

## Article

# Competition Law and Sustainability: EU and National Perspectives

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Climate change is the crisis of our time affecting every country on every continent. In light of the European Green Deal, ‘sustainability and competition law’ is currently one of the most debated topics in the EU. Therefore, this paper explores the interaction between competition law and sustainability in the EU placing this debate in an historical context embracing both competition law ‘as a shield’ and ‘as a sword’ approaches. Even though the European Commission seems to signal its intention towards more sustainability friendly competition practices, there has not been any expressly stated position yet (except its policy brief). Therefore, most importantly, the paper charts trailblazing national initiatives currently proposed by the EU Member States, such as the Netherlands, Greece, Austria, and Hungary and non-EU Member State—the UK.

## I. Introduction

Climate change is the crisis of our time affecting every country on every continent. The 2030 Agenda for Sustainable Development (including its 17 sustainable development goals, SDGs),<sup>1</sup> adopted by the United Nations General Assembly in 2015, provides a shared blueprint—a ‘plan of action for people, planet, and prosperity’ to guide all countries’ policies towards sustainable development until 2030. The Paris Agreement also aims to strengthen the global response to climate change ‘through appropriate financial flows, a new technology framework and an enhanced capacity building framework’.<sup>2</sup> In response to these international commitments, the EU launched its European Green Deal, which is an ‘integral part of the

### Key Points

- In light of the European Green Deal, the European Commission has signalled its intention towards more sustainability friendly competition law practice.
- The National Competition Authorities are trailblazing their own sustainability agendas: the paper identified five assertive national proposals demonstrating willingness to incorporate sustainability in competition law enforcement.
- A more uniform standpoint is needed as different national approaches in isolation create legal uncertainties for businesses.

Commission’s strategy to implement the United Nations’ 2030 Agenda’, particularly the UN’s SDGs. Sustainability discussions in the context of competition law have not attracted much attention until recently, most importantly in light of the European Green Deal. The European Green Deal, launched in December 2019, aims at making Europe the first climate-neutral continent by 2050 setting an agenda for sustainable economic growth in light of environmental and social policy priorities, decarbonising not just electricity but also buildings and transport, agriculture and industry. Since the European Green Deal, the European Commission has also instigated debates on greening competition law and policy,<sup>3</sup> namely, *how competition policy can support the EU’s focus on sustainability and progression towards climate neutrality by 2050*.

The Executive Vice-President and Commissioner for Competition, Vestager in her recent Keynote noted that.

‘Green policies like regulations, taxes, and investment are the key to the Green Deal. But with so much to do in such a short time, all of us – including competition

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1 General Assembly, the United Nations Sustainable Development Goals (SDGs). Available at: THE 17 GOALS Sustainable Development (un.org). There are 17 SDGs, such as no poverty; zero hunger; good health and wellbeing; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation, and infrastructure; reduced inequalities; sustainable cities and communities; responsible consumption and production; climate action; life below water; life on land; peace, justice, and strong institutions; and partnerships for the goals.

2 The UN official website: Key aspects of the Paris Agreement | UNFCCC.

3 The concept used by Prof Kingston. Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2011).

enforcers – also need to make sure that we’re doing what we can to help’.<sup>4</sup>

This message indicates a ‘all hands-on deck’ approach inferring that competition law also has a role to play. Although, the message is clear that competition law is not the main tool to tackle climate change issues, nevertheless, it has a role to play, arguably more than just ‘supportive’ in achieving green policy objectives. This is clearly reflected in various public consultations recently ran by the European Commission. Indeed, in the consultation dedicated to Better Regulation on the evaluation of competition rules on horizontal agreements (Commission Regulations (EU) No 1217/2010 (Research & Development Block Exemption Regulation) and 1218/2010 (Specialisation Block Exemption Regulation)), commonly referred to as the ‘Horizontal block exemption regulations’ (HBERs); and the Commission’s Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements (Horizontal Guidelines) held November 2019–February 2020, the most important development according to respondents were ‘climate change and the corresponding challenging environmental and sustainability goals.[...] [T]his results in increased demand from consumers and businesses for sustainable, ethical and environmentally friendly business practices’.<sup>5</sup> Furthermore, to embrace a green competition policy, the most recent consultation October–November 2020, was aimed at reflecting on how competition law and policy can contribute to the European Green Deal. It garnered over 200 contributions from all stakeholders including companies, social partners, governments, public administrations, competition authorities, and the civil society across the EU and beyond indicating a significant interest in this field. Those that took part in this consultation, followed by the participants of the EU competition law and sustainability conference held virtually on 4 February 2021, agreed that competition law and policy have an important role to play in delivering the Green Deal objectives, especially, by ‘driving green innovation and bringing about the technological revolution required to have sustainable jobs and growth, in line with EU rules and values’.<sup>6</sup> The HBERs, which are due to expire

in December 2022, accompanied by the Horizontal Guidelines and other sustainability-related guidance (i.e. covering a wider scope of the provisions related to abuse of a dominant position and objective justification and mergers) are an essential source of information providing necessary legal certainty for businesses. Therefore, this paper, *inter alia*, will shed light on the policy options as proposed by the recently issued documents, such as the Inception Impact Assessment,<sup>7</sup> Staff Working document (SWD),<sup>8</sup> and Competition Policy Brief.<sup>9</sup>

Competition law is traditionally used from two different perspectives, in the literature known as a sword and shield paradigm. In the context of sustainability, the application of competition law can be used as a sword to achieve sustainability (i.e. to prevent the degradation of the environment), where the provisions are interpreted so that measures harmful from a sustainability point of view are prevented/prohibited.<sup>10</sup> Businesses cannot use sustainability as cover (known as green washing), for instance, to hide cartels. As an example, in the Consumer Detergents case<sup>11</sup> the implementation of an environmental initiative concerning laundry detergents led to a cartel that coordinated price increases. From a supportive aspect, competition law can be used to allow measures, which are directed at achieving sustainability to counterbalance any anticompetitive effects, otherwise, allowing measures to be shielded from competition law prohibitions where they support sustainability.<sup>12</sup> Businesses are part of the ‘green economy’ and can provide important contributions to sustainability. Competitive markets encourage businesses to produce at the lowest cost, to use scarce resources efficiently, and to innovate and adopt more energy-efficient technologies simultaneously reducing CO<sub>2</sub> emissions, therefore, contributing

oe September 2021 - Publications Office of the EU (europa.eu), accessed 10 September 2021.

7 European Commission, Inception Impact Assessment. Ref. Ares(2021)3714309–07/06/2021.

8 Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulations SWD(2021) 103 final. It also includes an accompanied evaluation study, where both qualitative and quantitative evidence were collected the Commission. Evaluation support study on the EU competition rules applicable to horizontal cooperation agreements in the HBERs and the Horizontal Guidelines final report (B-1049 Brussels, 2021), available at: kd0221603enn\_HBERs\_evaluation\_study.pdf (europa.eu)

9 Competition Policy Brief (n 6).

10 Julian Nowag, ‘Sustainability & Competition Law and Policy—Background Note’ (OECD), available at: [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2020\)3&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=En), accessed 7 January 2021.

11 Case 39579—Commission decision of 13 April 2011.

12 Simon Holmes, ‘Climate Change, Sustainability, and Competition Law’ (2020) 8:2 Journal Antitrust Enforcement 354, available at: <https://doi.org/10.1093/jaenfo/jnaa006>.

