



**Stanford – Vienna
Transatlantic Technology Law Forum**

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European Union Law Working Papers

No. 107

**Sustainability Agreements and EU
Competition Law: A Critical Analysis of
Article 101 TFEU and the 2023 Horizontal
Cooperation Guidelines**

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2025

European Union Law Working Papers

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Suggested Citation

This European Union Law Working Paper should be cited as:
İremsu Keskin, Sustainability Agreements and EU Competition Law: A Critical Analysis of Article 101 TFEU and the 2023 Horizontal Cooperation Guidelines, Stanford-Vienna European Union Law Working Paper No. 107, <http://tflf.stanford.edu>.

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Abstract

This thesis explores the intersection of EU competition law and sustainability, focusing on how Article 101 TFEU supports sustainability agreements within the European Green Deal context. By analyzing the revised 2023 Horizontal Cooperation Guidelines, this study examines how these agreements align with EU competition principles while advancing environmental and social objectives. The study evaluates the practical challenges businesses face when incorporating sustainability initiatives into compliance frameworks and considers the role of national competition authorities in encouraging sustainable practices. Using case studies such as the Car Emissions Scandal, the research underscores the delicate balance between enforcing competition law and promoting the EU's sustainability agenda. The findings highlight the need for competition law to evolve in support of innovation, fair markets, and long-term societal goals and provide recommendations for future policies that integrate sustainability more effectively.

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List of Abbreviations

ACM	The Netherlands Authority for Consumers and Markets
AFCA	The Austrian Federal Competition Authority
BMW	Bayerische Motoren Werke
CECED	The European Committee of Manufacturers of Domestic Equipment
EC	European Commission
EEA	European Economic Area
EEC	The European Economic Community
EGD	European Green Deal
EU	European Union
FCO	The Federal Cartel Office
FTF	Fair Tropical Fruits
HCC	Hellenic Competition Commission
NCA _s	National Competition Authorities
NGO	Non-governmental Organization
NO _x	Nitrogen oxide
OECD	Organization for Economic Cooperation and Development
P&G	Procter and Gamble
R&D	Research and Development
SCR	Selective catalytic reduction
SME _s	Small and medium enterprises
TEC	The Treaty Establishing the European Community
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union
UN	United Nations

A. Introduction

Sustainable development stands as one of the most critical imperatives of our time. It represents a delicate balance between meeting present needs and preserving resources for future generations.¹ This approach recognises that economic growth must align with environmental protection and social equity, rather than at their expense. It is essential for addressing global challenges such as climate change, resource depletion, and social inequality.² By prioritising long-term environmental health, economic resilience, and social well-being, sustainable development ensures societies succeed today while securing a better future. The need to accelerate sustainable transformation has become even more urgent, particularly in the aftermath of the COVID-19 pandemic, which significantly disrupted economies and supply chains, and increased social injustices.³ Committing to sustainable practices not only protects natural ecosystems and biodiversity but also contributes to stable economies and equitable communities, creating a world where growth aligns with environmental responsibility and social inclusion. In today's interconnected world, complying with sustainable development principles is not just an ethical choice – it is a strategic necessity for businesses, governments, and communities alike, as sustainability increasingly drives consumer choices, investor decisions, and regulatory frameworks.⁴

¹ World Commission on Environment and Development, *Our Common Future* (The Brundtland Report) (United Nations 1987)

² Springer, 'Sustainability in the EU: International Trade, Renewable Energy and the Rule of Law' <<https://link.springer.com/book/10.1007/978-981-97-7202-5>> accessed 17 January 2025.

³ World Health Organization, 'Impact of COVID-19 on People's Livelihoods, Their Health and Our Food Systems' (13 October 2020) <<https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people%27s-livelihoods-their-health-and-our-food-systems>> accessed 17 January 2025.

⁴ World Economic Forum, 'Why Sustainability is Crucial for Corporate Strategy' (World Economic Forum, 2022) <<https://www.weforum.org/stories/2022/06/why-sustainability-is-crucial-for-corporate-strategy/>> accessed 8 December 2024.

The European Union (EU) has recognised the need for sustainable development, made it one of its main goals, and promoted it through many regulations and initiatives. The most important European treaties the *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU) explicitly include this objective in several places and concretise it. Sustainable development is one of the main goals of the EU,⁵ which supports this objective through various regulations and initiatives. In this context, Article 3(3) TEU emphasises the EU's dedication to sustainability, while Article 3(5) TEU specifies its role in contributing to the sustainable development of the earth and ensuring free and fair trade. Similarly, TFEU reinforces the same commitment. Article 7 TFEU requires the EU to maintain consistency across its policies and activities and consider all its objectives. Article 9 TFEU states that protecting human health must be regarded as in all EU policies and activities. Article 11 TFEU emphasises that environmental protection requirements must be integrated into the development and interpretation of EU policies and activities, particularly to support sustainable development.⁶ Together, these provisions show the EU's dedication to balancing economic, social, and environmental goals.

The first chapter introduces sustainability agreements, their connection to the European Green Deal (EGD), and the role of Article 101 TFEU, while also providing an overview of the evolution of Article 101 TFEU, including prohibitions under Article 101(1) TFEU and exemptions under Article 101(3) TFEU. It emphasises the relevance of sustainability agreements within the current legal framework and concludes with an introduction to the revised Horizontal Guidelines.

⁵ European Union, 'Aims and Values' (European Union) <https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_en> accessed 14 November 2024.

⁶ María Campo Comba, 'EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements' (2022) 3 ELR 190, 193.

The second chapter thoroughly examines the 2023 Horizontal Cooperation Guidelines, focusing on objectives, historical development, and the criteria for assessing sustainability agreements under Article 101 TFEU. It also explores the role of public authorities and emphasises sustainability benefits from environmental, social, and economic perspectives. The third chapter explores how national competition authorities in the Netherlands, Greece, Austria, and Germany approach sustainability agreements, alongside the broader EU perspective. The fourth chapter analyses the Car Emissions Case, discussing its application of Article 101 TFEU and its impact on sustainability and competition law. The final chapter concludes by summarising the findings, offering recommendations, and identifying areas for further research.

This thesis explores the role of EU Competition Law, particularly Article 101 TFEU, in the context of sustainability agreements. It examines how the 2023 Horizontal Cooperation Guidelines influence the application of Article 101 TFEU to these agreements. The research also investigates how sustainability agreements can be aligned with the core objectives of EU competition law. Additionally, it looks at the practical challenges companies face when trying to align their sustainability initiatives with competition law requirements under the 2023 Horizontal Cooperation Guidelines.

Having laid the groundwork by defining sustainability and sustainable development, while emphasising their significance in EU policies, the following will explore how these principles are applied across different EU Member States. It focuses on the EGD as the cornerstone of the EU's sustainability agenda and examines the integration of sustainability agreements within the framework of the EU Competition Law. The following chapters include a comprehensive analysis of how environmental objectives are integrated into market regulations, explaining how theoretical concepts are applied in practice across the EU.

B. Chapter 1: Sustainability Agreements and the European Green Deal

As part of the growing global recognition of the need for urgent action on climate change and sustainable development, the EU has taken bold steps to lead the charge through its flagship initiative⁷, the European Green Deal (EGD). This chapter explores the intersection of sustainability agreements and the EGD. It begins with an overview of the EGD and its connection to sustainability agreements and consumer welfare. This is followed by an assessment of Article 101 TFEU. The chapter concludes with a summary of the 2023 Horizontal Cooperation Guidelines.

a. Overview of the European Green Deal

The EGD is the EU's new growth strategy, focused on building a fair and prosperous society while ensuring a strong and sustainable economy. The EGD builds on the commitments of the Paris Agreement, adopted in 2015, which establishes a global framework to address climate change and promote actions toward a sustainable, low-carbon future.⁸ This initiative reconsiders many aspects to improve the well-being of all living species – people, animals, plants, and ecosystems. The EGD recognises the importance of protecting all forms of life on the planet, guided by the principle of ‘no one is left behind’.⁹ Introduced by the European Commission (EC) President Ursula von der Leyen in late 2019, the EGD includes a comprehensive set of initiatives, strategies, and legislative actions intended to transform the EU into a climate-neutral, resource-efficient, and socially equitable economy by 2050.¹⁰ The EGD aligns with the legally binding Paris Agreement, which obligates signatories to take national measures toward addressing climate

⁷ Constanze Fetting, ‘The European Green Deal’ (ESDN Report, ESDN Office, Vienna, December 2020).

⁸ United Nations Framework Convention on Climate Change (UNFCCC), ‘The Paris Agreement’ (2015) <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 24 January 2025.

⁹ Constanze Fetting, ‘The European Green Deal’ (ESDN Report, ESDN Office, Vienna, December 2020).

¹⁰ European Commission, ‘A European Green Deal’ (European Commission, 11 December 2019) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en> accessed 16 October 2024.

change, such as reducing greenhouse gas emissions and achieving climate resilience.¹¹ The EGD builds on these commitments by integrating legally enforceable EU-level actions, including the aim of achieving net-zero emissions by 2050. The EGD itself is a policy framework and not legally binding as a standalone document. However, it leads to the establishment of binding legislation such as the EU Climate Law¹², Renewable Energy Directive, and Energy Efficiency Directive. These laws impose specific obligations on Member States and businesses. Non-compliance with these laws can result in penalties. For example, businesses under the EU Emissions Trading System must meet emissions caps, and failure to do so results in financial penalties.¹³ Even though, the EGD itself does not create legal obligations, the legislation derived from it carries enforceable requirements and not following them can result in legal and financial penalties. In January 2020, after detailed discussions, the European Parliament officially approved the EGD, showing significant institutional backing for this major initiative.¹⁴ The main objectives outlined below form the fundamental principles of the EGD, providing a clear framework for the EU's shift towards sustainability. These interconnected objectives are detailed as follows:

The EGD is built around eight fundamental principles that guide the EU's transition to sustainability. These include increasing the EU's climate ambitions for 2030 and 2050 to achieve climate neutrality and ensure clean, affordable, and secure energy for all Member States. The EGD also aims to guide the industry towards a clean and circular economy model while implementing

¹¹ United Nations Framework Convention on Climate Change (UNFCCC), 'The Paris Agreement' (2015) <<https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>> accessed 24 January 2025.

¹² European Commission, 'European Climate Law' (Climate Action) <https://climate.ec.europa.eu/eu-action/european-climate-law_en> accessed 23 January 2025.

¹³ European Commission, 'EU Emissions Trading System (EU ETS)' (Factsheet) <https://climate.ec.europa.eu/system/files/2016-12/factsheet_ets_en.pdf> accessed 23 January 2025.

¹⁴ European Parliament, 'Resolution of 15 January 2020 on the European Green Deal (2019/2956(RSP))' (2020) P9_TA(2020)0005 <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0005_EN.html> accessed 13 January 2025.

energy-efficient building and renovation practices to reduce environmental impact. Additionally, it works towards a zero-pollution goal for a healthier, toxic-free environment, while protecting and restoring the EU's ecosystems and biodiversity to maintain ecological balance. The 'Farm to Fork'¹⁵ strategy focuses on creating fair, healthy, and environmentally friendly food systems, while efforts to develop sustainable and smart transportation solutions aim to reduce the impact of mobility. Together, these goals create a detailed plan for Europe's sustainable transformation, addressing environmental, economic, and social challenges.¹⁶

The transition outlined in the EGD must be fair and inclusive. The focus is on creating clean products and technologies to address climate change. Efforts in these areas are expected to drive innovation. Eventually, the EGD aims to establish the EU as a global leader in sustainable development, ensuring a balance between environmental, social, and economic goals for the well-being of present and future generations. The EGD aims to protect citizens from environmental threats and their long-term impacts while building a sustainable future. By creating a fair and inclusive environment, the initiative shows how environmental protection and social welfare are integrated. This positions the EGD at the heart of Europe's economic policy, highlighting the EU's commitment to prioritising both environmental sustainability and the well-being of its citizens.¹⁷

¹⁵ It seeks to reduce the environmental and climate impact of primary production while ensuring fair economic returns for farmers, fishers, and aquaculture producers. Key targets include significantly reducing the use and risk of chemical pesticides, decreasing nutrient losses and fertiliser use, cutting sales of antimicrobials, and increasing the area of agricultural land under organic farming. See, European Commission, 'Farm to Fork Strategy: Sustainable Food Production' (Food Safety) <https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/sustainable-food-production_en> accessed 23 January 2025.

¹⁶ Constanze Fetting, 'The European Green Deal' (ESDN Report, ESDN Office, Vienna, December 2020).

¹⁷ Ibid.

b. Intersection of Competition Law and Sustainable Development Goals

The EGD is an ambitious plan for significant environmental change. To achieve its sustainability goals, a solid legal framework that harmonises economic competition with broader societal objectives is necessary. This analysis explores how traditional legal tools, particularly competition law, can be adapted to support the EU's sustainability agenda, with a focus on Article 101 TFEU as a mechanism for achieving sustainability goals. This article prohibits anti-competitive agreements, yet they permit exemptions under Article 101(3) TFEU for agreements that promote collective benefits, such as those aimed at improving sustainability objectives. An assessment of Article 101 TFEU will be in the subsequent chapter, examining how sustainability agreements can be structured to align with competitive market practices while supporting the EU's broader environmental and societal goals.

i. Sustainability Agreements

Sustainability agreements include any type of horizontal cooperation between companies aimed at achieving sustainability objectives, regardless of the collaboration's structure.¹⁸ These agreements are examined under the 2023 Guidelines concerning the applicability of Article 101 TFEU to horizontal cooperation agreements, which will be analysed in the subsequent chapter. Although the updated Guidelines address sustainability agreements, they are not categorised distinctly from other types of horizontal cooperation agreements in the application of Article 101 TFEU. According to the guidelines, when a horizontal cooperation agreement traditionally falls under the types of agreements described in the prior chapters of the Guidelines – such as research and development (R&D) agreements, production agreements, purchasing agreements,

¹⁸ European Commission, 'Questions and Answers on Adoption of the New Horizontal Block Exemption Regulations and Horizontal Guidelines' (European Commission, 21 July 2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3014> accessed 5 December 2024.

commercialisation agreements, information exchange agreements, standardisation agreements, or standard terms agreements – and aims to achieve a sustainability objective, it should be assessed using the guidance provided in the applicable preceding chapters, along with the directives outlined in the ‘Sustainability Agreements’ chapter of the Guidelines.¹⁹ Such agreements often include objectives that contribute to addressing the issue of climate change, reducing pollution, defending human rights, preventing food waste, protecting animal welfare, and limiting the use of natural resources. These objectives align with the sustainable development goals promoted by the United Nations (UN), adopted by The Organization for Economic Cooperation and Development (OECD) and the EU.²⁰

Sustainability agreements are generally subject to Article 101 TFEU, which prohibits agreements that restrict competition. However, the 2023 Horizontal Cooperation Guidelines introduce specific rules for assessing these agreements, recognising their potential to promote important societal objectives like sustainability. These guidelines ensure that while competition is maintained, sustainability agreements that contribute to broader environmental and social benefits can still comply with competition law under certain conditions. It is crucial to note that not all sustainability agreements necessarily restrict competition or are considered anti-competitive under Article 101 TFEU. However, if a sustainability agreement has the potential to restrict competition among competitors, it must be carefully evaluated under Articles 101(1) and 101(3) TFEU. Article 101(1) TFEU examines whether the agreement has anti-competitive effects, while Article 101(3)

¹⁹ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C 259/01, para 523.

