HUNGARIAN COMPETITION AUTHORITY

SUSTAINABLE DEVELOPMENT AND COMPETITION LAW

(Special project for the 2021 ICN Annual Conference – Survey)

SURVEY REPORT

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While the survey collected the experience and views of ICN members and NGAs, this report should not be taken as representing the official views of the ICN or any of its members or NGAs.

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This survey report and all of its appendices are available at
https://www.gvh.hu/en/gvh/Conference/icn-2021-annual-conference/special-project-for-the-2021-icn-annual-conference-sustainable-development-and-competition-law

This third edition contains minor technical corrections.

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'As a species, we are expert problem solvers.'

David Attenborough[*]

Abstract

This global survey was the Special Project of the Hungarian Competition Authority as the host of the 2021 ICN Annual Conference.

It gathered information about the existing experience and predictions of competition agencies as well as about the views of the experienced non-governmental advisors of the ICN regarding the application of environmental sustainability considerations in competition law enforcement, with a particular focus on restrictive agreements.

While so far there has been a very little, albeit growing body of experience, limited mostly to Europe, business practices that give rise to the issue are likely to continue and spread, posing a challenge to competition agencies and other stakeholders worldwide.

Meeting that challenge – i.e., whether, when and how to incorporate sustainability considerations into competition assessment – requires effort, such as co-operation and capacity building, but it is not expected to entail paradigmatic change.

Legislative action does not seem to be essential, or timely *per se*, yet it may be instrumental in certain – perhaps many – jurisdictions. At the same time, soft laws and other tools that provide guidance have already been called for by practitioners.

Apparently, however, the precondition for progress in most regards is 'competition policy R&D', which is needed to overcome currently unresolved analytical and measurement issues, most urgently concerning 'green agreements' and their 'sustainability defence'.

Although signs of regional convergence in Europe were found, the survey remained inconclusive as to whether convergence or divergence is unfolding at the global level. In any case, the majority of the respondents are of the opinion that international organisations have an important role to play.

Finally, the results may inspire further research, including an eventual update of this survey.

[*] Speech given at the Davos Annual Meeting of the World Economic Forum on 21 January 2019.

Contents

Introduction and main conclusions

Sustainability and competition law is an emerging topic for competition agencies and other stakeholders, representing an area where there is great potential for further exploration. In fact, whether sustainability should be considered in competition law enforcement, and if so, how, is a topic giving rise to a number of controversies as well as conceptual and practical challenges.

Against this background, the Hungarian Competition Authority (GVH),[1] as the host of the 2021 ICN Annual Conference, dedicated its 'special project' to the topic of the interaction between sustainability and competition law. We found it adequate to contribute to the ongoing dialogue and exploration with a basic stock-taking; in other words, by collecting information globally about existing experience.

We limited our survey to environmental sustainability. While we are aware that social sustainability may also be an important subject in the context of competition law, environmental sustainability appears to be the most often discussed 'genre' of sustainability. In addition, by narrowing down to environmental sustainability, the topic is less heterogeneous and less complicated.

We focused on restrictive agreements, which seemed to be the most promising area in terms of case experience. In other respects, our survey was more comprehensive and complex – for instance, the term 'case' covered not only formal proceedings, but also informal consultations with parties. We also differentiated between the negative and positive effects of restrictive practices on sustainability (i.e., between sustainability related competitive concerns and sustainability defence).

We received responses from 52 competition agencies (CAs) and 41 non-governmental advisors (NGAs – who were filtered to have relevant experience). All things considered, we believe that the responses cover most of the relevant experience that CAs and NGAs have.

Given the size and nature of the survey, we applied a 'data based qualitative' analysis relying on simple descriptive statistics. We were careful when interpreting results and cautious when drawing conclusions.

Main conclusions

(i) NGAs with experience widely share the view that competition law enforcement has a role to play in achieving sustainability objectives, at least within certain limits.

There is almost a consensus among the (respondent) NGAs that competition law enforcement can play a reasonable role in achieving sustainability objectives, although comments suggest that this role should be limited in scope, as in most cases regulations are a superior means.[2]

Of course, this does not mean that those NGAs are right or that the same view prevails among *all* the NGAs (or among all the stakeholders); however, in any event, it shows the relevance and timeliness of the topic and this survey.

Perceived limitations are underscored by the varying views of the NGAs on different kinds of cases and by the fact that some NGAs expect 'impossible' cases to be launched relatively often.[3]

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1 Hungarian Competition Authority – Gazdasági Versenyhivatal (GVH).

2 See section NGA.II.A.1.

3 See sections NGA.II.A.2-3.

***(ii) Efficiency/welfare standard does not seem to impede sustainability cases and special competition law provisions do not seem to be conducive to such cases* per se.**

Legislative action does not seem to be imperative, yet it may be instrumental in certain – perhaps many – jurisdictions. Soft laws and guidance, however, are called for by NGAs.

Most cases with a sustainability component, and all cases with a major sustainability component, happened to be in jurisdictions where competition law refer to efficiencies or welfare objectives.[4] At the same time, only a small percentage of cases with a sustainability component, and none of those cases with a major sustainability component, belong to jurisdictions where competition law refers to 'other objectives' or to sustainability.[5]

Nonetheless, this does not necessarily imply that such references cannot hinder or facilitate – under certain circumstances and in certain jurisdictions – cases involving sustainability considerations.

In addition, more than half of the NGAs at least tend to believe that the competition law framework is flexible enough to incorporate those sustainability considerations that are relevant, while they tend to be significantly less satisfied with enforcement. NGAs also vocally call for more and better guidance.[6]

All things considered, results do not suggest that legislative action would be essential or timely *per se*. Nonetheless, it may be instrumental in certain – perhaps many – jurisdictions.

(iii) Sustainability considerations in competition law enforcement are not new, but case experience remains very limited.

However, sustainability considerations will probably emerge more often and will become geographically more widespread in the future.

It is apparent from the CAs' remarks, as well as from common knowledge (for instance on EU case law),[7] that the topic has existed for much longer than the last 6 years, and a large portion of NGAs also report experience which dates back further than 6 years.[8]

Still, the cumulative case experience remains quite limited: there is only a modest number of cases involving either sustainability related competitive concerns or a sustainability defence, and those cases are dealt with by a handful of CAs.[9] Responses also show that cases have only rarely been tested in court.[10]

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4 See section CA.II.A.1.

5 See sections CA.II.A.2 and CA II.A.4.

6 See sections NGA.II.B.1-3 and NGA.II.B.5.

7 E.g.: *Exxon/Shell* ((94/322/EC) Commission Decision of 18 May 1994 (IV/33.640 - Exxon/Shell)) and *CECED* (2000/475/EC: 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.CECED)).

8 See section NGA.I.C.4.

9 See sections CA III.B.1-2 and CA.III.E.1-2.

10 See sections CA.III.B.4 and CA.III.E.4.

Furthermore, there are only a few CAs with guidance materials, and the number of responding NGAs shows that there are only a few NGAs with experience in sustainability and competition at present.[11]

As for future trends, it is indicative that there has been a recent surge in the number of cases involving sustainability defence, and seemingly also in NGA experience.[12]

In addition, a much larger share of CAs predict that they will encounter the issue in an enforcement context in the near future than the share of those that have already dealt with it.[13]

Also, the share of CAs with a strategic agenda that includes sustainability and competition is higher than the share of those CAs with (any) actual experience in the topic.[14] This is largely consistent with the fact that the majority of NGAs expect the topic to be among the most important ones in the near future.[15]

(iv) At present, sustainability and competition is more of an issue in Europe than elsewhere.

However, interest and anticipation extend well beyond Europe, even if they are relatively modest so far.

Results are inconclusive as to whether international convergence or divergence is unfolding, albeit there are signs of regional convergence in Europe.

Europe's predominance is reflected by the much higher response rates of the European CAs and response ratios of European NGAs.[16] Also, there is a considerably large share of NGA views concerning European jurisdictions.[17]

What is more, all but one of the 'more experienced' CAs are European,[18] and the relevant case experience of CAs is also limited to Europe.[19] In addition, all but one of the CAs that report sector inquiry / market studies / research projects, and all of the CAs that have experienced an expertise gap are in Europe. Only one CA that anticipates an expertise gap is located outside of Europe, and efforts to deal with the expertise gaps are also concentrated in Europe.[20] [21]

At the same time, a large minority of non-European CAs (or a majority if we disregard those who did not give an answer) anticipate that they will encounter sustainability and competition in case

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11 See sections CA.III.C.3, CA.III.F.3, and NGA.I.A.2.

