The European Commission's new Guidelines on Sustainability Agreements—legal analysis and interplay with national regimes

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The revised Horizontal Guidelines (Guidelines), in which the European Commission (Commission) introduced a chapter on sustainability agreements, entered into force on 1 July 2023.[1] The first horizontal guidelines of 2001 (2001 Guidelines)[2] had a chapter on environmental standards agreements, a subset of sustainability agreements, while their successor, the horizontal guidelines of 2010 (2010 Guidelines),[3] did not mention sustainability agreements at all. The new chapter follows a significant change of policy, in line with the Commission's overall policy focus on sustainability under the European Green Deal and with the recent publication of guidelines on sustainability agreements in the food and agricultural sector.

During the Commission's public consultation on the draft horizontal guidelines in 2022, businesses raised several concerns regarding potential collaborations with competitors on sustainability initiatives. The key concerns were: (1) the lack of recognition of sustainability objectives for agreements other than standardisation;[4] (2) unclear criteria of application in the "soft safe harbor" presumption;[5] and (3) the burden of proof applicable to sustainability initiatives,[6] including the type of data required to prove an efficiencies defence (e.g., consumer surveys, quantification of sustainability benefits)[7] and how to balance and trade off benefits and/or harm between direct and indirect consumers.[8]

Several national competition authorities (NCAs) have already assessed sustainability agreements in specific decisions or even issued (draft) guidelines for undertakings. With the new Guidelines in place, case allocation between the Commission and those NCAs will need to be recalibrated and the interplay between the Guidelines and national regimes will have important implications for undertakings when shaping sustainability initiatives.

In this article, we will briefly describe the main features of the revised Guidelines (section 1) and assess the practical implications of the new regime in light of the main concerns that businesses raised (section 2). We will then describe the situation at Member State level (section 3) and, on that basis, analyse the interplay between the new European Union (EU) rules and the national regimes going forward (section 4). We will then provide a brief overview of the developments outside the EU (section 5) and finish with an outlook (section 6).

1. The revised Horizontal Guidelines

Chapter 9 of the Guidelines illustrates the Commission's overall approach on the interplay between sustainability and antitrust, i.e., that "competition policy does not stand in the way of horizontal cooperation agreements that pursue genuine sustainability objectives".[9] As such, the Commission's approach remains anchored in its existing economic paradigm requiring that sustainability benefits translate into economic benefits. The Commission has also not yet addressed sustainability in other dimensions of antitrust policy (i.e., art.102 Treaty on the Functioning of the European Union (TFEU) and merger control[10]).

1.1 Introduction to Chapter 9 on sustainability agreements

The Guidelines apply to sustainability agreements, i.e., "any horizontal cooperation agreement that pursues a sustainability objective" (para.521). Because sustainability agreements do not constitute a distinct type of

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[1] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements C(2023) 3445 final [2011] OJ C11/1.

[2] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/2.

[3] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1.

[4] See, e.g., ICC's contribution to EC public consultation (26 April 2022), para.112; GSMA's contribution to EC public consultation (April 2022), p.8; ERT's contribution to EC public consultation (30 April 2022), p.12.

[5] See, e.g., AFEP's contribution to EC public consultation (April 2022), p.4; AIM's contribution to EC public consultation (10 May 2022), paras 3.7.5 et seq.; ERT's contribution to EC public consultation (30 April 2022), pp.12–13; EuroCommerce's contribution to EC public consultation (26 April 2022), para.5.5.

[6] See, e.g., AIM's contribution to EC public consultation (10 May 2022), paras 3.7.9 and 3.7.12.

[7] See, e.g., AIM's contribution to EC public consultation (10 May 2022), paras 3.7.9 and 3.7.12; ERT's contribution to EC public consultation (30 April 2022), p.15; EuroCommerce's contribution to EC public consultation (26 April 2022), para.5.8.

[8] See, e.g., ICC's contribution to EC public consultation (26 April 2022), paras 122 et seq.; IRE's contribution to EC public consultation (26 April 2022), p.15.

[9] Commission, Explanatory note of the revised Horizontal Guidelines, 1 June 2023, para.22.

[10] Please note, however, that sustainability has played a role in EU merger control; see European Commission, merger brief 2/2023.

co-operation agreements between undertakings, a sustainability agreement could fall under the scope of two chapters of the Guidelines. In that case, the sustainability agreement should be assessed with regard to the other chapter of the Guidelines for its potential restrictions of competition. The guidance on sustainability agreements will apply for the assessment whether there is a restriction by object or by effect and a possible exemption under art.101(3) TFEU (paras 523 and 533). The Guidelines prescribe that in case of inconsistency between guidance provided in two chapters, the most favourable should apply (para.525).

1.2 Certain sustainability agreements may fall outside the scope of article 101(1) TFEU

The Guidelines acknowledge that sustainability agreements not affecting parameters of competition (e.g., price, quantity, quality, choice, innovation) can fall outside the scope of art.101(1) TFEU. In addition to the three examples cited in the draft guidelines (internal corporate conduct, creation of a database, and industry-wide campaigns),[11] the Guidelines also consider that sustainability agreements aimed solely at ensuring compliance with sufficiently precise legally binding requirements are unlikely to raise competition concerns (para.528).

The Commission considers that sustainability agreements, like other forms of co-operation agreements, may be objectively necessary and proportionate to achieve their objectives under the ancillary restraints doctrine. However, the Commission will not apply the *Wouters* case law more generally to sustainability agreements (para.521). As such, sustainability agreements cannot escape a complete assessment under the Guidelines on the sole basis of their legitimate sustainability objective.

1.3 The assessment of sustainability agreements under the Guidelines

Sustainability agreements affecting one or more parameters of competition will be assessed under the following framework, provided that they do not fall under the scope of another chapter of the Guidelines. (In which case, companies should consult both the sustainability chapter and any other applicable chapter(s) of the Guidelines and would be entitled to rely on the more favourable chapter in the event of any inconsistency). The sustainability chapter provides particularly detailed guidance for the assessment of sustainability standardisation agreements; other types of sustainability agreements are analysed in less depth.

First, the assessment requires determining whether the agreement contains a restriction "by object". The Guidelines provide that sustainability agreements aimed at covering up hardcore restrictions will be considered restrictive "by object". For instance, the Guidelines mention agreements limiting technological development to the minimum sustainability standard required by law (paras 547–548).

Even if the agreement falls under the scope of another chapter, its sustainability objective may still be taken into account in assessing whether it restricts competition "by object" or "by effect" (para.534). Undertakings must provide evidence that they pursue a sustainability objective to justify "a reasonable doubt as to the anti-competitive object of the agreement" (fn.372).

