The European Commission's Draft Guidelines on Sustainability Agreements—a legal analysis and practical implications

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Summary

The Draft Horizontal Guidelines promote a broad notion of "sustainability", extending beyond environmental sustainability to encompass "activities that support economic, environmental and social (including labour and human rights) development". Whilst the European Commission acknowledges that certain sustainability agreements may fall outside the scope of art.101(1) Treaty on the Functioning of the European Union (TFEU), for example under the ancillary restraints doctrine, it is not prepared to apply the *Wouters* case law more generally to sustainability agreements. The sustainability chapter of the Draft Guidelines appears as residual category. If a collaboration between rivals falls within a different chapter of the Draft Guidelines—e.g., agreements relating to R&D or production—that chapter will apply first and in full. Business can, however, still use the principles and reasoning underpinning the sustainability chapter as an interpretative aid, to understand how the Commission may balance efficiencies of a collaboration with any adverse effects on competition. The Commission creates a "soft safe harbour" presumption, which saves sustainability agreements that fulfil seven cumulative criteria from further assessment of effects. These agreements will be deemed as having no effects on competition but the actual consequences of such a presumption remain unclear. The chapter maintains, overall, an orthodox framework for analysing potential restrictions on sustainability agreements. The main innovation in the assessment that the Commission suggests is the recognition of collective benefits inside and outside the market(s) on which the collaboration takes place. Rather than constituting a major legal innovation, the draft guidelines provide incremental steps towards facilitation of sustainability agreements.

A. The current text of the draft guidelines on sustainability

On 1 March 2022, the European Commission (the Commission) launched a public consultation on the draft revised Horizontal Guidelines (Draft Guidelines) and invited stakeholders to comment during the public consultation until 26 April 2022. This draft updates the 2010 Horizontal Guidelines on the basis of recent case law and includes additional guidance on key issues such as ancillary restraints and potential competitors but also sustainability. The current Guidelines expire on 31 December 2022, so the new rules are expected to enter into force on 1 January 2023.

1. Introduction to Chapter 9 on sustainability agreements

Although included in the 2001 Guidelines, environmental agreements were removed from the 2010 Guidelines, leaving undertakings without any written guidance other than under the chapter on standardisation. The approach followed by the Commission in the 2010 Guidelines relied on the fact that environmental standards agreements would be more appropriately dealt with under the standardisation chapter and that other environmental agreements would be analysed under the relevant chapter (research and development (R&D), production, etc.) depending on the type of agreement.

By adding a new chapter to its guidelines, the Commission acknowledges the increased importance of sustainability agreements and the need for guidance on points such as the first mover disadvantage. The scope of the present chapter is indeed much broader than the environmental agreements included in the 2001 Guidelines to encompass "activities that support economic, environmental and social (including labour and human rights) development" (para.543). The expansive understanding of sustainability is interesting from a legal perspective, as not all of these elements (e.g., resilience of infrastructure and innovation) may present the same "negative externalities" and "market failures" which, according to the Draft Guidelines, justify recourse to collective action including collaboration between rivals (para.601).

The Commission states that sustainability agreements are not a distinct type of co-operation agreements. Rather, sustainability agreements refer to "any type of horizontal agreements that genuinely pursues one or more

sustainability objectives" (para.547). However, this chapter applies only when the agreement does not fall under the scope of another chapter of the Draft Guidelines, in which case guidance on sustainability will be applied only regarding the assessment of a possible exemption under art.101(3) TFEU. Thus, only sustainability standardisation agreements will be fully examined on the basis of Ch.9.

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

The Commission acknowledges that certain sustainability agreements may fall outside the scope of art.101(1) TFEU as they do not affect parameters of competition, notably price, quantity, quality, choice or innovation. The chapter lists three categories of agreements as examples: (1) agreements that do not concern competitors' economic activity but only their internal corporate conduct, (2) agreements that entail the creation of a database containing information about suppliers that have sustainable value chains, production processes and provide sustainable inputs, and (3) agreements that relate to the organisation of industry-wide campaigns about sustainability (paras 551–554).

If restrictions in sustainability agreements are objectively necessary to implement the cooperation agreement and proportionate to the objectives thereof, they might be justified as ancillary restraints (para.548; see s.1.2.6.). But the Commission is not prepared to apply the *Wouters* case law more generally to sustainability agreements: sustainability agreements cannot escape art.101 TFEU only because they might be considered necessary to pursue legitimate objectives of sustainability (para.548; see below B.1.).

