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THE EU COMMISSION'S GUIDELINES ON HORIZONTAL COOPERATION AGREEMENTS: SUSTAINABILITY AGREEMENTS AND THE SAFE HARBOUR FOR SUSTAINABILITY STANDARDS

ABSTRACT. *The role that various areas of law may play in addressing sustainability objectives is currently under debate. In competition law, the topic is part of a larger discussion about the use of antitrust law to further non-economic objectives and its alignment with the traditional consumer welfare standard. The process of revising the Horizontal Block Exemption Regulations provided an opportunity for the European Commission to address sustainability agreements. The new Horizontal Guidelines, adopted in June 2023, include a specific chapter dedicated to them. This paper analyses the main features of this chapter, within which a significant part is devoted to sustainability standards. The analysis highlights that the Commission has cautiously confirmed its traditional stance while considering broader forms of benefits in the competitive assessment, providing a soft safe harbour for sustainability standards, and maintaining a certain degree of flexibility.*

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1. Introduction

Sustainability is an open concept rooted in the protection of the environment and combined with social and economic development.[1] The terms 'sustainability' and 'sustainable development' are often used interchangeably and have recently gained much popularity.[2] According to the most commonly agreed definition of sustainable development coming from the Brundtland Report of the World Commission on Environment and Development, it refers to 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[3] Nowadays, climate change and environmental degradation are pressing global challenges, and discussions focus on how sustainability objectives intersect with the potential role that specific areas of law – including competition law – may play in addressing them.

At the international level, a fundamental point of reference is the Resolution 70/1, commonly known as the 2030 Agenda or the UN Sustainable Development Goals (SDGs), adopted in 2015 by the UN General Assembly and defining broader development targets for both developed and developing countries.[4] At the European level, the EU's commitment to the implementation of the 2030 Agenda through its internal and external policies is contained in policy documents and recent legislation.[5] Importantly,

[1] The foundational principles for sustainable development are based on natural science. It presupposes a balancing exercise between three pillars, ie environmental, social, and economic development. See OECD, 'Sustainability and Competition', OECD Competition Committee Discussion Paper (authored by J Nowag), <http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>, at 13: sustainability is based on the idea that environmental degradation and depletion of natural resources reduce economic growth and development; in turn, sustainable development aims at reviving growth while changing its quality.

[2] For an analysis of the definitions of such concepts, see, eg, HE Daly, 'Sustainable Development - Definitions, Principles, Policies' in M Keiner (ed), *The Future of Sustainability* (Springer 2006) 39; CA Ruggerio, 'Sustainability and sustainable development: A review of principles and definitions' (2021) 786 Science of The Total Environment. See also OECD (n 1) 11.

[3] UN World Commission on Environment and Development, 'Our Common Future' (1987) 43 (also known as the Brundtland Report). See GB Asheim, 'Sustainability: ethical foundations and economic properties', The World Bank (Policy Research Department Public Economics Division) May 1994 (affirming that the Brundtland Report looks at sustainability both as a requirement for intragenerational justice).

[4] General Assembly of UN, 'Transforming Our World: The 2030 Agenda for Sustainable Development', Resolution adopted on 25 September 2015, A/RES/70/1.

[5] European Commission, 'Next steps for a sustainable European future' COM(2016) 739 final; Id, 'The European

some provisions of EU Treaties include reference to sustainable development, which is listed among several other objectives in Article 3 of the Treaty on European Union (TEU).[6] Moreover, Article 11 of the Treaty on the Functioning of the European Union (TFEU) provides specifically for environmental protection requirements to be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.[7] Such provisions should be also read in connection with the general principle of consistency of EU policies and activities and all related goals, which must be ensured according to Articles 7 TFEU and 13(1) TEU.

Regulation is traditionally considered the preferred option to achieve specific public interest objectives such as sustainability. However, it has so far proved to be insufficient and the mobilisation of the private sector is seen as crucial in this context. Thus, the question arises as to what role competition law, which deals with conducts of private firms in the market, should play.

In general, considering the provisions mentioned above, the integration of sustainability objectives in the implementation of European competition policy could be viewed as mandated by the wording of the Treaties.[8] However, the topic is part of a larger discussion about the use of antitrust law to further particular public policies. This debate centers on whether pursuing non-economic objectives is consistent with the orthodox conception of antitrust law based on the traditional consumer welfare standard and on whether such approach should be reconsidered.[9] In particular, competition law

Green Deal', Communication COM/2019/640 final; Id, 'Towards a Sustainable Europe by 2030: Reflection Paper' (2019) <https://data.europa.eu/doi/10.2775/6762511>; Id, 'Delivering on the UN's Sustainable Development Goals – A comprehensive approach' SWD(2020) 400 final. See also: European Consensus on Development 'Our World, Our Dignity, Our Future' [2017] OJ C 210/1; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L 243/1.

[6] See also recital 9 TEU.

[7] With regard to Article 11, see B Sjåfjell and A Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2015). See also Articles 191 to 193 TFEU.

[8] For an overview of the steps that marked the entry of the sustainable development principle into EU law, see, eg, C Muraca, 'Tutela della concorrenza e sostenibilità ambientale: un dialogo difficile ma necessario' (2021) 1 Rivista della regolazione dei mercati 70, 79-81.

[9] For an overview on the debate on consumer welfare standard, see Organisation for Economic Co-operation and Development (OECD), 'The Consumer Welfare Standard – Advantages and Disadvantages Compared to Alternative

regimes holding that competition policy should promote only consumer welfare rather than wider public interest goals are called to deal with the question of whether there is any room in such standard for sustainability benefits. Indeed, it is controversial whether sustainability costs and benefits can be measured and included as efficiencies in consumer welfare as price effects and/or non-price effects (as qualitative efficiencies) or whether these considerations should be handled as public policy issues outside the competition law framework, or if the mainstream standard of consumer welfare should be abandoned.[10]

Most descriptions of competition law enforcement use the sword and shield paradigm. Applying this to sustainability, competition agencies must clarify to businesses that sustainability cannot be a cover for anticompetitive behaviour, while at the same time competition rules could be used to exempt measures that promote sustainability from antitrust prohibitions.[11] This can be seen as a conflict between calls for a stricter enforcement on the one hand, and a laxer enforcement on the other.[12] However, it is important to clarify a fundamental premise, ie that protection of both competition and

Standards' (2023) OECD Competition Policy Roundtable, Background Note, <www.oecd.org/daf/competition/consumer-welfare-standard-advantages-and-disadvantages-to-alternativestandards-2023.pdf>. On the relationship between competition law and public policy objectives, see H Schweitzer, 'Competition Law and Public Policy: Reconsidering an Uneasy Relationship – The Example of Article 81' in J Drexl, L Idot and J Monéger (eds), *Economic Theory and Competition Law* (Cheltenham, Edward Elgar, 2009) ch 9; I Lianos, 'Polycentric Competition Law' (2018) Current Legal Problems 161; A Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57 Journal of Common Market Studies 127; O Brook, *Non-Competition Interests in EU Antitrust Law An Empirical Study of Article 101 TFEU* (Cambridge University Press, 2022).