4 Margrethe Vestager, ‘Competition policy in support of the Green Deal’ (the 25th IBA Competition Conference, 10 September 2021), available at: Competition policy in support of the Green Deal | European Commission (europa.eu).

5 European Commission, ‘Factual Summary of the Contributions Received during the Public Consultation on the Evaluation of the Two Block Exemption Regulations and the Guidelines on Horizontal Cooperation Agreements’ (2019), available at: HBERs\_consultation\_summary.pdf (europa.eu).

6 Competition Policy Brief, Competition Policy in Support of Europe’s Green Ambition (1/2021), available at: Competition policy brief. 2021-01

to environmental and climate policies.<sup>13</sup> A transition to low-carbon economies involves embracing circularity inspired solutions. However, a circular economy,<sup>14</sup> where recycling and recovering materials in production/distribution and consumption processes are brought back to the market by its definition entails ‘first mover disadvantages’ with high investment cost. Therefore, cooperation on sustainability initiatives between economic agents, holding ‘a long-term view on economic relations’ and resting ‘on a notion of corporate responsibility’ beyond economic profit are essential.<sup>15</sup> However, this organisation of circularity can lead to tensions with competition law.<sup>16</sup> Some studies have demonstrated that businesses fear ‘unnecessarily restrictive or unpredictable competition law enforcement’.<sup>17</sup>

Traditionally, the focus of competition law is on economy goals, assuming that non-economic public goals are better dealt with by other areas of law. Building on the European Green Deal, this approach should change, as competition law and policy can contribute to the sustainability debates. Prominently, competition law should not act as a barrier to industry initiatives to deliver sustainability objectives. The notion of ‘sustainability’ or ‘sustainable development’ (used interchangeably) is far from clear and in the literature is defined by the three-pillar conception—embracing social, economic, and environmental aspects.<sup>18</sup> These pillars also attributed to the eminent Brundtland Report, Agenda 21, and the 2002 World Summit on Sustainable Development.<sup>19</sup> Indeed, the Brundtland Report defined sustainable development as ‘[...] development that meets the needs of the present without compromising the ability of future generations

to meet their own needs’.<sup>20</sup> According to Kuhlman and Farrington, sustainability is about welfare of generations and the fair use of limited natural sources.<sup>21</sup> In terms of balancing different pillars (i.e. environmental and economic), the proportionality test could be utilised implying that protecting fundamental ecological functions could be considered proportionate, despite causing economic losses. Given that ‘sustainability’ remains an open concept with myriad interpretations and context-specific understanding,<sup>22</sup> this paper does not aim to define it. Instead, the paper notes that there are different variations among different jurisdictions in the EU—with some of them adopting a narrow concept of sustainability with the sole focus on one pillar—environmental or climate change related issues, whereas others expressing willingness to encompass a broader meaning, embracing not only environmental but also a social dimension (e.g. addressing working conditions etc.).

There is a growing academic interest in exploring the interface of sustainability and competition law.<sup>23</sup> Contributing to the existing debates as well as acknowledging the need for a green competition policy, this paper explores the European Commission’s experience in the application of sustainability related issues in competition law from an historical perspective embracing both competition law ‘as a shield’ and ‘as a sword’ approaches. In contrast to the previous studies, this paper maps

13 Some examples include businesses utilising support from the Horizon 2020 projects to install innovative technologies to improve energy efficiency, also reducing CO<sub>2</sub> emissions as well as energy costs.

14 The circular economy principles are reinforced in the new Circular Economy Action Plan, which forms the main building blocks of the European Green Deal, Communication from the Commission to the European Parliament, The Council, and The European Economic and Social Committee and the Committee of the Regions a new Circular Economy Action Plan for a cleaner and more competitive Europe COM/2020/98 final.

15 Anna Gerbrandy, ‘Rethinking Competition Law Within the European Economic Constitution’ (2019) 57:1 Journal of Common Market Studies 132.

16 *Ibid.*, 127–142.

17 ICC, ‘Competition Policy and Environmental Sustainability’, available at: <https://iccwbo.org/content/uploads/sites/3/2020/12/2020-compolicyandenviroinsustainability.pdf>, accessed 26 November 2020.

18 Ben Purvis, Yong Mao and Darren Robinson, ‘Three Pillars of Sustainability: In Search of Conceptual Origins’ (2019) 14 Sustainability Science 681, available at: <http://dx.doi.org/10.1007/s11625-018-0627-5>.

19 Bedřich Moldan, Svatava Janoušková, Tomáš Hák, ‘How to Understand and Measure Environmental Sustainability: Indicators and Targets’ (2012)

17 Ecological Indicators 4, available at: <https://doi.org/10.1016/j.ecoli.2011.04.033>.

20 UN, Report of the World Commission on Environment and Development: Our Common Future, available at: [un-documents.net/our-common-future.pdf](http://un-documents.net/our-common-future.pdf).

21 Tom Kuhlman and John Farrington, ‘What is Sustainability?’ (2010) 2:11 Sustainability 3336.

22 Ben Purvis, Yong Mao and Darren Robinson, ‘Three Pillars of Sustainability: in Search of Conceptual Origins’ (2018) 14 Sustainability Science 681, available at: <http://dx.doi.org/10.1007/s11625-018-0627-5>.

23 Kingston (n 3); Anna Gerbrandy, ‘Solving a Sustainability-Deficit in European Competition Law’ (2017) 40:4 World Competition 539; Rutger Claassen and Anna Gerbrandy, ‘Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach’ (2016) 12:1 Utrecht Law Review 321; Ioannis Lianos, ‘Polycentric Competition Law’ (Centre for Law, Economics and Society Research Paper Series: 4/2018, 2018), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3257296](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257296); Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016); Simon Holmes, ‘Climate Change and Competition Law’ (OECD, DAF/COMP/WD(2020)94, 27 October 2020), available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2020\)94&docLanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2020)94&docLanguage=en); Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds), *Competition Law, Climate Change and Environmental Sustainability* (Concurrences 2021); Georgio Monti, ‘Four Options for a Greener Competition Law’ (2020) 11:3–4 Journal of European Competition Law and Practice 124; Eva van der Zee, ‘Quantifying Benefits of Sustainability Agreements under Article 101 TFEU in Terms of Human Well-Being’ (2020) 43:2 World Competition 189; Marios C. Iacovides and Christos Vrettos, ‘Falling Through the Cracks No More? Article 102 TFEU and Sustainability: The Relation Between Dominance, Environmental Degradation, and Social Injustice’ (2021) jnab010 Journal of Antitrust Enforcement 1; David Wouters, ‘Which Sustainability Agreements are Not Caught by Article 101 (1) TFEU’ (2021) 12:3 Journal of European Competition Law & Practice 257.

out national initiatives to incorporate different tools to navigate the sustainability and competition law debates. Specifically, the paper places emphasis on the trailblazing initiatives currently proposed by the EU Member States, such as the Netherlands, Greece, Austria, and Hungary and non-EU Member State—the UK.

The paper is structured as follows. After this introduction, the paper has two parts, covering both European and national positions. Although Sections II and III focus on the previous and current European Commission and the Courts' experience in addressing sustainability issues, respectively, Section IV is dedicated to national initiatives, namely, based on four EU Member States and one non-EU Member State, the UK, for further comparison. The concluding remarks are covered in Section V.

