Sell Green Downstream – Sustainable Dual Pricing and Competition Law
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I. Introduction

Recent literature has made a strong case for why sustainability considerations should play a larger role in competition law.[2] Competition authorities' rulemaking has already followed suit in certain instances.[3] At the same time, this development encounters critique which deserves to be taken seriously.[4] On a fundamental level, the – necessary – debate will continue. However, even regarding the existential question of how our societies and economies manage to become more sustainable, the devil can be in the detail. To what extent should competition law pursue a more sustainable approach (MSA) in a particular setting; do current, detailed rules in secondary and tertiary[5] EU law already allow for such an approach in their respective fields of application; where does a MSA require adjustments to them? These questions require granular analysis of individual settings and practices.

The present contribution limits its ambitions to such an individual setting, namely online/offline wholesale price differentiation in vertical distribution. In a prototypical setting, a producer of consumer goods (P) considers selling this good at different prices to its distributor (D) depending on whether resale by this distributor will take place online[6] or offline[7]. The price difference is intended to account for differences in the sustainability of the distributors' respective retail activities. Contractually, and through appropriate auditing, P ensures that goods priced for online distribution are not sold offline, and vice versa, so that inter-channel arbitrage does not level the price difference.

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[2] Cf. eg. Simon Holmes, 'Climate change, sustainability, and competition law' (2020) 8 JAE, 345-405; Holmes/Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part' (2022); ClientEarth and Simon Holmes, 'Horizontal agreements between companies – revision of EU competition rules, ClientEarth and Simon Holmes' contribution to the Commission's consultation' (2021); Kate Raworth, 'Doughnut Economics: Seven Ways to Think Like a 21st Century Economist (Random House Business Books 2017); Michelle Meagher, Competition is Killing US: How Big Business is Harming Our Society and Planet – and What To Do About It (Penguin Business, 2020); John Newman, 'The Output-Welfare Fallacy: A Modern Antitrust Paradox' (2022) 107 Iowa L. Rev.; Thomas Philippon, 'The Great Reversal: how America gave up on free markets' (2019); Iacovides/Vrettos, 'Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice' (2022), 10 JAE, 32-62.

[3] Draft Guidelines Sustainability Agreements, Opportunities Within Competition Law by ACM (2020); Draft guidelines on the applicability of Article 101 of the Treaty on the Functioning of the EU to horizontal cooperation agreements by EC (2022); Technical Report on Sustainability and Competition by the Hellenic Competition Commission and the Netherlands Authority for Consumers and Markets (2021); Sustainability and Competition – Note by Greece to the OECD (2020); Correspondance on the Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government (2022); Leitlinien zur Anwendung von §2 Abs 1 KartG auf Nachhaltigkeitskooperationen (Nachhaltigkeits-LL) by the Bundeswettbewerbsbehörde (2022). Further also P Jansen, S J Beeston and L Van Acker, 'The sustainability guidelines of the Netherlands Authority for Consumer and Markets' (2022) 18, 2 ECJ 287-327

[4] Cf. Schinkel/Spiegel, Can collusion promote sustainable consumption and production? (2016) IJOIO 2017/43, 371, 374 seq.; Hancher/Lugard, 'Honey, I Shrunk the Article! A Critical Assessment of the Commissions Notice on Article 81(3) of the EC Treaty' (2004) 25/7 ECLR 410; Piscitelli/Gebrandy, 'The Sustainability Dilemma in Competition Law' (2018/19) 8/1 ecdpm Great Insights 19 seq.

[5] „Secondary law" is used here to designate binding EU competition law outside the Treaties, such as the Vertical Block Exemption Regulation. "Tertiary law" designates guidance which the EU Commission has published on its application of EU competition law, without such guidance being – technically, notwithstanding its factual importance – binding on undertakings, e.g. the Commission's Vertical or Horizontal Guidelines.

[6] Meaning that the distributor sells the goods to its customers via an online shop and subsequently has the goods delivered to their location.

[7] Meaning that the distributor sells the goods to its customers in a brick-and-mortar shop, with or without subsequent home delivery.

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At first sight, it seems not evident why suppliers should engage in sustainability-oriented dual pricing at all. However, a more sustainable value chain for the supplier's products as a whole, achieved because dual pricing induces a shift of transactions towards the more sustainable distribution channel(s), can, for instance, help the supplier to fulfil co2 reduction goals or similar obligations. Reputational effects, and their positive impact on market success, may come into play as well. Monetary incentives to distribute more sustainably can, to give a final example, be part of a more general strategy to drive "green", but also commercially rational, innovation along the value chain.

Given that it may, for these reasons, become a rational choice which suppliers increasingly take, part II of this contribution assesses how such a pricing scheme would fare under current EU competition law. Part III summarizes the results of this conduct-specific MSA feasibility test and briefly reflects on how supplier market dominance may alter it.

In spite of its bounded starting point, the reader must bear with certain further limitations of this exercise. In particular, it focuses on the environmental damage[8] component of sustainability (with the carbon footprint being an important parameter) and refers, for delineation attempts regarding this fuzzy concept, to previous literature.[9] EU competition law forms the framework of reference, with only selective looks at Member State laws and disregard of competition rules outside the European Union.