[10] On the relationship between competition law and sustainability, see, eg, A Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) 40 World Competition 539; G Monti and J Mulder, 'Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives' (2017) 42 EL Rev 635; E Loozen, 'Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability' (2019) 56 CML Rev 1265; G Monti, 'Four Options for a Greener Competition Law' (2020) 11 Journal of European Competition Law & Practice 124; G De Stefano, 'EU Competition Law & the Green Deal: The Consistency Road' (2020) 1(2) CPI Antitrust Chronicle 41; CA Volpin, 'Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)' (2020) 1(2) CPI Antitrust Chronicle 9.

[11] See S Holmes, 'Climate Change, Sustainability and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354, 355; OECD (n 1) p 19 et seq. Moreover, see J Nowag and A Teorell, 'Beyond Balancing: Sustainability and Competition Law' (2020) 4 Concurrences 34 (using, with regard to the integration of sustainability in competition law, the distinction of supportive integration – similar to the 'shield' – and preventative one – similar to the 'sword').

[12] See also SM Colino, 'Antitrust's Social "Ripple Effect"' 42(2) Berkeley Journal of International Law (forthcoming 2024).

sustainability may well go hand in hand rather than be in conflict.[13]

The case of agreements between competitors is an illustrative example. Industry sustainability-oriented initiatives – concerning, eg, the abandonment of certain polluting standards – are likely to result in higher prices and restricted choice for consumers. On the one hand, some consider the collaboration between businesses as essential to advancing sustainability[14] and there is a concern among stakeholders that undertakings may be reluctant to collaborate to achieve greater sustainable results due to the fear of being found liable of infringement of competition law.[15] Moreover, coordination may be necessary – at least in an initial phase – for undertakings to avoid free-riding on the investments required to promote a sustainable product and to provide information to consumers ('first mover disadvantage'). On the other hand, some argue that allowing companies to enter into anticompetitive agreements does not provide them with greater incentives to promote sustainability and question the ability of private actors to coordinate in the public interest.[16] However, this strict approach has been criticised for being overly conservative, as it would generally question the potential role of private undertakings in complementing regulatory efforts.[17]

Against this background, the process of revising the Horizontal Block Exemption Regulations (HBERs) provided an opportunity for the European Commission to take action on the issue. The final version of the new Horizontal Guidelines (HGs) was adopted in June 2023, after a two-year review process.[18] The long-awaited intervention

[13] See, eg, A Pezzoli, 'Come era verde il mio cartello' (2022) 1 Analisi giuridica dell'economia 319, 321.

[14] See, eg, R Nidumolu, J Ellison, J Whalen, E Billman, 'The collaboration imperative' (2014) 92(4) Harvard Business Review 76.

[15] See International Chamber of Commerce (ICC), 'Taking the chill out of climate action: A progress report on aligning competition policy with global sustainability goals' (2023) <www.iccwbo.org/news-publications/policies-reports/how-competition-policy-acts-as-a-barrier-toclimate-action>. See also A Miazad, 'Prosocial Antitrust' (2022) 73 Hastings L J 1637, arguing (at 1644) that narrow focus on consumer welfare impedes prosocial collaboration, defined by the Author as collaboration that addresses environmental or social risks.

[16] MP Schinkel and Y Spiegel, 'Can Collusion Promote Sustainable Consumption and Production?' (2017) 53 International Journal of Industrial Organization 371; MP Schinkel and L Treuren, 'Corporate Social Responsibility by Joint Agreement' (2024) 123 Journal of Environmental Economics and Management 102897.

[17] See, eg, Monti (n 10) at 125.

[18] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements', Communication [2023] OJ C 259/1 (hereinafter, HGs). See also European Commission, 'Competition Policy in Support of Europe's Green Ambition', September 2021

of the Commission has occurred after some remarkable initiatives taken by some competition authorities.[19] The Dutch competition authority (ACM) has been a pioneer in this area, publishing the first draft guidelines on sustainability agreements in 2020 and a second version in 2021[20] and finally replacing them with a Policy Rule in October 2023.[21] Moreover, although now outside the EU, one cannot ignore the activism of the UK Competition and Market Authority (CMA), which published the final version of its Green Agreements Guidance in the same month.[22]

While the first version of the Horizontal Guidelines published by the Commission in 2001 contained a specific chapter on "environmental agreements",[23] there was

<https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF>.

[19] With regard to other initiatives, in 2021 the Hellenic Competition Commission (HCC) published a Staff Discussion Paper on Sustainability Issues and Competition Law (https://www.epant.gr/en/enimerosi/competition-law-sustainability. html) and in 2022 launched a regulatory sandbox for sustainable development in the market (https://www.epant. gr/en/enimerosi/sandbox.html). In September 2022, the Austrian Federal Competition Authority published its Guidelines on sustainability cooperation agreements between companies following the "sustainability exemption" contained in the Competition Law Amendment Act 2021 [see Kartellgesetz 2005 (Austrian Cartel Act), Austrian Federal Law Gazette I 2005/61 as amended by Kartellund Wettbewerbsrechts-Änderungsgesetz 2021 ('KaWeRÄG 2021'), Austrian Federal Law Gazette I 2021/176] <https://www.bwb.gv.at/fileadmin/user_upload/Leitlinien_zur_Anwendung_von____2_Abs_1_KartG_auf_Nachhaltigkeitskooperationen__Nachhaltigkeits-LL__final.pdf>, <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf>. See n 50. It is also worth mentioning that in Germany in March 2023, the Federal Ministry for Economic Affairs and Climate Action published a study entitled 'Wettbewerb und Nachhaltigkeit in Deutschland und der EU', conducted by academic experts, aiming at providing general insights and proposals on how antitrust law can be further developed with a view to sustainability goals <https://www.bmwk.de/Redaktion/DE/Publikationen/Studien/studie-wettbewerb-und-nachhaltigkeit.pdf?__blob=publicationFile&v=2>.