12 See sections CA.III.E.2 and NGA.I.C.4.

13 See section CA.III.H.4.

14 See section CA.IV.D.1.

15 See section NGA.II.E.2.

16 See sections CA.I.A.2 and NGA.I.A.2.

17 See section NGA.I.C.3.

18 See the introduction of section 'Competition agencies' (prior to section CA.I.A).

19 See sections CA.III.B.1 and CA.III.E.1, but also sections CA.III.B.2 and CA.III.E.2.

20 See sections CA.IV.A.1, CA.IV.B.1 and CA.IV.B.3.

21 Whether a CA is European or not also seems to matter in several other respects, namely whether a CA has published methodological/guidance documents; how sustainability related competitive concerns or sustainability defences affect case selection; and the enforcement outlook of CAs (see sections CA.III.C.3 and CA.III.F.3, CA.III.D.1 and CA.III.G.1, CA.III.H.4).

work in the near future, and a substantial minority of non-European CAs are planning action to deal with an anticipated expertise gap.[22]

Also, a clear majority of NGAs with only non-European experience tend to believe that sustainability and competition will be a major topic in the coming years, and a significant minority of non-European CAs have it on their strategic agenda.[23] Similarly, a clear majority of non-European CAs and a large majority of NGAs with only non-European experience believe that it should be one of the 5 most important items on the agenda of international organisations.[24]

Additionally, NGAs' 'own experience' (as opposed to 'own research'), i.e., the type of experience that includes involvement in cases, extends beyond Europe as well, albeit the number of NGAs reporting such exclusively non-European 'own experience' is modest.[25]

These (and other) results are consistent with both international convergence and divergence: European jurisdictions may or may not be followed by others, although extreme divergence seems to be unlikely, given the presence of interest outside of Europe. Nevertheless, the EU Green Deal is referred to by some CAs as a possible or even likely focal point of regional convergence in Europe.[26]

(v) Sustainability considerations more often emerge in practice as a defence (rather than prompting sustainability related competitive concerns).

Sustainability defence also seems to be a more recognised concept, and its analysis seems to be more evolved.

The number of defence cases exceeds those of offence cases in each category and time-period. Moreover, the recent surge of sustainability cases mentioned in conclusion (iii) concerns cases involving sustainability defence, making them multiple times more numerous either lately or cumulatively. A possible reason is a surge of 'green washing' and/or genuine 'green agreements'.[27]

NGAs tend to find sustainability defence cases more plausible, and they also expect them to be more prevalent (than cases involving sustainability related competitive concerns). Also, the expectation that 'impossible' cases will be launched, as mentioned in conclusion (i), concerns cases involving a sustainability defence to a significantly lesser extent.[28]

The analysis in defence cases – on average – is somewhat more tailor-made than in the cases involving sustainability related competitive concerns.[29]

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22 See sections CA.III.H.4 and CA.IV.B.4.

23 See sections NGA.II.E.2 and CA.IV.D.1.

24 See sections CA.IV.D.2 and NGA.IV.D.1.

25 See section NGA.I.C.1.

26 See sections CA.III.4. and CA.IV.B.4.

27 See section CA.III.E.2.

28 See sections NGA.II.A.2-3.

29 See section CA.III.F.1.

In addition, guidance documents on sustainability defence seem to be somewhat more linked to relevant case experience and to general experience related to sustainability than documents dealing with sustainability related competitive concerns.[30]

(vi) Additional skills are most likely needed, along with attention and preparations.

However, 'competition policy R&D' appears to be a precondition for progress in most regards.

A significantly larger share of the 'more experienced' CAs (than of the 'less experienced' CAs) have encountered (or anticipate) an expertise gap concerning sustainability and competition. Meanwhile, roughly half of the NGAs find the current state of preparedness of CAs to be at least acceptable, while only a tiny proportion find it to be excellent.[31]

Also, while a limited number of CAs have already taken action to deal with an expertise gap, a much larger portion of CAs are planning to do so.[32] Responses about what actions have been taken and are planned to deal with expertise gaps are consistent with the view that sharing experience via co-operation with foreign CAs is key, especially at the early stage, but if the issue is longer term, CAs want to internalise knowledge through some form of capacity building.[33]

Similarly, a large portion of respondent NGAs find the topic challenging, and an overwhelming majority of NGAs are planning preparations in the topic.[34]

Moreover, NGAs are significantly more positive about the legal framework than enforcement, including analysis, which suggests that, in the view of NGAs, the existing competition law framework has greater potential than what is currently being utilised. Their remarks, however, leave the strong and logical impression that 'competition policy R&D' – in the measurement of sustainability effects of various restrictive practices and their comparison to competitive effects – is fundamental and is the precondition for improvement in analysis as well as in other respects.[35]

(vii)International co-operation does matter, is welcome, and may be crucial for some.

CA responses suggest that co-operation with foreign CAs is crucial to deal with expertise gaps.[36]

In addition, a clear majority of CAs – irrespective of their location and level of experience – report that the topic should be among the 5 most important topics on the agenda of international organisations, which becomes a much larger majority if we disregard those CAs that did not answer the question.[37]

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30 See section CA.III.F.3.

31 See sections CA IV.B.1 and NGA.II.C.1.

32 See sections CA.IV.B.3-4.

33 See section CA.IV.B.4.

34 See sections NGA.I.C.5 and NGA.II.E.3.

35 See sections NGA.II.B.3 and NGA.II.B.5.

36 See sections CA.IV.B.3-4.

37 See section CA.IV.D.2.

Moreover, this support is also strong in relative terms: the share of CAs preferring the involvement of international organisations is much higher than the share of CAs with (any) actual experience in the topic, or the share of CAs having sustainability on their strategic agenda. This latter also implies that many CAs – that are not planning or that are not in the position to take action on their own – might only be able to rely on the work of international organisations.[38]

Likewise, a large majority of NGAs believe that sustainability and competition is among the top 5 topics that international organisations should deal with, and following the work of these organisations seems to be important when it comes to the NGAs' planned preparatory efforts.[39]

Topics for further research

(i) We presume, optimistically, that our stocktaking has covered most of the existing experience. Nevertheless, this is an evolving area and therefore a potentially fast-moving target.[40] Thus, it may be appropriate to update this survey in a few years' time.

(ii) While we focused on restrictive agreements, mergers and unilateral conduct could be explored as well. Experience in various case types could also be compared to each other in order to better understand the whys and hows.

(iii) Although we did not find the legal background to have a significant impact on how sustainability considerations are dealt with in enforcement, the issue might be addressed in more complex ways, such as considering the cumulative effects of legal and institutional arrangements.

(iv) The findings of our survey could be usefully complemented by research on whether recent and current developments might lead to divergence in competition law enforcement concerning sustainability considerations and how such divergence could be managed or possibly prevented.

*

The rest of the report presents the findings of the survey in detail, including aggregated survey data and their interpretation. CA responses and then NGA responses are discussed, following the structure of the questionnaires. Certain tables and charts are inserted into the main text, while others are only referred to in footnotes. The list of respondents can be found at the end of the report. Finally, the report is complemented by several appendices.[41]

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38 See section CA.IV.D.2.

39 See sections NGA.II.D.1 and NGA.II.E.3.

40 For example, an important DG Competition case (Case COMP/AT.40178 – Car emissions, Commission Decision of 08/07/2021) was closed after our survey ended, and the sandbox method of the Hellenic Competition Commission to provide businesses with guidance is expected to be finalised after the publication of this report.

41 Appendices A.1-2 contain all the tables and charts that were produced irrespective of whether they are inserted / referred to in the report or not, i.e., all aggregated survey data concerning CAs and NGAs, respectively.

Appendix B contain all non-confidential information that was provided as a response to questions on specific items, such as pieces of guidance documents.

Appendices C.1-4 contain the documents that were used to conduct the survey, such as the questionnaires.

Appendix D contains the contribution of the Romanian Competition Council that preferred to participate in the survey in this way.

Survey characteristics

Design and realisation

This special project was aimed at performing a global stocktaking of the existing experience on environmental sustainability and competition law. As such, it was intended to deal with facts in a descriptive manner rather than with prescriptive ideas. Indeed, it takes a neutral stance as to whether competition law has a role to play in achieving sustainability objectives.

To keep the project manageable, we focused on restrictive agreements, which seem to be the most promising area in terms of case experience. In other respects, our survey was more comprehensive and complex. For instance, it covered market studies and research, as well as institutional issues, such as capacity-building. Also, the term 'case' covered not only formal proceedings, but also occasions where CAs and parties interacted concerning a concrete restrictive agreement in an informal setting, including giving informal guidance to parties.