3. The assessment of sustainability agreements under the Draft Guidelines

Sustainability agreements (i.e., agreements pursuing a sustainability objective) that affect one or more parameters of competition have to be assessed under the following framework, provided that they do not fall within the scope of another chapter of the Draft Guidelines.

If the sustainability agreement does not fall under the scope of another chapter, sustainability standardisation agreements will be analysed solely on the basis of the framework in the chapter. First, it needs to be determined that the agreement does not contain any restriction "by object". To the extent the agreement pursues a genuine sustainability objective, it cannot be considered as restrictive by object. But any agreement used to cover up hardcore restrictions would be restrictive "*by object*" (para.570).

For the assessment of effects, the Commission creates a novel "soft safe harbour" presumption that the agreement does not fall under the scope of art.101(1) TFEU if some conditions are met. Otherwise, the agreement's effects have to be assessed. Agreements fulfilling the following seven cumulative conditions will be considered as falling outside the scope of art.101(1) TFEU (para.572):

1. Standard development must be transparent and participative.
2. The standard should be adopted on a voluntary basis and access should be open to all market participants.
3. Undertakings should be able to adopt stricter standards.
4. The parties should not exchange sensitive commercial information.
5. Access to the outcome should be effective and non-discriminatory.
6. Sustainability standards should not lead to a significant increase in price or a significant reduction in the choice of available products on the market.
7. There is a mechanism or monitoring system for compliance with the standard's requirements.

Finally, the Commission provides some limited guidance regarding the assessment of competitive effects of sustainability *standardisation* agreements.

If the agreement falls under the scope of another chapter, genuine sustainability objectives pursued by it may still be taken into account in the assessment of restrictions to determine whether it is restrictive by object or by effect (para.559). In that case, the undertakings must show evidence that the agreement pursues a genuine sustainability objective such as "to justify a reasonable doubt as to the anti-competitive object of the agreement" (para.560 and fn.319). Once that is established, the "by object" characterisation does not hold any longer and the effects of the agreement on competition will be analysed under the framework of the relevant chapter (para.560). Sustainability objectives will be taken into account under art.101(3) TFEU.

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

The Commission provides detailed guidance on the inclusion of sustainable benefits in the analysis of agreements under art.101(3) TFEU in order to benefit from an exemption. This part applies to all sustainability agreements, including those that were analysed under another chapter for the purpose of art.101(1) TFEU.

First, efficiency gains should be understood in broad terms, including both quantitative and qualitative efficiencies and long-term efficiencies for the improvement of technologies or production or distribution channels (paras 577–578). Undertakings must provide evidence of exactly how the claimed benefits will occur and provide an estimate of their impact (para.579).

Second, the indispensability criterion requires that restrictions on competition must be reasonably necessary to achieve the purported benefits to occur, without any

other economically practicable and less restrictive means of achieving such benefits being available (para.581). For instance, sustainability agreements could be indispensable in order to reach such benefits in a more cost-efficient way (paras 582–583); to solve market failures (with issues such as free-riding and the "first-mover disadvantage") (paras 584–585); to reach sufficient market coverage to allow actual benefits; or to compensate for the customers' insufficient information or knowledge preventing them from properly estimating benefits (para.586).

Third, the Draft Guidelines clarify that when assessing pass-on to consumers in the context of sustainability agreements, the Commission will interpret "consumers" in a broad sense, to comprise "all direct and indirect users of the products covered by the agreement". This is the most extensive and creative section of the chapter on sustainability. Historically, the Commission has balanced anti-competitive effects and efficiencies arising within the antitrust market(s) on which the collaboration takes place. Costs and benefits occurring on other markets—including benefits enjoyed by the general public—have been considered less extensively, or not at all. The Draft Guidelines envisage an expanded appreciation of benefits arising within and outside the relevant antitrust market(s).

Benefits *within the market* may be: individual use-value benefits, individual non-use value benefits or collective benefits. Individual use-value benefits refer to quantitative and qualitative efficiencies at the individual level resulting from the use of the product by the individual consumer. Thus, qualitative efficiencies brought by the agreement might compensate the harm arising from a price increase (para.591). Individual non-use value benefits refer to consumers' appreciation of the impact of their sustainable consumption on others for which consumers can be willing to pay a higher price for a lesser sustainable impact (paras 594–596). Such indirect benefits will be proven by showing consumer preferences (usually through willingness-to-pay surveys) that should be drawn up for a representative fraction of all consumers in the relevant market (paras 597–600). Collective benefits refer to benefits occurring regardless of consumers' individual appreciation of the product and can be included in the analysis as long as consumers in the relevant market are part of the larger group of beneficiaries (para.601). This analysis ensures the inclusion of negative externalities in the assessment.