[20] Authority for Consumers and Markets (ACM), 1st draft guidelines on sustainability agreements, 9 July 2020, <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf>; 2nd draft guidelines on sustainability agreements, 26 January 2021, <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf>.

[21] ACM, Policy rule 'ACM's oversight of sustainability agreements. Competition and sustainability'(4 October 2023) <https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf>.

[22] Competition & Markets Authority (CMA), Guidance on environmental sustainability agreements, 12 October 2023 <https://assets.publishing.service.gov.uk/media/6526b81b244f8e000d8e742c/Green_agreements_guidance_.pdf>; see also draft guidance, 28 February 2023 <https://assets.publishing.service.gov.uk/media/63fde435e90e0740de2669e7/Draft_Sustainability_Guidance_document__.pdf>(hereinafter, CMA Guidance).

[23] European Commission, 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation

no such dedicated part in the 2011 Guidelines and this was in line with the more restrictive approach towards non-economic factors adopted by the Commission after the entry into force of the modernisation regime.[24] Now the new 2023 HGs include a separate chapter devoted to "Sustainability Agreements", ie "agreements between competitors that pursue one or more sustainability objectives".[25] Sustainability is broadly conceived and includes: addressing climate change (eg, by reducing greenhouse gas emissions), reducing pollution, limiting the use of natural resources, upholding human rights, ensuring a living income, promoting resilient infrastructure and innovation, reducing food waste, facilitating a shift towards healthy and nutritious food, ensuring animal welfare, and so on.[26] Importantly, the new HGs state that "cooperation agreements may address residual market failures that are not or not fully addressed by public policies and regulation".[27]

This paper is structured as follows. Firstly, it analyses the main structure of Chapter 9 of the revised HGs on sustainability agreements and the approach adopted by the Commission. Then it examines the part specifically devoted to sustainability standardisation agreements. Finally, it draws some conclusive remarks on the Commission's approach in light of the experience gained so far.

2. The EU Commission's approach to sustainability agreements

In the new HGs the Commission clarifies that sustainability agreements do not constitute a separate category of horizontal cooperation agreements for the purposes of applying Article 101. Therefore, in general, the guidance contained in the chapters devoted to the various types of agreements applies and, in case of conflict, the guidance

agreements', Communication [2001] OJ C 3/02, ch 7.

[24] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2011] OJ C 11/01; see also Id, 'Guidelines on the application of Article 101(3) of the Treaty (formerly Article 81(3) TEC)' [2004] OJ C101/97; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[25] HGs, para 515.

[26] HGs, para 517.

[27] HGs, para 520.

most favourable to the parties applies.[28] Sustainability standardisation agreements constitute an exception and should be assessed in accordance with the guidance provided in Chapter 9, whereas Chapter 7 on standardisation agreements only provides further background on the conditions that both chapters have in common.[29]

The Commission also states that "agreements that restrict competition cannot escape the prohibition laid down in Article 101(1) simply by referring to a sustainability objective".[30] Then, where the parties substantiate that the main object of an agreement is the pursuit of a sustainability objective, and where this casts reasonable doubt on whether the agreement reveals by its very nature a sufficient degree of harm to competition to be considered a by object restriction, the agreement's effects on competition will have to be assessed on the basis of the following factors: the market power of the parties participating in the agreement; the degree to which the agreement limits the decision-making independence of the parties in relation to the main parameters of competition; the market coverage of the agreement; the extent to which commercially sensitive information is exchanged in the context of the agreement; and whether the agreement results in an appreciable increase in price or an appreciable reduction in output, variety, quality or innovation.[31]

As for sustainability agreements that do not breach competition law, the Commission essentially considers the following cases: i) sustainability agreements that do not raise competition concerns, ie, that do not affect competition parameters such as price, quantity, quality, choice, or innovation; ii) sustainability agreements that constitute a sustainability standard and fall into the scope of a "soft safe harbour"; iii) sustainability agreements that benefit from individual exemption ex Article 101(3) TFEU.

With regard to i), examples provided by the HGs include: agreements that aim solely to ensure compliance with sufficiently precise requirements or prohibitions in legally binding international treaties, agreements or conventions, whether or not they have been implemented in national law, and which are not fully implemented or enforced by a signatory State; agreements that do not concern the economic activity of undertakings, but their internal corporate conduct; agreements aimed at creating a data-

[28] HGs, para 525.

[29] Ibid.

[30] HGs, para 521.

[31] HGs, paras 534-535.

base containing information about suppliers or distributors and the sustainable features of their activities without requiring the parties to necessarily purchase from, or sell to them; agreements relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness.[32]

With regard to iii), the part devoted to Article 101(3) TFEU is a complex and detailed section on the four cumulative conditions required for an individual exemption (efficiency gains, indispensability, pass-on to consumers, no elimination of competition), the analysis of which is outside the scope of this paper.[33] However, some observations may be made here. Relevant questions inevitably concern the quantification of the benefits of sustainability agreements, the balancing of benefits and costs and the conditions for assessing the necessary requirements for an exemption under Article 101(3) TFEU,[34] in particular that of the 'fair share' to be passed on to consumers.[35] As a matter of fact, controversy arises as to whether the benefits deriving from the agreement must apply equally to the same consumers in the same markets as those suffering anticompetitive

[32] HGs, paras 527-531.

[33] HGs, paras 556 et seq. With regard to the difficulties in applying the traditional competitive assessment to environmental considerations, see OECD, 'Environmental Considerations in Competition Enforcement', Background Paper, 1 December 2021, DAF/COMP(2021)4, at 15, summarising such challenges as follows**:** i) determining the extent to which environmental effects may be taken into account, for example, when they are not directly affecting competition between market players, or they are of non-immediate economic nature; ii) deciding whether it is possible to take into account environmental efficiencies that benefit consumers other than those affected by the anticompetitive restriction (including future consumers); iii) knowing which timeframe to adopt for the consideration of environmental effects or efficiencies; and iv) assessing how to balance these environmental effects with other types of effects or efficiencies, when present.