We differentiated between the negative and positive effects of restrictive practices on sustainability (i.e., between sustainability related competitive concerns and sustainability defence), and in many cases we asked about the two in separate questions. For the sake of simplicity, these two scenarios are often referred to as 'offence' and 'defence', respectively, in the questionnaires as well as in this report and its appendices, including tables and charts.[42]

On the one hand, taking the effects of a restrictive agreement on sustainability into account may lead to the emergence of a sustainability related competitive concern. It is a concern that reduced competition leads, or is likely to lead, to a loss in sustainability (rather than e.g., a price increase) and/or that the restriction of competition occurs in terms of sustainability. An example of a restrictive agreement involving a sustainability related competitive concern may be an agreement between competing car manufacturers to limit their efforts to reduce CO2 emissions (as in this case the restriction occurs in terms of sustainability).

On the other hand, its effects on sustainability can serve as the basis of a defence for a restrictive agreement when the harm caused by the reduction, or likely reduction of competition is, allegedly, compensated/countervailed by sustainability benefits, or likely sustainability benefits produced by the same restriction. An example of a restrictive agreement involving a sustainability defence may be an agreement between competing car manufacturers to jointly set ambitious CO2 emission reduction targets. Depending on the jurisdiction and other conditions, this sustainability defence may lead to the finding that the agreement in question is ultimately either restrictive but net beneficial or net non-restrictive.

Instead of giving an exact definition of environmental sustainability,[43] we described it through a non-exhaustive list of illustrative examples in the hope that responses to questions about experience might also reveal what environmental sustainability is considered to be in practice and, if different meanings are attributed to the term, how they affect (if at all) analysis and other aspects of enforcement.[44]

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42 Offence and defence are sometimes labelled in the literature also as 'competition law as a sword', and 'sustainability as a shield', respectively.

43 E.g., by referring to the UN Sustainable Development Goals (https://sdgs.un.org/goals) or a subset of them.

44 Definition came up as an issue given that the borderlines of environmental sustainability are blurred. Animal welfare, for instance, is regarded by many as a 'green' topic. However, it has to do with animal rights and ethics rather than with environmental sustainability in the sense that to avoid a collapse, mankind must adjust to the finiteness of the resources of planet Earth and the limited renewal capacity of its ecosystems.

The project consisted of two online surveys:[45]

(i) a longer one among CAs, consisting of 57 questions, conducted in March-May 2021, and
(ii) a shorter one among NGAs, consisting of 26 questions, conducted in March-April 2021.

We received responses from 52 CAs and 41 NGAs. We reached out to some respondents to clarify details and inconsistencies, and we corrected their responses accordingly. All things considered, we believe that the responses cover most of the relevant experience that all CAs and all NGAs have.

Analysis

Given the size and nature of the survey, we applied a 'data based qualitative' analysis relying on simple descriptive statistics.[46] For each question, we constructed the simple distribution of answers, and for most questions we performed cross-tabulation with certain other questions (or group of questions).

Most importantly, these cross-tabulations allowed for comparisons to be made between CAs with various levels of experience or located on different continents (and a combination of the two), as well as between NGAs with different geographical sources of experience.

We also considered the more qualitative parts of the responses, found in both the comment section and in the answers given to the open-ended questions, when interpreting the results. In addition, we summarise or quote them in this report, when appropriate, to illustrate certain points (rather than to prove them, as usually these types of responses are rare). When we do so, we do it in an anonymised manner to ensure privacy and confidentiality.

We were careful when interpreting these results, and we drew conclusions only in rather straightforward cases or when several results pointed towards the same direction; we also refrained from expressing strong opinions. Some of our findings are indicative only, and we encourage readers to doublecheck any conclusions.

The limited number of answers given to the open-ended questions and the questions asking about the details of specific items, such as soft laws dealing with sustainability and competition, did not allow us to conduct a comparative analysis of these answers. This reflects the limited level of experience of the respondents in the field. Nevertheless, we cover the open-ended answers in our analysis (as described earlier), and in order to support further research, we also present the answers on specific items in Appendix B as fully as was possible without violating privacy and confidentiality.

In the end, responses did not reveal much, because – as it is discussed later – there is little experience and only a few guidance documents available. In any case, we found no signs of definitions that are either frivolous or more sophisticated than the everyday use of the expression.

Nevertheless, what CAs consider, and also what they should consider as a genuine sustainability consideration still matters, and it may deserve further exploration.

[45] Both online surveys were technically administered by Market Orientation Stratégiai Tanácsadó Kft, using Qualtrics Experience Management Software.

[46] As we did not perform more sophisticated (or stochastic) statistical analysis, the term 'significant' in this report never refers to statistical significance, but rather to substantive significance.

Competition agencies

We received responses from 52 CAs, which make up 40% of all CAs that we contacted.[47] We presume, optimistically, that most CAs with relevant experience responded to our questionnaire, so the responses cover most CA experience.

Data in this report mentioning CAs mostly concern respondent CAs and not all CAs, unless indicated otherwise. Still, in certain cases – for the sake of prudence – we highlight the fact that they concern only respondent CAs.

CAs were typically asked to report about their experience – most often by providing facts, for example about their relevant case record – in the last 6 years and about their expectations based on their experience.

In our analysis, we differentiate between 'more experienced' and 'less experienced' CAs.

CA.V.A.1.i Level of CA experience from case work and inquiries with significant sustainability link

More experienced	11	21%
Less experienced	41	79%

n=52

The table above shows that about a fifth of the (respondent) CAs are 'more experienced' in dealing with sustainability considerations in enforcement.

A CA was considered to be 'more experienced' if it had at least one

(i) case where the main/sole competitive concern was sustainability related,[48] or

(ii) case where the main/sole defence was a sustainability defence,[49] or

(iii) sector inquiry/market study/research where sustainability and competition was a major issue.[50] [51]

All other CAs were considered to be 'less experienced'.

We used this classification often in cross-tabulations.

[47] We managed to contact 129 CAs, by relying on the contact list provided by the ICN Secretary.

[48] See question CA.III.B.1 and the corresponding part of this report.

[49] See question CA.III.E.1 and the corresponding part of this report.

[50] See question CA.IV.A.1 and the corresponding part of this report.

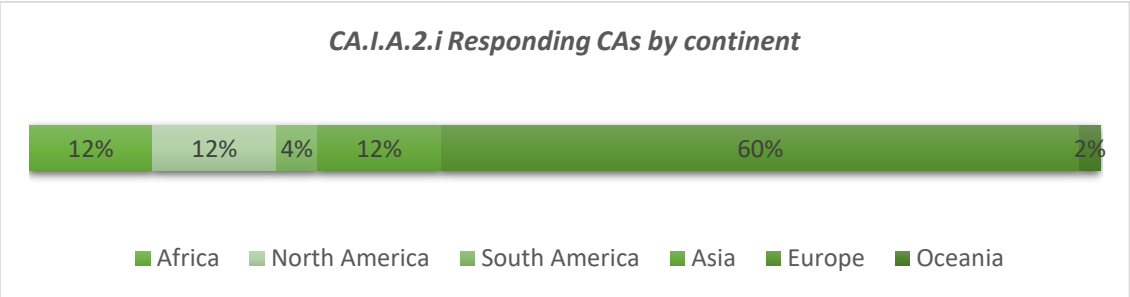
[51] Only one CA fulfils two criteria, and no CA fulfils all the three criteria.

Table CA.V.B.7 gives an overview of how many and what percentage of CAs have various types of experience. The categories that are used in the table are also related to questions CA.III.B.1, CA.III.E.1 and also to question A.IV.A.1. Responses to these questions are discussed later.

CA.I.A Agency

CA.I.A.2 Region of agency[52]

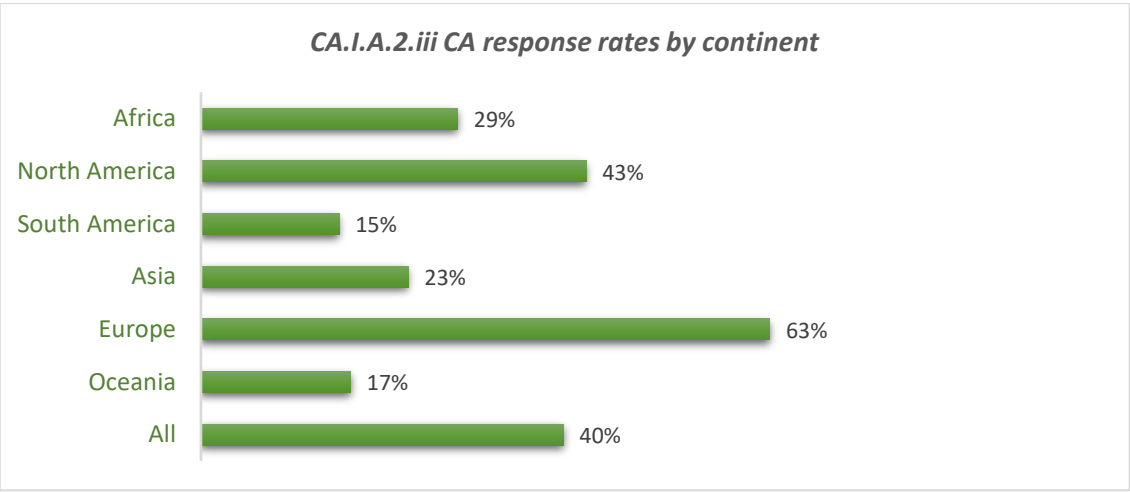
The chart below shows the geographical distribution of the respondent CAs.



