Sustainability Agreements in the European Commission's Draft Horizontal Guidelines

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Key points:

- The European Commission has published its Draft Horizontal Guidelines (DHG), which include an assessment of "sustainability agreements". The dedicated paragraphs enlarge the scope for the consideration of sustainability benefits.
- We review the various ways how such an extended consideration of sustainability benefits can take place, such as the introduction of safe harbours for certain sustainability agreements or the introduction of the concept of "collective benefits". In its balancing of effects, the DHG still remain firmly grounded in a consumer welfare analysis.
- We discuss possible problems that may arise from the broad conception of sustainability, notably in combination with the acknowledgement of "collective benefits". We propose an alternative.

I. Motivation

The European Commission has recently published its Draft Horizontal Guidelines (DHG).[1] A major novelty is the recognition of "sustainability agreements" as a new category[2] (Chapter 9). This did not come as a surprise given the Commission's own initiatives over the last two years[3] and as various countries and national competition agencies have already taken steps towards a greater recogni-

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[1] Commission, Draft 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreements' (2022), available at: https://ec.europa.eu/competition-policy/public-consultations/2022-hbers_en.

[2] While the DHG emphasize that the general principles of the assessment of horizontal agreements will apply here, they nevertheless provide extensive and specific guidance on them taking account of the unique challenges this type of agreement poses.

[3] The Commission had singled out sustainability as a major topic for its overhaul of the horizontal block exemption regulation (HBER); cf. Commission, 'Commission Staff Working Document Evaluation of the Horizontal Block Exemption Regulations' (2021) SWD(2021) 103 final, p. 19. The Commission had also commissioned an expert report on this topic (Commission, 'Incorporating Sustainability into an Effects-Analysis of Horizontal Agreements' (report written by Roman Inderst) (2022), available at: https://ec.europa.eu/competition-policy/system/files/2022-03/kd0722074enn_HBER_sustainability.pdf).

tion of sustainability concerns in the enforcement of their antitrust laws.[4] The OECD hosts a discussion on green innovation and competition in its 2022 Open Day and has dedicated a specific panel to this end in December 2021.[5]

In this contribution we first briefly review the Commission's draft (Section II). The DHG enlarge the scope for the consideration of sustainability benefits through generating a safe harbour for particular types of sustainability agreements, such as those that concern internal corporate conduct, providing conditions under which "sustainability standard agreements" may be exempted from an effects analysis, recognizing that even certain severe restrictions such as in the context of joint production and supply may not be considered as "by object"[6] and extending the scope of potentially relevant benefits that may be considered under an effects analysis. Many of these provisions should now give firms sufficient scope and certainty to pursue sustainability agreements. And they should also foster the application of new instruments borrowed, amongst others, from environmental and resource economics. The DHG thus provide an important step forward.

In Section III we discuss possible problems that may result from the broad conception of sustainability, notably in combination with the acknowledgement of "collective benefits". We propose an alternative.

With this contribution we aim to provide a timely input to the current debate about this draft, but also wish to contribute to its subsequent interpretation and practical application. With its draft guidelines the Commission treads novel grounds, which necessarily leaves ample scope for future concretization in enforcement practice.

II. Assessing Sustainability Agreements under the Draft Horizontal Guidelines

A. Definition

In the introductory Section 9.1 the DHG seek to provide a broad definition of sustainability, which is notably not restricted to environmental sustainability, making explicit reference also to, e.g., human rights and animal welfare (para. 543). At the same time, the DHG frame sustainability agreements in the context of the avoidance of externalities (para. 545). And the DHG seem to restrict the scope of such agreements to areas where the resulting market failures are not already addressed by regulation (para. 546).

Sustainability as a goal of societal importance and as enshrined in EU law in various ways[7] can be conceived of as a broad concept that goes beyond the protection of the climate and the preservation of flora and fauna. How-

[4] Notably in Austria and the Netherlands the goal of (ecological) sustainability has been enshrined in competition law or respective guidelines. This has been preceded by the commissioning of a report by the Dutch and Greek competition authorities (Roman Inderst, Eftichios Sartzetakis and Anastasios Xepapadeas, 'Technical Report on Sustainability and Competition' (2021), available at: https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf).