The Draft Guidelines also envisage two scenarios in which the Commission may credit "*collective benefits*" that accrue *outside the market* on which the collaboration takes place: (i) benefits accruing to (substantially) the same group of consumers but in their capacity as consumers or actors in a related market; (ii) benefits accruing outside the relevant market but to a group of consumers which overlaps substantially with consumers within the market. In both cases, the Draft Guidelines caution that collective benefits are only likely to materialise if the market coverage of the agreement is substantial and these collective benefits are significant enough to compensate consumers in the relevant market for the harm suffered.

In practical terms, companies must (i) describe clearly the claimed benefits and provide evidence that they have occurred or are likely to occur; (ii) define clearly all the beneficiaries; (iii) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or are part of them; and (iv) demonstrate what part of the collective benefits occurring or likely to occur outside the relevant market accrue to consumers of the product in the relevant market (para.606).

Finally, the Commission recalls that there should remain residual competition on the market concerned, even when the agreement covers the entire industry (paras 610–614).

B. Practical implications of the Draft Guidelines for sustainability agreements

The chapter of the Draft Guidelines raises several questions about its practical implications for sustainability initiatives.

1. The scope of the Draft Guidelines

First, the Draft Guidelines provide for a broad definition of "sustainability agreements": sustainability agreements are defined as "any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation" (para.547). This definition is very similar to the one provided by the Dutch Competition Authority (ACM), that also based its definition on the aim pursued by the agreement. Namely, the ACM has 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".[1] However, the ACM also introduces a sub-category of so-called "environmental-damage agreements", i.e., agreements through which undertakings co-operate to reduce environmental damage.[2] For these agreements, the ACM is inclined to take into account benefits for others than merely those of the users in the assessment under

[1] ACM, Second draft version of "Guidelines Sustainability agreements: Opportunities within competition law" (2021), para.7, available at: *https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf*.

[2] ACM, Second draft version of "Guidelines Sustainability agreements" (2021), 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).

art.101(3) TFEU and its national equivalent.[3] 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.[4] The Commission maintains its stricter approach that the consumers subject to the anti-competitive agreement or concerted practice need to be fully compensated for the harm that it causes. The Commission has, however, provided guidance on how "individual non-use benefits" might form a recognisable part of the benefits which allow sustainability agreements to be exempted under art.101(3) TFEU (see below, section B.4.).

The current Draft Guidelines capture more agreements than the 2001 Guidelines did in the chapter on environmental agreements. Indeed, the 2001 Guidelines had excluded three types of agreements from the scope of art.101(1) TFEU that would, under the Draft Guidelines, typically be subject to an effects assessment.[5] According to the chapter, sustainability agreements affecting one or more parameters of competition may need to be assessed under art.101(1) TFEU (para.555). While the chapter provides for detailed guidance for assessing the effects of agreements setting sustainability standards in Section 9.3.2, it does not include such a section for other types of sustainability agreements as most of them are likely to be analysed under other chapters of the Draft Guidelines. However, the rest of the chapter (including the section on the "by object" qualification and the guidance on sustainability benefits) is applicable to all sustainability agreements.

Second, the Chapter acknowledges that certain sustainability agreements could escape art.101(1) TFEU based on the ancillary restraints doctrine but confirms that "agreements that restrict competition cannot escape the prohibition of Article 101(1) for the sole reason that they are necessary for the pursuit of a sustainability objective" (para.548) and hence dismisses any general application of the *Wouters* or *Meca-Medina* rulings.

The Court of Justice held that certain restraints should be considered ancillary to the implementation of a non-restrictive agreement and, as a consequence, such restraint should be considered as not restricting competition. The Draft Guidelines explain that an ancillary restraint will comply with art.101(1) TFEU provided that the restraint is "objectively necessary to implement the horizontal co-operation agreement and proportionate to the objectives thereof" (para.39). For instance, in *Remia*, the Court of Justice considered that, in principle, non-compete clauses included in agreements to sell a business could be considered as ancillary to that agreement as long as it was necessary in such operation and that its duration and scope were strictly limited for that purpose.[6] The application of the ancillary restraints doctrine requires an assessment of the necessity and proportionality of the restraint in question. This implies assessing possible alternative solutions in order to determine whether one of them could be less restrictive, but also whether in the absence of such restriction, the same or a similar objective could not be reached. Such analysis has proven to be difficult in practice, as observed in *Mastercard*.[7]