## II. Revisiting the past: sustainability issues in the EU

Historically, the European Commission and the EU Member States have promoted sustainability related goals—including measures to transition to a green economy—through sector-specific regulation driven by various strategies and action plans (i.e. Circular Economy Action plan), taxation and investment (including, discretionary enforcement of State aid rules, e.g. to promote renewable energy projects). With some isolated exceptions, neither the European Commission nor the NCAs (National Competition Authorities) have used competition rules to advance these aims. Pursuing a European legal perspective, scholars seem to approach the constitutional context of the EU to give further direction towards sustainability, 'at least a normative space'.<sup>24</sup> Undeniably, sustainability and environmental protection are among the primary objectives of EU Law as laid down in the Treaties (i.e. TEU and TFEU), and the EU Charter of Fundamental Rights of the EU (the Charter), commonly referred to as 'the constitutional provisions'. Notably, Article 37 of the Charter provides: 'environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union'. Article 3(3) TEU clearly stresses that the Union works for the sustainable development of Europe. Regarding the implementation of these objectives, Article 7 TFEU postulates that 'the Union shall ensure consistency between its policies and activities, taking all of its objectives into account' with the priority

being placed on environmental protection, as 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities'.<sup>25</sup>

A shift in environmental regulation from command/control to market based instruments, such as environmental taxes, green subsidies, emissions trading, and other voluntary initiatives, have raised competition concerns.<sup>26</sup> The importance of environmental agreements and the increased use of market-based instruments in environmental policy were accentuated in a 2002 communication, where environmental agreements were defined as 'those by which stakeholders undertake to achieve pollution abatement, as defined by environmental law, or environmental objectives set out in Article [191 TFEU]'.<sup>27</sup> In terms of the competition law provisions, neither the provisions on abuse of a dominant position, restrictive agreements/concerted practices, merger control rules nor accompanied soft law explicitly address sustainability concerns. Merely, the former Horizontal Cooperation Guidelines, which were concerned with different types of cooperation and their potential to generate efficiency gains, apart from agreements on R&D, production, purchasing, commercialisation, standardisation, most importantly, also contained environmental agreements.<sup>28</sup> Indeed, a separate section on environmental agreements,<sup>29</sup> in relation to setting out standards on the environmental performance of products (inputs or outputs) or production processes, horizontal agreements for the common attainment of an environmental target, such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency.<sup>30</sup> The Guidelines highlighted different scenarios, when environmental agreements could fall under the ambit of Article 101 TFEU and when there is the possibility for its relevance. For instance, it noted that environmental agreements would always come under Article 101(1) by their nature if the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel, that is

24 Anna Gerbrandy, 'Changing Competition Law in a Changing European Union: The Constitutional Challenges of Competition Law' (2019) 14:1 *The Competition Law Review* 33.

25 Article 11 TFEU.

26 Milan Ščasný and Vojtěch Máca, 'Market-Based Instruments in CEE Countries: Much Ado about Nothing' in Laura Castellucci and Anil Markandya (eds), *Environmental Taxes and Fiscal Reform. Central Issues in Contemporary Economic Theory and Policy* (Palgrave Macmillan 2012), 57–89.

27 Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment COM(2002) 412, 4.

28 Commission Notice—Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements (Text with EEA Relevance) [2001] OJ C 3, para 10.

29 *Ibid.*, Chapter 7.

30 *Ibid.*, para 180.

otherwise prohibited price-fixing, output limitation, or market allocation, or if the cooperation is used as a means amongst other parts of a broader restrictive agreement, which aims to exclude actual or potential competitors. This chapter was omitted from the 2011 Horizontal Cooperation Guidelines. Yet, it does not mean that the assessment of these agreements has been downgraded.<sup>31</sup>

Indeed, it has been noted that the generic provisions or the provisions on standardisation agreements insofar as it concerns environmental standards of the Guidelines are sufficient to cover these kinds of agreements.

In terms of technicalities, competition law is traditionally used from two different perspectives, using competition law as a sword or as a shield. In the context of sustainability, the application of competition law can be used as a sword to achieve sustainability, such as prohibiting measures from a sustainability point of view.<sup>32</sup> Under this preventive interpretation also falls a balancing approach, as to whether the harm to competition and sustainability outweigh the benefits of the measure. As far as a supportive aspect is concerned, competition law can be used as a shield to allow measures, which are directed at achieving sustainability to counterbalance any anticompetitive effects.<sup>33</sup> The sustainability measure may not even be subject to the competition law prohibition in the first place, falling outside the scope of Article 101 TFEU (commonly known as the Albany route, where the CJEU expressed that Article 101 TFEU does not apply to collective bargaining).<sup>34</sup> For instance, in ACEA<sup>35</sup> and JAMA and KAMA,<sup>36</sup> associations of automobile manufacturers committed on behalf of their members to reduce CO<sub>2</sub> emissions from cars with the targets being set on behalf of all members collectively rather than individually. The car manufacturers were free to develop and introduce new CO<sub>2</sub>-efficient technologies independently and in competition with each other. Therefore, the Commission took the view that they did not restrict competition within the meaning of Article 101(1) TFEU.<sup>37</sup> Article 101 TFEU also does not apply to sustainability agreements that fall within the ancillary restraints/objective necessity doctrine.<sup>38</sup> Even the agreements falling under Article 101(1) TFEU restriction can be exempted under Article

101(3) TFEU. For instance, under the shield-type category, the Exxon/Shell case confirmed that environmental co-operations to reduce pollution would often lead to technical and economic progress under Article 101(3) TFEU.<sup>39</sup> In the CECED (European Council of Manufacturers of Domestic Appliances) case<sup>40</sup> the agreement was restrictive by object as it restricted producing or importing less energy efficient washing machines. However, it was, nevertheless, upheld under Article 101(3) TFEU as new machines would reduce the potential of energy consumption, meaning lower electricity, and water bills for consumers. Further benefits include the creation of new technically efficient machines and would stimulate future R&D on furthering energy efficiency. Similar to environmental objectives notified by CECED, the CEMEP (the European Committee of Manufacturers of Electrical Machines and Power Electronics) agreement<sup>41</sup> also aimed at gearing the EU market towards higher efficiency motors thereby saving energy in their operation. However, in contrast to CECED, where the definition and labelling of energy-efficient washing machines was already established, there was no established definition of energy efficiency of standardised low voltage motors present in the market and, therefore, competition did not appreciably take place on this product characteristic. This resulted in the agreement being granted negative clearance without any necessity to examine whether the conditions of Article 101(3) TFEU were fulfilled.<sup>42</sup>

Finally, competition law can also be used as a sword to prohibit cartels hiding behind 'green' initiatives. For instance, in the so-called Consumer Detergents case,<sup>43</sup> a prohibition decision under Article 101 TFEU was issued against three major detergent manufacturers: Henkel, Unilever and Procter & Gamble, which engaged in the infringing behaviour aimed at achieving market stabilisation by ensuring that none of them would use the environmental initiative to gain competitive advantage over the others. They also coordinated prices on washing powder. For instance, the parties agreed to keep the price unchanged during the different phases of the environmental initiative (namely, when products were 'compacted' (i.e. when the weight of the products was reduced), when the product quantity was downsized (i.e. when the product volume was condensed), or when they collectively decreased the number of scoops (wash loads)

31 Commission Press Release, 'Competition: Commission Adopts Revised Competition Rules on Horizontal Co-operation Agreements' (14 December 2010) 4.

