Munich: C.H. Beck 5th Ed. 2016) at Article 11 TFEU para. 9: "rechtlich eindeutig gewährleistet, daß nicht nur die Rechtsetzungstätigkeit der EU im Einzelfall, sondern darüber hinaus jedes (auch individuell-) konkrete Handeln der Organe umweltverträglich ausgestaltet sein muß. Mithin ist eine auch auf alle Einzelmaßnahmen ausgerichtete ‚strategische Umweltverträglichkeitsprüfung' durchzuführen." (footnotes omitted) translation: "guaranteed un-ambiguously in legal terms that not only legislative actions by the EU in a particular context but also any (even individually) concrete measures of EU Institutions must be designed in an environmentally-friendly way. Therefore, a 'strategical environmental assessment' must be undertaken with respect to any concrete measure." In a similar vein NELE MIEKE LEENTJE DHOND, INTEGRATION OF ENVIRONMENTAL PROTECTION INTO OTHER EC POLICIES: LEGAL THEORY AND PRACTICE (Groningen: Europa Law Publishing 2003) at 181: "The view that the provisions in Articles 6 and 174 EC are merely of a political nature or importance is unattainable in light of the above-summarised and -discussed case law. All provisions seem to have certain legal effects, which I divided into direct and indirect consequences".

frameworks and their economic underpinnings is needed. We turn to this point in the subsequent chapter of our article.

III Designing Legitimate Objectives in a Sustainability Context

III.i Preliminary Remarks

Based on our preceding analysis we see the potential of sustainability goals to be pursued under the ancillary restraints doctrine, though this requires the legislator to define and concretize such goals. In the following we expound on the challenges that must be overcome for that. We do so by providing various positive and negative examples, and by outlining economic methods that can help to assess the necessity of a restraint to attain such goal. Here, we structure our discussion as follows.

We first discuss the case where through respective laws there are clearly defined responsibilities imposed upon enterprises. Even though the respective obligations are imposed on each enterprise individually, we argue that under certain circumstances a realization of the objectives of the respective laws may require a cooperation between firms, so that the respective competitive constraints can be necessary and thereby fall squarely within the ancillary privilege.

Secondly, we turn towards the empowerment of firms to establish industry standards. This concerns situations in which the legislator shies away from enacting legislation to tackle externalities. A reason for regulatory abstinence can be a lack of information about concrete effects and the most efficient ways to mitigate them. The legislator may therefore decide to delegate to a specific industry, e.g., the development of sustainability standards to which all enterprises must then adhere.

Our third category concerns policy objectives that do not translate into responsibilities and obligations imposed on individual firms. Instead, there may be a concrete political commitment to reduce particular emissions. The problem that arises here is that an individual contribution by way of a sustainability agreement or merger will often not be indispensable to achieve that goal. Several measures are interchangeable, and a single measure will not suffice in itself to achieve the goal. While a specific cooperation may not be necessary to achieve this commitment, however, it may allow to do so at lower societal costs, for instance as it avoids making other sacrifices such as that of limiting traffic. We will assess whether this allows for sustainability corridors to be shaped by the legislator.

III.ii Specific Sustainability Obligations

As to the first scenario, our example is that of a legislation which imposes on firms obligations to ensure the compliance with sustainability standards along their entire supply chain.[45] This example alludes to recent developments around so called "supply chain legislation" in Europe. A supply chain legislation was passed in Germany in 2021, entering into force in January 2023.[46] The EU-Commission has proposed even more far reaching provisions on an EU-level, which will likely come into effect soon.[47] Such supply chain legislation obliges firms to observe legal and ethical standards as well as sustainability criteria within their own supply chains. The German supply chain legislation holds firms responsible for the compliance of their suppliers with "human rights-related" and "environment-related" obligations in various forms. Even though the law concretizes environment-related duties by references to specific pieces of environmental legislation[48], the assessment of concrete legal standards remains complex and sometimes involves additional room for interpretation.[49] The legal imperative therefore relates to ensuring the compliance of third parties, i.e. the suppliers, in Germany or in third countries, i.e. outside Germany or outside the EU respectively, with those standards.