The Court of Justice excluded the application of competition rules in cases where lawyers or sports organisations pursued a legitimate aim in the context of self-regulation. The Commission is not prepared to propose a transfer of this concept to sustainability agreements. In *Wouters*, the agreement's aim was the self-regulation of the lawyers' profession. The Court of Justice explains that "not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) [now 101(1)] of the Treaty".[8] Indeed, the Court of Justice provides criteria to assess whether agreements could still fall outside the scope of antitrust provisions, namely: (i) "the overall context in which the decision of the association of undertakings was taken or produces its effects"; (ii) its objectives; and (iii) whether the "consequential effects restrictive of competition are inherent in the pursuit of those objectives" (the *Wouters* Conditions).[9]

This case is very specific to the context imposed by the Dutch law that makes the bar association responsible for regulating the exercise of the profession. The objective of the agreement is thus to "to ensure that […] the rules of professional conduct for members of the Bar are complied with, having regard to the prevailing perceptions of the profession in that State".[10] Finally, the regulation was considered necessary for the proper practice of the legal profession and the inherent restrictive effects of competition did not go beyond what was required.[11] The fact that undertakings will not be able to benefit from such exclusion of the scope of art.101(1) TFEU on the sole basis of the *Wouters* Conditions essentially means

[3] ACM, Second draft version of "Guidelines Sustainability agreements" (2021), paras 46–50. Similarly, the equivalent of art.101(3) 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).
[4] ACM, Second draft version of "Guidelines Sustainability agreements" (2021), para.48.
[5] 2001 Guidelines, paras 184–187: (i) loose commitments or agreements that impose a target without any precise obligation; (ii) agreements that do only have a marginal influence on the market; and (iii) agreements that induce a genuine market creation.
[6] *Remia BV v Commission* (42/84) EU:C:1985:327; [1987] 1 C.M.L.R. 1 at [17]–[20].
[7] *Mastercard v Commission* (C-382/12 P) EU:C:2014:2201; [2014] 5 C.M.L.R. 23 at [106]–[111].
[8] *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99) EU:C:2002:98; [2002] 4 C.M.L.R. 27 at [97].
[9] *Wouters* EU:C:2002:98 at [97].
[10] *Wouters* EU:C:2002:98 at [105].
[11] *Wouters* EU:C:2002:98 at [107]–[109]. This finding was also later applied in the *Meca-Medina* case in the context of anti-doping rules in the sports sector. See *Meca-Medina v Commission* (C-519/04 P) EU:C:2006:492; [2006] 5 C.M.L.R. 18. See also *Ordem dos Técnicos Oficiais de Contas (OTOC) v Autoridade da Concorrencia* (C-1/12) EU:C:2013:127; [2013] 4 C.M.L.R. 20 and *Consiglio nazionale di geologi* (C-136/12) EU:C:2013:489; [2013] 5 C.M.L.R. 40 re other professions and services.

that undertakings will have to apply the general framework and assess the agreements' effects with regard to competition rules. This finding also confirms the Commission's view that undertakings' co-operation cannot and should not replace regulation when it comes to sustainability (see paras 545–546).

2. Can sustainability agreements amount to restrictions "by object"?

In *Cartes Bancaires*, the Court of Justice held that for an agreement to be considered a restriction of competition "by object" within the meaning of art.101(1), "regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part".[12] If an agreement pursues a sustainability objective, it is less likely to be qualified as "by object" restriction. When parties claim that an agreement—which appears to pursue price fixing, market or customer allocation, limitation of output or innovation—actually pursues a sustainability objective, they will have to bring forward all facts and evidence demonstrating that the agreement genuinely pursues such objective and is not used to disguise a "by object" restriction of competition (paras 559, 560). The question remains: what can be qualified as a sustainability objective and when would it be regarded as being genuine?