Second, as regards sustainability standardisation agreements in particular, the Guidelines provide for a presumption that the agreement does not fall under the scope of art.101(1) TFEU when six cumulative conditions are met. If not, the agreements' effects must be assessed. This novel "soft safe harbor" presumption is defined as follows:

1) Standard development must be transparent and participative.
2) The standard must be adopted voluntarily, with open access to all market participants.
3) Undertakings should be able to adopt higher sustainability standards even if binding requirements can be imposed on the participating undertakings.
4) The parties must not exchange sensitive commercial information unless objectively necessary and proportionate to implement, adopt, or modify the standard.
5) Access to the outcome of the standard-setting process must be ensured and should be effective and non-discriminatory.
6) The sustainability standard must meet at least one of the following conditions:
    1. It must not lead to a significant increase in price or a significant reduction in the quality of the product concerned; or
    2. The combined market share of the participating undertakings must not exceed 20% on any relevant market affected by the standard.

If the agreement does not meet the six cumulative conditions of the "soft safe harbor", the assessment of effects will have to reflect several criteria defined in the Guidelines: market power of the participating undertakings, degree of independence in decision-making, market coverage of the agreement, whether commercially sensitive information is shared, and whether the agreement results in an appreciable price increase or reduction in output, variety, quality, or innovation (para.535).

[11] David Little, Werner Berg, Clément Pradille, Axelle Aubry, "The European Commission's Draft Guidelines on Sustainability Agreements-a legal analysis and practical implications" [2022] E.C.L.R. 404.

1.4 The analysis of sustainability benefits under article 101(3) TFEU

The chapter provides significant guidance on the inclusion and assessment of sustainability benefits in analysing agreements under art.101(3) TFEU in order to benefit from an exemption. This guidance applies to all sustainability agreements and is not limited to the subset of sustainability standardisation agreements. The chapter provides guidance specific to sustainability agreements for each of the four cumulative conditions of art.101(3) TFEU.

First, the Guidelines consider efficiency gains in broad terms, including both quantitative and qualitative efficiencies as well as long-term efficiencies for the improvement of technologies or production or distribution channels (paras 557–558). In order for efficiency gains to be taken into account, undertakings must provide evidence on exactly how the claimed benefits will occur and provide an estimate of their impact (para.559).

Second, the indispensability criterion requires that restrictions be reasonably necessary for the claimed benefits to occur without the availability of any other economically practicable and less restrictive means of achieving such benefits (para.561). The Guidelines provide several illustrations for sustainability agreements that would be deemed indispensable. For instance, sustainability initiatives could be indispensable to solve market failures that are not addressed by existing regulation or to achieve regulatory objectives in a more cost-efficient way or more quickly (paras 564–565). They could also be indispensable to solve market failures in the absence of regulation to avoid issues such as free-riding or the "first-mover disadvantage" (para.566). The Guidelines anticipate that sustainability agreements may be indispensable when consumers fail to appreciate or lack sufficient information about the value of future benefits (para.563). Environmental economics has long appreciated the challenge that such "time discounting" or "time preference" poses to the promotion of more sustainable commercial practices and consumer habits.

Third, undertakings must demonstrate all benefits that are or will likely be passed on to consumers, i.e., all direct and indirect consumers of the products covered by the agreement. Three types of benefits can be taken into account:

- **Individual use-value benefits:**

  quantitative and qualitative efficiencies at individual level resulting from the use of the product by the individual consumer (para.571).

- **Individual non-use value benefits:**

  consumers' appreciation of the impact of sustainable consumption on others for which consumers are willing to pay a higher price for a lesser adverse effect on sustainability (para.575).

- **Collective benefits:**

  regardless of consumers' individual appreciation, benefits accruing to a larger group of beneficiaries as long as consumers in the relevant market are part of this wider section of society (para.582).

In concrete terms, undertakings are required to: (i) describe clearly the claimed benefits and provide evidence that they have occurred and/or will likely occur; (ii) define clearly all beneficiaries; (iii) demonstrate that the consumers in the relevant market substantially overlap with beneficiaries or form part of them; and (iv) demonstrate that the share of the collective benefits outweighs the harm to consumers in the relevant market, possibly together with individual use and non-use value benefits (para.587).

Finally, the Guidelines recall that there should in any event remain residual competition on the market concerned, even when the agreement covers the entire industry (para.592). In particular, the Guidelines admit that competitors, even if the agreement in question covers the entire industry, can collaborate on one of the competition parameters (e.g., price or quality), as long as they continue to compete on the other(s) (paras 593–595). The Guidelines also indicate that the temporary elimination of competition does not constitute an obstacle to the last condition for exemption, as competition will develop after the limited period of time elapses (para.596).

2. Practical implications of the new regime

The chapter on sustainability agreements raises several questions regarding the practical implications for undertakings considering concluding sustainability agreements. As described in the introduction above, the key concerns were (1) the lack of recognition of sustainability objectives for agreements other than standardisation;[12] (2) unclear criteria of application in the "soft safe harbor" presumption;[13] (3) the burden of proof applicable to sustainability initiatives,[14] including the type of data required to prove an efficiencies defence (e.g., consumer surveys, quantification of sustainability benefits)[15] and how to balance and trade off benefits

[12] See, e.g., ICC's contribution to EC public consultation (26 April 2022), para.112; GSMA's contribution to EC public consultation (April 2022), p.8; ERT's contribution to EC public consultation (30 April 2022), p.12.
[13] See, e.g., AFEP's contribution to EC public consultation (April 2022), p.4; AIM's contribution to EC public consultation (10 May 2022), paras 3.7.5 et seq.; ERT's contribution to EC public consultation (30 April 2022), pp.12–13; EuroCommerce's contribution to EC public consultation (26 April 2022), para.5.5.
[14] See, e.g., AIM's contribution to EC public consultation (10 May 2022), paras 3.7.9 and 3.7.12.
[15] See, e.g., AIM's contribution to EC public consultation (10 May 2022), paras 3.7.9 and 3.7.12; ERT's contribution to EC public consultation (30 April 2022), p.15; EuroCommerce's contribution to EC public consultation (26 April 2022), para.5.8.

and/or harm between direct and indirect consumers.[16] We will discuss the practical implications below with particular attention to these concerns.