II. Sustainability-Oriented Dual Pricing Absent Market Dominance

1. Dual Pricing Under the (Recast) EU Vertical Distribution Rules

"Dual pricing" is the label most frequently used in EU competition law terminology for settings in which a supplier prices its products differently depending on whether the distributor intends to sell them online or offline to downstream customers.[10] According to its vertical distribution rules in force until June 2022, EU competition law was very critical towards such arrangements. The Vertical Guidelines[11] even regarded them as hardcore restrictions on passive resales[12] since they attributed to them the capacity "to limit the distributor's access to a greater number and variety of customers".[13] This negative assessment extended also to more indirect distinctions in distributors' input prices, such as e.g. rebates granted only for transactions in either of the distribution channels.[14] The Commission accepted, however, fixed fees a supplier would pay to support its distributor's sales efforts via a particular channel.[15]

A key reason for this restrictive approach was the Commission's concern that dual pricing (and certain other vertical arrangements)[16] could serve to deliberately hamper online distribution and weaken its competitive potential, especially in order to protect territorial sales restrictions on distributors.[17] Fact

[8] ACM, Guidelines on Sustainability Agreements, 2021, para. 8, define environmental damage as "damage to the environment in the production and consumption of goods or services", resulting, for instance, "from the emission of harmful air pollutants and greenhouse gases, and from the waste of raw materials".

[9] United Nations, 'Report of the World Commission on Environment and Development ("Brundtland Report"), Our Common Future' (1987), Chapter 2, 37; J H Spangenberg, Economic sustainability of the economy: concepts and indicators (2005) Int. J. Sustainable Development, Vol. 8, Nos. 1/2, 48 ff.; S E Shmelev, Ecological Economics: Sustainability in Practice (2012), 5 ff.; Paul E Hardisty, Environmental and Economic Sustainability (), 10 ff., 17ff.; OECD, Guidance on Sustainability Impact Assessment (2010); id., OECD work on Sustainable Development (2011); RNE, Nachhaltiges Wirtschaften und Sustainable Finance; Luisa Münch, Ökonomische Nachhaltigkeit: Warum alle darüber reden! (2020)

[10] See, for instance, EU Commission, Explanatory note on the new V-BER and Vertical Guidelines, 4.

[11] EU Commission, Guidelines on Vertical Restraints, OJ C 130/1, 19.5.2010 (hereinafter : 2010 V-Guidelines).

[12] 2010 V-Guidelines, para. 52 lit. d.

[13] 2010 V-Guidelines, para. 52.

[14] MüKoEuWettbR/*Wagner-von Papp* GWB § 1 Rn. 434.

[15] 2010 V-Guidelines, para. 52.

[16] Cf. 2010 V-Guidelines, para. 52, lit. a-c.

[17] *Pautke/Billinger*, ZWeR 2016, 40, 43, also regarding the potential of certain dual pricing arrangements to effectuate resale price maintenance.

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finding in preparation of the new, 2022 V-BER and V-Guidelines, and possibly also the critique levelled by scholars and practitioners against its rigid position,[18] convinced the Commission, however, "that online sales have developed into a well-functioning sales channel that no longer requires special protection relative to offline sales channels".[19]

Nonetheless, the 2022 V-BER[20] and V-Guidelines[21] (jointly hereinafter: V-Rules) give no carte blanche for dual pricing, which is convincing because the practice does affect the downstream price competition between (distributors in) different sales channels.[22] The V-Rules do, however, treat dual pricing no longer as a hardcore restriction. Under certain conditions, the practice can – if the parties' market shares are below the V-BER thresholds (Art. 3 V-BER) – now profit from the block exemption (Art. 2(1) V-BER) "as it may incentivise or reward an appropriate level of investments in online or offline sales channels".[23] "However, where the difference in the wholesale price has the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers, it is a hardcore restriction within the meaning of [Art. 4(e) V-BER]. This would, in particular, be the case where the difference in the wholesale price makes selling online unprofitable or financially unsustainable, or where dual pricing is used to limit the quantity of products made available to the buyer for sale online. Conversely, dual pricing can benefit from the exemption provided by [Art. 2(1) V-BER] where the difference in the wholesale price is reasonably related to differences in the investments and costs incurred by the buyer to make sales in each channel".[24]

The language of the 2022 V-Guidelines can be understood to put dual pricing in favour of online or offline sales on an equal footing. A supplier may, accordingly, "incentivize or reward" either online *or* offline sales. A contextual interpretation of the Guidelines, their legislative history, and a look at their 2010 predecessor show, however, that their main focus lies on dual pricing which may (unduly) disfavour online sales, i.e. on lower prices or higher rebates for goods intended for offline sale.

2. Web Shops Save the Climate (?)

A sustainability perspective forces us to question many a cherished conviction. The esteem for local brick-and-mortar shops may be one of them. In fact, several recent studies indicate that online distribution tends to be "greener" – especially regarding its carbon footprint – than offline sales. The core reason seems to be that online distribution avoids emissions created by the on-site shop and by customers' journeys to and from that shop,[25] while using relatively efficient, and thus sustainable,

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[18] *Pautke/Billinger*, ZWeR 2016, 40, 48 ff.; Rinne/Kolb, NZKart 2015, 377, 378 ff.; ACM, Contribution to the public consultation on the review of the competition rules applicable to vertical agreements, 28.9.2009, 3; id., ACM0s strategy and enforcement priorities with regard to vertical agreements, 20.4.2015; GA Nils Wahl, Opinion 27.3.2014 – Rs C-67/13 P, Rz. 56; EuroCommerce, Contribution to the Commission roadmap on the revision of the Vertical Block Exemption Regulation, 6.12.2018; European Distribution Lawyers, Evaluation of the VBER 330/2010, 4.12.2018; EU Commission, Evaluation of the Vertical Block Exemption Regulation, 8.9.2020, 100 ff.