[34] On the possible inclusion of non-economic objectives in the assessment under Article 101(3) TFEU, see C Townley, *Article 81 and EC Public Policy* (Hart Publishing, 2009); O Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and Five Competition Authorities' (2019) 56 CML Rev; Id, 'Block Exemption Regulations and Public Policy: In the Defence of BERS' (2022) Cambridge Yearbook of European Legal Studies 1.

[35] According to a strict interpretation of the consumer welfare standard, any consideration of environmental or sustainability-related effects whose impact is of non-immediate economic nature, is 'unquantifiable' in economic terms, or does not produce an impact on the 'relevant consumers' (intended as the category of consumers in the relevant geographic and product market affected by the conduct), would not be included. An often-quoted example of an interpretation of Article 101(3) TFEU allowing for broader considerations to be taken into account is the Commission's decision in *CECED* (Commission Decision of 24 January 1999 in Case IV.F.1/36.718). The Conseil Européen de la Construction d'Appareils Domestiques (CECED) is an association comprising manufacturers of domestic appliances and national trade associations. In this case, an agreement between 90% of its members not to produce or import certain energy-categories of washing machines was exempted under Article 101(3) TFEU.

effects, and whether (and if yes, to what extent) it is possible to take into account the fact that future consumers will benefit despite current consumers will be hurt by the agreement. In the HGs the Commission reaffirms the general principle according to which consumers receive a fair share when the benefits deriving from the agreement outweigh the harm caused by it, so that the overall effect on consumers (as a whole) in the relevant market is at least neutral.[36] Therefore, the sustainability benefits that result from an agreement must accrue to the consumers of the products covered by that agreement. However, the Commission acknowledges that sustainability benefits are often manifested in the form of broad qualitative or cost efficiencies and identifies three types of benefits for consumers, ie: i) individual use benefits; ii) individual non-use value benefits; iii) collective benefits.

The first type refers to benefits resulting from the use of the product and directly improving the consumer's experience (eg, taking the form of improved product quality or product variety resulting from qualitative efficiencies, or of a price decrease as a result of cost efficiencies, or from the consumption of a sustainable product in the same way as results from the consumption of any other product). Individual non-use value benefits relate to voluntary (altruistic) choices by individual consumers. They are defined as those resulting from consumers' appreciation of the impact of their sustainable consumption on others: eg, consumers may decide to purchase a particular washing liquid not because it cleans better but because it contaminates the water less.[37] The Commission relies on a willingness-to-pay approach, considering that "consumers may be willing to pay a higher price for a sustainable product or to limit their choice of products (by not buying non-sustainable variants) in order to benefit society or future generations".[38] The third category of collective benefits is the most peculiar one and refers to those benefits that "occur irrespective of the consumers' individual appreciation of the product and accrue to a wider section of society than just consumers in the relevant market".[39] For example, consumers may be unwilling to pay a higher price for a product produced with a green but costly technology: in such case, in order to ensure that the benefits de-

[36] HGs, para 569. See also Guidelines on the application of Article 101(3) TFEU, paras 43, 85 *et seq.*

[37] HGs, para 576.

[38] HGs, para 577. On the use of willingness-to-pay approach, see R Inderst and S Thomas, 'Prospective Welfare Analysis – Extending Willingness to Pay to Embrace Sustainability' (2022) 18 Journal of Competition Law & Economics 551.

[39] HGs, para 582.

rived from the use of that green technology materialise, an agreement to phase out the polluting one may be necessary. The Commission clarifies that for collective benefits to be taken into account, the parties to the agreement are required to: (a) describe clearly the claimed benefits and provide evidence that they have already occurred or are likely to occur; (b) define clearly the beneficiaries; (c) demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or form part of them; and (d) demonstrate that the share of the collective benefits that accrues to the consumers in the relevant market, possibly together with individual use and non-use value benefits accruing to those consumers, outweighs the harm suffered by those consumers as a result of the restriction.[40]

Therefore, the Commission continues to adhere to the established approach in line with the consumer welfare standard while recognising the significance of broader benefits.[41] A critical issue is how to quantify and measure these benefits, which will require greater clarity. This is explicitly acknowledged by the Commission, which notes that, particularly with regard to collective benefits, there is currently little experience and anticipates that it will provide further guidance once it has gained sufficient experience handling real cases.[42]

Certainly, the approach adopted by the Commission is more conservative than the initiatives previously taken by the British and Dutch authorities.[43] With regard to the CMA, firstly it is worth clarifying that its Guidance focuses exclusively on environmental sustainability. It distinguishes between: i) 'environmental sustainability agreements', ie agreements between competitors which are aimed at preventing, reducing or mitigating the adverse impact that economic activities have on the environment or assist with the transition towards environmental sustainability; ii) 'climate change agreements', ie a sub-set of environmental sustainability agreements, which contribute to combating climate change (typically reducing the negative externalities arising from greenhouse gases, emitted from the production, distribution or consumption of goods and services); and iii) 'mixed agreements', where environmental issues are closely interlinked -eg, climate change and biodiversity, so that businesses' environmental sustainability agree-

[40] HGs, para 587.

[41] See Colino (n 12) 20.

[42] HGs, para 589.

[43] Holmes (n 11).

ments may generate both climate change benefits and other environmental benefits. With regard to the fair share, the CMA considers that benefits can include future as well as current benefits,[44] and acknowledges that the 'fair share to consumers' condition generally requires an assessment of whether the harm to consumers of the agreement's products is offset by benefits to substantially the same set of consumers and that, with limited exceptions, benefits to consumers in other markets are not included in this assessment.[45] However, a permissive approach is applied to climate change agreements, as the CMA considers it appropriate to exempt them if the 'fair share to consumers' condition can be satisfied taking into account the totality of the climate change benefits to all UK consumers arising from the agreement.[46]

With regard to the Dutch competition authority, the ACM, which adopts a definition of sustainability as broad as that of the Commission, identifies the category of 'environmental-damage agreements', defined as agreements that contribute efficiently to compliance with an international or national standard or to the achievement of a specific policy objective to prevent environmental damage. With regard to the latter, the ACM declares that it will not continue investigating an environmental-damage agreement if the initial investigation shows that i) it is plausible that the agreement is necessary for achieving the environmental benefits, and ii) that such benefits sufficiently outweigh the potential competitive disadvantages. In such respect, it is worth mentioning that in the draft Guidelines the ACM stated that, with regard to environmental-damage agreements, it should be possible to take into account benefits for others rather than merely those of the users.[47] However, in the Policy Rule, adopted after the publication of HGs, the ACM clarifies that it is important that consumers in the relevant market receive an appreciable and objective part of the advantages and that there should remain a degree of residual competition.[48] Thus, the final stance taken by the ACM is

[44] For the quantification of such benefits, see CMA Guidance, paras 5.25-5.28. See also para 5.7.