2.1 The scope of the Guidelines and the lack of recognition of sustainability objectives

First, the Guidelines apply to all sustainability agreements, regardless of their focus on a specific area of sustainability (i.e., environment, economic or social). While the Commission has deleted the requirement for agreements to pursue a "genuine" sustainability objective, the guidance on the application of art.101(1) TFEU and the appreciation of any restrictive effects of competition remain limited to sustainability standardisation agreements (s.9.3.2; paras 537–555). But the chapter provides less guidance on the application of art.101(1) TFEU to all other types of sustainability agreements and the Commission did not remedy the criticised lack of recognition of sustainability objectives for agreements other than standardisation.[17] The Commission will likely assess these agreements under other chapters of the Guidelines to assess whether these agreements restrict competition under art.101(1) TFEU.

However, the sustainability chapter in the Guidelines has a significantly broader scope than the chapter on environmental agreements in the 2001 Guidelines, which were confined to agreements with environmental objectives.[18] The 2001 Guidelines excluded three types of agreements from the scope of art.101(1) TFEU in their entirety, while these agreements will require an assessment of effects on competition under the Guidelines: loose commitments (agreements without any precise obligation); agreements with only a marginal influence on the market; and agreements that induce a genuine market creation.[19] Under the current regime these types of agreements must be assessed under different sections of the Guidelines: loose commitments and agreements with only a marginal influence on the market could benefit from the "soft safe harbor" presumption and agreements that induce a genuine market creation could be assessed under the Guidelines' chapter on research & development (R&D) (paras 150 et seq.). This may lead to similar results, but is of course more burdensome to achieve.

Second, the Guidelines confirm that the Commission will not generally apply the *Wouters* or *Meca-Medina* case law to agreements pursuing sustainability objectives: sustainability agreements cannot escape the prohibition of art.101(1) TFEU on the sole basis of their objective (para.521). In these cases, the Court of Justice of the European Union (CJEU) held that certain restraints can be considered as ancillary to the implementation of co-operation agreements, which should not be regarded as restricting competition as a consequence.[20]

As previously explained, these agreements related to very specific circumstances that the Commission examined. They particularly concerned cases in which lawyers and sports organisations legitimately aimed to self-regulate their activities.[21] In the case of sustainability agreements, the position taken in the Guidelines simply confirms that undertakings will not be able to apply a general framework of exemption, but rather have to assess the agreement's effects with regard to competition rules in light of the guidance provided in this chapter. This approach confirms the Commission's view that sustainability initiatives between undertakings cannot and should not replace regulation (paras 519–520), while it acknowledges in the Guidelines that sustainability agreements can still be indispensable even in the presence of regulation (paras 564 et seq.).

2.2 The application of the "soft safe harbor" presumption—still some lack of clarity

The Guidelines reiterate the "soft safe harbor" presumption for sustainability standardisation agreements foreseen in last year's draft guidelines. The Commission revisited the seven cumulative conditions and converted them into six conditions for agreements to be presumed as not having any appreciable negative effect on competition. While the first five conditions appear easy to implement and to self-assess for undertakings (para.549),[22] the sixth condition in the Guidelines potentially requires substantial attention:

- The sustainability standard must meet at least one of the following conditions:
  - — It must not lead to a significant increase in price or a significant reduction in the quality of product concerned; or
  - — The combined market share of the participating undertakings must not exceed 20% on any relevant market affected by the standard.

[16] See, e.g., ICC's contribution to EC public consultation (26 April 2022), paras 122 et seq.; IRE's contribution to EC public consultation (26 April 2022), p.15.
[17] See fn.4.
[18] According to the 2001 Guidelines, para.179, the target or the measures agreed needed to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant environmental regulations.
[19] 2001 Guidelines, paras 184–187.
[20] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) EU:C:1999:430; [2000] 4 C.M.L.R. 446; *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) EU:C:2002:98; [2002] 4 C.M.L.R. 27; and *Meca-Medina v Commission* (C-519/04 P) EU:C:2006:492; [2006] 5 C.M.L.R. 18.
[21] Little, Berg, Pradille, Aubry, "The European Commission's Draft Guidelines on Sustainability Agreements—a legal analysis and practical implications" [2022] E.C.L.R. 404, 406 at section B.1.
[22] See for these criteria in the draft guidelines of 2022, Little, Berg, Pradille, Aubry, "The European Commission's Draft Guidelines on Sustainability Agreements—a legal analysis and practical implications" [2022] E.C.L.R. 404, 407 at section B.3.

The first sub-condition corresponds to the seventh condition of the test initially foreseen in the draft guidelines published for public consultation last year, which had raised broad concerns among several business respondents.[23] In practice, this last condition creates legal uncertainty: requiring that a sustainability standard "should not lead to a significant increase in price or to significant reduction in the choice of products available on the market" raises the question when a price increase is "significant". Indeed, standards will often affect prices and/or product choice and the Commission does not provide any guidance on what constitutes a "significant" price increase or quality reduction, although several business organisations had asked this question in their contributions to the public consultation on the draft guidelines.[24]

The "soft safe harbor" presumption in the Guidelines has gained some legal certainty by introducing an alternative to that last condition and deleting the last requirement for a mechanism or monitoring system. However, this remains true only for sustainability initiatives involving undertakings with cumulative market shares below 20%. The impact of this modification from the draft guidelines seems limited as sustainability standardisation agreements generally aim to encompass a large share of the market to ensure the standard adopted among competitors is efficient and brings significant sustainability benefits.

In any event, it remains unclear how this presumption will actually change the current application of art.101(1) TFEU as the Commission always bears the burden of proof of restrictive effects of competition. Because this presumption is a mere "soft" safe harbour, the Commission does not commit to anything for undertakings that fulfil all six conditions set out in the Guidelines. It seems in any case that the Commission can easily rebut this presumption, in particular if the parties to the agreement rely on the first sub-condition of the sixth criterion (i.e., absence of *significant* price increase or quality reduction).

2.3 The burden of proof of sustainability benefits under article 101(3) TFEU

In accordance with the general guidance on art.101(3) TFEU, efficiency gains must be objective, concrete and verifiable—which undertakings are required to demonstrate to benefit from an exemption (para.559).[25] The Guidelines however do not provide guidance for undertakings to measure efficiencies of sustainability agreements although several businesses have been requesting additional guidance in that regard.[26] As previously explained,[27] the Guidelines refer to a Recommendation on the use of Environmental Footprint methods and instead point to the Commission's expected future guidance on this issue "when it has gained sufficient experience of dealing with concrete cases" (para.589).

In concrete terms, the methods to which the Commission points to—and the sustainability economics methods generally used to measure non-economic sustainability benefits—would require a significant amount of data that undertakings may not yet track in the ordinary course of business. Undertakings will also have to provide evidence that future benefits will likely occur if their claims of sustainability benefits will only be realised in the near future.