[19] EU Commission, Explanatory note on the new VBER and Vertical Guidelines, 4.

[20] EU Commission, Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134/4, 11.5.2022 (hereinafter: V-BER)

[21] EU Commission, Guidelines on vertical restraints, OJ C 248/1, 30.6.2022 (hereinafter: 2022 V-Guidelines)

[22] For this reason, it would also not be wise to see sustainability-oriented dual pricing entirely outside the scope of Art. 101 TFEU, cf. ACM, Guidelines on Sustainability Agreements, 2021, para. 18 seq.

[23] 2022 V-Guidelines, para. 209.

[24] 2022 V-Guidelines, para. 209, references omitted.

[25] E.g. Umweltbundesamt (German Federal Environment Agency), Die Ökologisierung des Onlinehandels, Teilbericht I, 2020, 26 seq.

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transport methods[26] from the distribution base to the customers (last-mile-delivery).[27] However, researchers also underline that such comparative analyses are highly fact-sensitive and that they fluctuate over time.[28] Indeed, factors like product characteristics, the way storage at the distribution base and shipping to the customer are organized, packaging and return rates, or changing mobility habits of brick-and-mortar customers, can lead to settings in which offline beats online distribution regarding the sustainability score.[29]

Of course, judgments on the preferability of online or offline distribution become much more complicated when they also consider other sustainability aspects, or broader notions of public interest, such as the disadvantages (certain members of) communities suffer from losing their local shopping infrastructure. The present contribution neither lobbies for online sales platforms nor denies all the qualifications and counterarguments that the above findings engender. These findings permit, however, to continue our legal discussion based on the assumption that a supplier may be justified to pursue a pro-sustainability strategy of fostering online instead of offline distribution. Do EU competition law's dual pricing rules leave room for such a strategy?

3. Sustainability as a Dual Pricing Criterion

As said, the wording of the V-Guidelines permits, in principle, price distinction in favour of either online or offline sales. Consequently, a different – namely lower – "wholesale price for products sold online than for products sold offline […] can benefit from the [block exemption]".[30] Sustainability pricing does not, in and of itself, have "the object of restricting sales to particular territories or customers", thus steering clear of the prohibitions in Art. 4(b)-(d) V-BER, para. 209(1) V-Guidelines. Evidently, pro-online pricing complies, rather than conflicts, with the V-Rules' traditional focus of protecting online distribution against attempts to prevent "the effective use of the internet" (Art. 4(e) V-BER, para. 209(2), (3) V-Guidelines).

Even absent objectives scorned by Art. 4(b)-(e) V-BER, suppliers are not at liberty now to favourably price goods for online resale. The V-Guidelines stipulate that the justification for dual pricing lies in incentivizing or rewarding the distributor's "appropriate level of investments" in the respective sales channel (para. 209(1) V-Guidelines) and that dual pricing can benefit from a block exemption "where the difference in the wholesale price is reasonably related to differences in the investments and costs incurred" to make sales in the respective channel (para. 209(4) V-Guidelines). The V-Guidelines fail to clarify whether the – as it were – appropriate investment criterion in para. 209(1) V-Guidelines and the reasonable relation criterion in para. 209(4) V-Guidelines constitute strict requirements that a dual pricing must meet in order to enjoy block exemption or whether they rather exemplify settings in which the block exemption seems appropriate. In any case, a supplier sailing for the V-BER's safe harbor seems well-advised to navigate towards these two landmarks.

In their primary, traditional meaning both criteria aim at a correlation between distribution investments and input prices. Offline distribution can, for instance, require higher investments in well-located premises, trained sales personnel, or an attractive presentation of on-shelf goods. The V-Rules permit compensation for this investment cost delta (vis-à-vis online distribution) through e.g. rebates

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[26] Cf. Kampffmeyer/Gensch, Working Paper Nachhaltiger Konsum durch Digitalisierung? 2019 Öko-Institut Working Paper 4/2019, 16; Schöder/Ding/Campos, The Impact of E-Commerce Development on Urban Logistics Sustainability, OJSS 2016/4, 3.

[27] Cf. Edwards/McKinnon/Cullinane, Comparative analysis of the carbon footprints of conventional and online retailing, A "last mile" perspective (2009) IJPDLM 2010/40.

[28] E.g. Umweltbundesamt (German Federal Environment Agency), Die Ökologisierung des Onlinehandels, Teilbericht I, 2020, 26-40; Schöder/Ding/Campos, The Impact of E-Commerce Development on Urban Logistics Sustainability, OJSS 2016/4, 5.

[29] E.g. Umweltbundesamt (German Federal Environment Agency), Die Ökologisierung des Onlinehandels, Teilbericht I, 2020, 26-40; Schöder/Ding/Campos, The Impact of E-Commerce Development on Urban Logistics Sustainability, OJSS 2016/4, 5.