For the definition of sustainability objectives, the Commission explicitly refers to the UN Sustainable Development Goals but also to the European Green Deal. The Commission provides a non-exhaustive list in para.543 of the Guidelines that should be helpful in determining whether a given objective could be considered sustainable. According to the Draft Guidelines, sustainability includes ("*but is not limited to*"): addressing climate change, elimination of pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, and ensuring animal welfare. On the basis of the UN Sustainable Development Goals to which the Commission has committed, one could also add gender equality, improving education, ensuring decent wages for workers, fighting against poverty, etc.[13]

The Commission does not provide an exhaustive explanation on when a sustainability objective is to be considered genuine. It does, however, provide a few leads. First, sustainability agreements that do not genuinely pursue a sustainability objective but cover up price fixing, market or customer allocation, limitations of output or limitations of quality or innovation, restrict competition by object.[14] Second, the pursuit of the sustainability objective should be certain.[15] Third, sustainability does not have to be the *only* objective of the agreement. This follows from the fact that, for example, the joint purchase of an environmentally beneficial product (see para.557) would also generate cost savings for the purchasers acting jointly. The Draft Guidelines do not, however, appear to determine whether the sustainability objective needs to be the main objective for the agreement. As long as the sustainability objective is genuinely pursued, it appears to be accepted that the joint purchasers in the example above primarily pursue cost savings. The same reasoning applies to R&D or specialisation agreements (para.558) directed at the development or production of sustainable products. The primary goal of achieving efficiencies in the innovative process would not exclude the genuine sustainability objective.

The Commission considers that agreements between competitors on how to translate increased costs resulting from the adoption of a sustainability standard into increased sales prices towards their customers restrict competition by object. The same shall apply to agreements between the parties to a sustainability standard putting pressure on third parties to refrain from marketing products that do not comply with the sustainability standard (para.571). This qualification appears appropriate for both examples. Despite having a laudable and genuine sustainability objective, such obligations appear suitable "on their face" to restrict competition. It is, however, conceivable that both restrictions might ultimately be acceptable. For example, conscious consumers might be prepared to pay more for sustainable products. Technically, this could be assessed under art.101(3) TFEU or considered in the discretion of the competent competition authority whether to intervene. We will deal with these options later in this article (see below Section B.4).

3. The assessment of effects: a new safe harbour presumption

The Commission sets seven conditions for agreements to be presumed as not having any appreciable negative effects on competition, six of which appear easy to implement and practicable:

1. the standard must be transparent and open for participation;
2. participation is voluntary;
3. participants are free to apply stricter standards;
4. participants should not exchange commercially sensitive information beyond what is needed for the development, adoption, or modification of the standard;

[12] See *Groupement des cartes bancaires (CB) v Commission* (C-67/13 P) EU:C:2014:2204; [2014] 5 C.M.L.R. 22 at [53].
[13] See para.543 of the Draft Guidelines with references to the UN Resolution 66/288 adopted by the General Assembly on 27 July 2012 and the 2030 UN Agenda for Sustainable Development.
[14] This is explicitly stated for sustainability standards in para.570 but the authors could not conceive of any reason why this should not equally apply generally to other sustainability agreements.
[15] See fn.319 of the Draft Guidelines with reference to judgment of 30 January 2020, *Generics (UK) Ltd v Competition and Markets Authority* (C-307/18) EU:C:2020:52; [2020] 4 C.M.L.R. 14 at [107]–[108] "*by analogy*".

5. parties should grant effective and non-discriminatory access to the outcome of the standardisation process; and
6. there should be a mechanism or monitoring system for compliance with the standard (para.572).[16]

However, the seventh and last condition is restrictive and difficult to apply in practice: sustainability standards "should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market" (para.572). This condition creates uncertainty as sustainability standards will often have repercussions on price and/or product choice. It is therefore crucial for the application of this criterion to determine what is "significant".

The Commission does not provide any guidance as to what constitutes a significant price increase. In the fourth example included at the end of the chapter, the Commission states that an increase of 12% of the price for the products in question is significant. The question remains, however, when a price increase becomes "significant". Would the definition of "significant" depend on the products and markets in question or is it possible to determine a threshold that is generally applicable? The Draft Guidelines do not answer this question. From a practical point of view and in the absence of any other specification, one could imagine that the Commission will proceed on a case-by-case basis to determine such significance. The Commission could take into account the specificities of the market at stake and the impact on demand of such price increase. Various factors including market definition or elasticity of demand could therefore be added by the Commission in the Draft Guidelines to clarify what is a "significant increase in price".