32 Nowag (n 10).

33 Holmes (n 12).

34 Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, ECLI:EU:C:1999:430.

35 Case COMP/37.231.

36 JAMA (Case IV/F-2/37.634) and KAMA (Case IV/F-2/37.611).

37 European Commission, XXIXth Report on Competition Policy 1999.

38 Case C-309/99, *Wouters and Others*, ECLI:EU:C:2002:98.

39 COMP/33.640 [1994].

40 COMP/36.718 [2000] OJ L 187/47.

41 CECER, OJ C 74, 5.

42 For further discussion, see European Commission, Competition Policy Newsletter (No 2 June 2000), available at: [cpn2000\\_2.pdf](http://cpn2000_2.pdf) (europa.eu).

43 Case 39579—Commission decision of 13 April 2011.

per package). Therefore, their behaviour was found to have the object of restricting competition.

These past cases illustrate how environmental agreements were considered using existing competition tools, yet, without any further in-depth assessments often adhering environmental benefits as complementary to economic benefits without quantifying them.

### III. The EU current approach towards sustainability

The European Green Deal has given a new impetus to businesses to pursue sustainability initiatives. As previously discussed, as part of the fit for purpose HBERs regulation review, following the public consultations the Commission published the Inception Impact Assessment and Staff Working Document (SWD). The SWD indicates that many respondents during the consultations considered that for sustainability initiatives to succeed, it is important for businesses to be able to cooperate; yet, of equal importance is to have clarity on when such cooperation is compatible with EU competition rules and when it is not.<sup>44</sup> The accompanied evaluation study also noted that the NCAs have investigated a number of cases concerning sustainability and joint bidding agreements—the categories of agreements not currently explicitly covered in the Horizontal Guidelines, which can lead to divergent approaches taken across the EU Member States. It seems that Commission agrees that the provisions contained in the HBERs and Horizontal Agreements Guidelines are outdated and are not sufficiently adapted to recent market developments, especially, in terms of the pursuit of sustainability goals. They do not offer sufficient legal certainty for types of horizontal agreements linked to sustainability. Yet, the policy options in this context are rather vague. Nonetheless, the Commission promises specific guidance on horizontal cooperation in terms of pursuing sustainability goals.<sup>45</sup>

The recent public consultation in light of the European Green Deal, resulted in the Competition Policy Brief (Brief) being published, where the constructive feedback collected during the consultation has framed three main on-going reform work-streams, embracing examples in each of the three competition instruments. These are: (i) State aid directed at the funding of non-fossil fuels; clarifying and simplifying the rulebook; and enhancing possibilities to support innovation; (ii) antitrust, where further clarification is required whether and how to assess

sustainability benefits; improving guidance and an open-door policy; and finally, (iii) mergers with strengthening enforcement regarding possible harm to innovation (i.e. green ‘killer acquisitions’); reflecting sustainability aspects/features prevailing in the market and consumer preferences for these. In this Brief, the Commission also commits to provide concrete examples how sustainability objectives can be pursued by different types of cooperation agreements (i.e. joint production/purchasing agreements, standard setting etc.) without restricting competition. This is promising and can give reassurance to businesses also unlocking further investments. In terms of the assessment of Article 101(3) TFEU, the Brief notes that sustainability benefits can be assessed as qualitative efficiencies resulting in an increased quality or longevity (e.g. replacing plastic with wood in toys or using recycled materials for clothing), as well as potentially offering cost efficiencies passed on to consumers (e.g. reducing plastic packaging may reduce the cost for materials, transport, and storage). It seems that the Commission is planning to change its approach in relation to sustainability benefits not needing to be direct or immediately noticeable product quality improvements or cost savings, provided the users appreciate the sustainability benefits and are willing to pay a higher price for this reason alone. Interestingly, with regard to ‘out-of-market’ efficiencies (e.g. the societal benefits accrued by carbon emission reduction) the Brief suggests that the assessment of the anticompetitive effects and benefits of a practice should, in principle, be made within the confines of the same relevant market. This clearly reflects the current anchored consumer welfare approach where restricting competition for a product can only be justified if the users of that product are not, on balance, worse off. This interpretation is in contrast to the national positions expressed by several Member States.<sup>46</sup> However, the Brief acknowledges that benefits generated on separate markets ‘can possibly be taken into account provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same’; and the benefits ‘fully compensate’ the consumers for the harm (the latter being part of society).<sup>47</sup> The near future will demonstrate how these efficiencies will be taken considered by the Commission.

As far as the most recent practice is concerned, there have not been ‘pure’ sustainability related cases.<sup>48</sup>

<sup>46</sup> To be discussed in Section IV.

<sup>47</sup> Competition Policy Brief (n 6).

<sup>48</sup> For instance, the Green Deal aspects have been noted in merger cases. For instance, in the Aurubis/Metallo merger, the Commission considered whether competition in the copper recycling sector (given the role of

<sup>44</sup> Commission Staff Working Document (n 8).

<sup>45</sup> Inception Impact Assessment (n 7).

Nonetheless, a good example in terms of using competition as a sword for innovation restriction, is the recent German carmakers case, where the European Commission imposed a fine of EUR 875,189,000 on Daimler,<sup>49</sup> BMW and Volkswagen group (i.e. Volkswagen, Audi, and Porsche) for breaching EU antitrust rules (notably, Article 101(1)(b) TFEU/Article 53(1)(b) of EEA-Agreement) by colluding on technical development in the area of nitrogen oxide cleaning.<sup>50</sup>

Specifically, these car manufacturers over a 5-year period (2009–2014) held technical meetings, where they agreed on AdBlue tank sizes and ranges and a common understanding on the average estimated AdBlue-consumption, removing the uncertainty about their future market conduct concerning NO<sub>x</sub>-emissions cleaning beyond and above the legal requirements and AdBlue-refill ranges. This means that they colluded to avoid competition on cleaning better than what is required by law despite the relevant technology being available. The Commission concluded that by its very nature, the parties in question restricted competition on product characteristics and in terms of technical development in the field of NO<sub>x</sub>-cleaning for new diesel passenger cars, they also limited choice for consumers, therefore, constituting an infringement ‘by object’ prohibited under Article 101(1)(b) TFEU.<sup>51</sup> Even though the Commission noted that neither of the undertakings involved had actually introduced SCR-systems with AdBlue-Tanks of uniform size or range or used the same cleaning strategies, effects of the agreement (and/or concerted practice) did not need to be taken into account. This is the first time that the European Commission determines that collusion on technical development amounts to a cartel. In this case, innovation was referred as the key to achieve ambitious Green Deal objectives with competition being of paramount importance for such innovation to thrive. Notably, the Executive Vice-President Vestager uttered:

‘In today’s world, polluting less is an important characteristic of any car. And this cartel aimed at restricting competition on this key competition parameter. [...] Competition and innovation [...] are also essential for Europe to meet its ambitious Green Deal objectives’.<sup>52</sup>

This preventive interpretation of Article 101 TFEU also questions, whether the harm to competition and sustainability can outweigh the benefits of the measure. For instance, the parties in this case argued that their contacts related to development of SCR-technology (selective catalytic reduction) also served the purpose of building a customer-friendly AdBlue-infrastructure and enhancing the marketability of the environment-friendly SCR-technology. The Commission found that the agreements (and/or concerted practices) of the parties in question concerning product characteristics of diesel passenger cars with SCR-systems did not meet the requirements of Article 101(3) TFEU, as it was doubtful ‘in how far agreeing certain AdBlue tank sizes or refill ranges, as well as the insufficiently anonymised or aggregated exchange of information on assumed average AdBlue-consumption of their new diesel passenger car models with SCR-Systems were capable of bringing about the claimed advantages “customer-friendly AdBlue-infrastructure” and “marketability of SCR-technology”’.<sup>53</sup> In any case, the Commission did not find this conduct to be indispensable to achieve these objectives.