[45] See CMA Guidance, paras 5.20-5.21.

[46] CMA Guidance, para 6.4.

[47] ACM, 2nd draft Guidelines, para 48: "it can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions. Moreover, they enjoy the same benefits as the rest of society. In that context, the agreement must contribute (efficiently) to the compliance with an international or national standard (to which undertakings are not bound) or to a concrete policy objective. One example of a concrete policy objective is the government's policy aimed at reducing CO2 emissions on Dutch soil by year X by Y%."

[48] See ACM, Policy Rule, para 23, adding that: "[i]n the foregoing, the 'polluter pays' principle and the principle of

closer to the Commission's approach.

It is worth mentioning that, up to now, a unique legislative intervention has been adopted in Austria. With the implementation of the ECN+ Directive,[49] in 2021 the Austrian legislator took the opportunity to *inter alia* introduce an explicit sustainability exemption from the general scope of the prohibition on cartels, providing in § 2(1) Austrian Cartel Act (the national corresponding rule to Article 101(3) TFEU) that "[c]onsumers 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." [50]

3. Sustainability standardisation agreements

A substantial part of Chapter 9 of the HGs is dedicated to sustainability standardisation agreements (or sustainability standards), which are likely to be a common type of sustainability agreements and for which the Commission lays down specific provisions, as previously mentioned.[51] Sustainability standardisation agreements have sim-

an effective enforcement of Article 101 TFEU by ACM and other members of the European Competition Network (ECN) is taken into account".

[49] Directive (EU) 2019/1 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3 (ECN+ Directive).

[50] See n 19. For comments, see V Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law' (2022) JECLAP; B Zelger, 'The new sustainability exemption according to § 2(1) Austrian Cartel Act and its relationship with Article 101 TFEU – European spearhead or born to fail?' (2022) 18(3) European Competition Journal 514.

[51] HGs paras 537-555. In general, standardisation can take place in various ways, ranging from the adoption of consensus-based standards by recognised international, European or national standards bodies, through consensus-based technical specifications developed by consortia and fora, to agreements between independent undertakings. As clarified by para 437, the HGs do not cover the preparation and production of technical standards as part of the exercise of public powers and the European standardisation organisations recognised under Regulation (EU) No 1025/2012 are subject to competition law to the extent that they can be considered to be an undertaking or an association of undertakings within the meaning of Articles 101 and 102. See Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the

ilarities with the traditional standardisation agreements addressed in Chapter 7 of HGs, but also have specific features indeed: first, the adoption of a sustainability standard may lead to the creation of a label, logo or brand name for products that meet certain minimum requirements and that can be used as long as the adopters comply with those requirements; second, adhering to and complying with a sustainability standard can be expensive, especially if it calls for altering current manufacturing or distribution procedures; third, unlike technical standards, questions of interoperability and compatibility between technologies are generally less relevant for sustainability standards; fourth, many sustainability standards are process-, management- or performance-based, thus, unlike many technical standards, sustainability standards often simply specify a goal to be met, without imposing a specific technology or production method to achieve that goal.[52]

This sub-category of sustainability agreements refers to those situations where competitors agree to adopt and comply with certain standards, eg, when competitors agree to phase out, withdraw, or replace non-sustainable products and processes with sustainable ones, or to harmonise packaging materials in order to facilitate recycling or harmonise packaging sizes to reduce waste, or to purchase only production inputs that have been manufactured in a sustainable manner. These agreements are used to specify requirements that undertakings in a supply chain have to meet in relation to a wide range of sustainability metrics and usually provide rules, guidelines or characteristics for products and processes in such regard. The HGs clarify that agreements between competitors that limit the participating undertakings' output of the products concerned by the agreement do not belong to such category.[53]

Some examples of standard-setting agreements related to sustainability issues can be found in the recent existing practice before the adoption of the new Guidelines. An often-cited example is the Dutch case *Chicken of Tomorrow* (2014).[54] At that time,

Council [2012] OJ L 316/12.

[52] HGs, paras 540-544.

[53] HGs, para 538.

[54] ACM, Case number 13.0195.66, 26.1.2015 <www.acm.nl/en/publications/publication/13761/Industry-wide-arrangements-for-the-so-called-Chicken-of-Tomorrow-restrict-competition>. See Id, 'Analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow', ACM/DM/2014/206028 <www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf>. The economic assessment of the ACM is accessible in Dutch: M Mulder et al, 'Economische Effecten van 'Kip van Morgen', ACM Economics Bureau', 2014 <https://www.acm.nl/sites/default/files/old_publication/publicaties/13759_onderzoek-acmnaar-de-economische-effecten-van-de-kip-van-morgen.pdf>.

the ACM decided that an agreement between Dutch retailers to only produce and sell chicken raised according to higher animal welfare and sustainability standards did not qualify for the exemption from the cartel prohibition. This decision attracted heavy criticism and critical comments from some scholars, sector organisations, and policymakers.[55] Adopting a traditional willingness-to-pay approach, the ACM found that the initiative qualified as a restriction of choice for consumers. In particular, the ACM ran a survey and found that consumers valued animal welfare and sustainability criteria as well as public health in their purchasing decisions, but not enough to justify the price increase expected from the agreement.

Moreover, competition issues in standard-setting cooperation have been raised in the agri-food sector.[56] It is worth mentioning that since 7 December 2021 the legal

[55] For a critical comment, see Monti and Mulder (n 10) at 639 et seq. However, it is worth adding that in 2020 the ACM published the study 'Welfare of today's chicken and that of the 'Chicken of Tomorrow' <https://www.acm.nl/en/publications/welfare-todays-chicken-and-chicken-tomorrow> concluding that the welfare conditions in that year of the selection of chicken meat sold in Dutch supermarkets resulted to more than exceeding the minimum requirements of the Chicken of Tomorrow. Therefore, it argued that it seemed highly likely that an anticompetitive agreement was not necessary, as, apparently, supermarkets were already stimulated enough individually to improve chicken welfare.