²⁰ Portuguese Competition Authority, ‘Best Practices Guide on Sustainability Agreements’ <https://www.concorrenca.pt/sites/default/files/documentos/Best_Practices_Guide_on_Sustainability_Agreements.pdf> accessed 11 December 2024.

TFEU provides a framework for exemptions if the agreement provides significant benefits that outweigh these effects.²¹

Sustainability agreements often focus on long-term goals, driving innovation and providing consumers with better and more durable products. These benefits frequently come from improved production processes and supply chain efficiency, which can also lead to lower costs.²² Furthermore, sustainability agreements can contribute to a more stable resilient market environment, which benefits consumers by reducing the instability of prices and ensuring more consistent access to goods and services.²³ These types of agreements align the interests of businesses with the needs of consumers. As a result, these efforts lead to the development of sustainability goals while improving both competition and consumer welfare.

ii. Consumer Welfare

Consumer welfare is one of the main objectives of competition law. In the *General Guidelines*, it is stated that ‘the objective of Article 81 (now Article 101 TFEU) is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.’²⁴ The relationship between EU competition policy and consumer welfare is foundational to the EU’s approach to economic regulation. EU competition policy aims to prevent anti-competitive practices that can harm consumers, such as monopolies, cartels, and

²¹ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C 259/01.

²² Bain & Company, ‘Lower Costs, Faster Adoption: Closing the Sustainable Innovation Gap’ (Bain & Company, 2023) <<https://www.bain.com/insights/lower-costs-faster-adoption-closing-the-sustainable-innovation-gap>> accessed 13 January 2025.

²³ Deloitte Insights, ‘Sustainability Regulation Outlook’ (Deloitte, 2023) <<https://www2.deloitte.com/us/en/insights/environmental-social-governance/sustainability-regulation-outlook.html>> accessed 13 January 2025.

²⁴ Svend Albæk, ‘Consumer Welfare in EU Competition Policy’ (European Commission, 2013) <https://competition-policy.ec.europa.eu/system/files/2021-09/consumer_welfare_2013_en.pdf> accessed 13 January 2025.

mergers that might disrupt competition. EU competition policy aims to create a fair and competitive market environment that benefits consumers by supporting lower prices, better product quality, and innovation.²⁵ This policy directly affects consumer welfare. In a competitive market, consumers can benefit from a wider range of goods and services. Competition also encourages the market players to compete on improving their products and strategies and expanding their market share.

Furthermore, the EU competition policy protects consumers from the abusive behaviours of dominant market players. The EU contributes to the maintenance of a market in which no party may impose conditions that would negatively affect consumers by monitoring and punishing unfair behaviours, such as predatory pricing or exclusive agreements that prevent the entry of new competitors into the market.²⁶

Competition law protects consumers by ensuring fair competition and guaranteeing that multiple options remain available in the market when properly enforced. Instead of being limited to just one choice, this allows consumers to choose products based on their quality. Essentially, the EU's competition policy creates a market that mainly serves consumer interests and distributes economic advantages equally.²⁷ This policy actively supports the EU's comprehensive objectives of improving social welfare and encouraging sustainable economic growth by focusing on efficiency and innovation.

²⁵ European Commission, 'Why Competition Policy Is Important for Consumers' (European Commission) <https://competition-policy.ec.europa.eu/about/what-competition-policy/why-competition-policy-important-consumers_en> accessed 13 January 2025.

²⁶ European Commission, 'Article 102 Investigations' (European Commission, 13 January 2023) <https://competition-policy.ec.europa.eu/antitrust-and-cartels/procedures/article-102-investigations_en> accessed 21 January 2025.

²⁷ European Parliament, 'Competition Policy' (European Parliament) <<https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy>> accessed 13 January 2025.

This emphasis on competitive markets and consumer welfare is consistent with the EU's sustainability objectives, as it promotes economic practices that are not just efficient and consumer-friendly but also environmentally conscious and socially responsible. Competition law plays a crucial role in achieving sustainability goals by encouraging fair competition, and innovation and promoting environmentally responsible business practices. However, competition law should not be regarded as the main tool for achieving these goals. The main object here is to analyse how competition law might contribute to sustainability. This chapter will investigate how competition law might encourage sustainable development goals and identify the main tools for accomplishing them. It is apparent that consumer welfare and sustainability goals are interconnected and should not be seen as conflicting goals.²⁸

c. Assessment of Article 101 TFEU

Understanding the extent of Article 101 TFEU is essential to analysing sustainability agreements. This article plays a fundamental role in maintaining competition within the EU's internal market by prohibiting actions that may disrupt competition.

i. Summary of the Evolution of Article 101 TFEU

The development of Article 101 of the TFEU shows the evolving history of EU competition law. First introduced as Article 85 in the *Treaty of Rome* in 1957²⁹, it initially aimed to prohibit anti-competitive agreements between undertakings. In the 1990s, following the *Maastricht Treaty*, Article 85 of the *Treaty of Rome* was renumbered as Article 81 in the *Treaty Establishing the*

²⁸ María Campo Comba, 'EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements' (2022) 3 ELR 190.

²⁹ Treaty Establishing the European Economic Community (Treaty of Rome, as signed 25 March 1957, entered into force 1 January 1958).

European Community (TEC)³⁰, although its content remained largely the same. The *Lisbon Treaty*, which came into force in 2009, renumbered Article 81 TEC as Article 101 TFEU.³¹ The renumbering was part of a larger effort to reorganise EU treaties, reflecting the evolving legal framework of European integration while preserving the foundational competition law principles from the *Treaty of Rome*. Despite these changes, the core principles remained consistent: preventing agreements that distort competition, restrict trade between Member States, or harm consumer welfare.

ii. Article 101(1) TFEU – Prohibitions

Article 101(1) TFEU prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have as their object or effect the restriction, prevention, or distortion of competition within the internal market. Examples include fixing purchasing or selling prices or trading conditions; limiting or controlling production, markets, technological development, or investment; market sharing or allocating sources of supply; applying dissimilar conditions to equivalent transactions in a manner that places certain parties at a disadvantage; or forcing supplementary obligations on parties, unrelated to the subject of the contract, as a condition for signing agreements.³² Such practices, often referred to as tying or bundling, are considered anti-competitive when they place parties at a disadvantage or distort competition in the market.³³

³⁰ European Union, ‘Treaty Establishing the European Community (Nice Consolidated Version) - Article 81’ (EUR-Lex) <https://eur-lex.europa.eu/eli/treaty/tec_2002/art_81/oj/eng> accessed 21 January 2025.

³¹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (signed 13 December 2007, entered into force 1 December 2009) [2007] OJ C306/01.

³² Article 101, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/88.

³³ European Commission, ‘Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings’ (2009) OJ C45/7.

Article 101(1) TFEU helps promote increased choice, innovation and better prices for the benefit of the market and consumers by ensuring fair competition. It recognises that while market competition is important, competition law can sometimes better serve broader societal goals, especially in promoting sustainable economic practices.

An agreement may restrict competition under Article 101(1) TFEU, but it does not necessarily mean that it necessarily restricts competition. First, it must be determined whether the anti-competitive conduct is by object or by effect. If there is a restriction by object, the primary purpose of the agreement is to restrict competition, regardless of its actual effects on the market. The assessment should focus on the agreement itself. Examples of this type of restriction include price-fixing, market sharing, or agreements to limit production or supply.³⁴ When there is a restriction by object, it is considered inherently harmful to the competition in the market, and it is not necessary to conduct a detailed market investigation to prove the harm, as it is against the laws by default.

On the other hand, restrictions by effect require evidence that the agreement has a noticeable negative impact on competition in the market. The key focus is on the consequences of the agreement, necessitating a comprehensive analysis of its actual or potential impact. Within this framework, the market power of the parties, the structure of the relevant market, and competitive constraints are analysed.³⁵ Exclusive supply agreements and non-compete clauses in contracts are examples of potential restrictions by effect, as their anti-competitive nature depends on a detailed analysis of their actual or potential impact on competition in the specific market context.

³⁴ European Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97 <[https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0427\(07\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0427(07)&from=EN)> accessed 21 January 2025.

³⁵ Ibid.

iii. Article 101(3) TFEU – Exemptions

Article 101(3) TFEU provides exemptions from the prohibitions under Article 101(1) TFEU for agreements that meet four cumulative conditions: contributing to economic or technical progress, enhancing product production or distribution, and fairly sharing the resultant benefits with consumers, provided they do not impose unnecessary restrictions or eliminate substantial competition.³⁶ Significantly, the burden of proof lies with the parties to show compliance with these conditions.³⁷

Examining how sustainability agreements can align with Article 101(3) TFEU is crucial for advancing the discussion. These agreements aim to achieve sustainability objectives within the framework of the EGD while complying with EU Competition Law. A broader interpretation³⁸ of Article 101(3) TFEU is particularly important to integrate sustainability goals effectively into competition law. This perspective recognises the potential for agreements to contribute to environmental, social, and economic progress without undermining market fairness or consumer welfare. This subchapter introduces the legal framework of Article 101(3) TFEU and highlights its relevance to sustainability agreements, while the next chapter³⁹ provides a comprehensive analysis of each exemption and its connection to specific sustainability objectives.

iv. Relevance of Sustainability Agreements in Current Legal Framework

Although cooperation between competitors is against Article 101(1) TFEU, it might be an effective strategy for achieving certain sustainability objectives. The possible success of

³⁶ Article 101, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/88.

³⁷ 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.

³⁸ María Campo Comba, 'EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements' (2022) 3 ELR 190.

³⁹ See, Chapter 2, Section C, 'Detailed Assessment of Sustainability Agreements under the Revised Guidelines', Sub-section i, point 3(a).

sustainability agreements under this framework depends significantly on the specific objectives of the agreements. It may allow for appropriate consideration of sustainability agreement objectives in some cases, particularly when focusing on agreements that pursue well-defined goals derived from international or national standards, or specific objectives that are not already mandatory for the companies involved.⁴⁰

Sustainability agreements are also significant in connecting corporate responsibility with existing legal and regulatory systems. By allowing competitors to work together on global challenges such as reducing carbon emissions or switching to renewable energy, these agreements create opportunities to address issues that exceed the capacity of individual companies to solve. Such efforts often go beyond immediate market competition and focus on creating long-term benefits for society. However, their effectiveness depends on how well legal frameworks like Article 101(3) TFEU can support sustainability goals while still ensuring fair competition. This balance is essential to prevent situations where collaboration could unintentionally reduce innovation or harm consumers.

d. Introduction to Horizontal Guidelines

The EC revised the Horizontal Cooperation Guidelines in July 2023, replacing the 2010 guidelines to address changing market conditions and new challenges. These substantially revised guidelines provide a framework for assessing various horizontal cooperation agreements, including joint production and R&D, within the context of EU competition law. This update introduces a new section about sustainability agreements to ensure that the agreements align with environmental goals without restricting competition. Additionally, the guidelines expand on the

⁴⁰ María Campo Comba, 'EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements' (2022) 3 ELR 190.

competitive effects of data sharing in digital markets. The guidelines aim to simplify compliance by providing clearer definitions and practical examples.⁴¹

Within this framework, sustainability agreements are collaborative structures designed to achieve objectives related to social, and economic, environmental sustainability.⁴² The 2023 Horizontal Cooperation Guidelines explain that sustainability objectives encompass a wide range of goals, including addressing climate change through the reduction of greenhouse gas emissions, reducing pollution, conserving natural resources, protecting human rights, ensuring a living income, fostering resilient infrastructure and innovation, reducing food waste, promoting healthy and nutritious food, and ensuring animal welfare.⁴³ Sustainability agreements are defined as ‘any horizontal cooperation agreement that pursues a sustainability objective, regardless of the form of the cooperation’.

This comprehensive approach aligns with the EU’s commitment to integrating sustainability into its policies. While the UN Resolution 66/288, titled ‘The Future We Want’, emphasises global sustainability goals, the EC’s guidelines provide specific frameworks for how such objectives can be pursued within the context of EU competition law. Therefore, the Commission’s broad interpretation is primarily based on its guidelines, which reflect and support international sustainability commitments.⁴⁴ This supports the EU's digital and green transitions and makes them

⁴¹ European Commission, ‘Questions and Answers on Adoption of the New Horizontal Block Exemption Regulations and Horizontal Guidelines’ (European Commission, 21 July 2023) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_3014> accessed 5 December 2024.

⁴² María Campo Comba, ‘EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements’ (2022) 3 ELR 190.

⁴³ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C 259/1.

⁴⁴ Taylor Wessing, ‘Sustainability Agreements’ (Taylor Wessing, September 2024) <<https://www.taylorwessing.com/en/insights-and-events/insights/2024/10/sustainability-agreements>> accessed 1 December 2024.

more relevant to today's economy. A more detailed examination of this topic will be in the next chapter.

e. Conclusion

The EGD reflects the EU's ambitious vision for achieving sustainability by harmonising environmental, social, and economic goals. As part of this broader effort, the intersection of competition law and sustainability agreements plays a critical role. By integrating sustainability objectives into Article 101 TFEU and the revised 2023 Horizontal Cooperation Guidelines, the EU provides a structured framework for advancing innovation, reducing environmental harm, and promoting social welfare, all while maintaining competitive markets. These guidelines not only clarify the legal frameworks for businesses to collaborate on sustainability goals but also emphasise the importance of balancing collective benefits with competition principles. By aligning legal frameworks with the EGD, the EU emphasises its commitment to addressing global challenges while ensuring a fair and inclusive market environment for present and future generations.

C. Chapter 2: Analysis of Sustainability Agreements under the 2023 Horizontal Cooperation Guidelines

As part of the revision of the Horizontal Cooperation Guidelines in 2023, Chapter 9 was introduced, focusing on sustainability agreements. This chapter provides guidelines for assessing the competitive aspects of agreements between competitors that aim to achieve sustainability goals.⁴⁵ In the following, the objectives and scope of the revised guidelines are analysed, their historical development is explored, a detailed assessment of sustainability agreements is provided, and the recognition of sustainability benefits under Article 101(3) TFEU is discussed.

a. Objectives and Scope of the Revised Guidelines

The revised guidelines aim to clarify and update the rules on horizontal cooperation agreements considering recent legal developments and changes in market dynamics. A significant update is the inclusion of sustainability agreements within competition policy, emphasising the EU's commitment to the EGD and its wider objective of promoting sustainable economic growth. These guidelines establish a framework for evaluating the compliance of horizontal cooperation agreements that aim to achieve sustainability objectives within competition law. They provide enhanced legal certainty and guidance for businesses engaged in horizontal cooperation by presenting clear rules and detailed examples. This assistance is essential since it clarifies for businesses what collaboration agreements are permitted by EU competition law. Furthermore, by prohibiting practices that might harm competition and encouraging agreements that result in innovation, increased efficiency and benefits for consumers, the rules aim to create a balance.