Such supply chain obligations fall onto individual firms. Each individual firm will then have to contemplate, first, if it wants to incur the respective costs of compliance with this law and, second, if it also accepts the liability risk resulting from the supply chain legislation. This may induce some companies to decide against continuing to do business in particular countries, with respective negative, unintended consequences. Such negative consequences from a termination of supply relationships in a third country would relate to the prevailing standards in those countries, since the pullback of the purchaser from the business relationship would mean that the supply chain legislation cannot produce any intended effects as to increasing standards there. Moreover, the exit would deprive the supply side in those countries from a possibility to obtain any economic

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[45] As mentioned, Germany has already passed a supply chain legislation. The EU is suit to follow. Since the legislative process is in flux, we do not enter into a discussion of specific provisions. Rather, we confine ourselves to the basic rationale behind such legislation which lies in extending local (national or EU-wide) ethical and regulatory minimum-standards to suppliers in third countries and holding local purchasers responsible for ensuring the compliance of the supply side with those standards.

[46] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten of 16 July 2021, BGBl. 2021 Teil I Nr. 46 of 22 July 2021, p. 2959.

[47] EU Commission of 23 February 2022, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937: https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf.

[48] See § 2(3) of the law.

[49] E.g. „Verletzung …einer umweltbezogenen Pflicht als sehr schwerwiegend bewertet" („violation of an environment-related duty considered very grave". *See* also the obligation to make a „Grundsatzerklärung" ("basic statement") in § 6 of the law, in which the firm must, inter alia, express its "environment-related expectations vis-à-vis its suppliers".

benefit from contracts with the respective purchaser. Beyond that, the termination of purchases in such a country will most likely increase the buyer power of purchasers from other countries where no supply chain legislation exists thereby reducing the contractual rent of the supply side further. These few considerations demonstrate that any supply chain legislation can have worsening effects on both the environmental and the ethical standards in third countries as well as the economic development of these countries if and to the extent that it gives incentives to the demand side to substitute domestic suppliers for the firms in those third-countries.

The cost of compliance with supply chain legislation will therefore impact on the likeliness that the supply chain legislation achieves its goal to improve production standards in supply chains and thereby contribute to sustainable international growth and development.

When firms can share information on particular suppliers, this may considerably reduce compliance costs. Developing joint industry standards on how to exert the necessary diligence may further reduce the risks of non-compliance for each individual company. Such information sharing and standard setting, notably among competitors, may, however, lead to ambiguous effects on consumer rent in the downstream market. Consumers might appreciate the more sustainable supply chain as a non-use value of the product and therefore have a greater willingness-to-pay.[50] On the other hand, the more sustainable production in a third-country can come with a cost increase, e.g. due to compliance with stricter sustainability standards. If the latter effects offset any benefit that can be measured in an increase in willingness-to-pay, the net benefit on consumer welfare is negative. This demonstrates an antitrust conundrum that can come along with the supply chain legislation. As outlined above, it is conceivable that firms will avoid the compliance risk of an engagement in a third country unless a coordination about sustainability standards takes place. Such coordination, which ensures that the legal rationale behind the supply chain legislation is achieved, can therefore be the cause for a net reduction in consumer rent. In those instances, a legal exemption under Article 101(3) TFEU based on efficiency claims is ruled out. If the achievement of the goals of the supply chain legislation, however, can be considered a legitimate objective in terms of the ancillary doctrine, the coordination would qualify as an ancillary restraint.

Based on the principles outlined above, the goals of the supply chain legislation in terms of environmental sustainability are sufficiently embedded in EU primary law.[51] What matters, therefore, is whether in such a case

[50] On the underlying argument, *see* Roman Inderst & Stefan Thomas, Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis, Journal of Competition Law & Economics, nhab016, https://doi.org/10.1093/joclec/nhab016.

[51] We assume that the ethical objectives pursued besides sustainability in the supply chain legislation can claim equal recognition in EU-primary law. Yet for the sake of argumentation in our article, it is not necessary to elaborate on this further. We confine ourselves to the aspect of environmental sustainability in the following.

the indispensability test of the ancillary doctrine is fulfilled. We want to make an important clarification on that in the following.

We do not state that any coordination in relation to the dealings with the obligations under a supply chain legislation will per se qualify as ancillary. Emphasizing this is, in our view, important to deal with a potential counterargument against our proposal. One might want to invoke that firms are supposed to comply with such legislation individually, and that the supply chain laws do not provide specific justification for harmful[52] collusion. All that is true. We merely state, however, that if it can be established that absent a horizontal coordination the objectives of the law would be periled thanks to the risk potentials outlined above, a restriction of competition can be indispensable for the attainment of the legal intention behind the supply chain legislation as a legitimate main operation.