[5] https://www.oecd.org/daf/competition/environmental-considerations-in-competition-enforcement.htm.

[6] Therefore, requiring a closer "by effect" analysis.

[7] See especially Article 11 TFEU (ex Article 6 TEC), Article 3 TEU (ex Article 2 TEU), Article 191 TFEU (ex Article 174 TEC).

ever, if sustainability is to be considered in antitrust enforcement, it might become necessary to concretize it, as we discuss in Section III.A.

At this point we restrict ourselves to a discussion of the DHG's concept of "residual market failure". The statements in para. 546 may not prove sufficiently clear and useful. The DHG make explicit reference to the pricing of CO2 emissions. The currently prevailing price is the result of a political decision regarding total admissible emissions (together with the size of exempted activities). By which standard should one consider the price as sufficiently high to rule out a "residual market failure"?[8] As the DHG remain within a consumer welfare standard, the provision in para. 546 may also be largely superfluous, at least as long as an effects analysis is carried out.

B. Sustainability Agreements Not Raising Competition Concerns

Section 9.2 essentially clears certain types of sustainability agreements: agreements that concern the internal corporate conduct, those relating to the creation of a database about sustainable suppliers or distributors, and those relating to the organisation of industry-wide awareness campaigns, although for the latter there seems to be a restriction to environmental sustainability (given the explicit mentioning of an "environmental footprint").

Providing basically a safe harbour for these types of agreements is important given their practical relevance. For an example that, again, goes beyond environmental sustainability, recent (partly enacted and partly planned) legislation in Europe will make firms responsible for (at least parts of) their supply chain. Allowing firms to share data on whether and which suppliers adhere to certain standards should greatly reduce their compliance costs, thereby also ensuring that firms will not withdraw from certain countries, which would contradict the intention of such legislation.

Importantly, these safe harbours do not make it necessary to prove efficiencies. This seems to be the case even if, for instance, jointly agreed changes in firms' internal conduct may result in an even substantial increase in costs that are passed on to consumers, notably when the agreement concerns the whole industry. Competitors' joint commitment to equal pay, for instance, may lead to much higher prices of products or services (We make this point for the sake of the argument, while we want to leave it open in this article whether the attainment of higher wages can be considered a matter of sustainability). Such an example highlights the possible need to sharpen the definition of sustainability (see Section III.A). We also think that, with respect to information sharing within a database (para. 553), an indispensability test must apply in that only those data can be collectively shared and provided that are necessary to inform about the sustainable value chains (and not, for instance, about prices, if that is not necessary).[9]

[8] We are aware of the discussion about the supposedly much higher "social cost of carbon", but equating this to a "non market failure" price would sidestep any expression of society's objectives.

[9] As to the legal reasons behind such data basis escaping Article 101 TFEU, the Commission remains silent. We think that, ultimately, it is due to the recognition of such information sharing to be ancillary to the pursuit of the creation of a sustainable value chain that the cartel prohibition does not apply thanks to the ancillary restraints doctrine. This potentially contrasts with the Commission's repudiative statement about the ancillary doctrine in para. 548; see also below Section III.C.

C. Categories of Assessed Sustainability Agreements

In Section 9.3 the DHG first clarify that the assessment of sustainability agreements that fall within the categories used elsewhere in the guidelines will be conducted accordingly (that is, explicitly R&D agreements, production agreements, purchasing agreements). The DHG add to this the category of "sustainability standardisation agreements" (Section 9.3.2), which are set apart from that of "standardisation agreements" treated in Chapter 7.