[30] 2022 V-Guidelines, para. 209(1).

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on goods for offline sale.[31] Lower prices for online resale goods, reflecting the sales channel's preferable environmental footprint, do not readily square with this logic. "Appropriate investments" is a broad term, arguably amenable to a MSA reading that considers investments appropriate, and thus worthy of compensation, where they enhance sustainability. However, in prototypical settings the distributor's actual investments necessary for online resale tend to be lower than those necessary for offline distribution. Supplier prices reflecting this delta would, hence, have to be higher, or in any case not lower for online than for offline resale goods. A figuring in of negative externalities, as suggested for sustainability-oriented price-cost calculations,[32] would aggravate the problem, if and because offline distribution generates stronger externalities and would, thus, become even more costly, relative to online distribution.

It seems, therefore, that a MSA to dual pricing would have to overcome a traditional reading of the reasonable relation criterion in para. 209(4) V-Guidelines – if understood as a strict requirement – or at least complement it with a criterion that permits sustainability-oriented incentivization. The fact that sustainability considerations are codified in the EU Treaties and the Charter of Fundamental Rights,[33] i.e. on a level way above the non-binding V-Guidelines in the hierarchy of EU law, would support such modifications. The Commission itself acknowledges, in its Draft Horizontal Guidelines,[34] sustainable development as a core principle and priority objective for EU policies and its own practice.[35] Nonetheless, the Commission would not be free to deviate at once from its V-Guidelines, which do not bind third parties but do have a self-binding effect on the Commission's application of the V-BER.[36] Given how important the V-Rules are as a guidance for lawful vertical distribution, a clear modification of their dual pricing language would, in any case, seem preferable over a mere re-interpretation, while also allowing for modified Commission practice.

4. Dual Pricing Modalities

If it turns – in particular through an explicit amendment of the V-Rules – sustainable dual pricing into a reliably permissible business option, the law must take precautions to ensure that such a step reaches its intended goals. Two of these precautions concern the verification of a distribution channel's sustainability and a recast version of the V-Guidelines' reasonable relation – one could also call it proportionality – criterion.

a. Verifying Sustainability

Determining and comparing the "true" environmental footprint of business activities is a highly fact-sensitive, complex, possibly even daunting task.[37] With their current setup, competition authorities are in no position to competently evaluate distribution channels for their sustainability. Nor does it seem feasible or efficient to inflate them into a combination of competition and environmental agencies. Nonetheless, competition law must avoid false negatives resulting from the non-enforcement of its V-Rules against dual pricing arrangements which use sustainability as a mere smokescreen that hides their true, anti-competitive objectives. A sort of collaborative sustainability onus seems to be

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[31] Wegner/Schwenker/Altdorf, ZWeR 3/2022, 243, 273 seq.

[32] Holmes/Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part' (2022) 7; Simon Holmes, 'Climate change, sustainability, and competition law' (2020) 8 JAE, 345, 399.

[33] Cf. Iacovides/Vrettos, Journal of Antitrust Enforcement, 2022, 10, 32, 40, on Art. 11, 191 TFEU, Art. 37 Charter of Fundamental Rights; Draft Horizontal Guidelines, para. 542, on Art. 3 TEU.

[34] EU Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Draft 1 March 2022 (hereinafter: Draft Horizontal Guidelines).

[35] Draft Horizontal Guidelines, para. 542, also with reference to the UN sustainable development goals and the European Green Deal.

[36] Wegner/Schwenker/Altdorf, ZWeR 3/2022, 243, 248; For more regarding the self-binding effect of soft law in EU competition law see Axel Kallmayer, Herausforderungen an Staat und Verfassung (2015) 664; Stefan Thomas, EuR 3/2009, 423, 424.

[37] Zimek/Baumgartner, Suistainability Assessment and Reporting of Companies (2020) 2 seq.

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promising in this respect. It would oblige the supplier to establish – and show to courts and authorities in case of proceedings[38] – which sustainability achievements justify the dual pricing preference given to a particular distribution channel. In many cases, the supplier will not be able to make such assessments inhouse, for lack of resources (skilled staff, specific software, etc.) and data on a distributor's environmental performance. It can, however, contractually oblige the distributor to submit the necessary data to a specialized service provider that evaluates the distributor's sustainability.[39] As a welcome side-effect, this triangular structure, in combination with a non-disclosure obligation on the service provider, may help avoiding risks to competition resulting from a direct exchange of sensitive business information between the supplier and the distributor.[40] Where the sustainability assessment condenses into a score or label,[41] it has the potential to permit swift identification and comparison of distribution activities that deserve, to varying degrees, preferential pricing. Sustainability-related scores or labels do already exist.[42] Their adaptation (where necessary) to and use for the dual pricing context should be feasible. Furthermore, the Draft Horizontal Guidelines expressly exempt from Art. 101(1) TFEU "agreements on the creation of a database containing information about […] distributors selling products in a sustainable manner, without requiring the parties to […] sell to those distributors".[43] The Guidelines permit, thus, even collaborative efforts by suppliers to determine and record the sustainability of their distribution channels.