In addition, undertakings will also need to assess and measure consumer preferences, on which they would rely to prove that consumers actually value more sustainable products, despite the higher prices, for instance. The Guidelines require undertakings to "provide evidence of the actual preferences of consumers" (para.580). This requirement departs from the higher standard of "cogent evidence of consumer preferences" which the draft guidelines foresaw and several business respondents opposed as too strict.[28] Despite the welcome revision of the standard of proof, undertakings will still need to undertake the difficult task of measuring consumer preferences over a representative sample of consumers and take into account the unavoidable biases associated with such surveys.[29]

Lastly, the Commission offers to take collective benefits into account if the consumers in the relevant market "substantially overlap" with the beneficiaries outside the relevant market (paras 583–585). However, the Guidelines remain silent on the scope of collective benefits and what will constitute a sufficient overlap between consumers in the relevant market and beneficiaries of collective benefits. In essence, the Commission still requires that consumers in the relevant market always be compensated for any harm caused by the agreement. Several business respondents had argued for a broader inclusion of out-of-market efficiencies in the balancing test.[30] It remains to be seen whether the Commission's more flexible approach for the recognition of collective benefits will allow for the clearance of sustainability agreements inducing wide collective benefits for society and only few benefits within the relevant market in the short term.

[23] See fn.5.
[24] Little, Berg, Pradille, Aubry, "The European Commission's Draft Guidelines on Sustainability Agreements—a legal analysis and practical implications" [2022] E.C.L.R. 404, 408 at section B.3. For business contributions, see fn.5.
[25] Guidelines on the application of Article 101(3) of the Treaty [2004] OJ C101/97, paras 50–58.
[26] See fn.7.
[27] Little, Berg, Pradille, Aubry, "The European Commission's Draft Guidelines on Sustainability Agreements—a legal analysis and practical implications" [2022] E.C.L.R. 404, 409 at section B.4.
[28] See fn.6.
[29] See e.g., K. White, D. J. Hardisty and R. Habib, "The Elusive Green Consumer", *Harvard Business Review* (July–August 2019), available at: *https://hbr.org/2019/07/the-elusive-green-consumer*.
[30] See fn.8.

2.4 The application of the Informal Guidance Notice for sustainability agreements

The Guidelines clarify that undertakings can seek the Commission's guidance on sustainability initiatives by including a reference to its Informal Guidance Notice (para.515).[31] Under the recently renewed Informal Guidance Notice, undertakings can seek such guidance from the Commission if the assessment of the agreement with regard to art.101 TFEU, for instance "poses a question of application of law for which there is no sufficient clarity in the existing Union legal framework".[32] The Informal Guidance Notice also provides that the Commission shall publish guidance letters.[33]

Many questions remain unanswered, and many issues are still unclear in the Guidelines, simply because of a lack of experience on the part of both authorities and undertakings of assessing sustainability agreements under antitrust rules. Therefore, undertakings can be expected to make use of the opportunity for informal guidance. The Commission would also be well advised to be receptive to such attempts, given the shortcomings of the preceding informal guidance notice, whose strict criteria for application deterred its use.[34] This could be very beneficial for sustainability projects as the issuance of guidance letters would not only provide comfort for undertakings participating in sustainability initiatives but also encourage others to engage in such initiatives.

2.5 Summary

As expected, the Guidelines provide some clarifications on how to deal with sustainability agreements but have not removed most of the concerns that business respondents had raised in their comments on the draft guidelines. The Guidelines have marginally clarified the criteria of application in the "soft safe harbor" presumption, but left open the key question on the degree of the price increase. And collective benefits can help to justify sustainability agreements within narrow limits. It remains to be seen whether the Commission will achieve its goal that "competition policy does not stand in the way of horizontal cooperation agreements that pursue genuine sustainability objectives".[35] Businesses dedicated to sustainability goals will likely rather seek assistance from certain NCAs than from the Commission. We will look into the potential interplay between the Commission and the NCAs below in section 4.

3. Overview of NCAs' activities

Several NCAs have published assessments of sustainability initiatives relying on specific sustainability provisions enshrined in national law (3.1) or have been active on sustainability issues by relying on existing antitrust rules (3.2).

3.1 NCAs implementing national regimes with specific sustainability provisions

(a) Netherlands Authority for Consumers and Markets (ACM)

Sustainability is one of the key priorities of the ACM.[36] It issued its first draft guidelines on sustainability agreements in July 2020 aiming to clarify how to structure sustainability agreements in order to respect competition law.[37] The second draft of these guidelines was published in January 2021. In these guidelines, the ACM defined sustainability agreements as encompassing "any agreements between undertakings, as well as any decisions of associations of undertakings, that are aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature".[38]

The ACM also introduced a sub-category of "environmental-damage agreements", through which undertakings co-operate to reduce environmental damage.[39] For these agreements, the ACM is inclined to take into account benefits for others rather than merely those of the users in the assessment under art.101(3) TFEU and its national equivalent.[40] The ACM considers it fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question creates the problem for which society needs to find solutions. In addition, they enjoy the same benefits as the rest of society.[41] Based on these guidelines, the ACM published several informal approvals of

[31] 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) (Informal Guidance Notice) [2022] OJ C381/9.
[32] Informal Guidance Notice, para.8.
[33] Informal Guidance Notice, para.22.
[34] Commission, press release, "Commission adopts a more flexible antitrust Informal Guidance Notice" (3 October 2022), available at: *https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5887*.
[35] Commission, Explanatory note of the revised Horizontal Guidelines, 1 June 2023, para.22.
[36] ACM, Second draft version of "Guidelines Sustainability agreements: Opportunities within competition law" (2021), Summary, available at: *https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf*.
[37] See ACM, press release (9 July 2020), available at: *https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements*.
[38] ACM, Second draft version of "Guidelines Sustainability agreements", para.7.
[39] ACM, Second draft version of "Guidelines Sustainability agreements", para.8. Although the Commission and the ACM share the same basic concept of sustainability agreements, their approach is very different, since the ACM defines this sub-category for which the assessment should also include wider collective benefits to the rest of society, regardless of the link with consumers of the relevant market (see paras 46–50).
[40] ACM, Second draft version of "Guidelines Sustainability agreements", paras 46–50. Similarly, the equivalent of art.101(3) TFEU in the Austrian competition law contains a non-rebuttable legal presumption that consumers obtain a fair share of the resulting benefits if the improvements in question contribute significantly to an ecologically sustainable or climate-neutral economy (§2 Kartellgesetz).
[41] ACM, Second draft version of "Guidelines Sustainability agreements", para.48.

sustainability initiatives. We summarise below the main requests that the ACM reviewed under its sustainability guidelines:

- In February 2022, it cleared the joint purchase by a business association of energy and water users of electricity from an offshore wind farm for a fixed price.[42]
- The same month, it cleared an initiative to set a common price for CO_2 during purchase and investment decisions by operators to invest in grids and natural-gas networks.[43]
- In June 2022, the ACM cleared a collaboration between Shell and TotalEnergies regarding the storage of CO_2 in empty gas fields in the North Sea, setting a common price of CO_2 storage for the use of the first 20% of the capacity.[44]
- In July 2022, the ACM announced that it was allowing co-operation between various soft drink suppliers to remove the plastic handle on soft drink multipacks.[45]
- In September 2022, the ACM approved a collaboration between members of the Dutch garden distribution sector on reducing the use of illegal pesticides, including banishment of plant suppliers infringing these rules.[46]
- In June 2023, the ACM rejected an initiative of the Dutch Food Retail Association (CBL) to fix a collective price among supermarkets for disposable cups and food containers, considering that there is no reason for introducing one, because such a price-fixing agreement does not seem necessary for promoting sustainability.[47]

In parallel and as of 2021, the ACM published draft guidelines on sustainability claims in order to provide rules of thumb and practical examples that can help businesses when phrasing sustainability claims.[48] The last version of these guidelines was published in June 2023.[49] According to the ACM, consumers are entitled to clear, complete and concrete information about the sustainability aspects of products and services. The revised guidelines contain five rules of thumb that businesses must follow when selling products and services.[50]

(b) Austrian Federal Competition Authority (AFCA)

The Austrian Federal Act against Cartels and other Restrictions of Competition (Austrian Cartel Act 2005 (ACA))[51] contains a ban on cartels and an exemption provision which replicates art.101 TFEU. Section 1(1 and 2) ACA contain the prohibited conduct equivalent to art.101(1) TFEU, s.1(3) ACA stipulates the legal consequence like art.101(2) TFEU and s.2(1) ACA contains the exemptions provided in art.101(3) TFEU at EU level. But the Austrian legislator added a "sustainability exemption" to s.2(1) ACA which entered into force on 10 September 2021. Unlike art.101(3) TFEU, s.2(1) ACA now contains an additional paragraph that reads: "Consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy".

Within the scope of the ACA, the provision (unrebuttably) presumes fair consumer share by way of legal fiction if an anti-competitive sustainability co-operation contributes substantially to an ecologically sustainable economy through the resulting efficiency gains. The other conditions for exemption—provided for identically in s.2(1) Cartel Act and art.101(3) TFEU—remain unaffected.[52] In September 2022, the AFCA published Guidelines on the Application of s.2 para.1 Cartel Act to Sustainability Cooperations (Austrian Sustainability Guidelines).[53] These guidelines shall enable undertakings to carry out the requisite self-assessment of whether sustainability co-operations are permissible under the ACA.[54]

[42] See ACM, press release, "ACM favors collaborations between businesses promoting sustainability in the energy sector" (28 February 2022), available at: *https://www.acm.nl/en/publications/acm-favors-collaborations-between-businesses-promoting-sustainability-energy-sector*.
[43] See ACM, press release, "System operators can collaborate in order to reduce CO2 emissions" (28 February 2022), available at: *https://www.acm.nl/en/publications/system-operators-can-collaborate-order-reduce-co2-emissions*.
[44] See ACM, press release, "ACM: Shell and TotalEnergies can collaborate in the storage of CO2 in empty North Sea gas fields" (27 June 2022), available at: *https://www.acm.nl/en/publications/acm-shell-and-totalenergies-can-collaborate-storage-co2-empty-north-sea-gas-fields*.
[45] See ACM, press release, "ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles" (26 July 2022), available at: *https://www.acm.nl/en/publications/acm-favorable-joint-agreement-between-soft-drink-suppliers-about-discontinuation-plastic-handles*.
[46] See ACM, press release, "ACM agrees to arrangements of garden centers to curtail use of illegal pesticides" (2 September 2022), available at: *https://www.acm.nl/en/publications/acm-agrees-arrangements-garden-centers-curtail-use-illegal-pesticides*.
[47] See ACM, press release, "ACM: no need for collective price-fixing agreements among supermarkets about plastic packaging" (23 June 2023), available at: *https://www.acm.nl/en/publications/acm-no-need-collective-price-fixing-agreements-among-supermarkets-about-plastic-packaging*.
[48] See ACM, press release, "Guidelines sustainability claims" (28 January 2021), available at: *https://www.acm.nl/en/publications/guidelines-sustainability-claims*.
[49] See ACM, press release, "Guidelines Sustainability claims (summary)" (13 June 2023), available at: *https://www.acm.nl/en/publications/guidelines-sustainability-claims-summary*.
[50] The rules of thumb are: (1) use correct, clear, specific, and complete sustainability claims, (2) substantiate sustainability claims with facts, and keep them up to date, (3) make fair comparisons with other products or competitors, (4) describe future sustainability ambitions in concrete and verifiable terms, and (5) ensure that visual claims and labels are useful to consumers and not confusing.
[51] Federal Law Gazette I No.61/2005 (NR: GP XXII RV 926 AB 990 p.112. BR: AB 7309 p.723) as last amended by Federal Law Gazette I No.176/2021 (NR: GP XXVII RV 951 AB 976 p.115. BR: 10689 AB 10702 p.929).
[52] See also Guidelines on the Application of Sec. 2 para. 1 Austrian Cartel Act to Sustainability Cooperations, September 2022 (Austrian Sustainability Guidelines), para.10.
[53] See Austrian Sustainability Guidelines.
[54] See Austrian Sustainability Guidelines, para.12.

The AFCA explains the entire self-assessment process in the Austrian Sustainability Guidelines. For undertakings looking for guidance regarding the sustainability exemption, s.5.2.3 provides explanations on what constitutes a "contribution to an ecologically sustainable or climate-neutral economy" and s.5.2.4 on what is considered to be "substantial" in this regard. With regard to the latter, the AFCA accepts that "an analysis of the positive and negative effects of a co-operation may be conducted quantitatively or qualitatively". A quantitative analysis is necessary if it is not clear in advance how proportional the restriction of competition is to the efficiency gains from ecological benefits. In such more complex cases, the AFCA will, when applicable, require undertakings to estimate credibly the effect of the restriction of competition and the level of the efficiency gains from ecological benefits. If there are qualitative efficiency gains and qualitative restrictions of competition, it may further be necessary to convert them approximately into monetary sums in order to be able to compare them more directly, using the same unit of measurement.[55]

(c) Hellenic Competition Commission (HCC)

In January 2022, the amended Greek Competition Act (Law 3959/2011) was published. Article 37A of this law provides the possibility for the president of the HCC "following proposal of the Directorate-General for Competition and at the request of the person concerned" to adopt a no-enforcement action letter "either because the conditions of Article 1(1) of this law or Article 101 TFEU are not met, or because the conditions of Article 1(3) of this law or Article 101 TFEU are met, on public interest grounds, such as the implementation of sustainable development objectives."