Importantly, one must note the ‘shield’ aspects in this case. Given that DAIMLER, VW, and BMW also discussed other issues related to the development of SCR-systems, the European Commission accompanied its prohibition decision with a letter to the relevant parties, where it incorporated much needed guidance on aspects that do not raise competition concerns, such as the joint development of an AdBlue dosing software platform; joint development of on liquid SCR-systems; the standardisation of the AdBlue filler neck; the joint preparation of charge sheets for parts of SCR-systems; and the discussion of quality standards for AdBlue, of warning strategies directed at ensuring the timely refill of AdBlue, and of the build-up of an appropriate infrastructure for AdBlue supply.<sup>54</sup>

Although the European Commission is still working on finding the best way to address the interplay of competition law and sustainability, NCAs have launched their initiatives, which will be discussed in the following section.

copper in the circular economy) would be reduced but found that harm was unlikely to occur. *Aurubis/Metallo Group Holding* (M.9409) Commission Decision of 4 May 2020.

49 Daimler AG avoided the fine as it was granted immunity under the leniency application.

50 AT.40178.

51 *Ibid.*

52 European Commission, ‘Antitrust: Commission Fines Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars’ (Press Release, 8 July 2021), available at: Antitrust: Commission fines car manufacturers (europa.eu).

53 AT.40178, para 175.

54 European Commission, Letter dated 8 July 2021, COMP.G4/GM.

## IV. National initiatives to address the interplay between competition law and sustainability

### A. The Netherlands

The Netherlands national competition authority—the Authority for Consumers and Markets (*Autoriteit Consument & Markt*, ACM) is the leading authority in this debate. In 2014, the ACM published the ‘Vision Document Competition and Sustainability’ proposing a radical change in relation to price-centric competition law assessment by indicating that lower prices do not always bring consumer welfare.<sup>55</sup> For instance, in the energy agreement for sustainable growth (*Energieakkoord voor duurzame groei*), four electricity manufacturers consulted the ACM regarding their intention to close up their five old coal-fired power plants in order to lessen environmental damage. This coordinated practice was expected to decrease the total energy supply by 10 per cent and consequently, increase electricity prices. The ACM found this initiative would violate Article 6(1) of the Dutch Competition Act due to the fact that consumer benefits were not convincingly demonstrated (no significant impact on health and carbon emissions were found).<sup>56</sup> A similar request was made in 2015 from chicken producers, to become the ‘The Tomorrow’s Chicken (*Kip van Morgen*)’ case, where the chicken producers (covered approximately, 95 per cent of the relevant market) made a joint decision to raise chickens in more organic conditions, therefore, increasing the cost. An exemption was not granted, as the ACM focused on consumer preferences and their sensitivity to price as well as reduction of choice, which led to the reduction of consumer welfare.<sup>57</sup> This largely criticised decision turned out to be a good decision based on ex-post assessment, which noted that the current market ‘for sustainable

chicken seems healthier and more competitive, then it would have, were the alliance allowed to proceed’.<sup>58</sup>

These cases have caused further discussions concerning whether competition law causes a barrier for sustainability goals. In response, the ACM issued the Sustainability Guidelines Draft in 2020 with further revision in 2021,<sup>59</sup> limited in scope to sustainability agreements. This proposal features a new approach allowing the benefits for society as a whole to be taken into account in the competition law assessment rather than only the user group buying the products in question, thus, encouraging businesses to enter into sustainability agreements, such as to achieve climate objectives (i.e. carbon emissions reduction). Most likely influenced by the previous cases, the connotation of ‘sustainability’ has a broad spectrum—serving the purposes for ‘the identification, prevention, restriction, or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature’.<sup>60</sup> The draft guidelines indicate three opportunities to businesses to meet the sustainability objective.

Firstly, in light of the Article 101(1) TFEU (domestic equivalent section 6(1) MW), all agreements apart from certain types of agreements (i.e. price-fixing, customer-sharing, distribution, collective distribution, production restraints, and collective refusals to buy or supply) could escape the cartel prohibition.<sup>61</sup> The draft guidelines indicate that sustainability agreements are unlikely to be anticompetitive ‘if they do not or not appreciably affect competition on the basis of key competition parameters such as price, quality, diversity, service, and distribution method’.<sup>62</sup>

Secondly, the guidelines have also proposed the revised conditions under Article 101(3) TFEU (section 6(3) MW). The first condition now has an explicit reference

55 ACM, Vision Document on Competition and Sustainability (May, 2014), available at: <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability>; Irina Toma, ‘Competition Law and Sustainability In The Netherlands’ (June 2016), available at: <https://fairtrade-advocacy.org/wp-content/uploads/2020/07/Competition-Law-and-Sustainability-in-the-Netherlands.pdf>, accessed 27 December 2021.

56 ACM, ‘Analysis by the Netherlands Authority for Consumers and Markets (ACM) of the Planned Agreement on Closing Down Coal Power Plants from the 1980s As Part of the Social and Economic Council of the Netherlands’ SER Energieakkoord’, available at: [https://www.acm.nl/sites/default/files/old\\_publication/publicities/12082\\_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf](https://www.acm.nl/sites/default/files/old_publication/publicities/12082_acm-analysis-of-closing-down-5-coal-power-plants-as-part-of-ser-energieakkoord.pdf).

57 ACM, ACM’s analysis of the sustainability arrangements concerning the ‘Chicken of Tomorrow’ (ACM/DM/2014/206028), available at: ACM’s analysis of the sustainability arrangements concerning the ‘Chicken of Tomorrow’.

58 Autoriteit Consument & Markt, Welzijn kip van nu en ‘Kip van Morgen’ De Autoriteit Consument & Markt: Onderzoek (1 September 2020) available at: <https://www.acm.nl/nl/publicaties/welzijn-kip-van-nu-en-kip-van-morgen>, as quoted in ‘Competition Policy, with a Touch of Green: From ‘Competition on the Merits’ to ‘Sustainable’ Competition on the Merits’ by Kalpana Tyagi, a conference paper presented at ASCOLA 1–3 July 2021.

59 ACM, Draft Guidelines, Sustainability Agreements, available at: <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>.

60 Ibid., para 7.

61 Sustainability agreements will be allowed if these agreements address the following: incentivise undertakings to contribute sustainability goal (without being binding on other individual undertakings); promote consciousness in terms of environment and climate through codes of conduct via joint standards, certification labels, etc.; serve for the purpose of increasing product quality while halting the production of less sustainable products; create initiatives for the creation of new products/markets through making sufficient production resources available like know-how; and determine specific laws of the countries, where undertakings’ suppliers or distributors do business.