[56] Eg, in Germany some investigations conducted by the Bundeskartellamt have led to mixed results. The Bundeskartellamt had no competition concerns regarding the sustainability initiative about living wages in the banana sector, which was qualified as a qualitative production standard established on a voluntary basis in order to ensure that the production of bananas in Ecuador complies with the relevant legal provisions in this country (statutory minimum wages) or that, in general, living wages are paid (Case summary 'German Retailers Working Group – Sustainability initiative to promote living wages in the banana sector', B2-90/21, 8.3.2022 <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2022/B2-90-21.pdf?__blob=publicationFile&v=2>. Such agreement did not involve exchange of information on purchasing prices, other costs, production volumes or margins and binding minimum prices or surcharges were not introduced at any point of the supply chain. Similar initiatives can be found elsewhere, such as in Belgium. See <https://www.belgiancompetition.be/sites/default/files/content/download/files/20230330_Press_release_11_BCA.pdf>. By contrast, the Bundeskartellamt found that the financing concept for the distribution of risks and burdens associated with agricultural transformation processes for milk producers presented by the agricultural policy project "Agrardialog Milch" (based on a jointly agreed mandatory and index-based price surcharge or price stabilisation mechanism), constituted sector-wide price fixing violating Section 1 of the German Competition Act (GWB) and Article 101 TFEU. The Bunderskartellamt also found that the exemption provided by Article 210a CMO Regulation did not apply. See Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, [2013] OJ L 347/671(as amended). See Bundeskartellamt Case summary 'Financing concept for a market-compliant and fair distribution of risks and burdens associated with agricultural transformation processes for milk producers', 8 March 2022, <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2022/B2-87-21.pdf?__blob=publication

framework for assessing initiatives to implement sustainability standards in this sector has changed with the entry into force of Article 210a of the CMO Regulation, which excludes certain restrictive (both horizontal and vertical) agreements from Article 101 TFEU prohibition, when those agreements are indispensable to achieve sustainability standards going beyond the mandatory EU or national rules.[57] On 7 December 2023 the Commission also adopted Guidelines on how to design sustainability agreements with the aim of clarifying how operators can start joint sustainability initiatives in line with Article 210a.[58]

At EU level, a debated case concerned the Commission's decision finding that Daimler, BMW and Volkswagen group breached EU antitrust rules by colluding on technical development in the area of nitrogen oxide cleaning.[59] The car manufacturers held regular technical meetings to discuss the development of the selective catalytic reduction (SCR)-technology which eliminates harmful nitrogen oxide (NOx)-emissions from diesel passenger cars through the injection of urea (also called "AdBlue") into the

File&v=2>. Moreover, the Bundeskartellamt did not oppose an initiative related to animal welfare, "Initiative Tierwohl", a project based on an agreement between the agricultural, meat production and food retail sectors, providing for the payment to livestock owners of a standard premium as a reward for improving the conditions in which animals are kept. See Bundeskartellamt, Press release 'Achieving sustainability in a competitive environment – Bundeskartellamt concludes examination of sector initiatives', 18.1.2022 <https://www.bundeskartellamt.de/SharedDocs/ Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html>. In such case,the Bundeskartellamt provided guidance to the initiative and called for the inclusion of more competition elements in the structure of the financing model. In addition, the Bundeskartellamt declared that it had no serious competition law concerns against the "industry agreement milk", a voluntary programme aimed at improving animal welfare in milk production. See Bundeskartellamt, Press release 'Increasing animal welfare in milk production – Bundeskartellamt tolerates the introduction of the QM+ programme', 29.3.2022 <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/ 2022/29_03_2022_Milch_Nachhaltigkeit.html> (according to which the Bundeskartellamt used its discretion not to oppose the agreement but also made its decision in light of the CMO Regulation).

[57] Regulation (EU) No 1308/2013 (see n 56). Article 210a was introduced as part of the 2021 reform of the Union's Common Agricultural Policy (CAP).

[58] European Commission, 'Guidelines on the exclusion from Article 101 of the Treaty on the Functioning of the European Union for sustainability agreements of agricultural producers pursuant to Article 210a of Regulation (EU) No 1308/2013', Communication [2023] OJ C, C/2023/1446. Here, "the term 'sustainability agreement' refers to any type of agreement, decision or concerted practice involving producers, both horizontally and vertically, that relates to the production of or trade in agricultural products and that aims to apply a higher sustainability standard than mandated by Union or national law, irrespective of the form of cooperation" (see Recital 10). See also HGs, para 47.

[59] Commission decision of 8 July 2021, *Car Emissions*, Case AT.40178, para 139.

exhaust gas stream. During these meetings, and for over five years, the car manufacturers colluded to avoid competition on cleaning better than what was required by law, despite the relevant technology being available. The Commission found that such conduct constituted an infringement by object in the form of a limitation of technical development.[60] This is the first decision in which the Commission has concluded that collusion on technical development amounts to a cartel. Given this novelty, the Commission advised the parties on aspects of their cooperation on SCR systems that did not raise competition concerns, such as the standardisation of the AdBlue filler neck, the discussion on AdBlue quality standards or the joint development of a software platform for AdBlue dosing.[61]

Moreover, outside the EU, another often-cited case is that occurred in the US in 2019, concerning the State of California and four automakers which entered into a California Air Resources Board framework agreement on fuel efficiency standards. The agreement called for lowering average fuel consumption by 2026 and reducing average emissions below the national standard. The DoJ opened an investigation into the agreement for a possible cartel violation in September 2019, due to concerns that it could

[60] See Article 101(1)(b) TFEU.