These suggestions do not intend to negate the inherent flaws and uncertainties in the sustainability assessment of complex business processes.[44] In spite of them, however, such assessments seem one of the better ways to establish an objective basis for sustainability-oriented pricing.

b. "Reasonable Relation" Revisited

Detailed sustainability assessments also help to fulfil an adapted reasonable relation requirement. It would demand that the dual pricing reflects the sustainability delta (measured as best possible in financial terms) between the distribution channels at issue. As indicated by para. 209(4) V-Guidelines, such a requirement seems, on the one hand, mandatory for fulfilling the necessity test under Art. 101(3) TFEU and helpful in mitigating a price-based engineering of distribution structures which uses sustainability as a mere cover-up. On the other hand, a nexus between the degree of sustainability achievements and input price reductions incentivizes further efforts to improve a distributor's

[38] On the burden of proving pro-sustainability, cf. ACM, Guidelines on Sustainability Agreements, 2021, para. 32. On how to fulfil the substantiation requirement, see ACM, Guidelines on Sustainability Agreements, 2021, para. 39 seq.

[39] On the use of studies prepared by knowledge institutions for general use or by the parties for their individual case, see also ACM, Guidelines on Sustainability Agreements, 2021, para. 35. On the setting of sustainability standards, a company's compliance with which can then be assessed and certified, see e.g. the ISO Guidelines for addressing sustainability in standards (ISO Guide 82:2019), https://www.din.de/de/wdc-beuth:din21:333003475

[40] On risks to competition and competition law rules regarding information exchange in vertical distribution relationships, see Aberle, NZKart 2022, 504; Schöner/Schlimpert, in: Bauer/Rahlmeyer/Schöner, Handbuch Vertriebskartellrecht, § 2 Rn. 22 seq.

[41] On the conditions for competition law-compliant standards, scores or labels that express the sustainability of market activities, see e.g. ACM, Guidelines on Sustainability Agreements, 2021, para. 24.

[42] E.g. 'Blauer Engel – Das Umweltzeichen' for last mile delivery <https://www.blauer-engel.de/de/zertifizierung/vergabekriterien>; Österreichisches Umweltzeichen; ISO, ISO 14001:2015 <https://www.iso.org/standard/60857.html>; see also TÜV Süd <https://www.tuvsud.com/de-de/dienstleistungen/auditierung-und-zertifizierung/umwelt-und-nachhaltigkeit/iso-14001>; LEED (Leadership in Energy and Environmental Design); Energy Star <https://www.energystar.gov/about/about_energy_efficiency>.

[43] Draft Horizontal Guidelines, para. 553.

[44] Zimek/Baumgartner, Suistainability Assessment and Reporting of Companies (2020) 3; Kumar/Mani, Sustainability Assessment in Manufacturing for Effectiveness: Challenges and Opportunities, Frontiers in Sustainability 2022/3, 9 seq.

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sustainability score, as well as efforts to maintain the score at lower cost through progress in static or dynamic efficiency.

Equally, a reasonable relation criterion implies that a distribution channel currently disfavoured by higher input prices must be allowed to catch-up on its sustainability score, necessitating the supplier to either level its prices for the various channels or even to price more attractively goods to be resold via the honed channel. Activating, thus, sustainability competition between distribution channels, as well as the pursuit of static and dynamic efficiencies within a channel,[45] is crucial for employing market forces in the interest of sustainability and for squaring "green prices" with the fundamental rationale of competition law.

To the extent dual pricing arrangements drive sustainable distribution, they qualify as sustainability agreements in the sense of, for instance, the pertinent Dutch Guidelines.[46] The same is true for agreements which flank the dual pricing arrangement and specify a sustainable performance that justifies the favourable pricing for the respective distribution channel. Such agreements on sustainable distribution performance should even, as a rule, be considered a necessary element of corresponding, competition law-compliant dual pricing arrangements. To the extent they reflect corporate social responsibility covenants or similar standards accepted by the law, the sustainable distribution performance agreements may qualify as per se acceptable under competition law.[47]

An intricate element in the reasonable relation assessment is the degree to which the sustainability performance of a distribution channel and the dual pricing's effect on it need to be quantified. The Dutch Sustainability Guidelines dispense with a quantification requirement (in monetary terms)[48] if (i) the parties have a limited combined market share and (ii) the "harm to competition is, based on a rough estimate, evidently smaller than the benefits of the agreement".[49] As to the first of these two criteria, a combined market share of no more than 30% constitutes the threshold.[50] However, this threshold addresses horizontal cooperation agreements. As a general rule, competition law tends to treat vertical agreements in a more lenient manner than horizontal agreements because they are not concluded between competitors and, therefore, usually generate a lower risk to competition in a given market.[51] This rule extends to the market share thresholds in Block Exemption Regulations.[52] It also suggests a higher threshold for vertical sustainability agreements than for horizontal ones. Aligning the mark with the V-BER threshold would increase practicability and the safe harbour effect of the BER, even though further economic research seems necessary to show that the downsides – especially in the form of false negatives – of such a pragmatic approach remain bearable. In any case, and wherever the threshold eventually comes to lie, it seems reasonable to exempt vertical sustainability agreements from a full-fledged quantification requirement where market shares of the parties are low.

The treatment of the second non-quantification requirement (benefits evidently outweigh harm) remains somewhat vague as the Dutch Guidelines mainly emphasize its fact-sensitivity and provoke doubts on whether this requirement really applies cumulatively with the market share threshold or

[45] Cf. ACM, Guidelines on Sustainability Agreements, 2021, para. 37.