62 Draft Guidelines (n 59), para 16.



to sustainability benefits under the ‘efficiency gains’ notion. Although efficiencies should be ‘objective’,<sup>63</sup> both quantitative data (i.e. the reduction rate of carbon footprints) as well as qualitative data (i.e. related to animal welfare) could be contemplated.<sup>64</sup> The second condition of ‘a fair share’ of the benefits to users also includes society at large (not only the users of product/service). This deviation from the traditional interpretation is only applicable to environmental-damage agreements and if ‘the agreement helps, in an efficient manner, comply with an international or national standard, or it helps realise a concrete policy goal (to prevent such damage)’.<sup>65</sup> In terms of weighing pros and cons of sustainability agreements, there is no need to always quantify them. This can be the case when the undertakings in question have a limited, combined market share (up to 30 per cent); or the harm to competition is evidently smaller than the benefits of the agreement.<sup>66</sup> The final two conditions of indispensability<sup>67</sup> and preservation of competition<sup>68</sup> are mainly built on the existing practice.

Thirdly, undertakings can also conduct a self-assessment of their agreement or ask to be assessed by the ACM.<sup>69</sup> If sustainability initiatives are not found to be compatible with the MW, undertakings could submit their initiatives to the legislature.<sup>70</sup> It has also been declared that undertakings will have the opportunity to contact the Minister of Economic Affairs and Climate Policy in the near future.<sup>71</sup> Certainly, the ACM sends a positive message to industry and businesses in terms of its position towards sustainability.

The ACM is the first NCA to develop a different standpoint concerning Article 101(3) TFEU by endeavouring to differentiate sustainability agreements from cartel agreements through using novel tools, such as a willingness-to-pay test and environmental cost calculation.<sup>72</sup> In other words, the ACM laid the way open

for assessing sustainability agreements under Article 101(3) TFEU exemption.

Given that the ACM is also responsible for consumer protection, it also published draft Guidelines on Sustainability Claims from a consumer protection perspective.<sup>73</sup> The guidelines advise businesses and consumers on different types of claims that could be misleading (or incorrect), and how to avoid ‘greenwashing’ (i.e. ‘misleading consumers by claiming that a product is more sustainable than it is in reality’).<sup>74</sup>

## B. Greece

Similar to the ACM, the Hellenic Competition Commission (HCC) can also be regarded as a leading authority in this debate, noting that the HCC has a role to play and ‘should facilitate the transition to a Green economy and support innovation within the Green economy taking into account possible externalities from generation to generation, through the use of new tools and approaches in order to understand consumer behaviour’.<sup>75</sup> Environmental protection is a constitutional obligation of the State enshrined in Article 24 of the Greek Constitution. To start an open dialogue and to find a way for evaluating business practices with their impacts on the environment, the HCC published a thorough draft staff discussion paper (discussion paper), where it discusses convergence areas and clashes between sustainable development and competition law.<sup>76</sup>

The discussion paper highlights that competition law should become more attuned to the broader constitutional values and programmatic aims regarding sustainability, and NCAs should take an active role by reviewing their aims and objectives with a broader perspective—embracing externalities and intergenerational effects, in addition to monetarily assessments. The paper further explores that the theory of harm should be redressed with long-term sustainability considerations by developing a competition law sustainability sandbox.<sup>77</sup> This sandbox

63 Draft Guidelines (n 59), para 35.

64 Draft Guidelines (n 59), paras 41–42.

65 Draft Guidelines (n 59), paras 43–45.

66 Draft Guidelines (n 59), paras 53–63.

67 Draft Guidelines (n 59), paras 64–68.

68 Draft Guidelines (n 59), para 69.

69 Draft Guidelines (n 59), paras 70–71.

70 Draft Guidelines (n 59), paras 73–74.

71 Draft Guidelines (n 59), para 75.

72 Francisco Costa-Cabral, ‘Competition Law and Sustainability: Dutch Authority Makes Headway with Draft Guidelines’ (European Law Blog, 9 October 2020), available at: <https://europeanlawblog.eu/2020/10/09/competition-law-and-sustainability-dutch-authority-makes-headway-with-draft-guidelines>; Melanie Bruneau, Antoine de Rohan Chabot and Antonia Rountou, ‘How European Competition Law Can Contribute to Achieving Sustainability Objectives’ (financier-worldwide, February 2021), available at: <https://www.financierworldwide.com/how-european-competition-law-can-contribute-to-achieving-sustainability-objectives#>. YAHxxnn7SUK, accessed 27 December 2021.

73 ACM, Guidelines Sustainability Claims, available at: [Consultatie Leidraad Duurzaamheidsclaims \(acm.nl\)](https://www.acm.nl/duurzaamheidsclaims).

74 Ibid. The greenwashing aspect from a consumer protection perspective, falls outside the scope of this article and it is here for reference only.

75 HCC, Technical Report on Sustainability and Competition (Press Release, 26 January 2021), available at: [Press Release - Technical Report on Sustainability and Competition \(epant.gr\)](https://www.epant.gr/press-releases/technical-report-on-sustainability-and-competition).

76 Draft Staff Discussion Paper on Sustainability Issues and Competition Law (2020), available at: [https://www.epant.gr/files/2020/Staff\\_Discussion\\_paper.pdf](https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf).

77 OECD, ‘Sustainability and Competition—Note by Greece’ DAF/COMP/WD(2020) 58–60, 64. In the literature, a sandbox is defined as ‘a safe space where both regulated and unregulated firms can experiment with innovative products, services, business models, and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in such activity’: Financial Conduct Authority, ‘Regulatory Sandbox’ (2015) Research Paper.

is proposed to provide a safe space (free from regulatory penalties) for businesses to experiment with new formats to achieve more quickly and efficiently sustainability goals and which may embroil cooperation between competing undertakings or even more permanent changes in market structure.<sup>78</sup> These experiments would be time constrained and supervised by the HCC, which would balance the possible anticompetitive effects with the need to provide incentives for the sustainability investment.

In contrast to the ACM, the HCC noted that sustainability consideration should have a broader scope (beyond Article 101(3) TFEU) and should cover all its aspects, for instance, under Article 102 TFEU (domestic equivalent) and merger control. Eminently, the paper signals that further consideration should be given on whether abuse of dominance infringements ‘may also include anticompetitive practices which also constitute breaches of environmental law or which restrict sustainable development’. For instance, sustainability considerations could justify otherwise illegal foreclosure on the basis of efficiencies or objective necessity, or more broadly based on the Article 11 TFEU requirement that environmental protection is integrated into all EU policies.<sup>79</sup> Indeed, a broader interpretation of the Article 102 TFEU prohibition of ‘unfair purchase or selling prices or other unfair trading conditions’ could encompass practices with negative sustainability impacts, such as dominant buyers paying excessively low purchase prices for inputs. In terms of merger control, it questions the extent to which sustainability issues could be considered when assessing mergers. Therefore, it reviews various options to address sustainability: (i) under substantive assessment pursuant to Article 2 European Union Merger Regulation (EUMR); (ii) under ‘efficiencies’; (iii) under the provision of relevant ‘remedies’; (iv) by utilising Article 21(4) EUMR; or (v) through the review of mergers under national competition law.<sup>80</sup> Although the HCC has already engaged with sustainability-related arguments in its past merger cases, in none of these cases sustainability has played an important role in reaching the decision.<sup>81</sup>

The HCC is planning to adopt sustainability guidelines,<sup>82</sup> to design the competition law sustainability sandbox, in view of the envisaged legislative change and the inclusion of a provision in its Competition

Law regarding no action letters. Moreover, the HCC proposed to establish a ‘Common Advice Unit’ formed by specialists from different regulatory institutions to provide informal consultation on proposed sustainability related-initiatives. Finally, the HCC pointed out the significance of collaborations between competition authorities at national level and the harmonisation of competition law rules at supranational level for realising the objectives of the Green Deal.<sup>83</sup> This can be illustrated by the joint technical report commissioned by the ACM and HCC.<sup>84</sup>

To conclude, the HCC’s exploratory discussion paper outlines a number of novel approaches, such as: (i) the creation of a competition law sustainability ‘sandbox’ in which market participants could team up to work on sustainable business projects with some measure of protection from competition rules; and (ii) the establishment of an ‘Advice Unit’ comprising experts from different regulatory authorities providing informal advice on sustainability-related initiatives. Further guidelines will follow defining the contours of legitimate cooperation between rivals on sustainability projects.