⁴⁵ European Commission, *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements* [2023] OJ C259/1, para 515.

b. Historical Development of the Guidelines

The European Economic Community (EEC) was established in 1957 by the *Treaty of Rome*, which also set the foundations for EU competition law. The Treaty established rules to guarantee fair competition within the common market⁴⁶ by eliminating distortions and encouraging economic integration. The main clauses dealing with competition law were Articles 85 and 86 of the EEC Treaty (now Articles 101 and 102 TFEU). While Article 85 of the EEC Treaty was prohibiting agreements, decisions and concerted practices that restrict competition, it allowed for exemptions if the agreements contribute to improving production, distribution, or technical progress while benefiting consumers. This article was the foundation of Article 101 TFEU. The principles which set the legal framework for competition law remain at the core of the EU's competition policy, enforced by regulations and the EC. However, the *Treaty of Rome* did not include any detailed guidelines for enforcement and exemptions.⁴⁷

Later, in 1962, Regulation No.17 was introduced to provide the procedural framework for implementing Articles 85 and 86 of the EEC Treaty. The legal foundation for maintaining antitrust laws and guaranteeing competition in the common market was established by this regulation. It also introduced a notification and exemption system that allowed businesses to submit requests for exemptions under Article 85(3) of the EEC Treaty, if their agreements improved consumer benefits and economic efficiency. This rule granted the EC the authority to conduct investigations, implement sanctions, and guarantee that competition laws are applied consistently between

⁴⁶ The EEC Treaty established a common market based on the free movement of goods, people, services and capital to work towards integration and economic growth through trade. See, European Union, 'Summary of the Treaty Establishing the European Economic Community (EEC Treaty)' (EUR-Lex) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:xy0023>> accessed 12 December 2024.

⁴⁷ European Union, 'Summary of the Treaty Establishing the European Economic Community (EEC Treaty)' (EUR-Lex) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:xy0023>> accessed 12 December 2024.

Member States.⁴⁸ For the first time, the idea of horizontal cooperation agreements was introduced within the framework of EU competition law by this regulation. It offered a framework for evaluating agreements between competitors with similar market positions.

In the following years, several changes were implemented as the concept of horizontal cooperation agreements evolved to address the need for clarity on permissible cooperative practices among competitors under EU competition law. Each regulatory change addressed previously unresolved questions about prohibited anti-competitive practices in EU competition law.

Regulation (EEC) No. 2821/71 established a structured legal framework for granting exemptions under Article 85(3) of the EEC Treaty. It allowed certain horizontal agreements that improved efficiency, productivity, or technical progress. The regulation allows competitors to collaborate in ways that could improve market efficiency and drive innovation through specific exemptions.⁴⁹

Building on this foundation, Commission Regulations 417/85 and 418/85 introduced specific block exemptions for specialisation and R&D agreements, providing further clarity on the types of cooperative practices that qualify for exemptions under Article 85(3) of the EEC Treaty. Regulation 417/85 encouraged businesses to enter into specialisation agreements, which allowed them to focus resources on specific production areas, improve efficiency, reduce costs, and benefit consumers.⁵⁰ Regulation 418/85 encouraged joint R&D efforts, as well as innovation and technical

⁴⁸ Council Regulation (EEC) 17/62 of 6 February 1962 First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ P 13/204.

⁴⁹ Council Regulation (EEC) 2821/71 of 20 December 1971 on the Application of Article 85(3) of the Treaty to Categories of Agreements, Decisions and Concerted Practices [1971] OJ L285/46.

⁵⁰ Commission Regulation (EEC) 417/85 of 19 December 1984 on the Application of Article 85(3) of the Treaty to Categories of Specialization Agreements [1985] OJ L53/1.

progress while preventing unnecessary duplication of effort.⁵¹ These exemptions were effective for 13 years, with retroactive applicability, giving businesses a structured timeframe to align their agreements with EU requirements while allowing for periodic review and updates. This was an important step towards harmonising competition policy and supporting innovation and efficiency in the EU market. These rules were further extended by Regulation 2236/97, which ensured continued stability while the framework was reviewed for relevance.⁵²

To modernise and adapt the framework, Regulations 2658/2000 and 2659/2000 replaced outdated provisions. These updates were designed to reflect changing market structures and economic realities, ensuring they remained relevant and effective. Regulations 2658/2000 and 2659/2000 introduced important changes to EU competition policy, focusing on encouraging innovation and improving efficiency. Regulation 2659/2000 encouraged joint R&D activities by allowing higher market thresholds, making it easier for businesses to collaborate without limiting competition.⁵³ At the same time, Regulation 2658/2000 supported efficiency and consumer benefits by allowing specialisation agreements but prohibiting restrictive practices like price fixing and market allocation.⁵⁴ Both regulations made sure that block exemptions were only applied when competition remained strong, setting clear limits to avoid excluding competitors or harming market diversity. With a ten-year validity, these rules provided businesses with a stable and predictable

⁵¹ Commission Regulation (EEC) 418/85 of 19 December 1984 on the Application of Article 85(3) of the Treaty to Categories of Research and Development Agreements [1985] OJ L53/5.

⁵² Commission Regulation (EC) 2236/97 of 10 November 1997 amending Regulations (EEC) 417/85 and 418/85 on the Application of Article 85(3) of the Treaty to Categories of Specialization Agreements and Research and Development Agreements [1997] OJ L306/12.

⁵³ Commission Regulation (EC) 2659/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Research and Development Agreements [2000] OJ L304/7.

⁵⁴ Commission Regulation (EC) 2658/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Specialization Agreements [2000] OJ L304/3.

framework to align their agreements with EU requirements.⁵⁵ Overall, these revisions modernised the EU's approach to horizontal agreements, making it more relevant to today's market needs.

The 2001 Guidelines on the Applicability of Article 81 TEC (ex-Article 85 of the EEC Treaty) had a major influence on how horizontal cooperation agreements were evaluated under EU competition law. They built on the framework established by Regulations 2658/2000 and 2659/2000, offering additional guidance on the evaluation of horizontal cooperation agreements and the block exemptions introduced by these regulations. By providing a clear structure for analysis, the guidelines helped businesses and regulators better understand the potential benefits, such as efficiency gains and innovation, and the risks, such as price-fixing and market sharing. They covered various types of agreements, including R&D, production, purchasing, standardisation, and to a lesser extent, environmental collaborations, focusing on their effects on market competition. Instead of changing the exemptions, the guidelines adapted economic criteria, such as market power and market structure. This made it easier to evaluate agreements more precisely based on their real impact.⁵⁶

Building on the foundation laid by the 2001 Guidelines, the 2011 Guidelines on the Applicability of Article 101 TFEU (ex-Article 81 TEC) had a significant impact on the evaluation of horizontal cooperation agreements. By refining the economic approach, it helped businesses and regulators better differentiate between agreements that inherently restrict competition 'by object', such as price-fixing, and those that restrict competition 'by effect'. The Guidelines reinforced the criteria under Article 101(3) TFEU, including the efficiency gains, indispensability,

⁵⁵ Commission Regulation (EC) 2658/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Specialisation Agreements [2000] OJ L304/3; Commission Regulation (EC) 2659/2000 of 29 November 2000 on the Application of Article 81(3) of the Treaty to Categories of Research and Development Agreements [2000] OJ L304/7.

⁵⁶ Commission Notice, 'Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements' [2001] OJ C3/2.

and consumer benefits, ensuring fair and consistent assessments. They also expanded examples of acceptable and problematic practices, making compliance clearer and helping businesses in self-assessment. Additionally, the Guidelines addressed contemporary challenges, such as digital data exchange and intellectual property, ensuring that the rules remained relevant in a rapidly evolving economic landscape. Overall, they provided clarity, fairness and adaptability, promoting collaboration where it benefits the market while protecting competition.⁵⁷

Finally, expanding upon the updates from earlier guidelines, the 2023 Horizontal Cooperation Guidelines represent a significant advancement in addressing current challenges and opportunities in horizontal agreements. They provide clearer examples and practical advice on areas like standardisation, R&D, and purchasing agreements, making the rules easier for businesses to understand and follow. The new chapter on sustainability agreements, which highlights the increasing significance of environmental factors in economic activities, is a significant contribution. The following offers detailed guidance on how agreements aimed at achieving sustainability goals can comply with competition rules, balancing environmental benefits with the need to protect market dynamics and consumer interests.⁵⁸

To stay relevant in the digital economy, the guidelines provide clear guidance on assessing data-sharing agreements, environmental collaborations, and the characteristics of digital markets. They also address important issues such as joint ventures and platform economies, allowing businesses to deal with the challenges of modern collaboration. By integrating sustainability and other emerging issues into the framework, the 2023 Horizontal Cooperation Guidelines highlight

⁵⁷ European Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements' [2011] OJ C 11/1.

⁵⁸ European Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements' [2023] OJ C259/1.

the EU's commitment to promote innovation and collaboration while aligning competition policy with broader societal goals, such as environmental protection and technological advancement. They also create a balance between developing beneficial cooperation and maintaining competition while ensuring both market efficiency and consumer interests are protected. Overall, they ensure that horizontal cooperation agreements remain a force for both economic progress and sustainability in the context of competition law.⁵⁹ A more in-depth assessment of sustainability agreements, based on the guidelines, will be provided in the following subchapter.

c. Detailed Assessment of Sustainability Agreements under the Revised Guidelines

A comprehensive evaluation of sustainability agreements is essential under the 2023 Horizontal Cooperation Guidelines, reflecting their growing significance in achieving environmental and social objectives. The revised Guidelines set out detailed criteria and practical examples to guide businesses and regulators in ensuring compliance with Article 101 TFEU. This chapter explores how sustainability agreements can satisfy the requirements for exemptions by examining both their potential benefits and risks. To determine whether sustainability agreements can qualify for exemptions, factors such as reduced environmental impact, increased resource efficiency and level of competition restriction are evaluated. The examples given will clarify how these concepts can be applied in practice while balancing sustainability goals and maintaining competitive markets.

⁵⁹ European Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements' [2023] OJ C259/1.

i. Criteria and methodology

The 2023 Horizontal Cooperation Guidelines explain how to assess sustainability agreements under Article 101 TFEU. These agreements are examined to guarantee their complete compatibility with competition rules, simultaneously furthering large EU objectives such as those presented in the EGD. These Guidelines emphasise that agreements should not impose unnecessary restrictions on competition; however, agreements may receive exemptions under Article 101(3) TFEU if they show several significant efficiencies, large benefits for consumers and compliance with all indispensability requirements and measures protecting fair competition.⁶⁰

The Guidelines require a detailed economic analysis to evaluate sustainability agreements. This includes looking at how the agreement affects price, output, innovation, and market access. In addition, the analysis focuses on identifying efficiency gains, such as cost reductions, improved resource efficiency, and technological progress. Consumer welfare is prioritised, specifically analysing whether the agreement provides measurable benefits to consumers, for example, better product quality, enhanced sustainability, or improved services.⁶¹

To consider sustainability agreements as beneficial, businesses must fulfil some specific criteria. These include showing measurable environmental improvements, such as reduced emissions and efficient resource management. In addition, agreements should also improve social welfare, such as ensuring fair access to resources or improving labour conditions. Any restrictions within the agreements must be proportional and necessary to achieve the stated sustainability

⁶⁰ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1.

⁶¹ Ibid.

goals. Transparency and cooperation between parties are important to ensure that parties clearly define their goals and that outcomes align with both market and environmental priorities.⁶²

1. Sustainability agreements that are unlikely to raise competition concerns

Not all sustainability agreements between competitors fall under Article 101(1) TFEU. Agreements that do not harm competition in terms of price, quantity, quality, choice, or innovation generally do not raise concerns. The Guidelines provide a non-exhaustive list of such agreements. Examples include agreements to comply with binding international treaties or conventions, such as prohibitions on child labour or harmful pollutants, particularly when such measures support sustainability due diligence obligations. Agreements focused on internal corporate practices, such as eliminating single-use plastics or reducing energy use in business premises, also fall outside the scope of Article 101(1) TFEU. These Guidelines emphasise that agreements must not unnecessarily restrain competition. Similarly, creating databases with general information about suppliers or distributors, as long as they do not require parties to buy from or sell to specific entities, is typically acceptable. Lastly, industry-wide awareness campaigns that educate consumers on the environmental impact of their choices, without promoting specific products, are also unlikely to restrict competition. These examples illustrate how sustainability agreements can avoid competition law concerns when carefully structured.⁶³

⁶² European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1.

⁶³ *Ibid*, paras 527-531.

2. Assessment of sustainability agreements under Article 101(1) TFEU

a. General principles

All agreements are assessed under Article 101(1) TFEU to determine their impact on competition. While sustainability agreements are initially assessed under Article 101(1) TFEU to determine if they restrict competition, they are typically addressed under Article 101(3) TFEU when considering whether their broader societal benefits justify an exemption from the prohibition. If a cooperation agreement claims to pursue a sustainability objective, this must be considered when determining if it restricts competition by object. If the agreement's sustainability goal creates reasonable doubt about its harmful nature, its effects on competition must be evaluated. However, this does not apply if the agreement is used to hide clear anti-competitive practices like price fixing, market sharing, or output restrictions. The assessment of effects considers factors such as the parties' market power, the extent to which the agreement limits independent decision-making, market coverage, the exchange of sensitive information, and any significant impact on price, output, variety, quality, or innovation. Even if an agreement restricts competition, it may still qualify for an exemption under Article 101(3) TFEU if all four conditions of the provision are met.⁶⁴

b. Sustainability standardisation agreements

Sustainability standardisation agreements are a type of sustainability agreement where competitors collaborate to establish standards aimed at promoting sustainable development. These agreements might include phasing out, withdrawing or replacing non-sustainable products and

⁶⁴ European Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements' [2023] OJ C259/1, paras 532–536.

processes, harmonising packaging to reduce waste, or adopting sustainable production inputs. Competitors may choose to follow and commit to certain sustainability standards for these reasons. These agreements, often private initiatives, establish rules or guidelines for products and processes related to sustainability metrics and may include labels, logos, or certifications for compliance. While they often contribute to competition by creating new markets, improving product quality, and allowing consumers to make informed choices through clearer sustainability information, they can also lead to increased costs and higher prices due to changes in production or distribution processes. However, unlike technical standards, sustainability standards often focus on goals rather than specific technologies, allowing flexibility in achieving those goals. Despite their benefits, sustainability standards can sometimes restrict competition, particularly through price coordination, limiting alternative standards, or excluding or discriminating against certain competitors.⁶⁵

Sustainability standards that disguise practices such as price fixing, market or customer allocation, output limitations, or restrictions on quality or innovation are considered restrictions of competition by object under Article 101(1) TFEU. For example, agreements among competitors to cover increased costs from adopting a sustainability standard through higher sale prices, to fix the prices of products that meet the standard, or to pressure others to avoid marketing non-compliant products that fall into this category. Similarly, agreements to limit technological development to the minimum sustainability standards required by law, rather than pursuing more ambitious environmental goals, also restrict competition by object.

⁶⁵ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, paras 537–546.

Sustainability agreements will only violate Article 101 TFEU if they include restrictions of competition by object or cause significant actual or potential negative effects on competition. Agreements that restrict competition cannot avoid the prohibition in Article 101(1) TFEU simply by claiming a sustainability objective.⁶⁶ The only exception to this restriction is the exemption under Article 101(3) TFEU. If this specific anti-competitive conduct fulfils the cumulative conditions under Article 101(3) TFEU, it is possible to overcome the prohibition within the same article. The exemptions specific to sustainability agreements are examined in detail in the next subchapter.