[46] ACM, Guidelines on Sustainability Agreements, 2021, para. 17.

[47] Cf. category five of per se lawful agreements in the ACM, Guidelines on Sustainability Agreements, 2021, para. 27 seq.

[48] Cf. on this quantification concept, including the determination of environmental prices (or shadow prices) which permit monetary quantification of pro-sustainability effects, ACM, Guidelines on Sustainability Agreements, 2021, para. 57 seq.

[49] ACM, Guidelines on Sustainability Agreements, 2021, para. 54.

[50] ACM, Guidelines on Sustainability Agreements, 2021, para. 55.

[51] Cf. 2022 V-Guidelines, para. 10; Florian Wagner-von Papp in Münchener Kommentar zum Wettbewerbsrecht (2022), GWB §1 N 224, 390 seq.; Fabian Uebele, Kartellrecht, Einführung in das Rechtsgebiet JURA 2022/6 706, 713.

[52] Cf., for instance, the 30% market share per party threshold in Art. 3(1) V-BER versus the 20% joint market share threshold in Art. 3 of the Specialisation BER.

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whether it can also justify non-quantification on its own.[53] In the present author's view, a low market share of the parties to a vertical agreement cannot, in combination with their mere allegation that the agreement promotes sustainability, remove *per se* the need to quantify sustainability effects. The necessity to fight anti-competitive agreements which use sustainability as a mere disguise suggests an approach that always requires the parties to substantiate, to a certain degree, that the pro-sustainability effects of their agreement outweigh its competitive harm. Below the threshold discussed above, however, the substantiation of qualitative aspects should, in principle, suffice. The frailer such a qualitative reasoning becomes, the more should it be corroborated with quantitative elements.

5. Test Under Art. 101(3) TFEU

If a distribution agreement containing a dual-pricing mechanism falls outside the V-BER, in particular because the parties' market shares are above the thresholds defined in Art. 3 V-BER, the agreement must pass muster with the four criteria stipulated by Art. 101(3) TFEU.[54] As applied traditionally, these criteria require the agreement (i) to contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) to allow consumers a fair share of the resulting benefit; (iii) to not impose restrictions unnecessary for these objectives; and (iv) to not allow for the elimination of competition regarding a substantial part of the goods in question. If pro-sustainability effects are, in light of the EU Treaties and the Charter, considered as improvements and progress in the sense of Art. 101(3) TFEU,[55] this qualification also extends to such effects realized by dual pricing. In consequence of the above reflections on burden of proof, it is – under Art. 101(3) TFEU as well – on the parties to show sustainability effects and their genuine objective to pursue such effects.[56]

The Dutch Sustainability Guidelines endorse a broad interpretation of the fair share for consumers which includes future and indirect customers, as well as long-term effects on them.[57] For agreements (called "environmental-damage agreements" by the authority) that fight environmental damage by helping, in an efficient manner, to "comply with an international or national standard, or [to] realize a concrete policy goal (to prevent such damage)", they even take into account benefits for society as a whole[58] and reject the traditional rule that the "fair share" consumers receive must at least fully compensate them for the harm suffered from the anticompetitive effects of the respective agreement.[59] Part of the dual pricing arrangements discussed here could fall in the category of "environmental-damage agreements", for instance if a price reduction for goods distributed online helped the distributor to increase the online component of its overall distribution activity and, thereby, to achieve a Co2 reduction goal set by the government.[60] Even though the Dutch Sustainability Guidelines focus on horizontal agreements, there is no good reason why the vertical nature of an agreement should exclude it from the "environmental-damage agreement" category. At least for dual pricing agreements that

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[53] ACM, Guidelines on Sustainability Agreements, 2021, para. 56: "A second category of agreements that lend themselves for a quantitative assessment are the cases in which, at first glance, it is already evident that the benefits offset (or more than offset) the harm". Does the "second category" imply a first category of agreements which are exempt from quantification solely because of parties' low market shares? And would it really have to be "qualitative" in the sentence quoted here?

[54] As dual pricing arrangements affect prices, a particularly important competition parameter, a sustainability rationale cannot prevent their being caught by Art. 101(1) TFEU, cf. Draft Horizontal Guidelines, para. 551 and – e contrario – the examples of agreements outside Art. 101(1) TFEU in para. 552 seq.

[55] Cf. Simon Holmes, 'Climate change, sustainability, and competition law' (2020) 8 JAE, 345, 372 seq.; EU Commission, 'XXV Report on Competition Policy' (1995) para. 85, 40; Heike Schweitzer, Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81, EUI Working Papers LAW 2007/30, 6 seq., for a critical opinion see cf. Or Brook, Struggling With Article 101(3) Tfeu: Diverging Approaches Of The Commission, Eu Courts, And Five Competition Authorities (2019) Common Market Law Review 56/1 121.

[56] Draft Horizontal Guidelines, para. 560.

[57] ACM, Guidelines on Sustainability Agreements, 2021, para. 43 seq.

[58] ACM, Guidelines on Sustainability Agreements, 2021, para. 52.

[59] ACM, Guidelines on Sustainability Agreements, 2021, para. 45 et seq.

[60] Cf. also the co2 reduction goal example in ACM, Guidelines on Sustainability Agreements, 2021, para. 48.