[61] With regard to this case, the Executive Vice-President of the Commission Margrethe Vestager, confirming that competition law enforcement and sustainability objectives may go in the same direction, said: "So today's decision is about how legitimate technical cooperation went wrong. And we do not tolerate it when companies collude. It is illegal under EU antitrust rules. Competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives. And this decision shows that we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal." See Commission, Press release 'Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars', 8 July 2021 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581>. For a comment on the case, see J Tirole, 'Socially responsible agencies' (2023) 7(4) Competition Law & Policy Debate 171, 174, arguing that this case "illustrates the authorities' dilemma between mission and societal concerns" and that "the EU environmental standards should have been enforced politically by ministries in charge of the environment, not by an agency in charge of protecting consumers who benefited from the cartelization. In this second-best situation, the competition authority substituted itself for failing environmental regulation". See also Holmes (n 11), at 6: "The fact that this case concerned sustainability, and something very important in the context of the fight against climate change (Nox emissions), was not formally an aggravating factor in the decision to impose significant fines. That said, when assessing the 'gravity' of the infringement, the Commission expressly noted that the parties' behaviour was 'by its very nature, capable of hindering competition in relation to cleaning better than required by the applicable EU emission standards and thus limiting technological development a type of conduct that is explicitly prohibited by Article 101(1)(b) of the Treaty. Technical development and innovation in the field of car emission cleaning technology is of public interest'." Other cases in recent years of 'cartel' behaviour where sustainability was a parameter of competition include the *Trucks* decision of the Commission of July 2016, fining five major truck producers for (*inter alia*) colluding on the timing of the introduction of new emission technologies to meet environmental standards and on passing on the costs of emission technologies for trucks compliant with newly introduced emissions standards (Case AT.39824, 19.07.2016).

raise prices by limiting the range of cars that could be driven in California. However, in February 2020, the DoJ closed the investigation without bringing charges against the car manufacturers.[62]

In general, as is the case with other standardisation agreements, sustainability standards may have both procompetitive and anticompetitive effects. Of course, they may help to overcome a first-mover disadvantage, because without the agreement, market participants would likely not shift their production, distribution and marketing activities towards higher environmental standards. However, these agreements may lead to an increase in production or distribution costs and consequently to increased prices, prevent effective access to the standard and may be problematic when they correspond to fixing the level of quality of innovation brought to the market by competitors in a specific industry.[63]

In the revised HGs, on the one hand, in addition to the positive outcomes of such agreements that may derive from enabling the development of new products or markets, increasing product quality or improving conditions of supply or distribution, the Commission considers the provision of information about sustainability matters, since sustainability standards may "empower consumers to make informed purchase decisions and therefore play a role in the development of markets for sustainable products"; lastly, sustainability standards can also level the playing field between producers that are subject to different regulatory requirements.[64] On the other hand, it is made clear that sustainability standards may restrict competition in three ways, ie: through price coordination, foreclosure of alternative standards, and the exclusion of, or discrimination against certain competitors.[65] Accordingly, an agreement between competitors on how to pass on to customers increased costs resulting from the adoption of a

[62] For a comment, see HJ Hovenkamp, 'Are Regulatory Agreements to Address Climate Change Anticompetitive?' (2019) The Regulatory Review – Opinion 506, <https://scholarship.law.upenn.edu/regreview-opinion/506>; J Nowag and A Teorell, 'The Antitrust Car Emissions Investigation in the U.S. – Some Thoughts From the Other Side of the Pond' 1(2) CPI Antitrust Chronicle, July 2020, 55. It is worth mentioning that in the US sustainability initiatives do not benefit from any special treatment or exemptions. In general on horizontal agreements, see United States Department of Justice and Federal Trade Commission, Antitrust Guidelines For Collaborations Among Competitors, April 2020 <https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf>.

[63] See OECD (n 33) at 25.

[64] HGs, para 545.

[65] HGs, para 546.

sustainability standard in the form of increased sale prices, or to fix the prices of products incorporating the standard, constitutes a restriction of competition by object. The same occurs in the case of an agreement between the parties to a sustainability standard to put pressure directly on competing third parties to refrain from marketing products that do not comply with the standard, or in the case of agreements aimed at limiting technological development to the minimum sustainability standards required by law, instead of cooperating to achieve more ambitious environmental goals.[66]

The peculiar treatment for sustainability standardisation agreements provided by the new HGs includes a list of six criteria, which, if met, allow parties to benefit from a "soft safe harbour".[67] According to the HGs, if all six conditions are met, the agreement is deemed unlikely to have an appreciable negative impact on competition; however, if the conditions are not fulfilled, there is no automatic presumption that such agreement restricts competition and it may still benefit from an individual exemption under Article 101(3).

The six cumulative conditions that must be met in order to benefit from the soft safe harbour may be summarised as follows: i) the procedure for developing the sustainability standard must be transparent, and all interested competitors must be able to participate in the process leading to the selection of the standard; ii) the sustainability standard must not impose on undertakings that do not wish to participate in the standard any direct or indirect obligation to comply with it; iii) to ensure compliance with the standard, binding requirements may be imposed on participating undertakings, but the undertakings must remain free to apply higher sustainability standards;[68] iv) the

[66] HGs, para 548.

[67] During consultations some stakeholders complained about ambiguity in the meaning of some requirements and requested attention on mandatory standards. See eg International Chamber of Commerce (ICC), 'ICC comments on the revised Research and Development Block Exemption Regulation and the revised Specialisation Block Exemption Regulation and Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements', 26 April 2022, 28-29 <https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en>.

[68] A criticism of this requirement was raised by MP Schinkel, 'Response to the public consultation of the "draft revised Horizontal Guidelines" of 1 March 2022, in particular to Chapter 9 Sustainability Agreements' (https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en). The Author argues that: "the core problem with sustainability agreements amongst competitors is that they eliminate sustainability as a dimension of competition. Where firms in competition strive to offer a more sustainable product than their rivals, in collaboration they'd have an incentive to jointly agree to all keep to a lower sustainability standard – and so save the cost of living up to a higher one. Now, the mere freedom to adopt a higher standard (…) is therefore not enough to rest assured that not less is done, because the firms involved all want to keep to the agreed lower standard. In essence, unilaterally

parties to the sustainability standard must not exchange commercially sensitive information that is not objectively necessary and proportionate for the development, implementation, adoption or modification of the standard; v) effective and non-discriminatory access to the outcome of the standard-setting process must be ensured.[69] Finally, the sustainability standard must meet at least one of the following two conditions: i) the standard must not result in a significant increase in the price or a significant reduction in the quality of the products concerned; ii) the combined market share of the participating undertakings must not exceed 20% in any relevant market affected by the standard – such condition was not included in the draft version, which provided a seventh condition concerning the establishment of a monitoring system to ensure undertakings' compliance with the requirement of the standard (now removed and replaced in a separate paragraph).[70] However, the Commission does not give a clear guidance on how to assess the significance of the price increase resulting from the standard, merely stating in a footnote that it will depend on the characteristics of the product and of the relevant market.[71]

adopting a higher sustainability standard – i.e. taking more sustainability effort – than was collectively agreed would be a form of "sustainability cartel defection". Just like for classic cartels it does not require a legally binding agreement (which is not available, after all) to all adhere to the higher cartel prices – that is, for the cartel to be stable – here the 'legal' freedom to offer a more sustainable product than was agreed does not assure that firms will indeed do this. In fact, if the firms involved would offer a more sustainable product than collectively agreed, no sustainability agreement would form – or, for that matter, have been needed to promote sustainability – in the first place. When one does form, the members of a sustainability agreement therefore will assure stability against any one of them 'cheating' by offering a greener product than agreed on."