Moreover, to consider a sustainability agreement as anti-competitive, a genuine sustainability aim should be seen. It should not be a cover-up of price fixing, market sharing or output limitation.⁶⁷ But what would be considered as ‘genuine’? For a conduct to be considered as ‘genuine’, it should be proportional and necessary. It should not pose a threat to the integrity of the market, and there should not be a less restrictive alternative that could achieve the same efficiency gains or sustainability benefits. Furthermore, this authenticity should also serve the ethics of businesses to achieve an impactful and honest relationship with consumers. Using only strong statements that emphasise sustainability is the core of their business might not reflect the real situation and lead to a disconnection with consumers.⁶⁸ The reason for that is, at that point, the consumers may start questioning whether this business is authentic with its sustainability aim. This authenticity would also support the collaborations of businesses and would be evident or serve as

⁶⁶ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, para 521.

⁶⁷ DG Competition, European Commission, Sustainability Agreements and EU Competition Law (European Network for Rural Development) <https://ec.europa.eu/enrd/sites/default/files/03_tg-sa-eu-competition_dg-comp_0.pdf> accessed 1 December 2024.

⁶⁸ Tag Worldwide, ‘Aim for Authenticity to Succeed in Sustainability’ (Tag Worldwide, 2023) <<https://www.tagww.com/insights/aim-for-authenticity-to-succeed-in-sustainability/>> accessed 18 January 2025.

an exemption when overcoming the prohibitions in Article 101 TFEU. In other words, the contrary behaviour would be ‘greenwashing’.

Greenwashing refers to the practice of misleading the public into believing that a company or organisation is doing more to protect the environment than it is in reality. By promoting false solutions to the climate crisis, greenwashing delays real and impactful action. Common tactics include vague or non-specific claims about sustainability efforts, using unverified or misleading labels such as ‘green’ or ‘eco-friendly’, and exaggerating the significance of minor improvements. For example, a company may claim progress toward ‘net-zero’ emissions without a credible plan or emphasise a product’s recycled materials while ignoring the high emissions caused by its production process. Greenwashing threatens consumer trust and hinders genuine sustainability efforts. It often involves emphasising one positive environmental aspect while ignoring broader negative impacts or presenting compliance with minimal regulatory requirements as extraordinary progress. Consumers are encouraged to research companies’ sustainability practices to avoid being misled. They can assess product lifecycles and look for credible and transparent commitments aligned with international standards.⁶⁹

To summarise, sustainability standardisation agreements provide a framework for competitors to collaborate on setting standards that promote sustainable development, such as reducing waste, adopting sustainable practices, or phasing out non-sustainable products. While these agreements can drive innovation, improve consumer choice, and create new markets, they may also restrict competition through practices like price fixing, limiting alternatives, or excluding competitors, which are prohibited under Article 101(1) TFEU. However, agreements that fulfil the

⁶⁹ United Nations, ‘What is Greenwashing?’ <<https://www.un.org/en/climatechange/science/climate-issues/greenwashing>> accessed 18 January 2025.

conditions of Article 101(3) TFEU, such as showing genuine sustainability aims, proportionality, and necessity, can qualify for exemptions. Authenticity plays a critical role in promoting consumer trust and avoiding harmful practices like greenwashing, where companies exaggerate or misrepresent their environmental efforts. To support significant progress, businesses must ensure transparency, align their actions with international standards, and provide genuine solutions that balance sustainability goals with fair competition.

3. Assessment of sustainability agreements under Article 101(3) TFEU

a. Efficiency gains, indispensability, pass-on to consumers and no elimination of competition

If the agreement allows for an assessment under 101(3) TFEU, the right way to do an assessment would be to analyse efficiency gains, indispensability, pass-on to consumers, and whether competition is eliminated. These are the four cumulative conditions that must be fulfilled for an agreement not allowed under Article 101(1) TFEU to be permitted. In this section, each condition will be assessed.

Starting with efficiency gains, it ‘requires that the agreement contributes to improving the production or distribution of goods or contributes to promoting technical or economic progress.’⁷⁰ The agreement must ‘contribute to objective efficiencies.’⁷¹ But what does objective efficiency mean? Efficiency refers to accomplishing a goal with minimal waste, effort or energy and involves making the best possible use of available resources so that nothing is wasted, and processes are simplified.⁷² Objective efficiency focuses specifically on measurable outcomes and quantifiable

⁷⁰ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, para 557.

⁷¹ Ibid.

⁷² Investopedia, ‘Efficiency: What It Means in Economics, the Formula to Measure It’ <<https://www.investopedia.com/terms/e/efficiency.asp>> accessed 18 January 2025.

criteria rather than subjective judgements. To contribute to objective efficiencies, it is essential to focus on reducing production and distribution costs, enhancing product variety and quality, improving production and distribution processes, and driving innovation. These efforts should result in clear, measurable benefits from the effective application of such measures. In terms of sustainability, this translates to adopting less polluting production and distribution methods, creating better production and distribution conditions, building more resilient infrastructure, and delivering higher-quality products. Additionally, it can also help minimise supply chain disruptions, speed up the process of bringing sustainable products to market and allow consumers to make well-informed purchasing decisions by simplifying product comparisons. Ultimately, these efficiencies must be clear, measurable and verifiable. In other words, the involved parties must be able to show the specific improvements in a clear and straightforward manner.⁷³

The second condition is indispensability. In Article 101(3) TFEU this is the third condition. However, according to the guidelines, the analysis of consumer fair share should exclude the effects of any restrictions that fail the indispensability requirement and are therefore prohibited under Article 101(1) TFEU. In the context of indispensability under Article 101(3) TFEU, a restrictive agreement should only include restrictions that are necessary to achieve the sustainability benefits. The parties must show that the agreement and its restrictions are essential for the claimed benefits and that no less restrictive, cost-effective alternatives exist to achieve the same outcome. Each business should decide on its own how to achieve sustainability benefits. Generally, when there is a demand for sustainable products, cooperation agreements are not necessary to achieve sustainability benefits. However, such agreements might be needed to achieve

⁷³ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, paras 557-559.

these goals more efficiently or quickly. The parties involved in the agreement must prove that each restriction on competition is necessary to achieve the claimed sustainability benefits and that there is no less restrictive or practical alternative to achieve the same results.⁷⁴

Furthermore, there are issues about consumer perception, market failures, and regulation. Consumers may struggle to understand the benefits of sustainability measures, misjudge short-term effects like price increases, or perceive reduced packaging as less value. While regulations often address market failures, agreements may still be needed when laws do not fully cover the issue, such as achieving higher sustainability standards or faster results. Specific scenarios include preventing free-riding on sustainability investments, achieving economies of scale for sustainability labels or standards, and aligning incentives among parties. However, as a general rule, restrictions in such agreements must not go beyond what is necessary to achieve their sustainability objectives.⁷⁵

The third condition⁷⁶ is pass-on to consumers. Consumers must ‘receive a fair share of the claimed benefits.’⁷⁷ First of all, it should be explained who is included in the scope of the consumers. In this context, it covers all direct and indirect consumers of the products covered by the agreement. Consumers are considered to receive a fair share of the benefits when the advantages of the agreement outweigh its harms, ensuring the overall impact on consumers in the relevant market is at least neutral. Sustainability benefits must directly benefit the consumers of

⁷⁴ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, paras 560-562.

⁷⁵ Ibid, paras 563-568.

⁷⁶ This is the second condition under Article 101(3) TFEU and is also referred to as the second condition in the guidelines. However, for the sake of fluency, it is mentioned here as the third condition because it appears third in the relevant section of the guidelines. According to the guidelines, the analysis of consumer fair share excludes the effects of restrictions that fail the indispensability requirement and are therefore prohibited under Article 101(1) TFEU.

⁷⁷ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, para 569.

the products covered by the agreement. In some cases, the harm to competition may be so minor compared to the benefits that a detailed assessment is not necessary. However, there are also situations where it is clear the claimed sustainability benefits either do not reach the relevant consumers or are not significant enough to outweigh the harm. In other cases, a detailed analysis may still be required to determine the impact.⁷⁸ A more in-depth analysis of the types of benefits will be provided in the next subchapter.

The fourth and final condition requires that competition must not be significantly eliminated. This ensures that some level of competition remains in the relevant market, regardless of the benefits provided by the agreement. This condition can still be met even if the agreement affects the entire industry, as long as the parties continue to compete on at least one key aspect, such as price. For example, if the agreement limits competition on quality or variety but leaves price unaffected, the condition may still be satisfied. Similarly, if competitors agree to avoid using a specific polluting technology or non-sustainable ingredient, competition is not eliminated if they continue to compete on factors like price or quality. Additionally, restricting competition temporarily for a specific purpose may still comply with this condition, as long as it does not cause long-term harm to competition. For instance, an agreement to limit the production of a product containing a non-sustainable ingredient, to introduce a sustainable alternative and to raise consumer awareness, would generally meet this requirement.⁷⁹

Considering these four cumulative conditions, Article 101(3) TFEU can serve as an exemption mechanism for sustainability agreements by ensuring that such agreements meet strict

⁷⁸ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, paras 569-570.

⁷⁹ *Ibid*, paras 592-596.

criteria. They must result in clear and measurable benefits, pass these benefits to consumers, include only necessary restrictions to achieve these objectives, and maintain a reasonable level of competition in the market. By fulfilling these conditions, businesses can show that their agreements contribute to sustainability goals without unnecessarily harming competition. Consequently, qualifying for an exemption under Article 101(3) TFEU.

b. Types of benefits

Regarding the fair share of benefits, it is important to make an assessment according to the type of benefits. Benefits can be divided into two categories: direct and indirect. Direct benefits are individual use value benefits which require an assessment under traditional efficiency assessment. Indirect benefits are individual non-use value benefits, which require the willingness to pay test. There are also collective benefits from collective action, and it requires a broader perspective to assess. Also, any combination of these types of benefits can be considered.⁸⁰ The assessment of fair share benefits involves determining whether the benefits resulting from a sustainability agreement outweigh the harm to competition and are passed on to consumers in a significant way.

To further explain each benefit, individual use value benefits refer to those that directly impact consumers when they use or consume a product. For example, higher product quality, better variety, or lower prices can directly improve the user's experience. These benefits are usually measurable and align with traditional efficiency assessments.⁸¹

⁸⁰ DG Competition, European Commission, Sustainability Agreements and EU Competition Law (European Network for Rural Development) <https://ec.europa.eu/enrd/sites/default/files/03_tg-sa-eu-competition_dg-comp_0.pdf> accessed 1 December 2024.

⁸¹ European Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements' [2023] OJ C259/1, paras 571-574.

On the other hand, non-individual use value benefits do not directly improve the consumer's personal experience, but they are valued for their broader impact. For instance, a consumer might prefer a sustainable product because it contributes to environmental protection, even if it does not change the product's quality or functionality for their personal use. These benefits often require assessments like a willingness to pay analysis to measure their value.⁸²

Collective benefits result from collective actions that address issues affecting society, such as reducing pollution or addressing climate change. Unlike individual benefits, they are shared widely and may not directly depend on the actions of any single consumer. Assessing these benefits requires a broader perspective that considers societal and environmental impacts.⁸³

In addition, sustainability agreements can provide a mix of direct, indirect, and collective benefits. In many cases, all these benefit types must be considered together to fully evaluate the impact of the agreement. The balance of these benefits plays a crucial role in meeting the requirements of Article 101(3) TFEU.⁸⁴

4. Involvement of public authorities

Public authorities being involved in or aware of sustainability agreements does not mean that Article 101 TFEU no longer applies. If public authorities simply encourage or make it easier for businesses to create anti-competitive sustainability agreements, but the businesses still act independently, those agreements can still fall under Article 101 TFEU. However, businesses will not be held liable under Article 101 TFEU if public authorities have forced or required them to

⁸² European Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements' [2023] OJ C259/1, paras 575-581.

⁸³ *Ibid*, paras 582-589.

⁸⁴ *Ibid*, paras 590-591.

make the agreement or if the authorities reinforce the agreement's effects. Essentially, if businesses lack autonomy because of government compulsion, they are not responsible under Article 101 TFEU.⁸⁵

ii. Examples

After outlining a comprehensive framework for sustainability agreements, the guidelines provide five illustrative examples to clarify their application. These examples cover agreements that benefit from a 'soft safe harbour', voluntary internal practices, agreements with no appreciable effect on competition, those unlikely to restrict competition under Article 101(1) TFEU, and agreements that may restrict competition under Article 101(1) TFEU but satisfying conditions of Article 101(3) TFEU.

Sustainability standardisation agreements fall under the soft safe harbour framework when they meet six cumulative conditions, ensuring they do not significantly restrict competition. These conditions include maintaining a transparent process for developing standards, avoiding obligations on non-participants, allowing participants to adopt higher standards, limiting the exchange of commercially sensitive information, ensuring non-discriminatory access to the standard and its associated labels or logos, and satisfying one of two criteria: no significant price increase or quality reduction, or participants' combined market share not exceeding 20%. These safeguards prevent the exclusion of alternative standards, ensure fair access, and limit opportunities for collusion. While adherence to these conditions minimises competition concerns, agreements outside the soft safe harbour require individual assessment under Article 101(1) TFEU to determine their competitive impact. Such agreements may still avoid significant anti-

⁸⁵ European Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements' [2023] OJ C259/1, paras 597-598.

competitive effects if sufficient competition exists from alternative labels or standards, or if firms remain free to operate outside the label, offering consumers diverse choices. Even in cases where agreements lead to price increases or reductions in variety or quality, they might still satisfy the conditions of Article 101(3) TFEU if the benefits outweigh the harms.⁸⁶ To better illustrate the concept of the soft safe harbour, the first two examples show agreements that benefit from this framework.

The first example involves a breakfast cereal packaging agreement, where breakfast cereal producers are criticised by the non-governmental organisation (NGO) ‘Prevent Waste’ regarding excessive packaging to make cereal boxes appear more attractive. In response, cereal producers, through their trade organisation, voluntarily agreed to limit excess packaging to 3%. This standard effectively reduced the waste and packaging costs, resulting in a 0.5% decrease in wholesale prices and a 0-0.5% decrease in retail prices.⁸⁷

This agreement was implemented transparently, without the exchange of sensitive information or imposing obligations on producers. The breakfast cereal producers remained free to further reduce packaging, and the agreement had no significant impact on competition in key areas such as price, quality, or innovation. By lowering costs and eliminating unnecessary waste, this type of standardisation agreement improves consumer benefits while promoting environmental sustainability. As a result, this agreement falls within the soft safe harbour

⁸⁶ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, paras 549-555.

⁸⁷ *Ibid*, para 599.

provisions under EU competition law. It is unlikely to produce any appreciable negative effects on competition. It provides advantages for both consumers and the environment.⁸⁸

The second example focuses on the Fair Tropical Fruits (FTF) label, a certification introduced by an NGO in collaboration with several fruit traders to promote fair-traded tropical fruits. To use the label, traders must ensure that the fruits they sell come from producers who guarantee fair wages and prohibit child labour. Participation in the FTF label is entirely voluntary, non-exclusive and monitored transparently. Traders are free to choose whether to use or not use the label on the fruits they sell. Despite its higher price, the FTF label has gained popularity among certain consumers, with the market shares of participating traders ranging from 12% for pineapples to 20% for mangoes.⁸⁹

This agreement is unlikely to restrict competition under Article 101(1) TFEU for several reasons. The market shares of participating traders are moderate, there is significant competition from other labels and conventional products, and participation remains voluntary and non-exclusive. Furthermore, the agreement does not involve the exchange of sensitive information, and the label only requires compliance with minimum fair-trade standards without imposing binding minimum prices or surcharges. As a result, the agreement enhances consumer choice by providing a clear option for 'fair trade' products. In conclusion, the FTF label likely benefits from the soft safe harbour for sustainability standards. It supports fair trade practices without appreciable negative effects on competition while offering consumers greater transparency and choice.⁹⁰

⁸⁸ European Commission, 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements' [2023] OJ C259/1, para 599.

