

Bird & Bird

# Competition law & sustainability

Progressing e-commerce delivery value-chain sustainability  
via horizontal and vertical agreements

*11 May 2022*



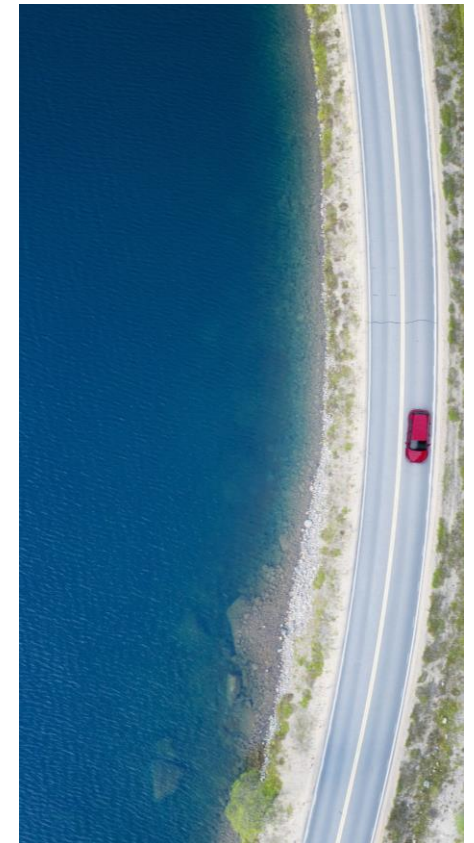
# Not every act to progress sustainability ... restricts competition

1. **Unilateral** acts
  - a. By a non-dominant company
  - b. By a (potentially) dominant company  $\Rightarrow$  only if undue restriction of competition
2. **Vertical** agreements  $\Rightarrow$  companies in different stages of the delivery value chain
3. **Horizontal** agreements – by (potentially) competing companies in the same stage of the chain  $\Rightarrow$  same relevant market
4. Agreements between **non-competitors**
5. **State aid**  $\Rightarrow$  selective financial advantages resulting in restriction of competition

# Scope $\Rightarrow$ restriction of competition?

Does the agreement fall within scope of antitrust rules?

- i. Agreements incentivizing a positive contribution to sustainability objectives without being binding on the individual undertakings
- ii. Codes of conduct promoting environmentally- / climate-conscious or socially-responsible practices
- iii. Agreements aimed at improving product quality, while terminating sale of certain products or products that are produced in a less sustainable manner
- iv. Initiatives creating new products or markets through innovation, where joint initiative is needed for acquiring sufficient production resources, including know-how, or for achieving sufficient scale
- v. Agreements with sole purpose to make the undertakings involved their suppliers and/or their distributors respect the national or international standards for doing business in countries outside Europe



# Assessment of sustainability agreements

*Restriction of competition justified by progression of sustainability?*



Exemption from prohibition on restrictive agreements  $\Rightarrow$  cumulative conditions:

- i. Efficiencies
- ii. **Fair share to consumers**
- iii. Necessary and proportional to realise efficiencies
- iv. No elimination of competition



# ACM's draft sustainability guidelines

## *Proposing a different application of 'fair share' criterion*

- **environmental-damage agreements** ⇒ more leeway
  - Agreement that aims to prevent or limit environmental damage generating efficiency gains for society; and
  - Agreement that helps, in an efficient manner, to comply with an international or national standard to prevent environmental damage to which the government is bound.
- Other sustainability agreements should be assessed in accordance with Commission's Guidelines
  - 'full compensations' of consumers
  - 'within markets benefits'



# Commission's draft Revised Horizontal Guidelines

*Policy proposal for the next 'decade'*

Sustainable development recognized as **core principle** of EU policy

Not all sustainability agreements raise competition concerns!