The determination of "significant" will have to be undertaken separately with regard to the reduction in the choice of products. As the product choice is stated separately, it appears inappropriate to reduce this alternative to a mere economical measurement.[17] But when is a reduction in choice significant: if a certain number of products disappear, if only a certain number of products remain available or if products with certain features are eliminated? Again, the Draft Guidelines do not address this issue. However, the question of reduced product choice is also directly related to this issue of product differentiation in all its aspects. Products may be differentiated on the basis of differences in quality, differences in functional characteristics or design, but also differences in availability (e.g., enough capacity to deliver the product or the service at the right time and place). The Draft Guidelines could thus be adapted to incorporate the above concepts, which will allow the Commission to specify which elements it will take into account in its analysis of what it considers a "significant reduction in the choice of products available on the market". Finally, this condition questions the duration of the assessment and the conclusions to be derived in case the significant price increase and/or reduction in choice of products would be compensated by a stabilisation of prices in the longer run and a wider choice of sustainable products after a few months.

Moreover, it is difficult to understand how this presumption changes the current application of art.101(1) TFEU since the Commission bears the burden to prove anti-competitive effects in any case. The Commission calls this presumption *soft* safe harbour. We assume this is because the safe conditions are not enshrined in law. As a consequence, the Commission might not investigate sustainability standardisation agreements where parties can show that they observed all seven conditions. But the Commission is not (even) committing to this. The only guidance they are prepared to provide is that sustainability standardisation agreements are "unlikely to produce appreciable negative effects on competition and will fall outside Article 101(1)" (para.572). They could therefore—even if the conditions were met—still investigate the conduct in question.

Lastly, it is also unclear what the consequences would be for national competition authorities and whether they could bring a case even though the agreement fulfils the conditions and the Commission refrains from investigating. As the presumption is based on substance "unlikely to produce appreciable negative effects", it appears very likely that a national competition authority would adhere to this.[18] For national courts, the consideration could be similar. They would likely be happy to use the presumption in the guidelines to exempt sustainability standardisation agreements from the application of art.101(1) TFEU. Given the narrow condition on increase of price and reduction of choice and its difficulties of interpretation, this will, however likely not capture many sustainability standardisation agreements in practice.

4. The exemption under article 101(3) TFEU and the assessment of sustainability benefits

The last section of the chapter aims at showing undertakings how they could ensure that their initiatives would be justified under art.101(3) TFEU.

The Commission accepts a broad range of sustainability efficiencies (para.578). In line with its guidelines on art.101(3), these efficiencies need to be substantiated and cannot simply be assumed. They also need to be objective, concrete, and verifiable.[19] The

[16] Conditions (1), (2), and (5) are also applied in the chapter on standardisation agreements; see para.477 of the Draft Guidelines.
[17] One could consider a reduction to be significant if—as a consequence of the product choice—the price for the remaining products went up.
[18] This could be different if they had prima facie evidence of anti-competitive effects. It is, however, hard to see which effects that could possibly be. In practice, this will most likely be co-ordinated between authorities through the European Competition Network (ECN). In any case, the ACM believes that their guidelines and the Draft Guidelines are consistent. See Andrew Boyce, "No gaps between EU and Dutch sustainability guidelines, Dutch antitrust chief says", *MLex* (14 March 2022), available at: *https://mlexmarketinsight.com/news/insight/no-gaps-between-eu-dutch-sustainability-guidelines-dutch-antitrust-chief-says*.
[19] Guidelines on the application of art.101(3) of the Treaty, paras 50–58.

Commission does not, however, provide guidance on how to measure efficiencies in sustainability agreements. The chapter refers to a Recommendation as an example of the methods that could be used in the assessment of efficiencies. The Commission Recommendation on the use of Environmental Footprint methods[20] indeed provides methods for companies to assess the environmental impact of their products but also of their organisation as a whole. The Green Deal expanded its application to other instruments such as the Taxonomy Regulation and now, antitrust.[21] Although this Recommendation offers clear and detailed guidance for environmental footprint assessments, this is a burdensome and data-intensive exercise that will not be easy to conduct for undertakings.

More concretely, a Product Environmental Footprint study would require undertakings to collect a lot of data in order to quantify the impact of a given product. The data collection would thus concern, for the production of a given product, all used energy, raw material and other physical inputs, waste, and emissions into air, water, and/or soil.[22] Once undertakings have collected and processed the required data, they would still have to classify the results into impact indicators (e.g., translate any emissions into CO_2 emissions to define its impact on climate change).

Finally, the impacts on climate change or resources use should be interpreted based on the scope of the study in order to summarise the results into a report.[23] This analysis and reporting process is therefore burdensome as undertakings do not necessarily track, collect and store such information and even if they do so, it can be difficult to isolate the impact of a given product from the rest of its operations. It also seems difficult to determine the precise impact of a product with complete information about the supply chain that does not only depend on the undertakings involved in the analysis.