Here, the DHG seem to have in mind in particular a joint (green) standard or sustainability goal on which the participants agree, possibly associated with a respective label, logo or brand name, rather than the joint adoption of a precise technical standard (e.g., to ensure interoperability). Importantly, with respect to such sustainability standard agreements, the DHG provide for a "soft safe harbour" (Section 9.3.2.4) if various cumulative conditions are satisfied, by which effective competition shall be preserved (as, amongst other requirements, the standard should be open to other firms and should not involve the exchange of non-necessary sensitive information).

Though the inclusion of such a "soft safe harbour" strikes us as useful given the increasing importance of such sustainability standards, its practical relevance may, however, be restricted by the requirement that firms need to show that "*the sustainability standard should not lead to a significant increase in price or to a significant reduction in the choice of products available in the market*" (para. 573). Notably industrywide agreements that raise the sustainability standard and thereby exclude the production or sale of some previously supplied less sustainable product will still need to undergo an effects analysis.[10] One must see however, in our view, that it can be the very purpose of a sustainability agreement to change the product range being offered in a market (towards the more sustainable variants). Therefore, a sustainability agreement can carry in itself the purpose to limit consumer choice in order for it to yield any beneficial effects on the environment.

Irrespective of whether an agreement falls into one of these categories, the fact that it relates to sustainability may be taken into account in assessing whether the restriction is by object or by effect. According to para. 560 even agreements that apparently pursue restraints to competition as severe as price fixing or a limitation of output will still require a by-effects assessment if it can be established that the agreement by this pursues a genuine sustainability objective.[11] This statement needs, however, to be seen in the broader

[10] See, in particular, Example 5 in para. 621, which deals with an agreement to phase out less energy-efficient washing machines.

[11] To apply the by-effects category, in this instance, raises further legal questions which cannot be dealt with exhaustively in this short article. It is well known already under the existing Horizontal Guidelines that severe restraints, such as a collusion on price, can fall outside the by-object category and therefore be subject to a by-effects analysis. The latter implies that even though price is being restricted between the parties to the agreement, the net effect of price fixing can be beneficial so that an anticompetitive effect must be denied (see, e.g., para 160 of the existing Horizontal guidelines with respect to joint selling within a joint-production cooperation). With respect to sustainability agreements it therefore becomes questionable which welfare standard or other kind of metric can be applied to check whether a sustainability agreement, even though involving competitively relevant parameters, will not lead to an anticompetitive effect.

context of other provisions of the DHG. For instance, para. 571 explicitly refers to sustainability standardisation agreements that comprise provisions to pass on higher costs to consumers as a restriction by object. In contrast, other references in the DHG suggest that agreements that jointly restrict production and supply to more sustainable (but also more expensive) products need to undergo an effects analysis. In practical terms, firms will look for greater transparency on which severe restriction will be treated as by object an which will not. Will this, for instance, also (not) apply to agreements that impose limits on capacity and output?

D. Efficiencies

Section 9.4 deals with the assessment under Article 101(3). Here, it is helpful that the DHG clarify that potential efficiencies explicitly relate to "*a broad spectrum of sustainability benefits*" (para. 577), though they need to be "*objective, concrete and verifiable*" (para. 579). Interestingly, the example which the DHG choose in this respect is that of a reduction of water contamination, which is remarkable as in this case appreciable consumer benefits may be limited. We return to this below.

Benefits are only appreciable to the extent that the agreement is indispensable to their realization (Section 4.2). The DHG dedicate various paragraphs to a concretization of the meaning of indispensability in the context of sustainability agreements under Article 101(3) TFEU. We regard this part of the DHG of particular practical importance. The DHG distinguish between the issue whether the agreement is in fact indispensable for the attainment of the respective sustainability benefits, or whether it only allows to reach the respective goal in a more cost efficient way. As the latter relates only to (production) cost efficiencies, their consideration can follow established procedures. Of greater novelty and potential importance seems to be the case where the agreement is necessary for the achievement of the respective benefits. Here, the DHG provide both positive as well as negative conditions, as follows:

The DHG acknowledge that without an agreement there may be free-riding on the investments to promote sustainability ("first mover disadvantage", para. 584), that parties may not sufficiently concentrate efforts on the respective standard or label, which may then fail to reach sufficient scale (para. 585), and that consumers may fail to sufficiently understand or appreciate the benefits (para. 586). With regards to the last case, at another instance the DHG rightly points out that in their analysis of consumers' valuation parties to an agreement should avoid superimposing their own preferences on consumers (para. 599). Such care may also be required with respect to para. 586.[12]

On the other hand, the DHG generally do not consider an agreement to be indispensable to the achievement of sustainability goals if such

[12] It must be noted, however, that para. 586 discusses only the case where consumers' lack of knowledge or their potential biases are limited to the tradeoff between future benefits and more immediate costs. The possibility of potential biases arises, however, also when assessing consumers' preferences for a balancing of effects (Section 9.4.3). As we discuss below, the DHG rightly refer to the importance of the context of such elicitation. Here, through the adequate design of hypothetical choice contexts, care can be taken to avoid suspected biases as much as possible (including seemingly "wrong" time preferences); cf. the discussion in Roman Inderst and Stefan Thomas, 'Reflective Willingness to Pay: Preferences for Sustainable Consumption in a Consumer Welfare Analysis' (2021) 17 Journal of Competition Law & Economics 848.

goals are defined as legal obligations with which firms must comply under EU or national law anyways (para. 583) or when there is demand for sustainable products (para. 582). We find these statements to be too restrictive. For instance, when new supply chain legislation forces firms to ensure environmental compliance within their entire supply chain, firms may consider terminating their supply chain contacts to some countries, since the monitoring effort in relation to suppliers located there would be too costly and the legal uncertainty too great. To terminate such business relationships, however, would not be intended by the new supply chain legislation. If firms were, however, allowed to coordinate on standards this may instead induce them to continue their business in or with the respective country whilst complying with the monitoring obligations under the new supply chain legislation.[13]

It is the subsequent discussion of the "fair share" requirement in Article 101(3) (Section 9.4.3 on "Pass on to consumers") that testifies, in particular, to the Commission's attempt to broaden efficiencies under a consumer welfare approach so as to take into account sustainability concerns. The DHG distinguish between, first, benefits of direct or indirect consumers and, second, so-called "collective benefits". As we will discuss, however, the latter are not disconnected at all from the consumer welfare paradigm.

The DHG acknowledge explicitly that next to use value benefits (Section 9.4.3.1), notably with respect to sustainability, non-use value benefits may be of particular relevance (Section 9.4.3.2). In the academic literature, non-use value refers to a valuation not based on the actual, planned, or possible use by oneself.[14] This may comprise the use value derived by others if a consumer has altruistic preferences, or it may represent the appreciation of the existence of a wild animal or some preserved natural habitat even though the respective consumer does not expect to make direct "use" of it (so-called "existence value"). The DHG stress that the respective consumer benefits, i.e. the respective willingness to pay, need to be measured appropriately (para. 598) and refer to surveys as one such instrument. We would suggest that in light of the advanced state of such measurement techniques in areas such as environmental and resource economics or marketing science, there should be no need to single out one instrument.[15] The DHG also stress that care must be taken with respect to the context in which the respective preferences are elicited. This is in our view very important as non-use values are typically not anchored by some immediate sensation, in contrast to use values, and should thus be much more susceptible to such context, including, as the DHG explicitly recognize, the expected behaviour of others, societal norms, limited

[13] If joint monitoring is more efficient (e.g. due to scale-effects), such an agreement may also be considered for traditional cost efficiencies.

[14] See, for instance, David Pearce, Giles Atkinson and Susana Mourato, '*Cost-Benefit Analysis and the Environment: Recent Developments*' (OECD Publishing 2006).