⁸⁹ *Ibid*, para 600.

⁹⁰ *Ibid*, para 600.

The third example introduces the ‘Fair Clothing’ label, an initiative aimed at promoting fair wages and ethical sourcing practices in the EU clothing market. Supported by government subsidies and consumer organisations, the campaign successfully convinced most EU clothing firms, to adopt the label. This ensures their products are sourced from producers in developing countries that adhere to minimum wage standards. Consequently, 85% of clothing sold in the EU now carries this label, and textile worker wages in developing countries have increased by an average of 20%. Moreover, studies show that the label has not caused a significant increase in clothing prices. The minimal price impact is linked to wages being a relatively small portion of overall production costs, as well as improved labour productivity in response to better wages, contributing to efficiency and potential cost savings.⁹¹

The agreement is unlikely to restrict competition under Article 101(1) TFEU. Costs like transport, import, distribution and packaging are accounted for by many participating retailers and brand owners. Consumers experience only a small price increase of about 1.5-2%, mainly due to a 200-300% markup on purchase prices, which keeps the overall price impact minimal. At the same time, productivity gains have compensated for higher wages, keeping the industry competitive. The clothing sector's intense competition also makes it harder for companies to raise prices significantly. Looking at the bigger picture, the agreement has succeeded in improving conditions for workers without driving up consumer prices or harming competition. This shows that businesses can work together on sustainability goals while keeping markets healthy and competitive.⁹²

⁹¹ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, para 601.

⁹² Ibid, para 601.

The fourth example illustrates an agreement among major processed food manufacturers to set recommended fat levels in their products, driven by government-funded research on the health risks of high-fat content. The recommendations are voluntary but are likely to become a standard due to a widely publicised national advertising campaign funded by a think tank.⁹³

While the recommendations could reduce consumer choice for high-fat foods, manufacturers can still compete on price, quality, taste, other nutritional content and branding. The agreement may even enhance competition by encouraging manufacturers to offer products with the lowest fat levels. If it is considered restrictive under Article 101(1) TFEU because of the reduced availability of high-fat options, the agreement is likely to satisfy the conditions of Article 101(3) TFEU. The health benefits and the value of the information provided to consumers outweigh any negative effects on competition. Therefore, the agreement supports public health initiatives without significantly restricting competition and is likely to qualify for exemptions under Article 101(3) TFEU due to its consumer benefits.⁹⁴

The final example examines an agreement among washing machine producers to phase out the least energy- and water-efficient models, aiming to improve environmental outcomes and reduce resource consumption. The agreement covers almost 100% of the market. However, these older models account for 35% of the current sales but are less environmentally friendly. The agreement was made after attempts to shift consumer demand away from these models through advertising campaigns failed. Studies revealed that many consumers struggled to weigh the long-term savings on electricity and water bills against the immediate higher purchase price of more efficient models. Most consumers are expected to recover the additional cost within 1-2 years, and

⁹³ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, para 602.

⁹⁴ *Ibid*, para 602.

almost all will do so within 4 years, given that the lifespan of more efficient models is typically 5 years. The agreement benefits all consumers by reducing overall electricity and water consumption, leading to environmental improvements like less pollution and resource use.⁹⁵

The agreement may have restrictive effects under Article 101(1) TFEU by reducing consumer choice and limiting competition on product range. However, it satisfies the conditions of Article 101(3) TFEU. To further explain producers have tried less restrictive alternatives to shift the consumer demand away from the least energy-efficient models by advertising but, it did not work. At this point, making an agreement to ensure energy and water efficiency improvements was necessary. Consumers gain net benefits from individual savings and collective environmental gains. Also, competition on other parameters, such as price, quality and innovation, remains unaffected. Consequently, while the agreement restricts the competition in terms of product range, it satisfies the conditions of Article 101(3) TFEU due to its significant consumer and environmental benefits, making it a valid sustainability initiative.⁹⁶

Overall, these illustrative examples align with the goals of the EGD by promoting sustainability while supporting EU competition policies. They offer legal clarity and detailed guidance on sustainability agreements, reducing legal uncertainty for businesses. Additionally, the guidelines encourage collaboration in areas such as product design and purchasing, driving sustainable innovation. To protect competition, the guidelines emphasise the importance of transparency and inclusivity, ensuring that sustainability agreements neither restrict competition nor compromise consumer welfare.

⁹⁵ European Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements’ [2023] OJ C259/1, para 603.

⁹⁶ Ibid, para 603.

d. Recognizing Sustainability Benefits under Article 101(3) TFEU

The framework of Article 101(3) TFEU provides an exemption mechanism for agreements, decisions or practices which would be prohibited under Article 101(1) TFEU for restricting competition. This exemption applies when the positive effect of the agreement outweighs the anti-competitive effects, under four cumulative conditions.

An agreement may qualify for exemption under Article 101(3) TFEU if it meets four cumulative conditions: it improves production or distribution of goods or promotes technical or economic progress; ensures consumers receive a fair share of the benefits; contains only restrictions essential to achieve these objectives; and does not substantially eliminate market competition.⁹⁷ In the Horizontal Guidelines, the EC clarifies the framework of the article, including economic and legal standards for assessing agreements. Recently, there has been increasing attention to how sustainability benefits can be considered under Article 101(3) TFEU, to align competition law with broader EU policy goals such as the EGD.

This section analyses how sustainability benefits align with Article 101(3) TFEU's exemption criteria, examining environmental, social and economic perspectives and their integration with corporate strategy and compliance.

i. Environmental, social and economic perspectives

1. Environmental perspective

Environmental perspectives emphasise the urgent need to address challenges such as climate change, resource depletion, and ecosystem degradation. As the global population grows,

⁹⁷ See, Chapter 2, Section i, Subsection 3(a): Assessment of Sustainability Agreements under Article 101(3) TFEU, specifically on efficiency gains, indispensability, pass-on to consumers, and no elimination of competition.

the demand for resources like timber, minerals and fossil fuels increases. Which leads to unsustainable extraction practices that severely impact the environment. Activities such as deforestation and mining release significant greenhouse gas emissions, contributing to global warming and often destroying natural habitats. However, adopting sustainable practices, such as reforestation – which helps absorb carbon dioxide and restore ecosystems – responsible resource management and the transition to renewable energy sources offers effective solutions. Sustainable energy alternatives like solar and wind power can reduce the dependence on fossil fuels, and adopting sustainable practices in mining and agriculture can also play a key role in reducing environmental harm. Conservation efforts that focus on reducing consumption, protecting biodiversity, and restoring natural habitats are essential to sustaining the Earth’s ecosystems. Adopting sustainable practices is fundamental for protecting the environment and protecting society’s long-term welfare.⁹⁸

The exemption framework under EU competition law allows agreements that may initially restrict competition to be exempted if they deliver significant benefits, including environmental improvements. Environmental perspectives are closely connected to the purpose of sustainability agreements, particularly in the context of Article 101(3) TFEU. Addressing climate change and conserving natural resources often require collaborative initiatives that align competitive markets with broader environmental goals. Reforestation initiatives, renewable energy transitions, and sustainable resource management are great examples of activities that benefit from such agreements. These measures contribute to reducing carbon emissions, preserving biodiversity, and enhancing ecological balance.

⁹⁸ Chengwu Lu and Kun Wang, ‘Natural Resource Conservation Outpaces and Climate Change: Roles of Reforestation, Mineral Extraction, and Natural Resources Depletion’ (2023) 86 *Resources Policy* 104159 <<https://doi.org/10.1016/j.resourpol.2023.104159>> accessed 23 December 2024.

By integrating sustainability into agreements, businesses can improve efficiency, innovate within their industries, and deliver substantial benefits to consumers. Article 101(3) TFEU ensures that these efforts remain proportionate and necessary, providing a legal framework that motivates companies to prioritise sustainability without disrupting market dynamics. This alignment emphasises the importance of integrating environmental goals within economic strategies to address sustainability problems.

2. Social and economic perspective

The recognition of social perspectives within EU competition law has transformed significantly, particularly in the context of Article 101(3) TFEU. Over time, this evolution has reflected broader changes in how courts and competition authorities assess benefits related to sustainability and social welfare. The framework for evaluating these non-economic benefits has shifted from a narrow, market-focused approach to one that embraces broader societal benefits and environmental considerations.

Initially, the EC's 2004 Guidelines focused almost entirely on monetary benefits, a traditional approach which is called 'welfare economic approach', emphasising economic efficiency while often disregarding the social and non-economic impacts of agreements. This traditional framework emphasised economic efficiency and consumer welfare, measured in terms of price reductions and the efficient allocation of resources. However, this narrow approach often disregarded social benefits that could not be easily quantified in monetary terms. For instance, improvements in labour conditions or broader community well-being were not typically

considered under this framework and limited the inclusion of social perspectives in sustainability agreements.⁹⁹

However, starting in 2011, decisions by the European Court of Justice expanded the definition of well-being to include quality of life and long-term societal benefits. This shift made it possible to consider how sustainability agreements could address broader social goals, not just immediate economic outcomes. More recently, the concept of human well-being has taken this further by offering a way to measure subjective experiences such as happiness and satisfaction, and objective factors such as access to resources and opportunities. As a result, these challenges reflect a growing commitment to recognising the value of social and environmental impacts, helping competition law better align with the EU's vision for a more sustainable and equitable future.¹⁰⁰

In recent discussions, the concept of 'human well-being' has been introduced as a valuable framework for analysing Article 101(3) TFEU. Human well-being is a combination of subjective well-being, such as happiness and life satisfaction, and objective measures, such as access to resources and capabilities. This approach provides a more comprehensive assessment of societal benefits and allows for the consideration of social benefits such as community development, health improvements, and better labour protections. By recognising non-economic contributions to societal well-being, human well-being supports sustainability agreements that align with the EU's broader goals of improving quality of life and long-term social welfare.¹⁰¹

⁹⁹ Eva van der Zee, *Quantifying Benefits of Sustainability Agreements under Article 101 TFEU in Terms of Human Well-Being* (2020) ILE Working Paper Series No 31, University of Hamburg, Institute of Law and Economics <<https://hdl.handle.net/10419/213490>> accessed 23 December 2024.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

To summarise, throughout the years, the recognition of social perspectives under Article 101(3) TFEU has evolved. For a long time, the focus was strictly on economic efficiency and quantifiable monetary benefits, largely excluding social aspects. Between 2004 and 2011, there was a slow recognition of non-monetary benefits, although these were not supported by well-defined evaluation frameworks. From 2011 onward, the welfare standards under EU law expanded to include quality of life and long-term societal benefits. This progression highlights the growing recognition of social perspectives in competition law, laying the foundation for a more comprehensive approach to assessing sustainability agreements under Article 101(3) TFEU.¹⁰²

ii. Integration with corporate strategy and compliance

Integrating sustainability agreements into corporate strategy plays an important role in achieving sustainable development goals. Encouraging businesses to align their decision-making processes with sustainability objectives is essential. This alignment can be strengthened through the creation of sustainability agreements and collaborations between businesses. However, many companies have been hesitant to enter such agreements due to the legal uncertainties caused by competition law. The revised Horizontal Cooperation Guidelines have addressed these concerns, providing clarity on key issues and motivating businesses to pursue sustainability agreements with confidence.

To ensure a better future for the next generations, it is crucial that businesses, regardless of size, take bold steps now to address critical issues such as climate change, resource depletion, and pollution. In a world shaped by evolving technology and rapid change, many businesses continue

¹⁰² Eva van der Zee, *Quantifying Benefits of Sustainability Agreements under Article 101 TFEU in Terms of Human Well-Being* (2020) ILE Working Paper Series No 31, University of Hamburg, Institute of Law and Economics <<https://hdl.handle.net/10419/213490>> accessed 23 December 2024.

to prioritise profit margins over environmental goals. This disregard for environmental considerations creates significant long-term challenges, threatening the well-being of future generations. It is essential to create a balance between profitability and sustainability to secure a healthier and more sustainable future.¹⁰³ Contrary to common misconceptions, focusing on sustainability does not lead to financial decline but instead drives long-term success. Studies have repeatedly demonstrated a strong link between sustainable practices and improved financial outcomes. Companies that embed environmental, social, and governance principles into their operations consistently outperform competitors in areas such as stock performance, operational efficiency, risk mitigation, and innovation. This shift towards sustainability marks a new era in business, where profitability and responsible practices coexist, showing that sustainability benefits not only the environment but also financial performance.¹⁰⁴

A systematic approach is essential for ensuring long-term business success while effectively integrating sustainability into the overall strategy. This begins with assessing key aspects of the company's ecological and social footprint to identify areas with significant potential for improvement. The organisation should create three to five clear, achievable sustainability goals adjusted to its mission and values. Building support and encouraging collaboration requires engaging employees, customers, suppliers, along the community. Businesses must fully integrate sustainability into every business operation, from supply chain management to product development, thus guaranteeing deeply sustainable practices at all levels. Regular, consistent monitoring and completely transparent progress reports are important for effectively tracking

¹⁰³ Knowledge Train, 'Sustainable Project Management' <<https://www.knowledgetrain.co.uk/project-management/sustainable-project-management>> accessed 23 January 2025.

¹⁰⁴ BCS, 'Prioritising Sustainability Over Profit' (BCS) <<https://www.bcs.org/articles-opinion-and-research/prioritising-sustainability-over-profit/>> accessed 26 December 2024.

performance and guaranteeing accountability. Long-term profitability and a sustainable future are achieved, and efficiency and reputation are importantly improved, by businesses readily following these very important steps.¹⁰⁵

For lasting success, integrating sustainable practices into business operations is analytically important, representing not only an important moral obligation but also a key calculated necessity. Companies need to concentrate on creating value over short-term profits, and it specifically allows them to focus on delivering significant, long-term benefits to stakeholders. Sustainable methods benefiting both the environment as well as overall business performance are encouraged by this perspective shift in many organisations. Businesses can improve their chances of a sustainable and highly profitable future by readily implementing eco-friendly initiatives, improving resource efficiency, and promoting innovation. Building resilience and securing a competitive advantage in an increasingly sustainability-focused global market arises from embracing sustainability, which addresses current ecological as well as social challenges.

e. Conclusion

The 2023 Horizontal Cooperation Guidelines mark a significant step in aligning EU competition policy with broader sustainability goals. By providing detailed guidance on sustainability agreements, the guidelines offer businesses a clear framework to pursue environmental and societal objectives without compromising competition. The inclusion of criteria under Article 101(3) TFEU ensures that sustainability agreements generating measurable efficiency gains, benefiting consumers, and maintaining competition can qualify for exemptions,

¹⁰⁵ ‘How to Integrate Sustainability into Business Strategy: 5 Key Steps’ *Deloitte Sustainable Business* (WSJ, 2023) <<https://deloitte.wsj.com/sustainable-business/how-to-integrate-sustainability-into-business-strategy-5-key-steps-3a843590>> accessed 26 December 2024.

encouraging responsible collaboration. Through the integration of environmental, social, and economic perspectives, the guidelines reflect a comprehensive approach to sustainability, promoting innovation, resource efficiency, and consumer welfare. Eventually, the guidelines not only support the EGD but also highlight the EU's commitment to advancing a competitive, sustainable, and forward-looking economy that balances profitability with long-term societal benefits.