Note: n=52

European CAs predominate the set of respondents – this statement is, however, based on an implicit comparison with universal distribution. It is more adequate to compare the shares of continents among the respondent CAs to the shares of continents among all CAs. In this comparison, Europe still has about one and a half times share, North America has roughly the same, while the other continents have smaller shares of respondents than of CAs in general.[53]

The same results can be observed when it comes to the response rates: Europe has the highest, North America is a distant second, and the rest comes after a gap, with South America having the lowest response rate.



Note: Number of respondents is 52, number of all (contacted) CAs is 129.

In order to get a sensible distribution for cross-tabulations with answers to other questions, we differentiate between European and non-European authorities, as shown in the chart below. The distribution of CAs between these two categories is less uneven than among all continents.

[52] Questions CA.I.A.1 and CA.I.A.3 were technical questions about the name of the CA and the contact person.

[53] See tables CA.I.A.2.i-ii in Appendix A.1.

CA.I.A.2.iv Geographical location of respondent CAs - Europe / Non-Europe

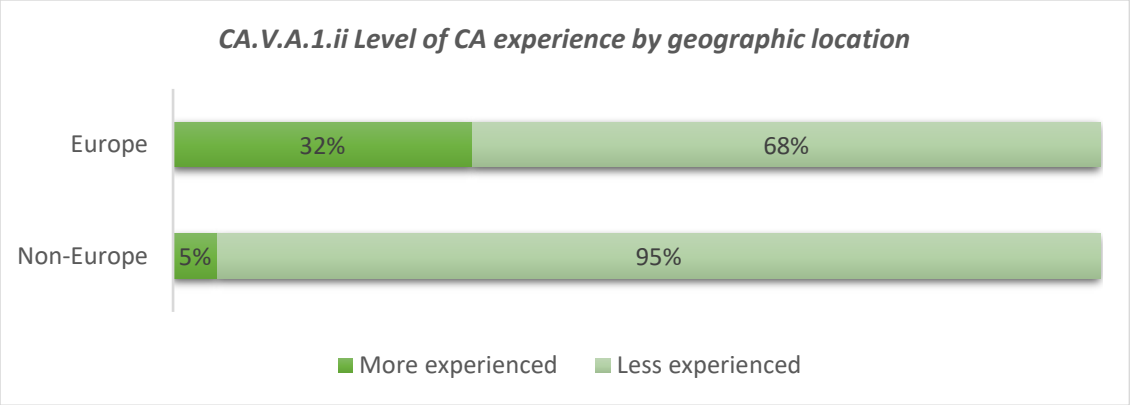
Europe	31	60%
Non-Europe	21	40%

n=52

Therefore, we used this classification often in cross-tabulations.

Cross-tabulation with the level of experience of CA

The chart below shows the level of experience of CAs by their geographical location.



Note: n=52

A much higher share of European CAs is 'more experienced' (than that of non-European CAs). Numbers in the corresponding table show that 'more experienced' CAs are, at present, concentrated in Europe, and only one 'more experienced' CA is located outside of Europe.[54]

CA.II.A Competition law

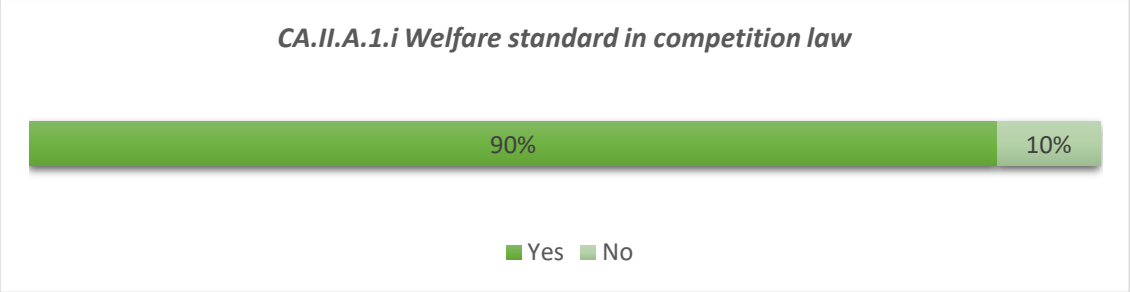
Answers concerning the legal background – including this section and the next one – are less representative due to relatively low response rate(s). Therefore, they do not necessarily give a true global picture of the legal background.

Still, when assessed in conjunction with experience (which is presumably covered much more by the answers), they may help to understand the significance of legal provisions.

CA.II.A.1 Welfare standard in competition law

The chart below shows that most competition laws (of the respondents) do refer either to efficiencies or welfare objectives.

[54] See also table CA.V.A.1.iii in Appendix A.1.



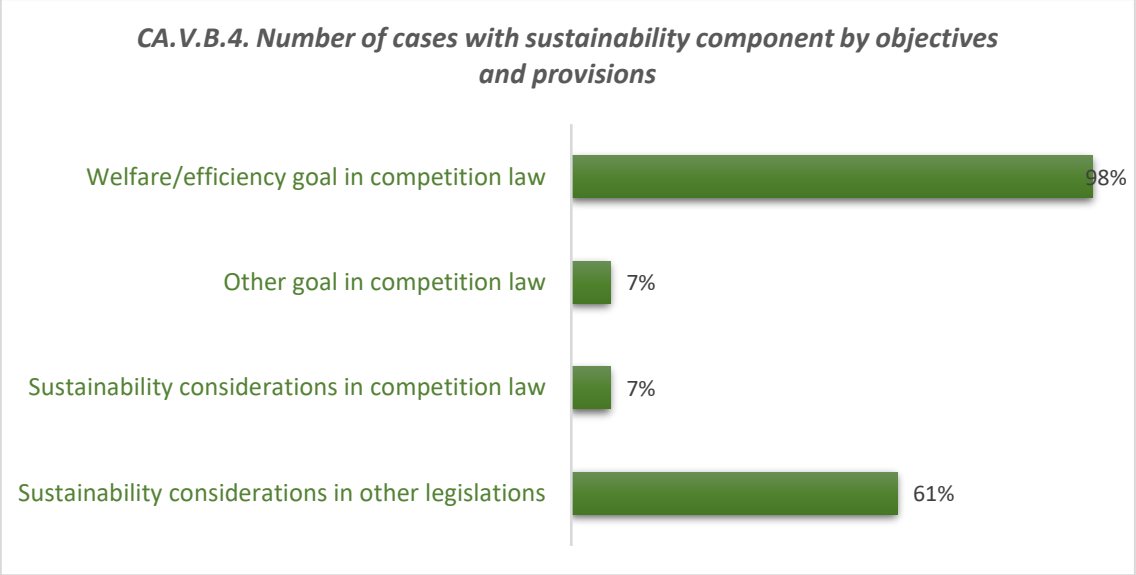
Note: n=52

Cross-tabulation with the geographical location of CA

Reference to efficiencies or welfare objectives is somewhat less prevalent in European competition laws (of the respondents) (than in non-European ones).[55]