[15] Other instruments are based on real or hypothetical choices that are then analyzed, for instance, through a conjoint analysis. For a short practical consideration see Roman Inderst and Stefan Thomas, 'Integrating Benefits from Sustainability into the Competitive Assessment—How Can We Measure Them?' (2021) 12 Journal of European Competition Law & Practice 705; and for greater details the discussion and literature referenced in Inderst, Sartzetakis, Xepapadeas (n 4).

knowledge, and ingrained (purchasing) habits.[16]

With these considerations the DHG recognize the importance of non-price efficiencies for an adequate balancing of sustainability benefits. In our own experience, the tools and practical skills needed to perform such an analysis are typically not part of the training in industrial organization and competition economics. While consultancies may be quick to buy in such expertise, e.g., from marketing scholars, antitrust authorities may be more constrained in this respect. Looking into the future, this may justify why authorities will, at first, remain reluctant to accept such evidence. Our hope is that all parties contribute to a mutual learning experience and the development of accepted standards.

What the recognition of use- or non-use value benefits lacks, in our view, is, however, a sufficient acknowledgement of the dimension of time, which should be of particular importance for sustainability. In certain cases the actions undertaken with or without an agreement may lead to irreversible consequences. Should this be the case, how should the preferences of current and future consumers (still within the relevant market) be traded off with each other if they cannot be assumed to be the same?[17] Such a trading-off of current and future costs and benefits, even across different cohorts of consumers, is also of importance when so-called "collective benefits" (Section 9.4.3.3) are recognized, to which we turn next.[18]

With the recognition of "collective benefits" the DHG acknowledge potential benefits that go beyond appreciated consumer use- or non-use value benefits. Our reading of the respective provisions is such that the DHG thereby still remain firmly within the grounds of the consumer welfare paradigm. To put it simply, such benefits must still accrue in a sufficient amount to those consumers that are potentially negatively affected by reduced choice and higher prices. For this the DHG's example in para. 604 is particularly instructive. There, drivers benefit from cleaner air when a less polluting fuel is introduced, even though for each individual driver this benefit is obviously brought about by the collective change in behaviour of all other drivers as the effect of one's own pollution is negligible. It is thus the change of behaviour of others that compensates for a higher price, which differs sharply from the traditional application of a consumer welfare standard (which typically calculates willingness-to-pay while holding all other consumers' behaviour fixed). We return to this in detail in Section III.B. For the moment we note the DHG require full compensation for (negatively) affected consumers: "[...] *the sustainability benefits from*

[16] The issue of context is dealt with extensively in Inderst and Thomas (n 12), embedding it also into diverse academic strands such as that of social choice theory and behavioural welfare economics. In Roman Inderst, Felix Rhiel and Stefan Thomas, 'Sustainability Agreements and Social Norms' (2021), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887314, we provide a more detailed, empirically backed discussion of the relevance of social norms, and how these may be changed by an agreement.

[17] For a detailed discussion see Roman Inderst and Stefan Thomas, 'Prospective Welfare Analysis – Extending Willingness-To-Pay Assessment to Embrace Sustainability' (2021) Journal of Competition Law & Economics nhab021.

[18] To note just one issue that arises in this respect, when cost and benefits arise differently across cohorts of consumers, the academic literature makes use of social discount rates, while competition analysis typically balances costs and benefits by using individual discount rates of affected consumers.

cleaner air are in principle relevant for the assessment and can be taken into account if they are significant enough to compensate consumers in the relevant market for the harm suffered." [19]

In Section 9.4.4 the DHG turn to the fourth condition of Article 101(3). Even though we do not detect major novelties that are specific to sustainability agreements, it is noteworthy that the DHG explicitly recognize that competition need not be eliminated at all even when an agreement covers the whole or a very large part of the market, which, as the DHG recognizes, may be necessary to realize the respective benefits. Firms should then still compete on other strategic dimensions.