On this basis, the HCC launched its "Sustainability Sandbox" in October 2022 to promote the goals of sustainability and competition in the Greek market.[56] The Sandbox is a protected environment in which companies can propose initiatives. These initiatives are then fully reviewed *ex ante* by the HCC Directorate-General for Competition, based on various evaluation criteria. The HCC president can then issue a no-enforcement action letter. Once the review is finalised and if the initiative is accepted, the interested parties can leave the Sandbox and implement the business proposal in the market. The Sandbox aims to provide legal certainty on competition law for companies implementing sustainable projects.

(d) Hungarian Competition Authority (GVH)

The GVH has adopted a new notice on remedies that allows for proactive reparation (or compensation) when the undertaking has infringed competition law (under arts 101 and 102 TFEU). This new notice notably allows taking into consideration commitments contributing to sustainability or environmental protection as they increase consumer welfare.[57] Proactive reparation (compensation) is deemed to exist, when the undertaking that committed the infringement partially or fully remedies the negative effect. When an undertaking offers a commitment to proactive reparation, the GVH may, in particular, consider whether the commitment contributes to sustainability or environmental protection, thereby increasing consumer welfare.[58] The GVH would decide whether it recognises proactive reparation as a fine-reducing factor when establishing the infringement.[59]

3.2 NCAs assessing sustainability on the basis of existing antitrust tools

(a) The German Bundeskartellamt (Federal Cartel Office; FCO)

The FCO has published a note on the topic before the Organisation for Economic Co-operation and Development (OECD) in December 2020[60] and several opinions on sustainability initiatives published in the last several months.[61]

Neither the German legislator nor the FCO has launched any specific initiative to modify or reform competition law in light of sustainability requirements. Neither has the FCO issued guidelines for the treatment of sustainability agreements in German competition law. It has, however, expressed its position at various occasions, for example in a note to the OECD in December 2020.[62] The FCO does not observe a general conflict between public interest objectives and competition law; if a conflict emerges, it is primarily the task of the democratically elected lawmaker to strike a balance between the opposing interests.[63] The FCO is

[55] Austrian Sustainability Guidelines, para.91.
[56] See HCC, press release (22 June 2022), available at: *https://www.epant.gr/en/enimerosi/press-releases/item/2226-press-release-creation-of-the-sandbox-for-sustainable-development-and-competition.html*.
[57] See HGA, Notice No.1/2020, Section III.7.3, available at: *https://www.gvh.hu/pfile/file?path=/en/for_professional_users/notices/1_2020_antitroszt-kozlemeny_egyseges-szerkezetben_1_2021_modositassal_a&inline=true*.
[58] See HGA, Notice No.1/2020, Section III.7.3, para.33.
[59] See HGA, Notice No.1/2020, Section III.7.3, para.34.
[60] OECD, "Sustainability and Competition, Note by Germany" (1 December 2020), available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2020/OECD_2020_Sustainability_and_Competition.pdf?__blob=publicationFile&v=2*.
[61] See, e.g., FCO, press release (18 January 2022), available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.pdf?__blob=publicationFile&v=3*; BKA, press release (25 January 2022), *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.pdf?__blob=publicationFile&v=3*.
[62] OECD, "Sustainability and Competition, Note by Germany" (1 December 2020).
[63] OECD, "Sustainability and Competition, Note by Germany" (1 December 2020), para.90.

aiming to protect the environment and take other public interest objectives into account within its scope of discretionary powers.[64]

The FCO provided guidance, for example, concerning an animal welfare initiative in 2014. "Initiative Tierwohl" is a project based on an agreement between the agricultural, meat production and food retail sectors and aims to reward livestock owners for improving the conditions in which animals are kept. The initiative is mainly financed by the four largest food retailers in Germany. A key component of the initiative is paying participating livestock owners a standard premium (referred to as "animal welfare payment") via the participating slaughterhouses. The FCO encouraged the initiative to introduce in several stages a clear labelling for meat produced in line with animal welfare criteria to create transparency for consumers on the conditions in which animals are kept and their origin. The financing model was also adjusted several times in the last several years. The agreement between the businesses on paying a standard premium was tolerated by the FCO for a transitional period due to the project's pioneering nature. However, the FCO insists that competition elements gradually be introduced.[65] On the other hand, the FCO clearly pointed out the limits under competition law for envisaged surcharges in the milk sector. These surcharges were deemed to constitute illegal price-fixing which was not intended to achieve a higher sustainability standard than what EU or national law stipulate.[66]

(b) Belgian Competition Authority (BCA)

On 30 March 2023, the BCA approved its first assessment of a sustainability initiative. The initiative consisted of a collaboration between the Sustainable Trade Initiative (IDH) and five large retail chains in Belgium (Colruyt Group, Delhaize, Aldi, Lidl, and Jumbo) aimed to ensure living wages in the banana sector. In practice, Belgian retailers are collaborating to set common objectives, exchange know-how, harmonise approaches and timetables, monitor progress and launch joint actions in the field wherever possible.[67]

In its assessment, the BCA took into account, among others, the following elements: transparency, voluntary participation, freedom of participants to set stricter standards, absence of exchange of commercially sensitive information, effective and non-discriminatory access to the standard, absence of significant price increase or choice reduction, continuous monitoring of implementation and absence of recommendation on minimum prices or on how to pass on any costs.