- ✓ internal conduct rather than economic activity
- ✓ dissemination of information about sustainable suppliers or distributors
- ✓ Joint awareness campaigns  $\Rightarrow$  industry-wide or targeting consumers

Assessment of restrictive effects of sustainability agreements



# Commission's draft Revised Horizontal Guidelines (2)

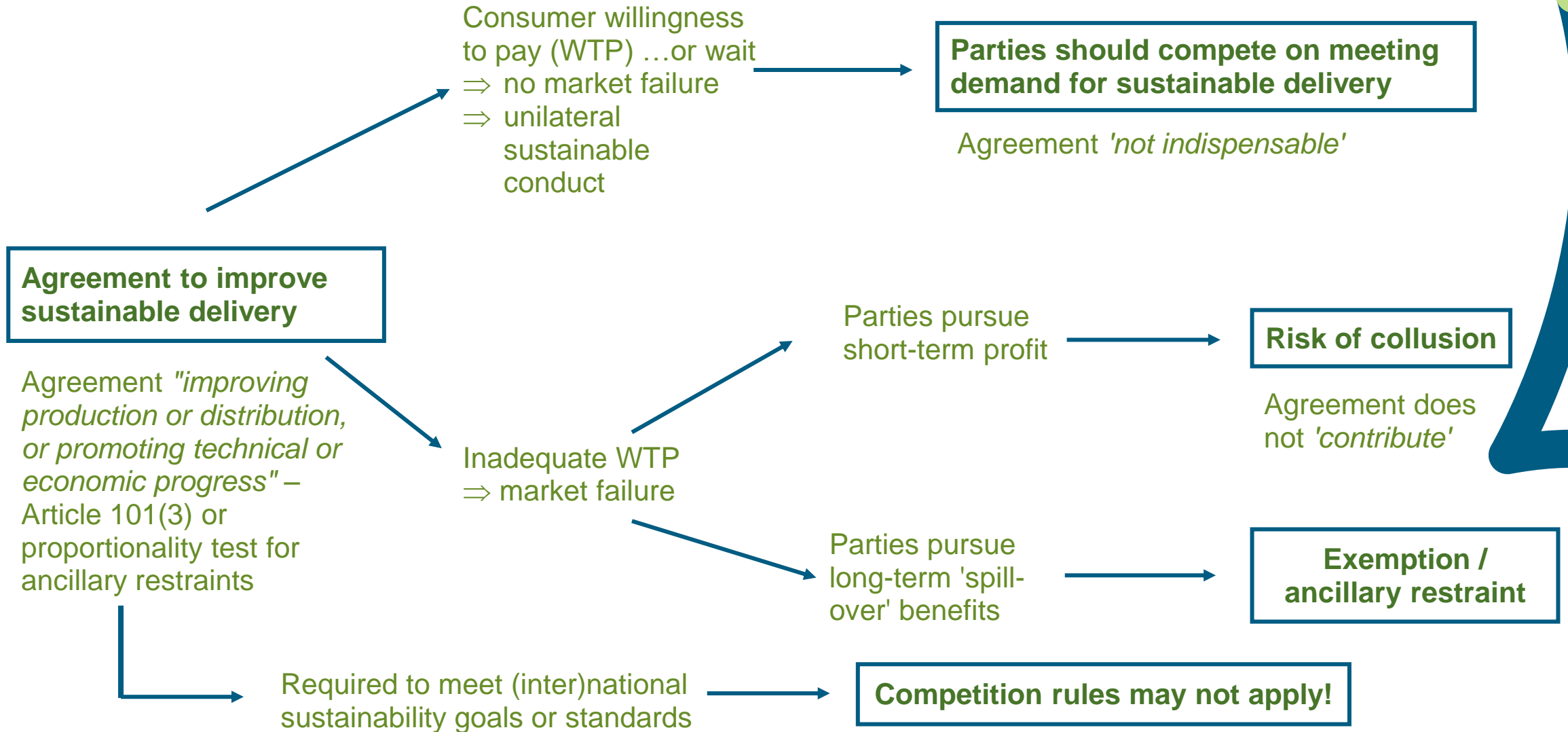
*Sustainability standardisation agreements* ⇒ **soft safe harbour**

No 'by object' restriction of competition

Meeting cumulative conditions:

- i. Transparent development of the sustainability standard
- ii. No obligation to participate
- iii. Freedom to adopt higher sustainability standards
- iv. No unnecessary exchange of commercially sensitive information
- v. Effective and non-discriminatory access
- vi. No significant increase in price or reduction in choice
- vii. Monitoring system for compliance with standard

# Decision tree for analysis under EU antitrust law







# Thank you

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