III. What is Special about Sustainability?

A. Defining Sustainability and its Scope

We already acknowledged that the Commission may not have been in a position to apply a narrow and thereby sharp and transparent concept of sustainability. Its conception in para. 543 thus remains broad and vague. The DHG's explicit account contains objectives as diverse as labour and human rights, the environment, healthy food or animal welfare. It is also not clear to us whether the initial sentence of this paragraph has any constraining purpose: "*In broad terms, sustainable development refers to the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs.*" We cannot see how the objective to preserve resources could, other than in a very faint and indirect way, relate to, for instance, standards that foster animal welfare or specific labour rights, such as to collective bargaining.[20] Both in principle but also in concrete cases, these diverse sustainability goals may also be conflicting, e.g., as measures to protect the environment or to increase animal welfare can have distributional implications. And it must be acknowledged that consumer preferences for "sustainable" measures and products are often non-consequentialist and may therefore have sometimes little or no real impact, or they may even prove counterproductive.[21] The DHG seem to circumvent these issues by focusing examples on environmental sustainability. In fact, our reading suggests that some paragraphs are indeed limited to this (e.g., in the case of the exemption of joint awareness campaigns regarding the "environmental footprint"). But in several other occasions such a restriction does not transpire. As we discuss below, at least according to our reading this could mean that the concept of "collective benefits" is also applicable to, for instance, the benefits that conscious consumers of chicken meat experience when less conscious consumers are constrained to purchase more expensive meat satisfying a

[19] To us this requirement is, however, not fully transparent as the DHG make reference also to other beneficiaries, e.g., non-driver citizen in the fuel example. Should there be no other repercussions across markets (in the sense of para. 602), it is unclear how such benefits to non-consumers should play any role at all.

[20] Of course, the term "resources" is not necessarily confined to (depletable) natural resources, but could include so-called social capital and with it the cultural and social fabric of society. But this does not help to make the term much more precise.

[21] Often cited examples are that of carbon leakage or that a reduced purchase of merchandise produced from child labour may actually worsen, at least in the shorter term, the condition of the affected children and their families.

higher standard of animal welfare. As another example, irrespective of the ensuing higher prices, according to our reading, firms in an industry may be allowed to jointly commit to a minimum wage or to an equal pay regime, provided that these qualify as broad sustainability objectives.

B. Collective Benefits

Returning to the fuel example, even a driver who derives no benefits from improving the health of others should benefit from a scenario in which all other drivers purchase a less polluting fuel and thereby improve air quality. The acceptance to pay a higher price in the changed scenario would thus not relate to a change in one's own behaviour but to a change in the behaviour of other consumers. An agreement that would result in such a change could thus increase the collective welfare of consumers, even though each individual consumer would rather individually defect and purchase a cheaper, less polluting fuel. In our own work we referred to this as "collective willingness to pay", setting it thus apart from "individual willingness to pay", and noted that its elicitation is at the heart of social choice, as applied notably in environmental and resource economics.[22] With respect to such "collective willingness to pay", we raised however several concerns that, in our view, should limit the consideration of such benefits.

Take again the case of animal welfare. When asking the (potential) purchasers of chicken meat, there may be some who would derive high utility when all chicken, i.e., not only those whose meat is consumed by themselves, would have more space. Put differently, the knowledge that chicken raised for the consumption by others must suffer exerts a negative externality on them, and this would be reduced by an agreement that raises animal welfare standards. Collectively consumer welfare may thus be higher if all consumers were constrained to purchase more expensive chicken meat satisfying such higher standard. In our work we expressed serious reservations against such an extension of the consumer welfare paradigm, which blurs or even transcends the boundaries between what individual choices in the market should deliver and what collective choices through notably the political process should achieve. We therefore stressed the need to carefully delineate which preferences over the choices of others should be considered legitimate. The DHG circumvents this discussion by focussing on an example that concerns negative health externalities. The DHG refers here also to particular evidence (para. 607), e.g., from academic organisations, and there exist indeed methods to measure the respective impact as well as tabulated results from studies.[23] In some sense, in this case the benefits may seem to be more objective than, for instance, in our preceding case of animal welfare and the (dis-)utility that the consumption of others generates for individual consumers. Imposing additional requirements for the measurement of collective benefits may thus also open up a way to reign in their applicability.