The ancillary privilege would no longer apply, however, if the coordination exceeded what is indispensable to achieve the main operation. To engage in downstream price coordination, for example, can constitute a naked restraint without being ancillary to the legitimate main operation as emanating from the supply chain legislation.[53] Such agreement would therefore not be indispensable for the attainment of the legislative aim. The same would be true for a fixation of minimum prices to be paid to the producers of, for instance, an input that satisfied the applied environmental standard. Even though such a measure could benefit the supply side, the provisions of the existing supply chain legislation are not concerned with the general principle of fairness of purchasing prices in a supply chain so that, again, such coordination could not be considered necessary for the attainment of a legislative goal as required by the *Wouters* judgment.

III.iii Specific Industry Mandates

The second category of sustainability corridors that national legislators may want to create within the realm of the European sustainability goal deals with explicit encouragements of the industry to collude on certain parameters to transform the industry. For instance, the legislator may allow the industry to agree on ways how to achieve certain sustainability standards, e.g. about animal welfare, within a certain time period. For instance, the objective may be to ensure that 80% of total industry production or sales satisfy a given standard. Such a standard could relate to maximum transport distances for live animals. Within the time window, no specific obligations are placed on individual firms. After this time window, instead, it is foreseen that requirements will be imposed on each individual firm should the industry target not be met. Such requirements placed on each

[52] If measured from the consumer welfare perspective.

[53] Unless special justifications apply, such as a joint production with subsequent joint distribution, where, depending on the case, a restriction by effect can be absent, *see* Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C 11/1, paras. 160 et seq.

individual firm may, however, be inefficient as compared to achieving an industrywide target in ways that policymakers cannot conceive of given their lack of information. For instance, regulation may indiscriminately limit transport distances regardless of the time of the year or the particular animal or breed. Again, to achieve the industrywide target and thereby avoid the less efficient regulation, firms may need to exchange information or commit to a joint path of action. In other circumstances, firms may need to share information on the sustainability standards that their (joint) suppliers adhere to.

Again, restraints of competition that are not necessary to fulfill the respective sustainability objective within the industry mandate cannot be covered by the ancillary privilege. Firms would thus have to exert caution, for instance, on which information to share, and that their joint commitment does not mitigate competition in any other way.

III.iv Specific Policy Sub-Goals

Finally, we envisage a third scenario for a publicly defined sustainability corridor. It concerns sustainability measures which are neither defined as specific sustainability obligations nor as specific industry mandates. This third scenario is about the definition of a concrete goal, albeit in a quantifiable way, so that the net contribution to the pursuit of the overarching objective can be measured accordingly. It is, therefore, a precisely quantified goal that is embedded in a wider policy aim to which it is supposed to make a contribution. We refer to this as a "sub-goal". We will first home in on the situation by an example and then elaborate on the legal and economic questions.

Assume that the legislator commits to a specific sustainability sub-goal, such as a reduction of the emission of a particular pollutant by a certain amount until a particular point of time, or likewise a reduction of its concentration in densely populated areas. Such a commitment may not involve a precise list of specific instruments. In fact, there may be various options to achieve this objective, such as changes in production technologies but also, for instance, the restriction of (economic) activity, e.g., of inner city traffic. Each such activity may involve different societal costs, such as foregone utility from travelling or lost economic activity. As discussed below, in most instances, there will be no particular tax on the respective emissions. Policy may, however, consider various instruments to achieve this target, such as a gradual increase in minimum standards of emissions or immissions.

Suppose now that firms jointly propose an agreement under which a reduction in such emissions or of the respective concentration of particulate matters or gases would be achieved that would otherwise not materialize. This may involve the utilization of a more expensive production technology, or a restriction to products that generate less of those emissions. A unilateral implementation of such a policy may not be successful as consumers do not exhibit a sufficiently high willingness-to-pay, i.e., as they do not value sufficiently the thereby reduced out-of-market externalities. Suppose also that the agreement leads to a quantifiable reduction of the

respective emissions and that it was possible to gauge which other measures could thereby be avoided while still achieving the defined sub-goal. Specifically, to stay within the target, under realistic scenarios restrictions to traffic may be unavoidable otherwise. But the measures intended under the agreement will come at higher prices for consumers. For the sake of the argument, assume again that this price increase will be greater than any potential increase in willingness-to-pay by consumers for the reduction in emissions as a non-use value of the product so that an efficiency defense under Article 101(3) TFEU would have to be denied.