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foster sustainability in an evident and substantial manner, it seems preferable, and in line with the Dutch Sustainability Guidelines' concept for environmental-damage agreements, to not require that the resale prices in a distribution channel fully pass on the input price reductions received for that channel under the dual pricing. Its possibility to retain part of the reduction as additional profit incentivizes the distributor to shift activity to the more sustainable distribution channel and may enable it to invest in even increasing that channel's sustainability. In view of the latter effect, competition authorities should look favourably at agreements that complement dual distribution by an obligation on the distributor to invest part of its resulting additional profits into improving the sustainability of its business.

The reasonable relation criterion looms large in an Art. 101(3) TFEU assessment as well since it ties into the provision's necessity requirement, helping to prevent excessive distortions to competition between distribution channels by way of price distinctions which go beyond their sustainability delta. Assuming that their market shares above the V-BER thresholds require parties to quantify the positive and negative effects of an agreement, a certain percentage of genuine sustainability-oriented dual pricing agreements would likely not survive the necessity test under Art. 101(3) TFEU, simply because of the difficulties to express effects in monetary terms. This may suggest a sort of sliding scale, according to which stronger qualitative indications that an agreement is beneficial on balance can outweigh certain weaknesses in quantification. Even if this sliding scale flexibility were introduced, it would remain challenging to show "that (i) no alternative measure is possible that is less anticompetitive than the agreement, and (ii) that all anticompetitive elements of the agreements are essential to the realization of the objective".[61] Case law, including ex ante guidance letters (cf. 6. below), should aim at developing parameters allowing parties to gauge whether their agreement would pass this test.[62]

6. MSA as a Consultative Enterprise

Even if a "green recast" of the V-Rules provided some guidance, concrete projects for sustainability-related dual pricing would have to venture into unexplored competition law territories. Under the self-assessment regime introduced by Regulation 1/2003,[63] this could result in considerable infringement risks and a corresponding deterrence effect. It comes in handy, therefore, that a recent Notice[64] indicates the EU Commission's increased readiness to provide ex ante guidance letters[65] on the competition law compliance of specific business practices.

An issue qualifies for a guidance letter, in particular, if it presents "novel […] questions for the application of Articles 101 or 102 TFEU"[66] which are not yet sufficiently clarified through existing Union (case) law.[67] This would certainly be the case for the dual pricing schemes discussed here. The same goes for the "interest in providing guidance" and "added value with respect to legal certainty" which the Notice requires.[68] Among the listed parameters for identifying such interest and added value,[69] at least relevance "for the achievement of the Commission's priorities or Union interest" and the potential for

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[61] ACM, Guidelines on Sustainability Agreements, 2021, para. 65.

[62] The general rule that the necessity of non-binding standards for sustainable production is usually clearer than the necessity of such standards in combination with an obligation to only produce as per the standard provides – regardless of whether one fully subscribes to it – an example for such parameters, though not one very specific to dual pricing; cf. ACM, Guidelines on Sustainability Agreements, 2021, para. 66.

[63] Cf., for instance, EU Commission Communication, Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM/2014/0453 final, para. 6.

[64] Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), 2022/C 381/07 (hereinafter: Guidance Letter Notice).

[65] Guidance Letter Notice, para. 4.

[66] Guidance Letter Notice, para. 4.

[67] Guidance Letter Notice, para. 7.

[68] Guidance Letter Notice, para. 7.

[69] Ibid.

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"more widely spread usage in the Union" would be present. Whilst the Commission has discretion on whether it issues a guidance letter,[70] one could say that the sustainability-oriented policy demands in the Treaty and Charter weigh in favour of a guidance-friendly exercise of this discretion.

Since a request needs to substantiate (including comprehensive factual information) not only why it qualifies for a guidance letter but also how the applicant perceives EU competition law to apply to their (intended) practice,[71] it can serve as a catalyst for the thorough legal and factual assessment of an intended dual pricing scheme by its participants. Upon publication,[72] the guidance letter instructs not only the applicants but also further potential implementers of sustainability pricing.

The legal assessment in a guidance letter has a binding effect neither on EU courts, Member State courts, Member State competition authorities, nor even – in a strict sense – on the issuing EU Commission itself.[73] However, the Commission assures to take the guidance letter "into account" in case of a subsequent examination of the addressed conduct,[74] and it invites Member State authorities to do the same.[75] More robustly, the Commission – as the Dutch watchdog in similar settings[76] – will, in principle, "not impose any fines on applicant(s), with respect to any action taken by the applicant(s) relying in good faith on the Commission's guidance letter".[77] In all likelihood, EU and Member State courts will heed Commission guidance letters as well, at least as an indication of the bona fides of the parties to conduct which those courts consider to be anti-competitive, in spite of a diverging guidance letter. All in all, such letters do, therefore, provide a considerable level of reliable guidance and protection for green pricing pioneers.

IV. Conclusions

1. Insights Art. 101 TFEU

When it comes to sustainability agreements, a horizontal focus makes certainly sense. The present contribution tried to show, however, that vertical agreements should not be overlooked either. Its finding that there is already some room for pro-sustainability drafting, but also much room for a clearer and more favourable legal basis, likely applies to a range of further vertical settings, too.

In horizontal and vertical settings alike, the determination and quantification of sustainability parameters will remain a core problem. Competition watchdogs are not in a good position to assess them, they should rely on a stakeholder-based approach.