Regarding indispensability, the Commission states that this condition would not be fulfilled by agreements taking place on a market in which there is demand for sustainable products and consumers are willing to pay higher prices for those compared to non-sustainable ones (para.582). However, the chapter also requires undertakings to show that consumers would be compensated for potential restrictions of competition, i.e., by showing that consumers value sustainable benefits arising from consuming sustainable products (para.597). Thus, there seems to be a contradiction. On the one hand, indispensability requires that the consumers are not willing to pay for the more expensive sustainability product. On the other hand, the exemption test requires undertakings to show that consumers' perception of the value of sustainability features of the product are higher or at least comparable to the additional costs. As such, it seems that it will not be sufficient for undertakings to show that consumers' willingness to pay compensates for the price premium because in that case, the agreement will not be deemed indispensable—unless undertakings show that it achieves the results in a more cost-efficient way.

Regarding benefits, the Commission underlines that any type of combination (or not) of benefits can be enough for the agreement to be exempted as long as the consumers in the relevant market are compensated. But when it comes to individual non-use value benefits, the Commission does not provide any guidance as to what is a representative fraction of consumers in the relevant market or what is "cogent evidence of consumer preferences" (paras 599 and 600). Requiring undertakings to produce cogent evidence is a very high standard of proof. Although the burden of proof always falls on the undertaking claiming the exemption, the standard is usually defined by the Court of Justice as requiring "convincing arguments and evidence".[24] In addition, consumer preferences are difficult to measure as the instruments usually relied upon present a lot of biases as people tend to overestimate what they would be willing to pay for a sustainable product.[25] Finally, the Commission cites *Asnef-Equifax* when using the term of representative fraction of consumers but this ruling does not provide guidance on this notion. The Court of Justice only acknowledges that an agreement could be exempted even though individual customers would be worse off from the agreement provided that the overall group benefits from it.[26] Thus, it seems that it would be sufficient if the benefits are measured from a sample of consumers as long as benefits would still be positive on average when applied to the entire customer base of the relevant market.

As regards the measure of non-economic benefits, the Commission states that the measurement is usually done by way of consumer surveys (para.598). The main issue for measuring such non-economic benefits is that these goods are not sold on a market and thus do not have a price. It is possible to measure their value by way of the revealed preferences methods (relying on similar goods that are sold on another market) or the stated preferences methods (relying on surveys to consumers about their

[20] Recommendation on the use of Environmental Footprint methods (16 December 2021), available at: *https://ec.europa.eu/environment/publications/recommendation-use-environmental-footprint-methods_en*.

[21] See DG environment website, "Environmental footprint methods" (16 December 2021), available at: *https://ec.europa.eu/environment/news/environmental-footprint-methods-2021-12-16_en*.

[22] See Annex 1 to 2 of Commission, Recommendation on the use of the Environmental Footprint methods, p.21, available at: *https://ec.europa.eu/environment/publications/recommendation-use-environmental-footprint-methods_en*.

[23] 2 of Annex 1 to 2 of Commission, Recommendation on the use of the Environmental Footprint methods.

[24] *GlaxoSmithKline v Commission* (C-501/06 P) EU:C:2009:610; [2010] 4 C.M.L.R. 2 at [82]. As a comparison, the Court of Justice and the GCEU requires the Commission to bring a "sufficiently *cogent* and consistent body of evidence" in merger proceedings (*Bertelsmann AG v Impala* (C-413/06 P) EU:C:2008:392; [2008] 5 C.M.L.R. 17 at [50]) and to produce "sufficiently *precise* and consistent evidence" in antitrust cases (*Intel Corp Inc v Commission* (T-286/09 RENV) EU:T:2022:19; [2022] 4 C.M.L.R. 7 at [163]) (emphasis added).

[25] See e.g., Katherine White, David J. Hardisty and Rishad Habib, "The Elusive Green Consumer", *Harvard Business Review* (July–August 2019), available at: *https://hbr.org/2019/07/the-elusive-green-consumer*.