D. Chapter 3: Initiatives of the National Competition Authorities in Promoting Sustainability Agreements

In recent years, the integration of sustainability objectives into competition law has gained importance. Governments and authorities are working hard to balance economic growth with environmental and social goals. In this regard, National Competition Authorities (NCAs) play an important role in making the necessary adjustments and guiding businesses toward sustainable practices. To better understand their approaches, it is necessary to first examine the EU perspective. This analysis then examines the approaches and initiatives of competition authorities across the EU, including the Netherlands and Greece, as Member States with two of the leading NCAs in terms of sustainability debates¹⁰⁶, alongside Austria and Germany. By analysing the actions of these NCAs, this analysis interprets how different jurisdictions are adapting competition frameworks to effectively support sustainability goals.

a. The European Union Perspective: Harmonising Competition and Sustainability

To better understand the approaches of NCAs, it is necessary to clarify the EU's perspective. The EU aims to achieve sustainable development through balanced economic growth, stable prices, a highly competitive market economy, full employment and social advancement.¹⁰⁷ Therefore, in its competition policy, the EU not only prioritises economic growth through a fair competitive market but also works to include sustainability objectives.

¹⁰⁶ Jurgita Malinauskaite and Fatih Buğra Erdem, 'Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities' (2023) 61(5) *JCMS: Journal of Common Market Studies* <<https://onlinelibrary.wiley.com/doi/10.1111/jcms.13458>> accessed 5 January 2025.

¹⁰⁷ European Union, 'Aims and Values' (European Union) <https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_en> accessed 14 November 2024.

The EU's approach is based on the idea that competition law can support broader societal goals, like protecting the environment and developing sustainable practices. The EU allows certain agreements that benefit society, even if they partially restrict competition, by recognising that market forces alone may not fully address issues such as climate change or resource depletion. These agreements, permitted under Article 101(3) TFEU, must show clear benefits for both consumers and the environment.¹⁰⁸ Additionally, the EU actively encourages innovation and investment in green technologies, ensuring that sustainability objectives are aligned with fair competition and consumer choice. Supporting sustainable initiatives, monitoring compliance with competition rules, and contributing to collaboration among businesses are the main priorities for the EC. These efforts aim to drive innovation, reduce environmental impact, and maintain competitive markets while protecting consumer interests. In this context, the European Committee of Manufacturers of Domestic Equipment (CECED¹⁰⁹) case and the Consumer Detergents case reflect key aspects of the EU's approach to balancing environmental goals with competitive market principles.

The CECED is a European association of domestic appliance manufacturers.¹¹⁰ The relevant market is domestic washing machines, specifically for household use in the European Economic Area (EEA). The case is about an agreement within CECED to phase out the production and importation of energy-inefficient washing machines, specifically categories D to G under the EU energy labelling directive. The agreement aimed to improve energy efficiency, reduce electricity consumption, and promote environmental benefits. The agreement involved ending the

¹⁰⁸ See, Chapter 2, Section i, Subsection 3(a): Assessment of Sustainability Agreements under Article 101(3) TFEU, specifically on efficiency gains, indispensability, pass-on to consumers, and no elimination of competition.

¹⁰⁹ *Conseil Européen de la Construction d'Appareils Domestiques*

¹¹⁰ Involved manufacturers include Bosch Siemens, Electrolux, Whirlpool, Candy, Miele, Brandt, and others, representing about 90% of the EEA washing machine market.

production and import of certain machines by specific deadlines and setting goals for reducing energy use.¹¹¹

The agreement raised concerns about potential violations of EU competition rules under Article 81(1) of the EC Treaty. Specifically, the EC considered that the limitation to production and importation potentially reduced consumer choice and distorted competition in the market. Since the parties of the agreement hold 90% of the market share, the agreement could restrict manufacturers from competing freely. In addition, the phase-out of lower-energy-efficiency machines could lead to higher production costs and potentially higher prices for consumers. The EC assessed every aspect of the agreement to determine if the benefits of the agreement, such as energy efficiency and environmental advantages, outweighed its restrictive effects on competition. As a result, the EC granted an exemption under Article 81(3) due to the agreement's significant contributions to technical progress and environmental benefits.¹¹²

The Consumer Detergents case involved Henkel, Procter & Gamble (P&G), and Unilever, who participated in a cartel within the heavy-duty laundry detergent market across several EU countries. The companies coordinated actions during the implementation of an environmental initiative aimed at reducing detergent dosage and packaging materials. Instead of using the initiative to contribute to competition, they engaged in anti-competitive practices, including price fixing, limiting promotional activities, and sharing sensitive market information to stabilise market positions and avoid competition. The EC found these actions in breach of EU Article 101 of the TFEU and Article 53 of the European Economic Area (EEA) Agreement. Henkel was granted

¹¹¹ European Commission, *Commission Decision of 24 January 1999 Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV.F.1/36.718. CECEDE)* [2000] OJ L 187/47.

¹¹² *Ibid.*

immunity for its early cooperation, while P&G and Unilever were fined EUR 211.2 million and EUR 104 million, respectively, with reductions applied for leniency and settlement cooperation.¹¹³

The EC raised several concerns while assessing the agreement in the Consumer Detergents case. It found that the participating companies restricted competition by fixing prices, limiting promotional activities, and sharing sensitive market information, which distorted normal market dynamics. The agreement was also aimed at stabilising the companies' market positions, preventing competitive advantages, and potentially reducing consumer benefits by distorting normal market dynamics. Moreover, the practices had cross-border implications, affecting trade across multiple EU countries. While the environmental initiative to reduce detergent dosage and packaging had a positive goal, the Commission criticised its misuse as a cover for anti-competitive behaviour, highlighting the importance of balancing sustainability objectives with fair competition.

These cases provide examples of when sustainability agreements might be permissible under EU competition law and contribute to the framework for analysing sustainability agreements under Article 101(3) TFEU. They also reflect the EU's perspective and efforts when it comes to aligning competition law enforcement with broader policy goals, such as sustainability. These cases not only illustrate how the EU integrates sustainability into its competition policy but also does it while maintaining the focus on consumer welfare and market integrity. Within the scope of the EU competition perspective, competition law should not unnecessarily restrict agreements that encourage environmental sustainability if they meet the criteria for exemptions under Article 101(3) TFEU. To achieve this goal, the EU encourages businesses to innovate and meet the needs of today for a better tomorrow. By supporting sustainable initiatives, enforcing competition rules,

¹¹³ European Commission, *Summary of Commission Decision of 13 April 2011 Relating to a Proceeding Under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39.579 – Consumer Detergents)* [2011] OJ C193/06.

and encouraging responsible collaboration, the EC works to create a balance between sustainability and economic growth, creating benefits for both businesses and society.

b. The Netherlands: Balancing Sustainability and Competition Through Market Regulation

The Netherlands Authority for Consumers and Markets (ACM¹¹⁴) played a crucial role in integrating sustainability considerations into competition policy. Over time, the ACM has progressively integrated sustainability considerations into its approach, focusing mainly on direct consumer benefits over broader environmental or societal gains. Two key cases illustrate this early approach.

The first case involved a proposal to shut down five coal-fired power plants in the Netherlands to reduce carbon emissions. This initiative was rejected by the ACM due to concerns over potential increases in energy prices. Another notable example is the ‘Chicken of Tomorrow’ case, where Dutch supermarkets agreed to exclusively sell sustainably produced chicken. The ACM blocked the agreement because the associated cost increases were incompatible with consumer willingness to pay.¹¹⁵ These cases emphasise the ACM’s initial price-focused approach, which gave minimal consideration to environmental or societal outcomes.

This price-focused approach began to change in 2020. The ACM has adopted a different approach. In July 2020, the ACM published draft guidelines that proposed a broader framework for evaluating environmental damage agreements. These guidelines suggested that societal

¹¹⁴ *Autoriteit Consument & Markt*

¹¹⁵ Jurgita Malinauskaite and Fatih Buğra Erdem, ‘Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities’ (2023) 61(5) *JCMS: Journal of Common Market Studies* <<https://onlinelibrary.wiley.com/doi/10.1111/jcms.13458>> accessed 5 January 2025.

benefits, rather than just direct consumer benefits, could be considered in assessing such agreements. This shift aimed to provide collaboration among competitors on environmental sustainability initiatives, aligning with broader climate objectives.¹¹⁶ It represented a critical step toward integrating sustainability into the national competition law framework.

As discussed in detail, Chapter 9 of the EU's Horizontal Cooperation Guidelines serves as a key reference point for assessing the compatibility of sustainability agreements with EU competition rules. The Dutch ACM has consistently shown dedication to this integration, emphasising its commitment to supporting the EGD. While this approach has been subject to debate, given its relatively new and developing nature, the ACM has taken a practical and forward-thinking stance toward promoting a more sustainable and competitive market.

In January 2021, following a public consultation, the ACM issued revised draft guidelines. These guidelines maintained the broader assessment for environmental damage agreements and emphasised that such agreements should only be pursued when companies cannot achieve the desired sustainability benefits independently.¹¹⁷ The ACM describes environmental damage agreements as those that effectively support adherence to international or national standards or aim to achieve specific policy goals focused on preventing environmental harm. In this context, environmental damage refers to harm caused during the production, transportation, and consumption of goods or services.¹¹⁸ In particular, the ACM introduced a willingness to pay test to ensure that resulting costs for consumers are not higher than those of government measures with

¹¹⁶ Bird & Bird, 'Dutch Competition Authority Offers More Leeway for Environmental Sustainability Initiatives' (Bird & Bird, 23 July 2020) <<https://www.twobirds.com/en/insights/2020/netherlands/dutch-competition-authority-offers-more-leeway-for-environmental-sustainability-initiatives>> accessed 5 January 2025.

¹¹⁷ Ibid.

¹¹⁸ Authority for Consumers and Markets (ACM), *Policy Rule on the ACM's Supervision of Sustainability Agreements* (ACM, July 2020) <<https://www.acm.nl/documents/Beleidsregel-Toezicht-ACM-op-duurzaamheidsafspraken-ENG.pdf>> accessed 24 January 2025.

the same sustainability benefits. These revisions also included evaluations of sustainability initiatives against national and international policy objectives, alongside the provision of individual guidance and informal advice for businesses.

This evolving approach has redefined consumer welfare, moving from a narrow focus on economic benefits to a more expansive consideration of societal gains. This shift has supported the adoption of sustainable practices and promoted collaborative efforts among competitors. Essentially, the ACM's model creates a balance between ecological priorities and economic principles¹¹⁹ while ensuring that societal benefits are not overlooked.

Most recently in October 2023, the ACM introduced a new policy rule aligning with the EC's revised Horizontal Cooperation Guidelines. This policy framework provides more room for competitors to collaborate on sustainability initiatives, particularly in achieving environmental objectives such as reducing carbon emissions. Crucially, the policy requires that consumers receive an appreciable and fair share of benefits.¹²⁰

c. Greece: Innovating with Sustainability Through the Sandbox Approach to Competition Law

Greece has taken significant steps towards integrating sustainability into its broader economic and legal framework. The urgent need for sustainable development was recognised by the authorities. Efforts of Greece are supported by various initiatives such as the Greece Country Council under the Sustainable Markets Initiative, which aims to develop sustainable investments

¹¹⁹ Jurgita Malinauskaite and Fatih Buğra Erdem, 'Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities' (2023) 61(5) *JCMS: Journal of Common Market Studies* <<https://onlinelibrary.wiley.com/doi/10.1111/jcms.13458>> accessed 5 January 2025.

¹²⁰ Eversheds Sutherland, 'Dutch Competition Authority Continues to Provide More Room for Sustainability Agreements' (Eversheds Sutherland, 4 October 2023) <<https://www.eversheds-sutherland.com/en/netherlands/insights/dutch-competition-authority-continues-to-provide-more-room-for-sustainability-agreements>> accessed 5 January 2025.

and policies that align with environmental, social, and governance principles. The Council contributes to cross-sector collaboration to create a greener and more inclusive economy.¹²¹

In September 2020, the Hellenic Competition Commission (HCC) held the conference ‘Sustainable Development and Competition Law: Towards a Green Growth Regulatory Osmosis’ to explore how competition law could support sustainability efforts. The event brought together policymakers, industry leaders, and academics to discuss how businesses can adopt environmentally friendly practices without disrupting market fairness. The discussions focused on practical ways to align competition policies with sustainability goals, aiming to balance economic growth with environmental protection. This conference reflects the HCC’s effort to contribute to cooperation between different sectors and create policies that encourage businesses to prioritise sustainability while maintaining a competitive market.¹²²

Building on these sustainability principles, the HCC has become one of the leading NCAs in aligning competition law with sustainability objectives. Greece amended its Competition Law No. 3959/2011 in January 2022 to include provisions for no-action enforcement letters when sustainability initiatives illustrate substantial positive effects for society. This amendment establishes a legal mechanism to advance environmental and social objectives while protecting competitive market conditions.¹²³

¹²¹ Sustainable Markets Initiative, ‘Greece Country Council’ (Sustainable Markets Initiative) <<https://www.sustainable-markets.org/country-councils/greece-country-council/>> accessed 5 January 2025.

¹²² Hellenic Competition Commission, *Sustainable Development and Competition Law: Towards a Green Growth Regulatory Osmosis* (HCC, 2020) <https://epant.gr/files/2020/FINAL_Programme_Sustainability_and_Competition_Law_EN.pdf> accessed 5 January 2025.

¹²³ Hellenic Competition Commission, *Sustainability Sandbox* (HCC) <<https://sandbox.epant.gr/en/>> accessed 5 January 2025.

Following this, the HCC introduced the Sustainability Sandbox in October 2022 and became the first national competition authority to introduce such a tool. The Sustainability Sandbox allows businesses to test sustainability-related initiatives under the Commission's supervision to ensure they do not violate competition law. This initiative offered legal certainty, reduced regulatory risks and encouraged companies to invest in sustainable projects with significant public interest benefits.¹²⁴

The HCC has taken significant steps to integrate sustainability into its competition law framework, setting an example of how regulatory authorities can address modern environmental challenges. Through initiatives such as the Sustainability Sandbox, the amendment of Competition Law No. 3959/2011, and the organisation of forward-looking conferences, the HCC has shown its commitment to aligning economic policies with sustainable development goals. These efforts have provided businesses with the tools and legal certainty to deal with projects that benefit society and the environment while maintaining fair competition. The HCC has created an environment where sustainable practices are encouraged and supported by bringing together policymakers, industry leaders, and academics. The HCC's initiatives emphasise the crucial role of competition law in maintaining fair markets while supporting sustainability efforts, indicating that economic growth and environmental responsibility can coexist.

d. Austria: Aligning Sustainability and Competition Law in Green Market Regulation

Austria has shown a strong commitment to integrating sustainability goals into its policy by implementing strategies and initiatives to contribute to environmental protection and

¹²⁴ Hellenic Competition Commission, *Sustainability Sandbox* (HCC) <<https://sandbox.epant.gr/en/>> accessed 5 January 2025.

sustainable development. Since 2010, Austria has followed its approach to sustainable development through the Austrian Strategy for Sustainable Development¹²⁵. This initiative was supported jointly by the Federal Government and the Federal Provinces and shows Austria's commitment to global sustainability efforts. The strategy aligned with the EU Sustainable Development Strategy and the UN Millennium Development Goals. It focuses on addressing critical areas such as climate action, water management, energy efficiency, sustainable agriculture and forestry.¹²⁶

Internationally, Austria has shown its support for the UN's Sustainable Development Goals by emphasising climate action and sustainable development in its 2020 Voluntary National Review.¹²⁷ In 2022, a national circular economy strategy was adopted, targeting climate neutrality by 2040 and resource conservation by 2050.¹²⁸ Austria's policies prioritise renewable energy, with hydropower leading electricity production, and promote public transportation through the Climate Ticket¹²⁹ initiative.¹³⁰ These comprehensive strategies balance economic growth with environmental and social priorities.