Even assuming the existence of more statutory guidance and stakeholder-based sustainability verification, considerable uncertainty will remain at least until some case law has developed. During that initial phase, it would seem adequate not to fine parties that err in their bona fide attempt to promote sustainability.

Essentially, the dual pricing discussed here is a way to internalize negative externalities on the distributors' level. Other mechanisms for achieving such internalization may well be superior. It matters, however, also whether they are actually put into practice. Comprehensive taxation of gains resulting from the exploitation of negative externalities, for instance, will, at best, take some further time and may remain a pipe dream. One may read the Draft Horizontal Guidelines in the sense that private sustainability agreements only pass the necessity test if there is a market failure adverse to sustainability and which public policies or regulations do not sufficiently address.[78] However, even such a

[70] Guidance Letter Notice, para. 4.
[71] Guidance Letter Notice, para. 12.
[72] Guidance Letter Notice, para. 22.
[73] Guidance Letter Notice, para. 24 seq.
[74] Guidance Letter Notice, para. 24.
[75] Guidance Letter Notice, para. 27.
[76] ACM, Guidelines on Sustainability Agreements, 2021, 2.
[77] Guidance Letter Notice, para. 25.
[78] Draft Horizontal Guidelines, para. 546.

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restrictive interpretation would not exclude necessity for many settings, given the pertinent shortcomings in the current legal framework.

2. A Sideway Glance at Art. 102 TFEU

Where a company holds a dominant market position or – in jurisdictions knowing this concept[79] – relative market power, competition law subjects it to specific conduct obligations, including obligations regarding pricing conduct. In particular, the undertaking must not engage in unjustified price discrimination between its customers. Art. 102(c) TFEU prohibits the application of "dissimilar conditions to equivalent transactions" which would place trading partners "at a competitive disadvantage". Consequently, assuming dominance, the application of differing prices for distribution channels with differing sustainability scores engages non-discrimination rules under Art. 102 TFEU. On the one hand, such pricing could constitute an unjustified discrimination against the distribution channel facing higher prices. Higher input prices constitute, in principle and if the delta is material,[80] a competitive disadvantage vis-à-vis competitors.[81] On the other hand, one may argue that the price distinction is even necessary because homogeneous prices would disregard the sustainability gap and, thus, discriminate against the more sustainable channel. After all, Art. 102 TFEU prohibits unjustified discrimination not only in the form of treating like settings differently, but also in the form of like treatment for different settings.

The present contribution discusses a rather narrow setting. In particular, this setting assumes equal costs for catering to either distribution channel; it disregards horizontal side-effects, including primary line economic harm to competitors; there is no geographical or customer group-related distinction which could create barriers to trade within the EU internal market; and the supplier runs no downstream business, competing with its distributors, which could insert an element of self-preferencing into its price distinction. Absent all these elements, Art. 102(c) TFEU is not (enforced as) a rigid provision against all sorts of dissimilar downstream trading conditions.[82] Practicability issues aside, this reticence is largely due to the fact that vertical discrimination in prices and terms does not necessarily harm consumer welfare.[83] A comprehensive concept of consumer welfare, which includes sustainability considerations, suggests that pro-sustainability price distinctions do not automatically inflict consumer harm, even if they result in higher consumer prices in a certain distribution channel or in the removal of certain distribution features (e.g. design or location features of brick-and-mortar shops) which consumers appreciated but which had a negative effect on the distribution channel's sustainability. Furthermore, understanding different levels of negative externalities generated by distribution channels as differences in their respective, true costs could link sustainability-oriented price distinctions back to costs as an, in principle acknowledged, reason for charging trading partners different prices.

As to negative effects of (price) discrimination on output, economic theory holds that there is no output reduction risk where transaction details can be established in direct negotiations with the customers because the supplier will be ready to negotiate the supply of additional goods at any price above marginal cost.[84] It seems questionable whether this finding applies to our setting as our supplier does, by definition, not accept prices above marginal cost but below the price level set by adding, as it were, the unsustainability surcharge to the marginal cost. However, a resulting output reduction risk is, in the end, the consequence of internalizing negative externalities, not the consequence of an anticompetitive stratagem by the dominant undertaking. On a more fundamental level, one can question the

[79] See, e.g., § 20 of the German Act Against Restraints of Competition.
[80] Art. 102(c) TFEU requires a significant competitive disadvantage, cf. Temple Lang, Anticompetitive Non-Pricing Abuses Under European and National Antitrust Law, in Hawk, Fordham Corporate Law Institute, 2004, 235, 248.
[81] Cf. on the requirements for a sufficient competitive disadvantage to exist, in particular, CJEU, C-525/16 *MEO*, EU:C:2017:1020.
[82] O'Donoghue/Padilla, 958.
[83] For further details, see O'Donoghue/Padilla, 958 seq.
[84] O'Donoghue/Padilla, 964.

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equation that higher output means greater consumer or overall welfare and, hence, constitutes a result to be protected *per se* by competition law. Such reflections are, however, beyond the scope of this contribution.

All in all, even with regard to more established efficiency considerations, the law on discriminatory pricing leaves room for greater sophistication. Hence, developing a justification from differences in the trading partners' sustainability is, all the more, pioneer work. It seems, however, worthwhile to undertake this work as the above thoughts indicate that there is room for considering this factor.

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