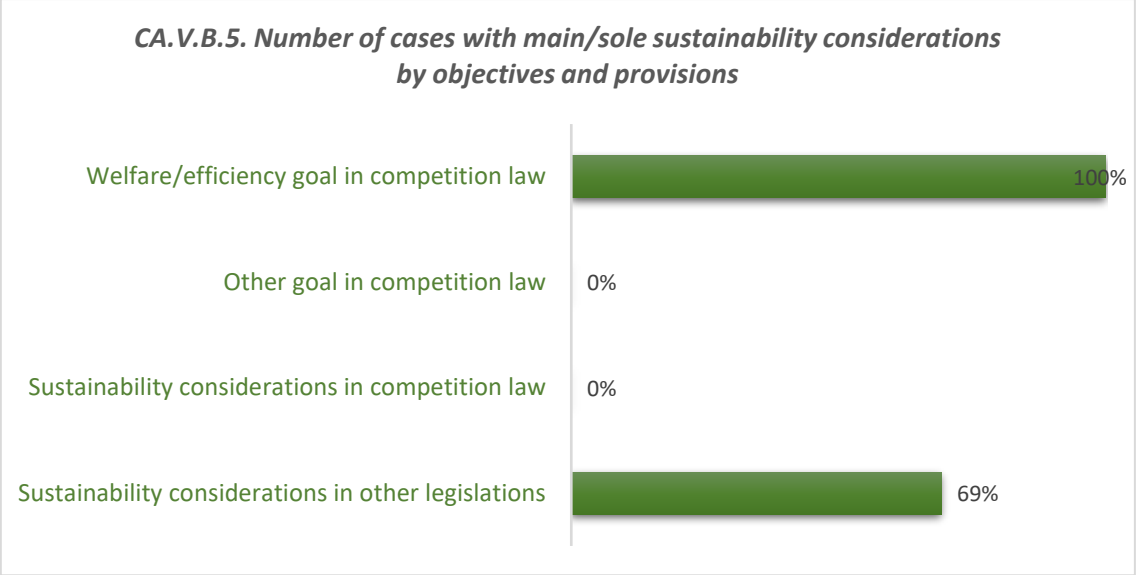
Cross-tabulation with the number of cases involving sustainability considerations

The first chart below shows that most cases with a sustainability component happened to be in jurisdictions where competition law refers to efficiencies or welfare objectives. The second chart shows that all cases involving a sustainability related competitive concern or a sustainability defence that was the main/sole concern/defence in the given case belong to those jurisdictions.



Note: n=41

[55] See table CA.II.A.1.ii in Appendix A.1.



Note: n=13

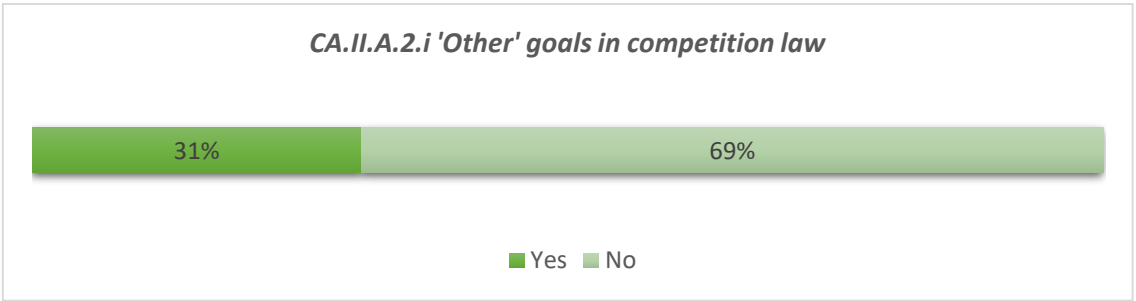
This suggests that welfare objectives do not impede cases involving sustainability considerations *per se*.

Nonetheless, this does not necessarily imply that they cannot facilitate or impede – under certain circumstances and in certain jurisdictions – such cases.

We do not see any need to present cross-tabulation against the level of experience of CAs, because in the context of this section, it would be inferior to that against the number of cases which was already presented. The same applies throughout sections CA.II.A-B.

CA.II.A.2 Other goals in competition law

A substantial minority of CAs report that their competition laws refer to 'other' objectives.



Note: n=52

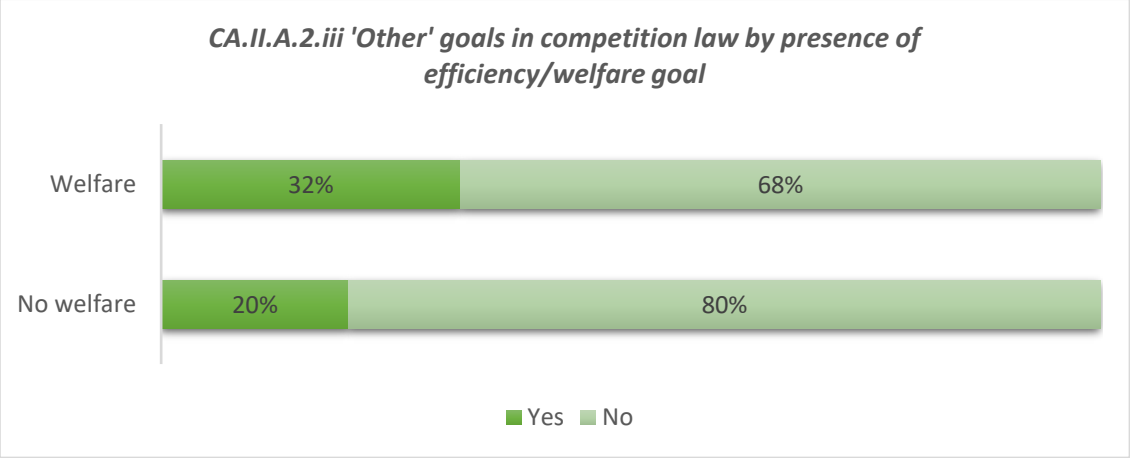
Cross-tabulation with the geographical location of CA

While 'other' objectives are relatively rare in the European legislations (of the respondents), competition laws referring to 'other goals' make up about half of the legislations (of the respondents) outside of Europe.[56]

Cross-tabulation with the presence of efficiency/welfare objectives

Most jurisdictions with 'other' objectives refer to an efficiency/welfare objective as well.

[56] See table CA.II.A.2.ii in Appendix A.1.



Note: $n_{welfare}=47$, $n_{no\ welfare}=5$

Surprisingly, 4 jurisdictions do not refer to either an efficiency/welfare objective or 'other' objectives. It is possible that those competition laws refer to either an efficiency/welfare objective or 'other' objectives rather implicitly. Alternatively, they may have a standard that differs from the efficiency/welfare standard, which is still not regarded as an 'other' objective by those four respondents.

Cross-tabulation with the number of cases involving sustainability considerations

A small percentage of cases with a sustainability component happened to be in jurisdictions where competition law refers to 'other objectives'. What is more, none of the cases involving a sustainability related competitive concern or a sustainability defence that was the main/sole concern/defence in the given case belongs to those jurisdictions.[57]

This suggests that reference to 'other' objectives is not a precondition or a facilitator of cases involving sustainability considerations *per se*.

Nonetheless, this does not necessarily imply that it cannot facilitate or impede – under certain circumstances and in certain jurisdictions – those cases.

CA.II.A.3 Other goals in competition law – what they are

Among 'other goals', the most frequent is 'public interest', 'other' is a distant second, 'security of supply' a distant third, and then comes the rest.[58]

Apparently, we were not able to predefine all kinds of 'other' objectives, and thus remarks in the comment section indicate a variety of formulas referring to a limited number of underlying objectives, such as the general economic interest, preserving jobs or SMEs.

We are of the opinion that structuring these formulas would be rather difficult without intimate knowledge of their interpretation and application in each jurisdiction. Therefore, we did not try to classify them or find a link between them and CA experience involving sustainability considerations.

[57] See tables CA.V.B.4-5 in section CA.II.A.1 and in Appendix A.1.

[58] See table CA.II.A.3.i in Appendix A.1.

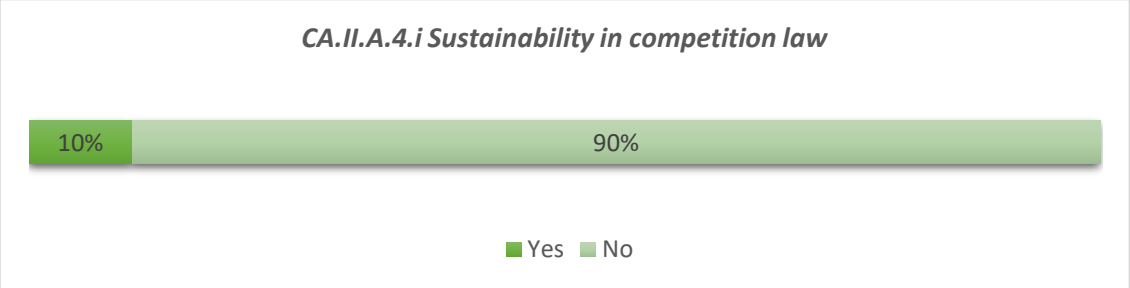
Cross-tabulation with the geographical location of CA

There are certain geographical differences among the jurisdictions that have other goals. For instance, in the responses, 'media plurality' was only marked by European CAs, while 'financial stability' was only marked by non-European CAs.[59]

One can think of various theories to explain these differences, but we do not believe that any of those theories would be related to sustainability. Additionally, as we highlighted above,[60] this picture is not representative enough to draw conclusions about the legal background itself.