If the legislator endorsed such sustainability agreements under the condition that they yielded an appreciable reduction of the societal costs of climate change, the question about the ancillary privilege would arise. Again referencing the conclusions drawn above on the general principles behind the doctrine, we find persuasive arguments to consider it applicable. Sustainability as the overarching legitimate goal is enshrined in EU-primary law, while, according to *Wouters*, the necessity of an agreement must be assessed in the light of the laws of the respective jurisdiction. If the latter established a regime that honored collective action to reduce emissions in a quantifiable way so that societal costs are being reduced, the necessity would have to be assessed in the light of this legal regime, viz. in relation to the legally defined sub-goal.

One might want to involve two counterarguments to which we will turn now.

The first objection against relying on the ancillary doctrine here could be that, according to the jurisprudence, mere cost reductions that render an operation more efficient, do not qualify for the ancillary exemption. Rather they have to be dealt with under Article 101(3) TFEU. In the present context, however, the reliance on cost relates to societal costs rather than to the costs of production. Therefore, the cost reduction is used as a unit of measure for quantifying the net contribution to the attainment of the sustainability sub-goal. It is not a reflection of an increase in producer surplus. The measurement of social costs and the respective avoidance attributable to an agreement is a measurement of the degree to which a contribution to the policy sub-goal is made. This can follow established procedures, as they are commonly applied in environmental and resource economics.[54] More specifically, one way is through an abatement cost analysis, as we briefly discuss next.

This is part of the greater toolkit of (environmental or social) cost benefit analysis. Such an analysis is carried out by public bodies in various areas to assess the impact of public policy interventions.[55] Within the context

[54] *See*, for instance, in Roman Inderst, Eftichios Sartzetakis & Anastasios Xepapadeas, *Technical Report on Sustainability and Competition, A report jointly commissioned by the Netherlands Authority for Consumers and Markets (ACM) and the Hellenic Competition Commission (HCC)*, 2021, available at: https://www.acm.nl/en/publications/technical-report-sustainability-and-competition (last accessed 15 March 2022).

[55] *See*, for instance, the guidelines published by the OECD specifically for environmental projects: OECD, Cost-Benefit Analysis and the Environment, Further Developments and Policy Use, Paris, 25 June 2018. Available at: https://www.oecd.org/governance/cost-benefit-analysis-and-the-environment-9789264085169-en.htm (last accessed 15 March 2022). For a discussion within the context of sustainability and competition policy *see* also T. van Dijk, A New

of an abatement cost approach, it is not necessary to calculate the respective environmental or social cost of a specific intervention, for which there are other methods. Instead, starting from a specific objective, such as the aforementioned reduction in emissions or immissions, the aim of the method is to estimate the costs that are required to achieve such an objective. In its general application, a so-called supply-curve is constructed, which comprises different measures that contribute to this objective and that ranks those measures in relation to their costs. From this curve one can learn the marginal abatement costs for any given level of emission reduction or targeted maximum level of immissions. The (additional) measure proposed by the agreement can then be assessed accordingly. In the most simple case, the respective benefits are equal to the costs that are associated with the costliest measures, as learnt from the supply-curve, that are just needed so as to achieve the objective.

Hence, in response to a first possible objection, we have seen that the analysis relates to social costs, not cost efficiencies from the perspective of firms. And we have also seen that such social efficiencies can be quantified using standard approaches from cost-benefit analysis. Now, a second objection could be that a quantified reduction in emissions merely contributed to the attainment of the sustainability goal, yet would not in itself be necessary to achieve an improvement. If checked against the jurisprudence in *Wouters*, however, such counterargument would be brittle. There, the ECJ emphasized that the particular national legal framework, in which the restrictive decision was taken, was all but one possible way of attaining the goal of ensuring "proper practice of the legal profession". Other Member States were found to apply different regimes, yet still the Court of Justice found the decision as taken within the Dutch legal framework necessary in relation to the particular legal design in the Netherlands. Therefore, it should not be seen as conditional for the application of the ancillary doctrine that the national legal framework, in which the restrictive coordination takes place, is in itself indispensable in the sense that no other way of attaining the societal goal would be conceivable.