[26] See *ASNEF-EQUIFAX Servicios de Informacion sobre Solvencia y Credito SL v Asociacion de Usuarios de Servicios Bancarios (AUSBANC)* (C-238/05) EU:C:2006:734; [2007] 4 C.M.L.R. 6 at [70].

own assessment of the price they would pay for a given product). For instance, in the *Chicken of Tomorrow* case, the ACM relied on customer surveys and determined that customers would not be willing to pay for enhanced animal welfare as much as the price premium that would derive from the implementation of the agreement.[27]

As regards collective benefits, similar questions arise for evidence of the agreements' effects on a wider group. How can evidence be provided that collective benefits have occurred or are likely to occur? In environmental economics, the usual approach to prove that collective benefits have occurred is to measure damages that society has avoided through the consumption of more sustainable products. For instance, avoided CO_2 emissions could be translated into monetary values of the avoided costs to society in terms of pollution or health expenses.[28] The inclusion of future benefits requires that undertakings provide evidence that collective benefits are *likely* to occur. In theory, one should apply a discount rate to future benefits in order not to overestimate their impact in the present context as they will only occur in the long term.[29] However, the chapter does not provide guidance on how to best take into consideration such uncertainty.

According to the chapter, efficiencies occurring outside the market cannot compensate for effects brought on a related market, especially when consumers are not part of the same group. In *Mastercard*, the Court of Justice ruled that benefits brought to cardholders on one side of the system could not compensate for the anti-competitive effects brought to merchants on the other side of the system.[30] The Court of Justice interpreted art.101(3) TFEU in such a way that efficiencies must benefit all consumers as a group and not specifically each individual consumer in the relevant market.[31] This approach allows to exempt an agreement in which consumers in the relevant market would be individually worse off as long as the collective group of beneficiaries (that are not necessarily consumers in the relevant market) are better off as a result of the agreement. Thus, the chapter provides some flexibility as it potentially encompasses a wide range of beneficiaries and does not require that consumers of the relevant products or services be individually compensated from the agreement.

C. Conclusion

The Chapter on Sustainability Agreements in the Draft Guidelines is a rather conservative proposal to foster sustainability agreements. It neither assumes sufficient consumer benefits in return for the achievement of specific sustainability improvements (the Austrian model), nor introduces "environmental-damage agreements" for which benefits accruing for non-users can be taken into account (the Dutch model).[32] Nor does it contain specific procedural suggestions, such as the "sandboxes for sustainable development", which encompass the creation of a digital space for dialogue between companies and authorities.[33] Rather, the Commission continues to demand full compensation for consumers but appears to be prepared to accept benefits that do not necessarily have to accrue in the market or to the users directly concerned by the agreement. It remains to be seen whether this is sufficient to promote sustainability agreements and cure observed market failures. In addition, the chapter leaves a number of questions open, such as the impact of the soft safe harbour. At the very least the Commission should commit not to intervene in cases in which the criteria for the safe harbour are met, and provide more guidance for the other open questions identified above in the final version of the guidelines.

[27] See ACM, *Analysis of the sustainability arrangements concerning the "Chicken of Tomorrow"* (26 January 2015), available at: *https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf*.

[28] See e.g., N. Stern, "Stern Review: The Economics of Climate Change", National Archives (October 2006), available at: *https://webarchive.nationalarchives.gov.uk/20100407172811/http://www.hm-treasury.gov.uk/stern_review_report.htm*.

[29] The importance of discounting was also underlined by the Greek and Dutch competition authorities. See ACM and Hellenic Competition Authority (HCC), *Technical Report on Sustainability and Competition* (January 2021), available at: *https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf*, pp.47–48.

[30] "[W]here, as in the present case, restrictive effects have been found on only one market of a two-sided system, the advantages flowing from the restrictive measure on a separate but connected market also associated with that system cannot, in themselves, be of such a character as to compensate for the disadvantages resulting from that measure in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the relevant market, in particular […] where the consumers on those markets are not substantially the same". See *Mastercard v Commission* EU:C:2014:2201 at [242].

[31] "Under Article 81(3) EC, it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers". See *Asnef-Equifax and Administracion del Estado* EU:C:2006:734 at [70].

[32] In light of this distinction with the Dutch model, the ACM has recently published a comfort letter allowing an agreement between TotalEnergies and Shell to collaborate in the storage of CO_2 in empty natural-gas fields in the North Sea. In its press release, the ACM indicates that the agreement creates a new market for the storage of CO_2 in empty gas fields and that it will bring sufficient benefits to customers and society with regard to its objective of reducing CO_2 emissions. Interestingly, the ACM also indicates that the agreement is allowed "under both Dutch and European competition rules" while it applies its own Draft Guidelines in the reasoning. See ACM, "Shell and TotalEnergies can collaborate in the storage of CO_2 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*.

[33] HCC, "Sustainability Sandbox" (12 July 2021), available at: *https://www.epant.gr/en/enimerosi/sandbox.html*.