CA.II.A.4 Sustainability in competition law

Sustainability is not frequently referred to in competition laws.



Note: n=52

Cross-tabulation with the geographical location of CA

Although sustainability is hardly referred to in Europe, it is mentioned much more often (but still in a minority of cases) in other continents (cumulatively).[61]

Cross-tabulation with the presence of 'other' objective(s), and with the presence of efficiency/welfare objectives

We found that sustainability is mostly referred to in those (respondent) jurisdictions that also refer to 'other' objectives.[62] We identified only one exception.

In addition, in all the (respondent) jurisdictions where competition law refers to sustainability, there is also a reference to efficiency/welfare as an objective.[63]

Thus, sustainability provisions can co-exist not only with 'other' objectives (or can be understood as one of them), but also with the efficiency/welfare goal.[64]

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59 See table CA.II.A.3.ii in Appendix A.1.

60 See the introduction of section CA.II.A.

61 See table CA.II.A.4.ii in Appendix A.1.

62 See table CA.II.A.4.iii in Appendix A.1.

63 See tables CA.II.A.4.iv-v in Appendix A.1.s

64 This co-existence implies that – if competition laws are coherent – sustainability considerations are consistent with the efficiency/welfare paradigm, as well as with 'other' goals. If competition laws are not coherent, they still may be meant to be so by the lawmaker.

In other words, sustainability provisions may be intended to make sure that all relevant factors – including sustainability considerations – are taken into account in order to achieve the general goals of the competition law. Alternatively, the function of sustainability provisions may be to divert the law – to some extent and in certain cases – from its general objectives. This may vary across jurisdictions.

However, our survey did not explore the relationship of sustainability provisions and the various goals of competition law in more detail. Therefore, we cannot infer from our survey as to how often co-existence entails consistency.

Cross-tabulation with the number of cases involving sustainability considerations

A small percentage of cases with a sustainability component happened to be in jurisdictions where competition law refers to sustainability. What is more, none of the cases involving a sustainability related competitive concern or a sustainability defence that was the main/sole concern/defence in the given case belongs to those jurisdictions.[65]

This suggests that reference to sustainability in competition law is not a precondition or a facilitator of cases involving sustainability considerations *per se*.

Nonetheless, this does not necessarily imply that it cannot facilitate – under certain circumstances and in certain jurisdictions – those cases.

CA.II.A.5 Place of sustainability in competition law

Sustainability is most often referred to in the general parts of the law (of the respondents), a distant second are the parts of the law dealing with mergers and restrictive agreements, a distant third is 'other', while it is never referred to in relation to unilateral conduct.[66]

Cross-tabulation with the geographical location of CA

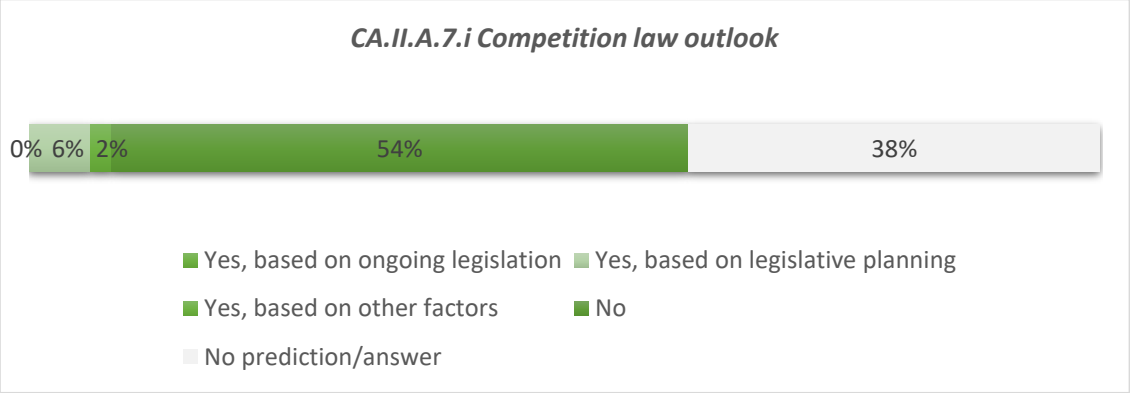
There are considerable differences in answers depending on the geographical location of the CAs, but we were not able to link these differences to sustainability.[67] Additionally, as we highlighted above,[68] this picture is not representative enough to draw conclusions about the legal background itself.

CA.II.A.6 Sustainability related provisions in competition law

The non-confidential responses to this question can be found in Appendix B.

CA.II.A.7 Competition law outlook

The chart below shows that only a few respondents anticipate the introduction of (new) sustainability related provisions into their competition law in the near future, while the majority expect no change at all, and a large minority cannot even predict.



Note: n=52

[65] See tables CA.V.B.4-5 in section CA.II.A.1 and in Appendix A.1.

[66] See tables CA.II.A.5.i in Appendix A.1.

[67] See tables CA.II.A.5.ii in Appendix A.1.

[68] See the introduction of section CA.II.A.

In the comment section, several CAs mention various reasons for why changing the law is not on the table in their respective jurisdictions, including a preference, at this stage, to build up experience from case work; furthermore, some CAs state that they have a public interest clause which is already may cover sustainability, thus making the adoption of sustainability specific provisions unnecessary. One CA indicates that although no legislation is anticipated, it is planning to issue soft laws or guidance documents in the near future. Another CA offers a perspective from which the preparation and issuance of guidance documents is an interim step towards legislation.

Cross-tabulation with the geographical location of CA

There is no significant difference depending on the geographical location of CAs.[69]

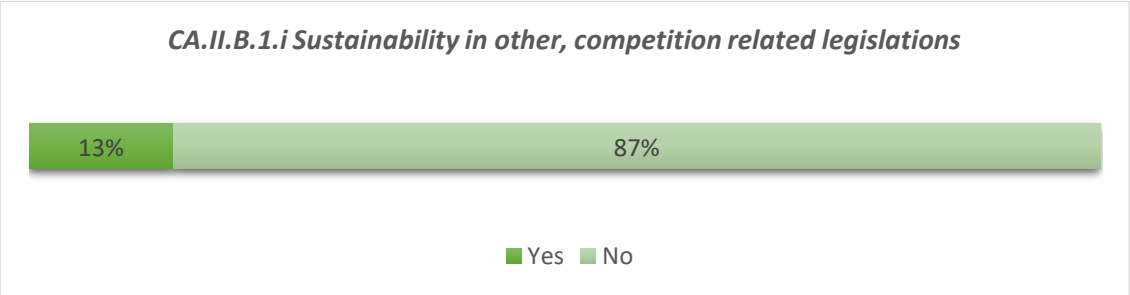
CA.II.B Other legislations

Answers concerning the legal background – including this section and the previous one – are less representative due to the relatively low response rate(s). Therefore, they do not necessarily give a true global picture of the legal background.

Still, when assessed in conjunction with experience (which is presumably covered much more by the answers), they may help to understand the significance of legal provisions.

CA.II.B.1 Sustainability in other competition related legislations

Sustainability is not frequently referred to in other, competition related legislations (of the respondent CAs).



Note: n=52

Cross-tabulation with the geographical location of CA

Sustainability appears in other, competition related legislations much more frequently (but still rarely) in European jurisdictions (of respondent CAs) than in non-European ones,[70] although this does not lead us to any theory of causality.

Cross-tabulation with the number of cases involving sustainability considerations

A clear majority of cases with a sustainability component happened to be in jurisdictions where other legislation refers to sustainability. An even larger majority of the cases involving a sustainability related competitive concern or a sustainability defence that was the main/sole concern/defence in the given case belong to those jurisdictions.[71]

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69 See table CA.II.A.7.ii in Appendix A.1.