[69] This includes providing effective and non-discriminatory access to the requirements and conditions for the use of the agreed label, logo or brand name, and allowing undertakings that did not participate in the development of the standard to adopt the standard at a later stage.

[70] HGs, para 553. The HGs provide two examples of sustainability standardisation agreements benefiting from the soft safe harbour. The first example involves breakfast cereal manufacturers organising to limit excess packaging size, resulting in decreased packaging costs and consequently a small reduction in wholesale and retail prices. The second example concerns a label for fair-traded tropical fruits set up by a non-governmental organisation together with a number of fruit traders. To use the label, firms must guarantee that the fruits come from producers that ensure fair living wages for their workers and that do not make use of child labour (while remaining free to also trade fruits under other labels or without labels).

[71] See HGs, fn 382. It is worth noting that in CMA's Guidance similar requirements are provided for collaborations between competitors aimed at developing environmental sustainability standards (paras 3.14-3.15). Those agreements are deemed unlikely to have an appreciable negative effect on competition, provided that: i) the process for developing the standard is transparent and it is possible for any business in markets affected by the standard to participate; ii) no business is obliged to implement the standard if it does not wish to do so (albeit the standard may require

4. Concluding remarks

The Commission's intervention in the area of sustainability agreements provides a framework for businesses to cooperate on sustainability goals. It also highlights the EU's focus on sustainability issues in the international landscape, where a unanimous approach to these agreements is currently lacking.[72] It remains to be seen how the new HGs on sustainability agreements will be implemented, whether collaborations among competitors will be widespread and significantly promote sustainability goals, and how

businesses that have committed to implement the standard to comply with the requirements of the standard, and may provide for a mechanism to monitor such compliance); iii) any business can implement the standard on reasonable and nondiscriminatory terms; iv) businesses implementing the standard are free to go beyond the minimum environmental sustainability requirements set by the standard, or to develop or implement additional higher standards (or, if applicable, to develop alternative standards for any competing products they sell outside of the standard); and v) the standard is unlikely to result in an appreciable reduction in the availability of suitable products for consumers to purchase. The Guidance does not refer to increase in prices and clarifies that a standard is unlikely to result in an appreciable reduction in product choice if at least one of the following conditions applies: (i) the participating businesses are free to sell alternative competing products outside of the standard on the relevant market(s) affected by the standard, and remain free to independently determine which of their products the standard will apply to; or (ii) the combined market share of the participating businesses is sufficiently small (for example, below 20% on any relevant market affected by the standard) to allow sufficient alternative choice for consumers.

[72] Eg, in January 2023, the Japan Fair Trade Commission released its draft ('Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society under the Antimonopoly Act', <https://www.jftc.go.jp/en/pressreleases/yearly-2023/January/230118.html>). In July 2023, Singapore's Competition Consumer Commission (CCCS) announced a public consultation to seek feedback on its draft 'Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives' <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/sustainability-guidance-note-for-business-collaboration-public-consult-20-july-23>. In the US agencies largely remain silent on sustainability issues and do not support any favourable treatment. See L Kahn, Opinion, 'ESG Won't Stop the FTC' Wall Street Journal (21.12.2022), <https://www.wsj.com/article s/esg-wont-stop-the-ftc-competition-merger-lina-khansocial-economic-promises-court-11671637135>. For an overview on US debate, see D Hearn, C Hanawalt, and L Sachs, 'Antitrust and Sustainability: A Landscape Analysis', Columbia Center on Sustainable Investment and Sabin Center for Climate Change Law (July 2023), at 33 et seq. In the US political debate, there is controversy with regard to net zero alliances (whereby companies pledge to limit fossil fuel production and reduce greenhouse gas emissions), which are under attack from some members of Congress and State Attorneys General, labelling them as collective boycotts [see, eg, Attorneys General of various US States, *Letter to NZIA* (15 May 2023) 1 <https://attorneygeneral.utah.gov/wp-content/uploads/2023/05/2023-05-15-NZIA-Letter.pdf>; Hearing of the US Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights on 'Oversight of Federal Enforcement of the Antitrust Laws' (20 September 2022), <https://www.judiciary.senate.gov/meetings/oversight-of-federal-enforcement-of-the-antitrust-laws>. For an overview at global level, see ICC (2023), 'Taking the chill out of climate action: A progress report on aligning competition policy with global sustainability goals' <www.iccwbo.org/news-publications/policies-reports/how-competition-policy-acts-as-a-barrier-to-climate-action> (in particular, at 15-16 on US and China).

the role of competition agencies in this area will develop.

While failing to meet the expectations of those who supported a more progressive approach, similar to those adopted by some competition authorities at national level, the Commission has taken its first steps with caution. It has confirmed its traditional stance while considering wider forms of benefits to be included in the competitive assessment, providing a soft safe harbour for sustainability standards, and maintaining a certain degree of flexibility. This approach seems to be consistent with the Commission's declared aim to show that competition policy does not stand in the way of horizontal cooperation agreements that pursue genuine sustainability objectives.[73] The presence of controversial aspects in the HGs that require further clarification must also be understood in light of the current lack of substantial practical experience.[74]

[73] See European Commission, 'Explanatory note on the main changes proposed for the Horizontal Block Exemption Regulations and Horizontal Guidelines' <https://competition-policy.ec.europa.eu/document/download/1010b1fc-03be-453a-b482-9a81d5a4e808_en?filename=2023_HBERs_explanatory_note_en.pdf>.

[74] See Holmes (n 11) affirming, at 8, that "these guidelines do not (and could not) provide the answers to all the questions that businesses and others will have on what they can, and cannot, do in this area." However, undertakings may request the Commission to provide informal guidance regarding novel or unresolved questions on individual sustainability agreements. See HGs, para 515; Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) [2022] OJ C 381/9.