### C. Austria

In contrast to the previous two soft approaches initiated by the ACM and HCC, Austria has taken a more radical approach, as it is the first EU Member State to incorporate sustainability-related matters through a legislative route proving sustainability’s increasing importance. The Austrian legislator explored sustainability related considerations in competition law enforcement practice and questioned whether agreements between undertakings that may (partially) restrict competition can be exempted due to broader sustainability benefits.

Therefore, the legislator proposed to explicitly expand the scope of the exemption from the cartel prohibition under section 2(1) of the Cartel and Competition Law Amendment Act 2021 (Kartell und Wettbewerbsrechts Änderungsgesetz 2021, domestic equivalent of Article 101(3) TFEU), which implements the ECN+ Directive. For the first time in Austrian antitrust law, section 2(1) explicitly allows out-of-market efficiencies, where the environmental benefits do not need to be granted to consumers on the relevant market, it is sufficient if they benefit the broader society. The provision particularly states that ‘[c]onsumers shall also be considered to

78 Draft Staff Discussion Paper (n 76).

79 Draft Staff Discussion Paper (n 76), paras 42–43.

80 Draft Staff Discussion Paper (n 76), paras 99–105.

81 See, for instance, Case N. 615/2015, available at: <https://www.epant.gr/apo-faseis-gnomotiseis/item/84-apofasi-615-2015.htm>; Case 682/2019; Case 694/2019.

82 Hellenic Competition Commission, ‘Contributing to the European Green Deal’ (public consultation contribution, November 2020), available at: <https://ec.europa.eu>.

83 Draft Staff Discussion Paper (n 76).

84 Roman Inderst, Eftichios Sartzetakis, and Anastasios Xepapadeas, ‘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](https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf), accessed 27 December 2021.

be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress significantly contributes to an ecologically sustainable or climate-neutral economy'.<sup>85</sup> It seems that the focus is on environmental aspects rather than a broad range of SDGs. During the consultation process, the Austrian federal competition authority (BWB), (which is an independent and autonomous authority at the Austrian Federal Ministry of Science, Research and Economy to conduct investigations into the possible violations of antitrust law and European competition law), indicated the necessity of a broad understanding of consumer welfare by taking more account of impacts on quality, variety, and innovation, rather than adhering to the short-term effects of low prices in the enforcement of competition law. However, the BWB observed that the new concepts proposed and the meaning behind 'positive effects on the environment or the climate' should be further clarified to avoid any legal uncertainties.<sup>86</sup> Even though the regulatory guidance is not yet available, the legislative materials overview the types of environmental benefits that may be considered sufficient to 'escape' the cartel prohibition.<sup>87</sup> For instance, not only environmental benefits that materialise immediately can be taken into account but also benefits to be achieved in the short term, therefore, a 'future generation' can benefit from the ecological advantages of the cooperation.<sup>88</sup> In terms of specific examples of advantages contributing to an 'ecologically sustainable and climate-neutral economy', the materials suggest some climate protection measures, such as renewable energies and emission reductions, the sustainable use of natural resources, measures contributing to the transition to a circular economy, or measures directed at saving or restoring ecosystems and biodiversity. To prove 'significant contribution' the calculation of the costs of environmental impacts on society are expected to be provided. However, similar to the ACM, an exact calculation of the environmental benefits will not be required, if the disadvantages resulting from the agreement on competition are minimal, whereas the environmental contribution is clearly material.

Analogous to the ACM's draft guidelines, the Austrian materials exclude hardcore restrictions captured by the cartel prohibition, from an individual exemption under sustainability grounds. It will be useful to see how this new domestic provision will be implemented in practice and what impact it would have in relation to Article 101 (3) TFEU, as most cooperation agreements have cross-border effects within the EU.

It seems that the BWB will need to issue further guidance on the new sustainability exemption from the cartel prohibition in consultation with the Federal Ministry for Climate Protection based on practical experience.

#### D. Hungary

The Hungarian Competition Authority, *Gazdasági Versenyhivatal* (GVH) is responsible for three main pillars: (i) competition supervision (under both domestic competition law and EU law); (ii) competition advocacy; and (iii) development of competition culture, which also embraces development of the culture of consumer decision-making.<sup>89</sup> For its 2020 objectives, the GVH aims to become a green authority with its green strategy expected to be approved in 2021. Although this sets an example for other public authorities as well as businesses, the GVH has also taken some steps in relation to the interplay between competition law and sustainability. Specifically, it has recently issued an amendment to its notice related to fines (the so called—New Notice),<sup>90</sup> by introducing a pro-active remedy, with an undertaking providing either partial or full compensation for the negative impact of its competition law violation in order to obtain a reduction in the fine (or the removal of the whole fine). Pursuant to the New Notice, the GVH may also consider the positive impact of pro-active remedies on sustainability and environmental protection, even if businesses make commitments that are largely unrelated to the violation, provided such commitments serve sustainability and environmental objectives. Although there is clearly an out-of-market scope employed here to support sustainability issues, there is no further clarification in terms of what is meant by 'sustainability objectives', how this positive impact will be calculated, and how these commitments will be assessed or monitored in practice. The near future

85 Viktoria, H.S.E. Robertson, (2022) 'Sustainability: A World-First Green Exemption in Austrian Competition Law'. *Journal of European Competition Law and Practice*, lpab092.

86 Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021—KaWeRÄG 2021 (114/ME), available at: [https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME\\_00114/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00114/index.shtml).

87 Florian Reiter-Werzin and Maria Dreher, 'Amendment of Austrian Competition Law Strengthens Role of Sustainability' (Freshfields), available at: Amendment of Austrian Competition Law Strengthens Role of Sustainability, Florian Reiter-Werzin, Maria Dreher (freshfields.com).

88 Ibid.

89 The GVH, Annual Report of 2020, available at: [file \(gvh.hu\)](http://gvh.hu).

90 The GVH notice related to fines in antitrust cases came into force January, 2021, with an amendment, coming into force on 22 April 2021. Tünde Gönczöl, Áron Károlyi-Szabó, Tihámér Tóth, 'New Antitrust Fine Notice of the Hungarian Competition Authority: Less Predictability?' (JDSUPRA), available at: <https://www.jdsupra.com/legalnews/new-antitrust-fine-notice-of-the-4018240>, accessed 21 May 2021.

should demonstrate the effectiveness of the practical enforcement of this new development.