[22] Roman Inderst and Stefan Thomas, 'The Scope and Limitations of Incorporating Externalities in Competition Analysis within a Consumer Welfare Approach' (2021), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3896243.

[23] Inderst, Sartzetakis, Xepapadeas (n 3) provide a discussion both of the respective measurement tools and sources for such tabulated results.

Another built-in limitation that safeguards against such an overextension of collective benefits may derive from the previously discussed restriction to areas with a "residual market failure" (para. 546). As we already discussed, this concept may, however, have little practical use. Both in the case of animal welfare and that of CO2 there exists regulation, but in which of the two cases can it be thought to be insufficient in that it would give rise to a "residual market failure"?

C. An Alternative

The DHG recognize that in certain circumstances non-use value may be an important part of consumer welfare. The DHG testify to the Commission's preparedness to take this into account and rely on respective measurements, provided that certain standards are satisfied. For this it is at first not relevant which sustainability concerns determine consumers' valuation. We acknowledge that this may be somewhat different in practice, as the DHG recognize the need to validate any such measurements.

Our preceding discussion suggests, at least to us, that the DHG's broad conception of sustainability may, however, have potentially problematic implications for other provisions of the guidelines. In this section we considered again the consideration of "collective benefits" and argued with the example of animal welfare that the inherent expansion of the consumer welfare standard may need limitations. In fact, we noted that the choice of examples in the DHG suggests that much was crafted with an eye on environmental sustainability, given also the clearly expressed policy priority of the Commission in this respect.

In our recent work we have sketched another way for a greater incorporation of sustainability benefits.[24] It is based on the ancillary restraints doctrine and the Court's jurisprudence in *Wouters*. There, we lay out a roadmap for how the legislator could create a framework of "sustainability corridors" that would allow to rely on the ancillary restraints doctrine to make antitrust law more accommodating of sustainability considerations. Our proposal sets out specific requirements for such sustainability corridors that ensure that the ensuing antitrust assessment is governed by a strict and quantifiable indispensability test.[25] In particular, this requires a sufficiently concrete materialization of these objectives in legislation. Thereby, also out-of-market benefits, i.e., beyond those obtained by consumers in the relevant market, could be included without compromising the consumer welfare standard as the single metric for efficiency under Article 101(3).[26]

[24] Roman Inderst and Stefan Thomas, 'Legal Design in Sustainable Antitrust' (2022), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4058367. For a short exposition of the arguments leading to such a proposal see also Roman Inderst and Stefan Thomas, 'Sustainability and Competition: How Competition Law Enforcement Needs to be Overhauled to Achieve Sustainability Goals' (2022), available at: https://www.competitionpolicyinternational.com/sustainability-and-competition-how-competition-law-enforcement-needs-to-be-overhauled-to-achieve-sustainability-goals1/.

[25] Specifically, we discuss three such instances: specific sustainability obligations placed on individual firms, which may however require collective actions; specific mandates that are targeted at the respective industry rather than individual firms; and policy objectives that are not targeted at individual firms or industries but provide a metric for the measurement of sustainability benefits (e.g., by way of conducting an abatement cost analysis).

[26] We acknowledge in our contribution that this may give rise to sometimes severe distributional implications, as only consumers bear the costs of

We are aware that the DGH seem to not espouse the ancillary doctrine as a general approach for dealing with sustainability under Article 101 TFEU,[27] though this may again be due solely or mainly to the fact that the DHG apply a broad and, as we have noted above, not clearly and transparently defined notion of sustainability. We feel that there is, therefore, still room for discussion of whether such a route of legislative "sustainability corridors" may allow to "square the circle".

higher prices. As the consideration of such sustainability benefits is, however, linked to specific legislation, this provides scope to address such implications (notably with tools, such as transfers, that are out of reach for antitrust enforcement).

[27] *„Agreements that restrict competition cannot escape the prohibition of Article 101(1) for the sole reason that they are necessary for the pursuit of a sustainability objective"* (para. 548).