70 See table CA.II.B.1.ii in Appendix A.1.

71 See tables CA.V.B.4-5 in section CA.II.A.1 and in Appendix A.1.

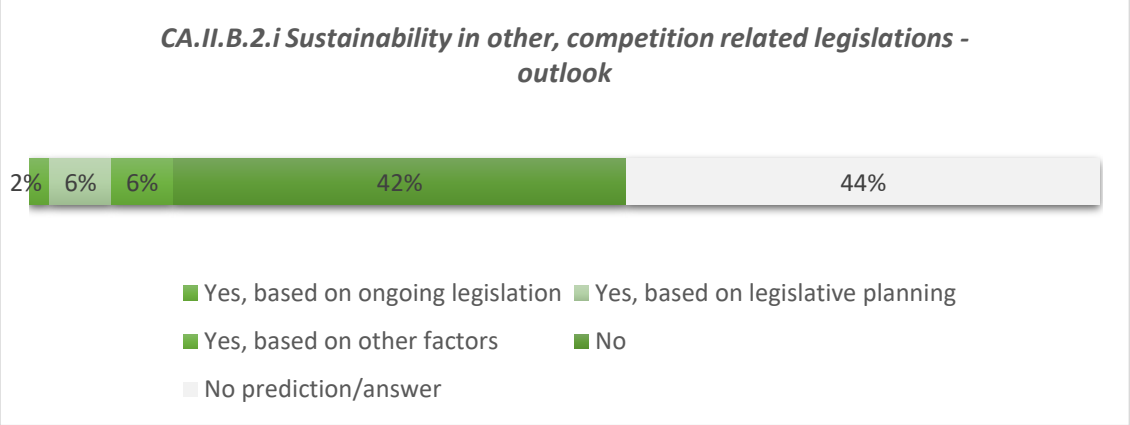
We do not have a theory of causality in either direction, i.e. we cannot see why sustainability related provisions in *other* competition related legislations would facilitate sustainability related competition cases, especially when the provisions in question do not concern competition law enforcement, or *vice versa*. However, we think that a correlation between the two could reflect broader societal attention towards and/or commitment to sustainability in these jurisdictions.

It is unclear at this point whether such attention and/or interest (if it exists) could affect other CA activities relevant for this survey (such as case selection, analysis, preparation and publication of guidelines).

In any event, conclusions concerning sustainability in other, competition related legislations may greatly depend on their detail, which is not really explored in this survey. Therefore, we are not in the position to draw any conclusions.

CA.II.B.2 Sustainability in other, competition related legislations – outlook

The chart below shows that – on average – CAs do not expect much change in the near future, and almost half of them did not predict/answer as regards to sustainability considerations/provisions in other, competition related legislations. The latter suggests that there is considerable uncertainty in this area, which may or may not be related to sustainability, as it may also reflect how law-making works in various jurisdictions.



Note: n=52

Nevertheless, a significant minority of CAs expect change and we are aware of an ongoing legislation in one of the European jurisdictions. In addition, it is likely that any significant changes in EU rules, if they occurred, would have a broader effect, at least regionally, as also indicated by one CA (other than DG Competition) in the comment section.

Cross-tabulation with the geographical location of CA

Future changes are somewhat more expected by European CAs in their jurisdictions than by non-European agencies in their respective ones.[72]

[72] See table CA.II.B.2.ii in Appendix A.1.

CA.III.A General case experience

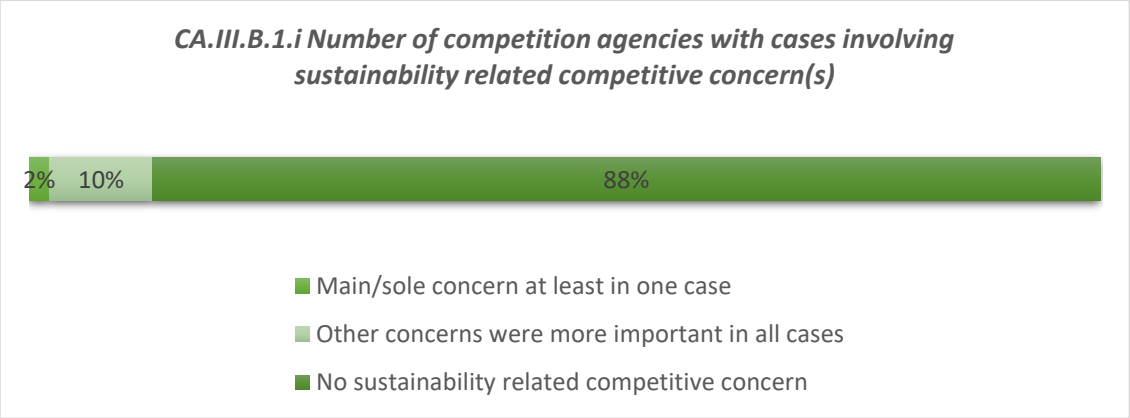
CA.III.A.1 Jurisdiction

All respondents report that they have jurisdiction over restrictive agreements.[73] This also means that all respondents remain relevant – for the most part – with regard to questions addressing case experience related to restrictive agreements.

CA.III.B Case record – offence

CA.III.B.1 Number of CAs with cases involving sustainability related competitive concerns

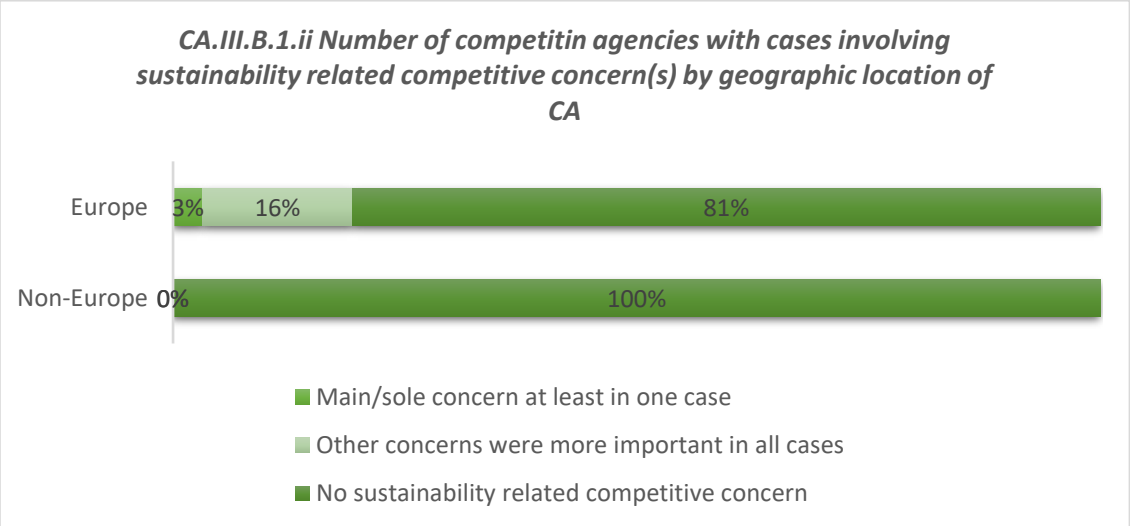
The chart below shows that only a very limited number of CAs have case(s) in this category, and only one CA had a case where sustainability was the main/sole concern.



Note: n=52

Cross-tabulation with the geographical location of CA

Relevant case experience is limited to Europe, as shown in the chart below.



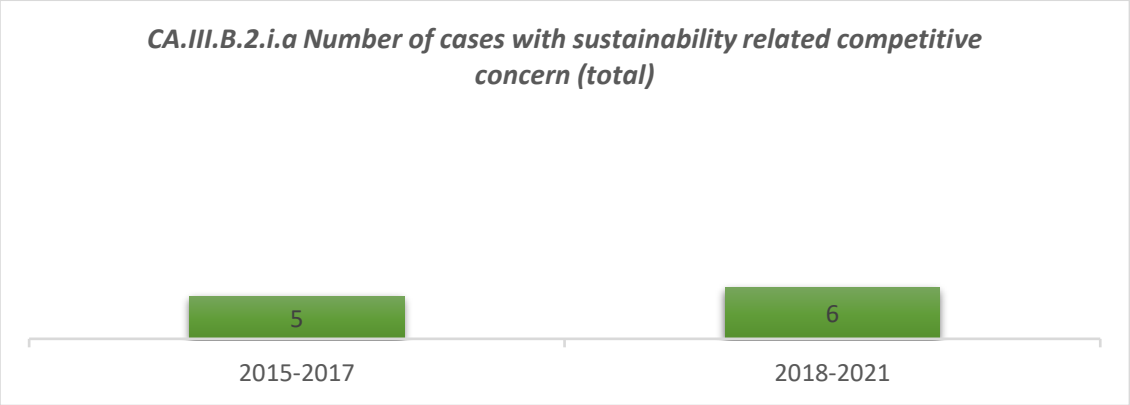
Note: $n_{Europe}=31$, $n_{Non\text{-}Europe}=21$

[73] See table CA.III.A.1.i in Appendix A.1.

Therefore, we do not see any need to present cross-tabulation against this variable in the rest of section CA.III.B or in sections CA.III.C.1-2 which concern case record. The same applies to cross-tabulation against the level of experience of CAs, as questions about cases are about experience.