(c) Other NCAs

Several other NCAs have also taken positions regarding the inclusion of sustainability in their antitrust assessments on the basis of existing antitrust rules:

- The French Competition Authority (FCA) has already expressed its commitment to take into account sustainability and support the green transition, without yet issuing any guidance or assessment of sustainability initiatives.[68]
- The Italian Competition Authority (AGCM) has set up a task force on the interplay between competition and environmental sustainability in July 2021, without any additional action taken in that regard since then.[69]
- The former president of the Portuguese Competition Authority (PCA) indicated that the PCA does not intend to define additional guidance at national level in light of the Commission's Guidelines. According to the former president, the Guidelines strike the right balance and NCAs contributed to the Guidelines through the European Competition Network (ECN).[70]

4. Interplay between the Commission's revised Horizontal Guidelines on sustainability agreements and national regimes

One obvious risk deriving from the patchwork of national and EU competition laws as described above (section 3), is a widening gap between certain, more permissive national laws and the rest, including EU competition law. Whilst this is inherent in the allocation of competences between the EU and the Member States, such a widening gap may also have repercussions on the consistent application of EU competition law. The NCAs are well aware of that risk and the ACM, for example, has publicly declared its intention to align its sustainability guidelines with the Commission's.[71] Other NCAs have welcomed the Commission's Guidelines, which were drafted with

[64] OECD, "Sustainability and Competition, Note by Germany" (1 December 2020), para.93.
[65] FCO, "Achieving sustainability in a competitive environment" (18 January 2022), available at: *https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html?nn=3591568*.
[66] FCO, "Surcharges without improved sustainability in the milk sector: Bundeskartellamt points out limits of competition law" (25 January 2022), available at: *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2022/25_01_2022_Agrardialog.pdf?__blob=publicationFile&v=5*.
[67] See BCA, press release, "The Belgian Competition Authority assesses a sustainability initiative on 'living wages in the banana sector'" (30 March 2023), available at: *https://www.belgiancompetition.be/sites/default/files/content/download/files/20230330_Press_release_11_BCA.pdf*.
[68] FCA, "Roadmap 2023–2024" (3 March 2023), available at: *https://www.autoritedelaconcurrence.fr/en/article/autorite-publishes-its-roadmap-2023-2024, p.4*.
[69] OECD, "Environmental Considerations in Competition Enforcement, Note by Italy" (24 November 2021), available at: *https://one.oecd.org/document/DAF/COMP/WD(2021)49/en/pdf*, para.28.
[70] Olivia Rafferty, "Margarida Matos Rosa: the exit interview", GCR (28 April 2023), available at: *https://globalcompetitionreview.com/article/margarida-matos-rosa-the-exit-interview*.
[71] See ACM, press release, "European Commission publishes new guidelines on competition and sustainability" (1 June 2023), available at: *https://www.acm.nl/en/publications/european-commission-publishes-new-guidelines-competition-and-sustainability*.

contribution from NCAs.[72] Member States and their NCAs have taken different views on how to approach sustainability questions or how to apply certain provisions,[73] but such divergence has resulted in healthy competition for the best solution; we have not observed any tendency by NCAs to undermine or ignore EU competition law.

We consider below the delimitation of EU and national competition laws and the allocation of competence between the Commission and the NCAs (4.1) and then assess the interplay between the regimes and authorities in the sustainability field (4.2).

4.1 Scope of application of EU and national competition laws and allocation of competences between the Commission and the NCAs

The interplay between the enforcement of antitrust rules at EU and national levels directly concerns both the scope of application of EU and/or national law, respectively, and the question who is competent to apply EU competition law in a given situation.

(a) Scope of application of EU and national antitrust rules

EU antitrust law applies to all practices that may affect trade between Member States, as provided by art.3(1) of Regulation 1/2003.[74] According to art.3(2) of Regulation 1/2003 and consistent with the principle of primacy of EU law, the application of national law cannot lead to the prohibition of practices that may affect trade between Member States and that would otherwise not be prohibited under art.101 TFEU.[75] Member States can only adopt stricter national rules regarding unilateral conduct covered by art.102 TFEU.

The key criterion to determine whether EU law applies is therefore whether the practices may appreciably affect trade between Member States. According to the Guidelines on the effect on trade, this notion captures all practices that may affect trade between Member States in an appreciable manner:

- **May affect:**

  affection foreseeable with a sufficient degree of probability based on objective factors on the pattern of trade between Member States, regardless of whether such effects are direct or indirect, actual or potential;[76]

- **Trade between Member States:**

  all cross-border economic activity between Member States, even when confined within the limits of the territory of a Member State or of a region of a Member State;[77]

- **In an appreciable manner:**

  practices must not have an insignificant effect on the market based on the position and importance of the undertakings on the relevant product market and of the economic and legal context of the practices.[78] This is particularly the case when the market shares of the parties to the agreement exceed 5%.[79]

The notion of effect on trade sets a relatively low threshold, particularly in the context of sustainability initiatives which would often aim to cover a broad part of the market and thus most likely would have foreseeable and appreciable effects on cross-border economic activity.

(b) Competence of the Commission and NCAs

Regulation 1/2003 sets out a system of parallel competence of the Commission and the NCAs regarding the application of antitrust rules. The NCAs' material competence is determined according to the following three criteria in the ECN Cooperation Notice:

- The practice has substantial direct or foreseeable effects on competition or is implemented within or originates from the territory of a Member State;

[72] The German Monopolies Commission, for example, supports the Commission's approach in the Guidelines, see XXIV. Hauptgutachten-Wettbewerb 2022, p.2, 206 et seq. Similarly, the former president of the Portuguese Competition Authority indicated that considering the Commission's Guidelines, no additional guidance would be necessary at national level as the Guidelines strike the right balance and NCAs contributed to the Guidelines through the European Competition Network (ECN); see Rafferty, "Margarida Matos Rosa: the exit interview", GCR (28 April 2023).

[73] The ACM, for example, has publicly pronounced reluctance to issue fines for breaches of the Commission's proposed exemption from competition rules for sustainability agreements in the agricultural sector. Instead, the ACM would prefer to discuss potential remedies with the undertakings, while the Commission has not made such statement regarding its guidelines on sustainability agreements in the agricultural sector. See Bethan John, "Dutch enforcer will not issue fines for sustainability exemption breaches, official says", GCR (12 June 2023), available at: *https://globalcompetitionreview.com/article/dutch-enforcer-will-not-issue-fines-sustainability-exemption-breaches-official-says*.

[74] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003) [2003] OJ L1/1, art.3(1).

[75] Regulation 1/2003 art.3(2).

[76] Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Guidelines on the effect on trade) [2004] OJ C101/81, paras 23–24.

[77] Guidelines on the effect on trade, paras 19–22.

[78] Guidelines on the effect on trade, paras 44–49.

[79] Guidelines on the effect on trade, para.53. The CJEU has not excluded that the sole fact that parties to concerted practices have market shares clearly exceeding the threshold of 5% could be sufficient to consider as having met the condition of appreciability. See *Ziegler SA v Commission* (C-439/11 P) EU:C:2013:513; [2013] 5 C.M.L.R. 36 at [96].

- The authority is able to effectively end the entire infringement (i.e., with a cease-and-desist order and if appropriate, a sanction); and
- The authority is able to gather the evidence required to prove the infringement.[80]

However, the Commission will be considered better-placed to handle the case if the practice affects competition in more than three Member States,[81] or if the case is closely linked to other EU law provisions that may be exclusively or more effectively applied by the Commission or if new competition issues arise to ensure effective enforcement of EU antitrust rules.[82] In the case of sustainability initiatives, the Commission could leverage the latter provision to preserve the coherence of EU antitrust rules as sustainability cases remain a novel question of antitrust enforcement due to the lack of significant precedents at EU level.