Concerning competition law, The Austrian Federal Competition Authority (AFCA)¹³¹ has taken significant steps to integrate sustainability into its competition policy. In 2021, the Austrian

¹²⁵ *Österreichische Strategie Nachhaltige Entwicklung (ÖSTRAT)*

¹²⁶ Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology, 'Austrian Strategy for Sustainable Development (ÖSTRAT)' <<https://www.bmk.gv.at/en/topics/climate-environment/sustainable-development/oestrat.html>> accessed 5 January 2025.

¹²⁷ European Environment Agency, 'Austria: Country Profile - SDGs and Sustainability Transitions' <<https://www.eea.europa.eu/themes/sustainability-transitions/sustainable-development-goals-and-the/country-profiles/austria-country-profile-sdgs-and>> accessed 5 January 2025.

¹²⁸ Federal Ministry for Climate Action, Environment, Energy, Mobility, Innovation and Technology, 'Circular Economy Strategy' <<https://www.bmk.gv.at/en/topics/climate-environment/waste-resource-management/ces.html>> accessed 5 January 2025.

¹²⁹ *Klimaticket*

¹³⁰ Net Nexus Mag, 'Austria's Commitment to Sustainability: Leading the Green Movement in Europe' <<https://netnexusmag.com/austrias-commitment-to-sustainability-leading-the-green-movement-in-europe/>> accessed 5 January 2025.

¹³¹ *Bundeswettbewerbsbehörde (BWB)*

legislature amended the Cartel Act through the Cartel and Competition Amendment Act 2021.¹³² This change aimed to integrate sustainability objectives into a national cartel and competition law. This amendment introduced a sustainability exemption into Austrian competition law, allowing certain agreements that contribute significantly to an ecologically sustainable or carbon-neutral economy to be exempt from the cartel prohibition.¹³³

Following the 2021 amendment, the AFCA published its '*Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Agreements*' in 2022. These guidelines aim to help companies understand how sustainability agreements can be assessed under the amended Cartel Act. They specify the conditions under which competition-restricting agreements may be justified, provided these agreements result in efficiency gains that meaningfully contribute to environmental sustainability. These guidelines specify five cumulative conditions for such exemptions: the cooperation must result in improvements in production or distribution or promote technical or economic progress, thereby generating overall social welfare. The restriction of competition must be essential to achieving these gains and consumers must receive a fair share of the benefits, particularly through contributions to ecological sustainability or carbon neutrality. The agreement must not eliminate competition for a substantial part of the relevant products or services and comply with all other applicable legal provisions.¹³⁴

In fact, the AFCA has adopted an approach closely aligned with the principles outlined in the EU's Horizontal Cooperation Guidelines. By integrating sustainability considerations into

¹³² *Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021 – KaWeRÄG 2021*

¹³³ Austrian Federal Competition Authority, 'Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Agreements' <https://www.bwb.gv.at/fileadmin/user_upload/AFCA_Sustainability_Guidelines_English_final.pdf> accessed 5 January 2025.

¹³⁴ Ibid.

competition law, the AFCA showed a commitment to supporting the EC's broader goals of supporting innovation, promoting economic progress, and achieving ecological sustainability. The emphasis on cumulative conditions – such as ensuring efficiency gains, indispensability, consumer benefit, and compliance with legal provisions – reflects a shared framework with the EU for evaluating agreements that balance competition with sustainability objectives. This alignment highlights Austria's contribution to achieving the EU's goals of climate neutrality and sustainable development.

e. Germany: The Federal Cartel Office's Balancing Act

The Federal Cartel Office (FCO)¹³⁵ currently incorporates sustainability considerations into its competition policy. While aiming to protect market fairness under competition law, it also acknowledges agreements and collaborations that support sustainability objectives without unduly restricting competition.

The FCO emphasises that competition law does not essentially contradict sustainability efforts. In contrast, it supports the idea that a competitive market contributes to innovation. However, it establishes clear boundaries to ensure that collaborations genuinely improve sustainability objectives rather than solely benefiting the profit margins of a limited number of companies. There are two crucial initiatives which the FCO inspected: the banana supply chain in the context of establishing living wages and the *Initiative Tierwohl* for improved animal welfare.

¹³⁵ *Bundeskartellamt (BKartA)*

In both instances, the NCA evaluates the voluntary standards and practices to ensure they comply with competition law and do not involve anti-competitive measures.¹³⁶

The living wages in the banana sector initiative aligns with the sustainability framework because it focuses on ethical and responsible practices in supply chains, which are included in the five core principles¹³⁷ of sustainability. This initiative aims to ensure workers in the banana sector, starting with Ecuador¹³⁸, are paid fair living wages, which means they earn enough to meet their basic needs and live with dignity. This aligns with sustainability's social principle, which emphasises human rights and fair labour practices. In the context of voluntary standards, the German retailers and *Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH* agreed on voluntary common standards for ethical sourcing. This indicates that they will purchase bananas exclusively from suppliers who meet these wage criteria. It encourages fair treatment of workers without imposing regulations that could unnecessarily restrict market competition. By 2025, the goal is for 50% of private-label bananas sold in Germany to meet these criteria. This voluntary commitment avoids binding minimum wage costs or price-fixing mechanisms, preserving competition while encouraging fair treatment of workers. The initiative focuses on monitoring transparent wages to ensure accountability. Transparency is a critical part of sustainability because it contributes to accountability and builds trust across the supply chain. The FCO supported this

¹³⁶ Bundeskartellamt, 'Achieving Sustainability in a Competitive Environment – Bundeskartellamt Concludes Examination of Sector Initiatives' (18 January 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html> accessed 8 January 2025.

¹³⁷ Michael U Ben-Eli, 'Sustainability: Definition and Five Core Principles, a Systems Perspective' (2018) 13 *Sustainability Science* 1337, 1338 <<https://doi.org/10.1007/s11625-018-0564-3>> accessed 8 January 2025.

¹³⁸ Bundeskartellamt, 'German Retailers Working Group – Sustainability Initiative to Promote Living Wages in the Banana Sector' (Case Summary, 8 March 2022) <<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2022/B2-90-21.pdf>> accessed 8 January 2025.

initiative because companies were not exchanging information, such as prices or production volumes, which could disrupt competition.

This initiative aligns with the German Act on Corporate Due Diligence in Supply Chains (2023), which requires companies to ensure human rights and sustainability in their global supply chains. It establishes mandatory due diligence obligations for large companies operating in Germany to address human rights and environmental risks in their supply chains. Key measures include implementing risk management systems, conducting regular risk analyses, enforcing preventive and remedial actions, and establishing complaint mechanisms.¹³⁹ Companies must report annually on their compliance efforts, with non-compliance potentially leading to fines or restrictions on public contracts. The Act mainly seeks to protect international human rights and environmental rules, focusing on improving conditions in global supply chains, especially in the Global South, by following existing agreements rather than creating new ones.¹⁴⁰

The *Initiative Tierwohl*, established in 2015, is Germany's largest platform dedicated to enhancing animal welfare in livestock farming. It brings together farmers, the meat industry, and the food retail and gastronomy sectors in a collective effort to improve animal health and welfare beyond legal requirements. This initiative provides financial support to farmers for implementing welfare measures, conducts inspections to ensure compliance, and offers a product seal indicating participation. Currently, approximately 600 million pigs, chickens, and turkeys benefit from this program.¹⁴¹ Regarding sustainability, *Initiative Tierwohl* contributes significantly by promoting

¹³⁹ German Act on Corporate Due Diligence Obligations in Supply Chains, *Federal Law Gazette*, 16 July 2021 <<https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf>> accessed 8 January 2025.

¹⁴⁰ Federal Ministry for Economic Cooperation and Development (BMZ), 'The Supply Chain Act: Facts for Partner Countries' (BMZ) <<https://www.bmz.de/resource/blob/154774/lieferkettengesetz-faktenpapier-partnerlaender-eng-bf.pdf>> accessed 8 January 2025.

¹⁴¹ 'About Us' (Initiative Tierwohl) <<https://initiative-tierwohl.de/en/about-the-initiative/about-us/>> accessed 8 January 2025.

higher animal welfare standards, which align with environmental and ethical objectives. The initiative supports sustainable farming practices that can lead to better resource management and reduced environmental impact by improving living conditions for livestock.

In terms of competition law, the initiative has been reviewed by the FCO. The authority raised concerns about the ‘animal welfare surcharge’, a required payment buyers made to farmers participating in the initiative. This payment was seen as potentially disrupting fair market competition. To address this, *Initiative Tierwohl* decided to eliminate the mandatory payment by 2024 and replace it with a voluntary recommendation system. The change is intended to maintain the initiative’s focus on sustainability while ensuring it complies with competition law.¹⁴² This case serves as a typical example of the challenges in aligning collective sustainability efforts with legal frameworks designed to maintain market competition.¹⁴³

The FCO works closely with businesses and provides guidance on how to align their sustainability efforts with competition rules. Also, it monitors these initiatives to ensure they continue to adhere to fair competition standards. It emphasises the importance of transparency for consumers, allowing them to make well-informed choices when purchasing. This way, sustainability goals are aligned with consumer choice and market transparency. Even though the

¹⁴² Bundeskartellamt, ‘Initiative Tierwohl Abolishes Animal Welfare Surcharge: Balance Between Sustainability and Competition Ensured’ (25 May 2023) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/25_05_2023_ITW.html> accessed 8 January 2025.

¹⁴³ Blomstein, ‘Competition and Sustainability: Animal Welfare Initiative’ (30 May 2023) <<https://www.blomstein.com/assets/downloads/20230530competition-and-sustainabilityanimal-welfare-initiative.pdf>> accessed 8 January 2025.

FCO has allowed certain projects as transitional measures, it encouraged adopting a competitive approach over time to ensure sustainability efforts remain aligned with fair market practices.¹⁴⁴

The FCO takes a balanced approach to supporting sustainability initiatives, carefully ensuring they do not harm competition or restrict consumer choice. Promoting measures that improve workers' lives, enhance animal welfare, and encourage responsible practices helps businesses contribute to social and environmental goals while staying competitive and legally compliant. This approach creates a fair balance between sustainability and market fairness, contributing to both ethical standards and healthy competition. The following chapter will examine the German car emissions case, exploring its implications for competition law, sustainability objectives, and corporate accountability.

f. Conclusion

While competition authorities aim to align with EU regulations, their differing strategies play a crucial role in achieving the EU's objectives and ensuring harmonisation across Member States. The Netherlands and Greece, as leaders in sustainability debate¹⁴⁵, have implemented concrete initiatives. Austria, on the other hand, has focused on improving and harmonising its regulations to encourage sustainable practices. Meanwhile, Germany has adopted a more balanced approach, integrating sustainability into its strategies without restricting competition and consumer choice. Together, these efforts reflect the EU's broader commitment to innovation, environmental protection and economic growth.

¹⁴⁴ Bundeskartellamt, 'Achieving Sustainability in a Competitive Environment – Bundeskartellamt Concludes Examination of Sector Initiatives' (18 January 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/18_01_2022_Nachhaltigkeit.html> accessed 8 January 2025.

¹⁴⁵ Jurgita Malinauskaite and Fatih Buğra Erdem, 'Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities' (2023) 61(5) *JCMS: Journal of Common Market Studies* <<https://onlinelibrary.wiley.com/doi/10.1111/jcms.13458>> accessed 5 January 2025.

Although the Netherlands has taken steps to include societal benefits in its evaluation of sustainability agreements, it is argued that the willingness to pay test may limit the implementation of impactful sustainability initiatives by prioritising short-term consumer cost considerations over long-term environmental gains. On the other hand, the willingness to pay test can evolve and has the potential to reflect broader sustainability goals by including future societal preferences.¹⁴⁶ A more flexible framework that considers broader societal and environmental benefits, even when direct consumer benefits are not immediately evident, could strengthen these efforts.

In Greece, the Sustainability Sandbox is an innovative tool, but its limited scope and application may restrict its effectiveness. Expanding its use to cover a broader range of industries and ensuring sufficient resources for monitoring and enforcement are crucial for maximising its potential impact.

Austria's approach to introducing a sustainability exemption in its Cartel Act is notable, but some critics believe that the strict requirements for exemption might discourage businesses from making sustainability agreements. A more adaptive framework that encourages innovation while maintaining legal frameworks could help address these issues.¹⁴⁷

Germany's initiatives, such as the *Tierwohl* and banana supply chain programs, emphasise integrating social and environmental goals into competition law. However, the gradual phase-out of mandatory sustainability payments in the *Tierwohl* program has been criticised for potentially

¹⁴⁶ Roman Inderst and Stefan Thomas, 'Prospective Welfare Analysis: Extending Willingness-to-Pay Assessment to Embrace Sustainability' (LawFin Working Paper No. 29, February 2021) <<https://ssrn.com/abstract=3699693>> accessed 24 January 2025.

¹⁴⁷ Ullrich Max, 'The new sustainability exemption according to § 2(1) Austrian Cartel Act' (2022) *European Competition Journal* <<https://www.tandfonline.com/doi/full/10.1080/17441056.2022.2131238>> accessed 24 January 2025.

reducing financial incentives for farmers to adopt higher welfare standards. It is important to find a way to ensure that voluntary measures still lead to significant improvements.

Additionally, while these Member States emphasise transparency and compliance, there is still room to improve cross-border harmonisation and coordination among NCAs. Different approaches to evaluating sustainability agreements can create regulatory uncertainty for businesses operating across the EU. This could hinder the broader adoption of sustainable practices.¹⁴⁸

To conclude, while these initiatives are significant steps towards the EU's ambitious sustainability and competition goals, addressing the critical gaps is essential for further development. More flexibility, stricter enforcement, and improved cross-border coordination are essential to ensure that these national efforts effectively address the scale and urgency of Europe's sustainability challenges.

¹⁴⁸ Jurgita Malinauskaite, 'Competition Law and Sustainability: EU and National Perspectives' (2022) 13(5) *Journal of European Competition Law & Practice* 336 <<https://academic.oup.com/jeclap/article/13/5/336/6533512>> accessed 24 January 2025.