Given the GVH's other task to ensure conscious consumer decision-making and the improvement of consumer awareness, the GVH also issued a 'green marketing notice' to tackle 'greenwashing'. This notice provides 'dos' and 'don'ts', and sets a clear environmentally-friendly advertising practice based on 'green claims (greenwashing)' in response to increased numbers of environmentally-conscious customers.<sup>91</sup>

### E. Other countries outside the EU: the UK experience

After leaving the EU, the CMA (the Competition and Markets Authority, an independent non-ministerial department, responsible for competition and consumer protection in the UK) has now new challenges due to an expected increase in the caseload for merger control and competition law enforcement, which are addressed in its 2020/2021 annual plan. In terms of sustainability, the UK follows the EU and other Member States pattern. Given the UK's commitment to a legally binding target of net zero emissions by 2050, the CMA's report notes that one of its key priorities are on 'supporting the transition to a low-carbon economy'.<sup>92</sup> Similar to the European Commission, the CMA has also recently launched a consultation<sup>93</sup> on how competition and consumer (the other CMA's role) regimes can better support the UK's Net Zero and sustainability goals. Interestingly, the CMA excludes State aid, the aspect that was included in the European Commission's consultation.

Although sustainability is a broad concept, encompassing a range of objectives beyond the need to address climate change, the CMA quite rightly gives its strategic priority related to climate change by focusing on the 'environmental aspect of sustainability agreements'. This is also reflected in its recent guidance on sustainability agreements and competition law, which also covers industry-wide initiatives and decisions of trade associations for the attainment of sustainability goals, namely

related to climate change.<sup>94</sup> The CMA has indicated that it has drawn inspiration from the ACM guidelines and is keen to support businesses in adapting to climate change, while ensuring that markets remain open to the kind of disruptive innovation assisting in achieving climate change and sustainability goals. The CMA's new guidance notes that businesses may need to cooperate in order to achieve sustainability goals. For instance, businesses may decide to combine expertise to make their products more energy efficient or agree to use packaging material that meets certain standards in order to facilitate package recycling and reduce waste. The guidance remarks that businesses should use a fair standard-setting process when determining industry-based standards to achieve sustainability goals, ensuring access to 'the standard is on fair, reasonable and non-discriminatory terms'.<sup>95</sup> Similar to the other jurisdictions discussed above, the CMA also warns that sustainability agreements must not be used to cover a cartel; no commercially sensitive information beyond what it is necessary to set the standard is allowed. The guidance also reminds about block and individual exemptions indicating that some sustainability initiatives may fall into one of the general categories of agreements (such as research and development or specialisation agreements), which may be exempt from the anticompetitive agreement's prohibition. In terms of an individual exemption, sustainability agreements may still be permitted on an individual basis provided they generate benefits, which are deemed to outweigh the disadvantages of restricted competition under four traditional conditions: (i) the agreement should generate efficiencies (i.e. increase the quality of products); (ii) these efficiencies cannot be achieved with less restrictive means; (iii) they should benefit consumers; and (iv) the agreement should not lead to the elimination of competition in the market. In contrast to the detailed Dutch guidelines, the UK guidance is rather vague with many unanswered questions raised by other NCAs, such as whether out-of-market efficiencies can be taken into account or whether benefit society as a whole rather than a group of consumers affected by the agreement can be included and if yes, how these efficiencies should be evaluated and measured. It is unlikely that this guidance will provide legal certainty for businesses, as a survey conducted by Pinsent Masons in 2020 discovered that 72 per cent of participants wanted

91 The GVH, 'Not All That glitters Is Green: GVH Helps Advertise Products Lawfully' (Press Release, 17 December 2020), available at: [https://www.gvh.hu/en/press\\_room/press\\_releases/press-releases-2020/not-all-that-glitters-is-green-gvh-helps-advertise-products-lawfully](https://www.gvh.hu/en/press_room/press_releases/press-releases-2020/not-all-that-glitters-is-green-gvh-helps-advertise-products-lawfully).

92 The CMA, Annual Report 2021–2022, available at: CMA Annual Plan 2021 to 2022 (publishing.service.gov.uk).

93 29 September—10 November, 2021. The CMA, 'Environmental Sustainability and the Competition and Consumer Law Regimes' (CMA148con, 29 September 2021), available at: Environmental Sustainability and the Competition and Consumer Law Regimes: Advice to the Secretary of State for BEIS (publishing.service.gov.uk).

94 The CMA Guidance 'Environmental Sustainability Agreements and Competition Law' (27 January 2021), available at: Environmental Sustainability Agreements and Competition Law - GOV.UK (www.gov.uk).

95 Ibid.

more explicit guidance as to what is and is not permissible from a competition law perspective.<sup>96</sup>

Finally, given the CMA's other role—consumer protection, it recently published a Green Claims Code directed at protecting consumers from misleading environmental claims amidst concerns over 'greenwashing', similar to the notices previously published by the Dutch and Hungarian authorities.

Although the use of green claims and the provision of environmental information are aimed at preventing misleading claims which could erode consumers' trust, the UK code signals that it also intends to protect businesses from unfair competition and ensure a level playing field. Together with the ACM, the CMA is also co-leading a project under the auspices of the International Consumer Protection Enforcement Network (ICPEN), looking at misleading green claims made on-line.<sup>97</sup>

## V. Conclusion

In light of the European Green Deal and international commitments (i.e. the Paris agreement), sustainability debates are unavoidable and should also be placed in the competition law context. Although sector-specific regulations, taxation and investment (including State aid, due to 'first mover disadvantages' associated with high investment costs) are the main tools to facilitate the transition to a green economy, it seems that an 'all hands-on deck' approach is needed to tackle the climate emergency and isolated *ad hoc* sustainability related exceptions are no longer an option. Sustainability related matters should be conceptualised in competition practice providing legal certainty to industry, defining a clear set of rules to follow.

Given that sustainability is at the top of the EU's agenda, the paper has explored the previous and current

European Commission's approaches to sustainability related matters, especially its recent call for finding the best way to address the interplay of competition law and sustainability. The article has noted that even though the European Commission seems to signal its intention towards more sustainability friendly competition practices, there has not been any express position stated, except some indications in its recent Policy Brief. Therefore, the NCAs are trailblazing their own agendas as discussed in this article. The paper identified five assertive national proposals demonstrating a willingness to incorporate sustainability in the competition law enforcement. However, there are vast differences in approaches among the NCAs in the EU and the UK, ranging from the explicit national draft guidelines (the Netherlands) and less detailed guidelines in the UK; a draft staff discussion paper with further suggestions of experimental sustainability sandbox tools (Greece); addressing sustainability and environmental protection through pro-active remedies (recently presented in Hungary) to enfolding a completely contrasting approach—a legislative route in Austria (i.e. the inclusion of an explicit condition of 'ecologically sustainable or climate-neutral' aspects to the national equivalent of Article 101(3) TFEU). Although this interface debate is still evolving, the near future will demonstrate whether and which approach will be championed by the EU and the UK. Most certainly, a more uniform standpoint is required as different national approaches in isolation create legal uncertainties for businesses.

<https://doi.org/10.1093/jeclap/lpac003>

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96 Alan Davis, 'UK CMA Issues Guidance on Balancing Sustainability and Competition Law' (Out-law news, Pinsent Masons, 2 February 2021), available at: UK CMA issues guidance on balancing sustainability and competition law (pinsentmasons.com).

97 The CMA, Annual Report 2021–2022 (n 92).