Once the Commission initiates proceedings in a given case, art.11(6) of Regulation 1/2003 provides that NCAs are relieved of their competence to initiate proceedings against the same undertakings regarding the same practices.[83]

4.2 Practical considerations—how to achieve the most for sustainability agreements?

Based on the rules described above (4.1), deviating national law, such as the Austrian sustainability exemption[84] can only be applied if the sustainability agreement does not appreciably affect trade between Member States. At least any practice that would cover the entirety of the Member State (e.g., Austria as a whole) and be applied by companies that have combined shares of 5% or more at national level on the market in question would likely be captured by EU competition law. They would thus trigger the consequences under Regulation 1/2003: according to art.3(1) sentence 1 of Regulation 1/2003, the NCA in question would have to apply art.101 TFEU in addition to national law (e.g., s.2(1) ACA). The sustainability agreement in question would therefore need to comply with the narrower requirements according to art.101(3) TFEU.

To the extent the sustainability agreement would rely for justification on collective (or "out-of-market") efficiencies, the additional assessment under art.101(3) TFEU becomes relevant. For ease of reference, we might consider a sustainability agreement that generates substantial collective (or "out-of-market") efficiencies only (or primarily; Type A) and another one that generates substantial individual use-value ("in-market") efficiencies and substantial collective ("out-of-market") efficiencies (Type B).

Type A agreements would only be justifiable under art.101(3) TFEU if it could be established that consumers were willing to pay more for such collective benefits, converting them into "*individual* non-use value benefits" (see above section 1.4). We could use the example in para.585 of the Guidelines: consumers may buy clothing made of sustainable cotton that reduces the use of fertilisers and water on the land where the cotton is cultivated. Such environmental benefits could in principle be taken into account as collective benefits. However, absent substantial overlap between the consumers of the clothing and the beneficiaries of the environmental benefits, it may be challenging to demonstrate that collective benefits would accrue to the consumers in the relevant market. The Guidelines would require the undertakings concerned to demonstrate that consumers of the clothing are willing to pay more for clothing that is made of sustainably grown cotton (individual non-use value benefits). Without such evidence, the agreement risks falling short under art.101(3) TFEU, even if it would otherwise satisfy all conditions of s.2(1) ACA (and potentially also the requirements under Dutch national competition law as stipulated in the ACM's draft guidelines on sustainability agreements).

Type B agreements may be justified under art.101(3) TFEU for the same reason as Type A agreements. But they may also be justified on the basis of individual use-value efficiencies. We may use the other example in para.585 of the Guidelines: drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel were used. To the extent that a substantial overlap of consumers (the drivers in this example) and the wider beneficiaries (citizens) can be established, the sustainability benefits of cleaner air can be taken into account, provided that they compensate the consumers in the relevant market for the harm suffered. Such agreement would likely satisfy all conditions of s.2(1) ACA (and potentially also the requirements under Dutch national competition law as stipulated in the ACM's draft guidelines on sustainability agreements) already on the basis of the collective benefits achieved.

The assessment of these two types of agreements reveals the potential tension and discrepancy between the application of the Guidelines in relation to sustainability initiatives and certain national laws for Type A agreements. Undertakings participating in sustainability initiatives without the data to prove significant "in-market" efficiencies for consumers may prefer to roll out their initiatives in Member States where authorities take a more expansive approach to quantifying environmental benefits, before potentially expanding the

[80] Commission Notice on cooperation within the Network of Competition Authorities (ECN Cooperation Notice) [2004] OJ C101/43, para.8.
[81] ECN Cooperation Notice, para.14.
[82] ECN Cooperation Notice, para.15.
[83] Regulation 1/2003 art.11(6).
[84] "Consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy." See section 3.1(b), above.

initiative to the EU. However, as shown in section 4.1, undertakings will have no certainty that the case would fall within the competence of the relevant national authorities. The case law suggests that undertakings have no right or legitimate expectation as to whether their case will be dealt with by a specific competition authority.[85] The possibility to pick and choose the most suitable competition authority remains highly theoretical, unless the undertakings are willing to develop their sustainability initiatives within the boundaries of a given Member State (or part of it). It therefore remains to be seen how the interactions between NCAs and the Commission will evolve as actual sustainability initiatives are brought forward.[86]

5. Conclusion/outlook

The Commission's Guidelines on sustainability agreements mark a shift in antitrust policy regarding sustainability initiatives. According to Olivier Guersent, Director-General for Competition, only a few sustainability initiatives have been brought forward in the EU.[87] Whether the Guidelines will encourage undertakings to reach out to the Commission more frequently with their sustainability initiatives remains to be seen. Several uncertainties could discourage businesses from coming forward, despite the publication of the Guidelines and the Commission's displayed willingness to provide informal guidance. In particular, it remains unclear whether the Commission will actually make use of the "soft safe harbor" for standardisation agreements and how it will apply the cumulative conditions notwithstanding the residual uncertainty described above. The Commission's willingness to publish guidance letters and to publish further informal guidance on other issues (e.g., how to measure sustainability benefits) will therefore be important to support the development of further sustainability initiatives in the EU. As several NCAs either have more lenient regimes or appear more sustainability-promoting, they could continue to play an important role in shaping the application of the Guidelines, as undertakings might have incentives to reach out to the most proactive and most lenient authorities on sustainability issues. The risk of inconsistent application of EU competition law due to divergent guidelines and practices across NCAs appears limited, as the Commission will remain able to intervene and potentially overcome any divergence.

[85] Judgment in Joined Cases *Thyssenkrupp v Commission* (T-144/07, T-147–150/07 & T-154/07) EU:T:2011:364 at [78].
[86] The authors also note that several NCAs outside the EU have issued guidance or decisions on the interplay between sustainability and competition law (i.e., the CMA in the UK, the Commerce Commission in New Zealand, the Australian Competition and Consumer Commission, the Chinese State Administration for Market Regulation, the Japanese Fair Trade Commission and the Competition and Consumer Commission in Singapore). While these developments are relevant, an extensive analysis of their work is outside the scope of this article.
[87] Mlex, "Most environmental agreements are unlikely to cause antitrust harms, EU's Guersent says" (10 October 2022), available at: *https://content.mlex.com/#/content /1415593?referrer=email_instantcontentset&paddleid=202&paddleaois=2000*.