E. Chapter 4: The Car Emissions Case – Article 101 TFEU Sanctioning Cartels

Postponing the Introduction of New Sustainability Standards in the Market

The Car Emissions Case (AT. 40178) involves leading car manufacturers conspiring to hinder advancements in emissions technology. Major manufacturers – Daimler, Volkswagen and Bayerische Motoren Werke (BMW) – coordinated to limit the development of several selective catalytic reduction (SCR) systems, important for reducing nitrogen oxide (NOx) emissions in many diesel passenger cars. Restricting technical parameters, such as smaller AdBlue tank sizes, lets the companies avoid competing to exceed regulatory standards, thus limiting market competition as well as environmental progress. EU competition law investigations resulted in significant fines, marking an important turning point for sustainability alongside accountability within the industry.¹⁴⁹

Diesel engines became very popular in Europe because they were fuel-efficient and offered tax advantages. However, they produce harmful NOx emissions, so the EU introduced stricter environmental rules such as Euro 5 (2009) and Euro 6 (2014). To meet these rules, car manufacturers started using SCR technology, which reduces NOx emissions. The efficiency of the SCR systems is highly dependent on the size of the AdBlue tank and the amount of AdBlue use, as these factors determine how far a vehicle can travel before requiring a refill.¹⁵⁰

To have a better understanding of the case, it is essential to explain how the SCR system works in diesel passenger cars. The SCR system is a technology designed to reduce harmful NOx emissions, which contribute to air pollution and health problems. It operates by injecting a liquid

¹⁴⁹ European Commission, ‘Commission Decision of 8.7.2021 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.40178 - Car Emissions)’ [2021] OJ C <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40178/40178_4091_3.pdf> accessed 26 December 2024.

¹⁵⁰ Ibid.

called AdBlue¹⁵¹ – a mixture of water and urea – into the exhaust gases. The heat in the exhaust converts AdBlue into ammonia, which then reacts with NOx in the SCR system, breaking it down into harmless nitrogen and water vapour. This process significantly reduces NOx emissions. AdBlue is stored in a separate tank in the car, and the size of this tank determines how far the car can go before a refill is needed.¹⁵² Smaller tanks may limit the effectiveness of the system over long distances, as less AdBlue is available to clean the exhaust. The SCR system is a vital tool for making diesel vehicles more environmentally friendly.

This analysis explores the case’s background and context, analyses the legal proceedings as well as decisions, and further explores its wider implications for sustainability standards along with market dynamics.

a. Background and context of the case

The case involves three major German car manufacturers Daimler, Volkswagen (including Audi and Porsche) and BMW who were found to have coordinated their activities regarding the development of exhaust gas cleaning systems, specifically the SCR system, for diesel passenger cars in EEA. The conduct, which took place between June 2009 to October 2014, was found to be an anti-competitive practice, violating Article 101 TFEU and Article 53 of the EEA Agreement.¹⁵³

The manufacturers’ collusion took place during regular meetings of the ‘Circles of Five’, where they agreed on limiting AdBlue tank sizes (8-10 litres) and refill ranges to approximately

¹⁵¹ It is the brand name for Diesel Exhaust Fluid. See, James Howe, ‘AdBlue and SCR Systems Explained’ (Classics World, no date) <<https://classicsworld.co.uk/car-mechanics/adblue-and-scr-systems-explained/>> accessed 24 January 2025.

¹⁵² Department of the Environment (Maryland), ‘Selective Catalytic Reduction (SCR) Fact Sheet’ (Maryland Department of the Environment) <www.mde.state.md.us> accessed 16 January 2025.

¹⁵³ European Commission, ‘Commission Decision of 8.7.2021 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.40178 - Car Emissions)’ [2021] OJ C <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40178/40178_4091_3.pdf> accessed 26 December 2024.

10,000 km. This coordination discouraged competition and innovation in emissions technology. Despite knowing that larger tanks and higher AdBlue consumption could achieve better NOx reductions, the companies exchanged sensitive technical information and collectively decided not to exceed regulatory requirements. They avoided competing to create cleaner technologies, instead aligning on minimal standards to reduce costs and simplify implementation.¹⁵⁴

This anti-competitive behaviour had significant consequences. It restricted innovation, limited consumer choice, and harmed environmental progress by preventing the development of cleaner diesel technologies. Although individual manufacturers eventually implemented various AdBlue tank sizes, often larger than the agreed-upon limits, the cartel's actions ensured that the technology did not evolve to its full potential. The EC imposed substantial fines on Volkswagen and BMW, while Daimler received immunity for revealing the collusion under a leniency program.¹⁵⁵

The case emphasises the broader implications of anti-competitive conduct in sustainability-related industries. The agreement among the manufacturers to limit competition on SCR system development directly hindered advancements in reducing diesel emissions during a critical period for environmental regulation. This decision pointed out the need for effective enforcement of competition law to protect innovation, consumer interests, and environmental goals.

¹⁵⁴ European Commission, 'Commission Decision of 8.7.2021 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.40178 - Car Emissions)' [2021] OJ C <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40178/40178_4091_3.pdf> accessed 26 December 2024.

¹⁵⁵ Ibid.

b. Analysis of legal proceedings and decisions

The Car Emissions Case represents a significant legal proceeding initiated by the EC under Article 101 TFEU and Article 53 EEA Agreement, both of which prohibit anti-competitive agreements.

The investigation began in 2015 when Daimler applied for leniency¹⁵⁶, disclosing anti-competitive practices that occurred during the ‘Circles of Five’ meetings. Following Daimler’s disclosure, Volkswagen applied for leniency in 2016, providing additional details about the collusion. In April 2019, the EC issued a Statement of Objections, formally identifying the anti-competitive behaviours under investigation.¹⁵⁷

The case was based on Article 101 TFEU and Article 53 EEA, which specifically prohibit agreements that restrict competition or limit technical development. Moreover, the investigation revealed that the manufacturers coordinated on AdBlue tank sizes (between 8 – 10 litres) and refill ranges of approximately 10,000 kilometres, despite the availability of better technical solutions. This collusion limited innovation and prevented consumer access to more effective diesel emissions reduction technologies.

To establish the case, the EC relied on documentary evidence, such as emails and meeting records from the ‘Circles of Five’, as well as admissions from the involved parties. The evidence

¹⁵⁶ The Leniency program in competition law allows companies that are involved in anti-competitive practices, such as cartels, to report their misconduct to competition authorities in exchange for immunity or a reduction in fines. By cooperating and providing evidence about the illegal activities, these companies can avoid or mitigate penalties that would have otherwise been imposed on them. This program is designed to encourage cooperation with competition authorities and improve enforcement efforts against anti-competitive behaviour. See, European Commission, ‘Leniency’ (Competition Policy) <https://competition-policy.ec.europa.eu/antitrust-and-cartels/leniency_en> accessed 24 January 2025.

¹⁵⁷ European Commission, ‘Commission Decision of 8.7.2021 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.40178 - Car Emissions)’ [2021] OJ C <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40178/40178_4091_3.pdf> accessed 26 December 2024.

demonstrated that the manufacturers exchanged sensitive technical information about AdBlue consumption rates and strategies to meet emissions standards, restricting competition in developing SCR systems.¹⁵⁸

In 2021, the manufacturers agreed to settle the case, acknowledging their involvement and liability. The total fines amounted to €875 million, with Volkswagen and BMW receiving significant penalties for their roles in coordinating tank sizes and sharing technical information. However, Daimler avoided a fine entirely under the leniency program for revealing the collusion.¹⁵⁹

The EC concluded that the conduct violated Article 101(1) TFEU, as it limited technical innovation, restricted consumer choice, and harmed the environment by preventing advancements in reducing NOx emissions. The behaviour was classified as an agreement and/or concerted practice with a clear anti-competitive object, meaning its harmful effects were evident without the need to demonstrate specific market impacts.¹⁶⁰

The case emphasised the importance of maintaining competition in environmental technologies and set a precedent for addressing collusion on technical standards. It highlighted the Commission's commitment to penalising anti-competitive practices that hinder technological progress and environmental objectives, ensuring fair competition and protecting societal interests.

¹⁵⁸ European Commission, 'Commission Decision of 8.7.2021 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.40178 - Car Emissions)' [2021] OJ C <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40178/40178_4091_3.pdf> accessed 26 December 2024.

¹⁵⁹ 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) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581> accessed 28 December 2024.

¹⁶⁰ European Commission, 'Commission Decision of 8.7.2021 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.40178 - Car Emissions)' [2021] OJ C <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40178/40178_4091_3.pdf> accessed 26 December 2024.

c. Implications for sustainability standards and market dynamics

The case highlights the significant impact of anti-competitive practices on sustainability and market competition in the automotive industry. By examining the collusion among Daimler, Volkswagen, and BMW, this case reveals how restricting innovation and limiting competition can hinder progress toward environmental goals and disrupt market dynamics.

One of the key issues was the impact on sustainability standards. By agreeing to limit AdBlue tank sizes and avoiding competition in developing more effective SCR systems, the companies delayed progress in reducing harmful NOx emissions. Rather than working to go beyond regulatory requirements, they prioritised cost-saving measures, which weakened the EU's efforts to implement stricter environmental rules such as Euro 5 and Euro 6.

The case significantly affected market competition. The manufacturers' collusion reduced the pressure to innovate cleaner and more advanced technologies, depriving consumers of vehicles with improved emissions performance and limiting their choices. This also caused the European car industry to lose valuable opportunities to lead in green technology. Commissioner Margrethe Vestager, responsible for competition policy, stated that while companies are free to collaborate to enhance product quality, EU competition laws prohibit collusion that hinders improvements and restricts competition on quality. She expressed concerns that Daimler, Volkswagen, and BMW may have violated these rules by potentially limiting advancements in technology. Consequently, European consumers might have been deprived of access to vehicles featuring the best available

innovations.¹⁶¹ Furthermore, the collusion damaged public trust in automakers, as they failed to meet consumer expectations for accountability and responsible environmental practices.

The case emphasised the need for better regulations to prevent such collusion. Stronger and clearer rules, like the Real Driving Emissions tests introduced in 2016, are important for ensuring manufacturers meet higher standards. Regulators also need to monitor the industry closely to stop companies from holding back innovation while appearing to comply with basic requirements.¹⁶²

To summarise, the case shows how collusion can delay progress in environmental protection and harm competition. It emphasises the importance of effective regulations and accountability to promote innovation, protect consumer interests, and advance sustainability objectives.

d. Conclusion

The Car Emissions Case shows how harmful anti-competitive practices can be for both the environment and market competition. By working together to limit improvements in SCR technology, Daimler, Volkswagen, and BMW slowed progress in making cleaner and more efficient cars. The EC's decision to impose fines and enforce competition laws highlights the need for accountability and fair practices in industries that affect sustainability. This case is a reminder that promoting competition and innovation is crucial for achieving environmental goals and giving

¹⁶¹ European Commission, 'Antitrust: Commission Sends Statement of Objections to BMW, Daimler and VW for Restricting Competition on Emission Cleaning Technology' (Press Release, 5 April 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008> accessed 28 December 2024.

¹⁶² European Commission, 'Commission Decision of 8.7.2021 Relating to a Proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (AT.40178 - Car Emissions)' [2021] OJ C <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40178/40178_4091_3.pdf> accessed 26 December 2024

consumers better choices. To prevent similar issues in the future, stronger rules and closer monitoring are essential to ensure industries prioritise progress and responsibility.

F. Conclusion

a. Summary of Key Findings

This thesis highlights the essential role of sustainability agreements in supporting the EU's sustainability goals, as set out in the EGD. At the core of this vision is the alignment of environmental, social, and economic priorities to create a transformative path towards sustainable development. The EGD's focus on achieving a climate-neutral and resource-efficient economy is reinforced by frameworks like Article 101 TFEU and the 2023 Horizontal Cooperation Guidelines.

Sustainability agreements are increasingly recognised as an effective way to align business collaboration with environmental objectives. The updated Guidelines offer clear direction on how these agreements can comply with legal standards while pursuing sustainability goals. They have the potential to advance innovation, improve resource efficiency, and benefit consumers, all without compromising fair competition. However, this thesis also emphasises the challenges of creating a balance between these aims. For example, agreements that limit competition for sustainability purposes must satisfy the cumulative conditions of Article 101 (3) TFEU, including measurable consumer benefits, efficiency improvement, and ensuring that competition is not significantly harmed.

The analysis of NCA approaches, including those in the Netherlands, Greece, Austria and Germany, highlights the different ways sustainability agreements are implemented across the EU. These cases show the importance of developing policies that are tailored to local economic and environmental conditions. Moreover, the Car Emissions Case shows the practical challenges of aligning sustainability initiatives with competition law, emphasising the need for strong legal frameworks to prevent greenwashing and guarantee genuine environmental benefits.

b. Recommendations for Future Policy and Research

To strengthen the alignment between EU competition law and sustainability goals, this research proposes a combination of policy recommendations and areas for further investigation.

From a policy perspective, first, the EU should expand the 2023 Horizontal Cooperation Guidelines to include more sector-specific examples and templates. This would provide businesses across various industries with practical tools to create sustainability agreements that comply with competition law achieving measurable environmental benefits.

Second, the enforcement mechanisms surrounding Articles 101(1) and 101(3) TFEU should be strengthened to prevent misuse of sustainability agreements. Specifically, measures should be implemented to identify and address agreements that disguise anti-competitive practices, such as greenwashing or price coordination. Enhanced monitoring practices, supported by clear guidelines for verifying sustainability claims, would improve compliance and protect market integrity.

Third, financial incentives should also be introduced to encourage small and medium enterprises (SMEs) to participate in sustainability initiatives. Additionally, since SMEs often lack the resources to adopt environmentally friendly practices or engage in sustainability agreements without breaching competition rules, targeted financial support mechanisms, such as grants or subsidies, could address these challenges.¹⁶³ Such measures would balance opportunities, ensuring sustainability efforts include smaller businesses as well as larger corporations.

¹⁶³ OECD, 'Financing SMEs for Sustainability' (OECD, December 2022) <https://www.oecd.org/publications/financing-smes-for-sustainability_19414952-en.pdf> accessed 28 January 2025.

Finally, cross-border collaboration between NCAs should be encouraged to harmonise the interpretation and application of competition law to sustainability agreements. This would minimise regulatory inconsistencies across Member States, creating a more unified approach to achieving the EU's sustainability objectives. Aligning NCA actions more closely with the principles set out in the 2023 Horizontal Cooperation Guidelines would also enhance consistency and provide legal certainty for businesses.

On the research and development front, further investigation is needed to explore the long-term impact of sustainability agreements on market dynamics, consumer welfare, and environmental outcomes. Enhanced monitoring and enforcement practices deserve further exploration to ensure compliance while preventing greenwashing. Investigating how sustainability agreements can drive technological innovation and assessing their socioeconomic impacts, such as on employment and equity, would also contribute to a more comprehensive understanding. In addition, examining global best practices could provide a roadmap for adapting successful strategies within the EU context.

In conclusion, sustainability agreements represent a promising pathway for integrating environmental objectives into the framework of EU competition law. While challenges remain, the evolving legal framework, exemplified by the 2023 Horizontal Cooperation Guidelines, offers a strong foundation for advancing innovation, ensuring consumer welfare, and promoting sustainable development. The EU can continue to strengthen its position as a global leader in building a fair, inclusive, and sustainable future for its citizens and the global community by adopting targeted policies, addressing research gaps, and encouraging collaboration.

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