As will be typically the case with the consideration of out-of-market benefits, while the costs of an agreement, e.g., in terms of reduced variety or higher prices, fall upon consumers, most of these benefits may not accrue to the same group of consumers. In fact, the described cost-effectiveness approach would be blind about the distribution of benefits and costs, e.g., as to who would benefit the most when the measures proposed under the agreement avoid the imposition of restrictions to inner city traffic. The enforcement of antitrust traditionally does not have at its disposal instruments to address such a potential unbalanced distribution of costs and benefits, which provides justification for the "fair share" requirement in Article 101(3) TFEU and, correspondingly, a more narrow restriction of the respective group of consumers. The formulation of a policy objective, as just described, and its recognition as a justification for the application of the ancillary restraints doctrine, however, open up a different path. In expectation of such a balancing of consumers' interests with

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Approach to Assess Certain Sustainability Agreements Under Competition Law, in COMPETITION LAW AND ENVIRONMENTAL STABILITY (Paris, France: Concurrences Books, 2021).

broader societal benefits, policymakers could explicitly address this in the respective legislation, which may foresee the possibility of compensating actions if the respective benefits and costs have been convincingly calculated (e.g., such as a reduction of taxes on vehicles or other appliances that fall under the agreement and that achieve the respective reduction).

Finally, the proposed recognition of sustainability benefits under a specific policy objective should not be confused with a broad acceptance of measurable societal benefits. For instance, regarding the emissions of some noxious substances there may exist recognized measures for the respective social prices, e.g., derived from studies on their negative health impact. Firms may now propose to jointly lower their emissions below the minimum standard that currently prevails, and they may wish to recognize the resulting benefits, e.g., in terms of avoided health costs. As we discussed above, to the extent that these affect non-consumers they would not be recognizable as efficiencies. The minimum standards set by policy should, however, already recognize the underlying trade-off, including health benefits and costs, from a societal perspective. In this case there is thus no identifiable, concrete objective that would justify the firms' agreement and the higher costs imposed on consumers.[56]

IV Conclusions

In various contributions, as cited above, we have proposed ways how to extend the consumer welfare paradigm so as to make antitrust law and its enforcement more accommodating of sustainability considerations. So-called out-of-market externalities that are not (and will not be) appreciated by current or future cohorts of consumers of products in the concerned market(s) must necessarily still escape such an approach. In our view, there is indeed little scope for a general extension of consumer welfare considerations in antitrust law in such a direction, unless one is willing to accept a multi-goals approach. As we have laid out above, as well as in our previous contributions, such an approach is however fraught with many problems, of which the failure of a single, unifying metric for such multiple goals is just one. With this background, our present contribution is to propose a way to both stay within the existing legal framework but to also provide an approach for selectively expanding the consideration of specific sustainability goals.

For this we lay out a roadmap for how the legislator could create a framework of "sustainability corridors" that would allow to rely on the ancillary restraints doctrine. Our analysis of the courts' application of this doctrine both shows that this is feasible also in our context and it provides us with specific guidelines. Based on this,

[56] While we acknowledge that there may be many reasons for why currently prevailing standards and regulation may fall short of societal preferences, including those of future generations, such as failure and inertia of the political system or a lack of information, neither the joint actions of firms nor the involvement of the enforcer can and should replace the political process.

our proposal sets out specific requirements for such sustainability corridors that ensure that the ensuing antitrust assessment is governed by a strict and quantifiable indispensability test. In a final step we attempt to flesh out this indispensability test by taking up three specific instances. When legislation imposes on individual firms certain sustainability obligations, their fulfillment in the spirit of the law may require collective actions. Policy may also formulate specific industry mandates, so that it is left to firms collectively to find ways how to fulfill the respective objectives (possibly under the threat of additional, though most likely less efficient, regulation, in case the objective has not been reached). A third instance concerns policy objectives that are not targeted at individual firms or industries but provide a metric for the measurement of sustainability benefits. Here, we discussed the case of an abatement cost analysis that would allow to measure the (social) benefits of an agreement in a (monetized) way that is commensurable with the measurement of consumer harm. In all three instances we stressed the need to both define clear objectives and apply a strict indispensability test. While the respective standards need to be (further) developed and tested by antitrust authorities and courts, the task of defining such sustainability corridors lies with the legislator.