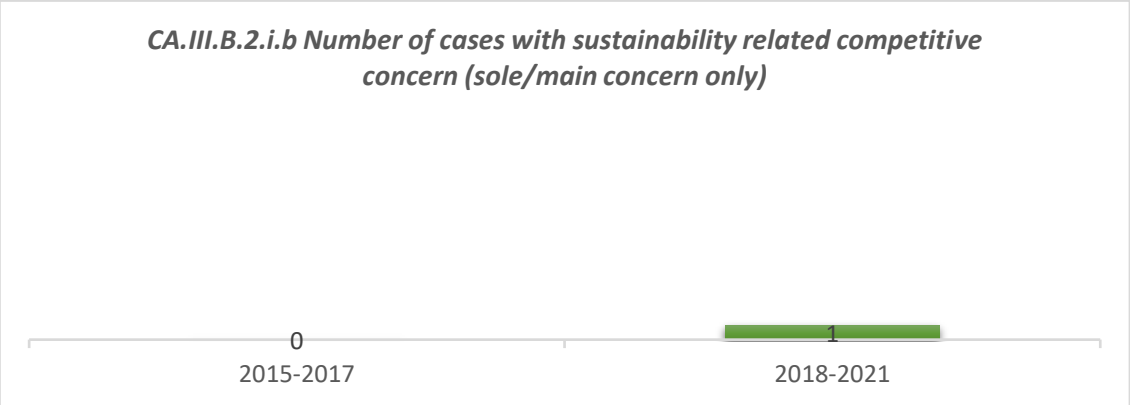
CA.III.B.2 Number of cases involving sustainability related competitive concerns (by time period)

The charts below shows that there is a limited number of cases, which are roughly the same over time.



Note: Number of respondents is 52.

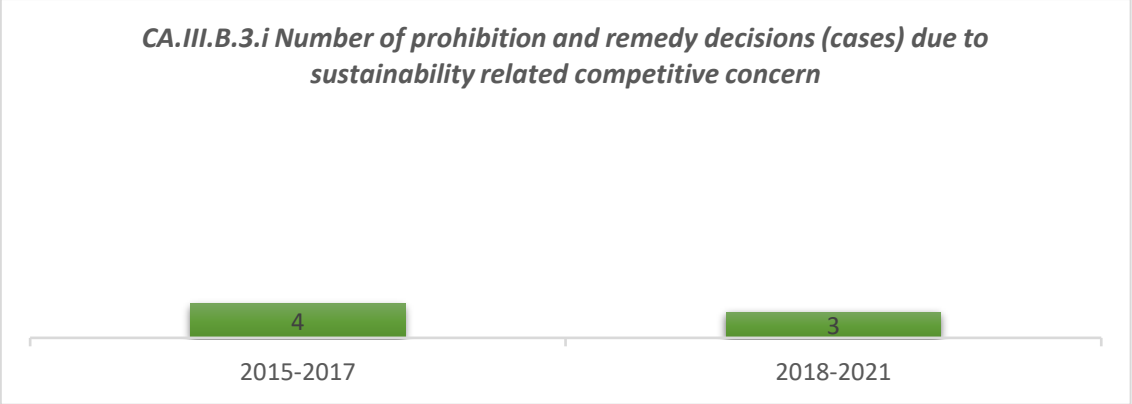
There was only one case (in the second period) where sustainability was the main/sole concern. It is worth highlighting that this case was – as the CA to which the case belongs to noted in the comment section – not a formal proceeding but an informal consultation.



Note: Number of respondents is 52.

CA.III.B.3 Number of prohibition and remedy decisions involving sustainability related competitive concerns (by time period)

The chart below shows that the number of prohibition and remedy decisions is low, and roughly the same over time. In the second period, there were only prohibition decisions.



Note: Number of respondents is 52.

Note: Number of respondents is 52.

This translates into a 64% average prohibition and remedy rate[74] (compared to all cases involving sustainability related competitive concerns).[75] The remaining cases were probably dropped by CAs either at an informal or a formal stage.

The number of prohibition decisions exceeds that of the cases where the sustainability related competitive concern was the main/sole concern. Therefore, we believe that the concerns in question were important even in those cases where they were considered secondary (provided that the responses are consistent with the previous ones and with the instructions of the questionnaire).

CA.III.B.4 Court decisions/review in cases involving sustainability related competitive concerns

All respondents report that none of their cases has been tested in court (concerning the sustainability related competitive concern),[76] although one CA indicated in the comment section that a judicial review is still pending.

Consequently, none of the cases involving sustainability related competitive concern has been tested in court (concerning such concerns).

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74 See table CA.III.B.3.ii in Appendix A.1.

The table shows a significant decrease in the intervention rate over time, but given that case numbers are very low, this may represent 'natural' volatility rather than a trend.

75 See section CA.III.A.2.

76 See table CA.III.B.4.i in Appendix A.1.

CA.III.B.5 Sectors – sustainability related competitive concerns

Responses as to which sectors are involved by offence cases are discussed later, together with the responses to other questions concerning the involvement of sectors by defence cases as well as by other activities and experience.[77]

CA.III.B.6 Profile of cases involving sustainability related competitive concerns

Respondents did not identify any difference as to the profile of cases involving sustainability related competitive concerns compared to other restrictive agreement cases.[78]

CA.III.B.7-8 Case presentation – sustainability related competitive concerns

The non-confidential responses to question CA.III.B.7 can be found in Appendix B.

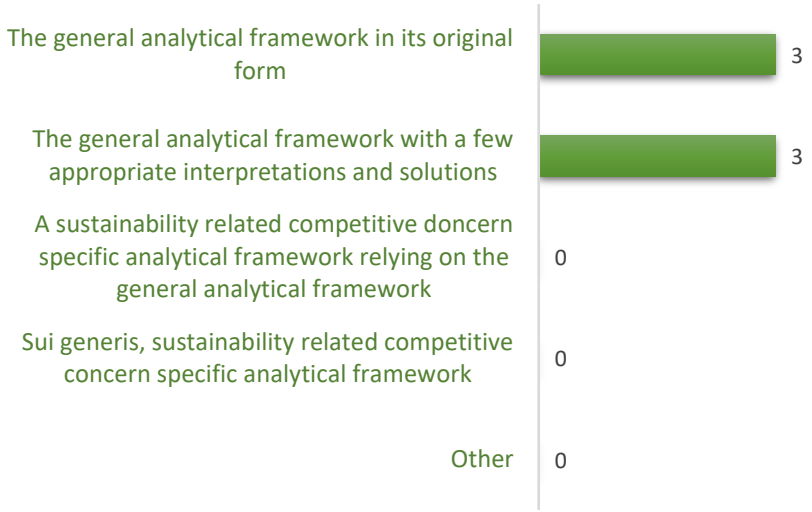
Responses to question CA.III.B.8 are taken into account in this analysis, but they are not detailed here for confidentiality reasons.

CA.III.C Assessment/methods – offence

CA.III.C.1 Method relation to general method – offence

Responses indicate that the general analytical framework was applied in all cases either in its original form or with a few appropriate interpretations and solutions.

CA.III.C.1.i Assessment method in cases involving sustainability related competitive concern (multiple choice)



Note: n=6

No CA mentions sustainability specific methodologies in use either as a response or in the comment section.

[77] See section NGA.I.C.2.

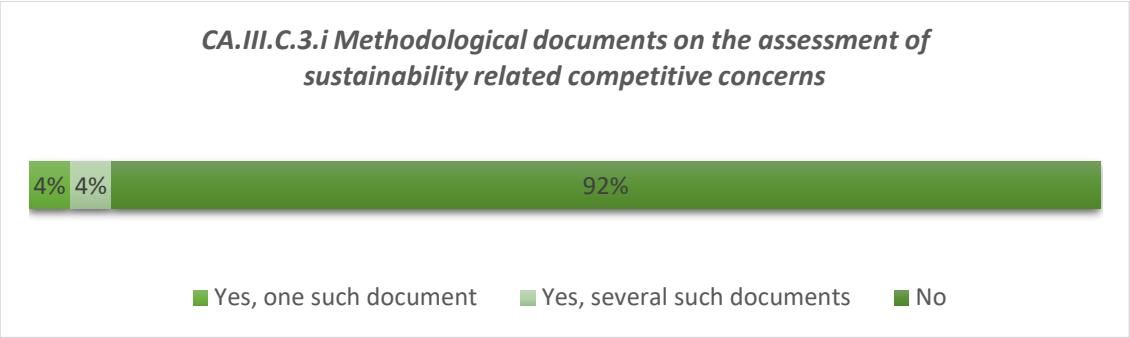
[78] See table CA.III.B.6.i in Appendix A.1.

CA.III.C.2 Method description – offence

Responses indicate the reliance on the general analytical framework (which is usually based on the efficiency/welfare paradigm).[79] For example, a (European) CA reports an ongoing internal effort to determine whether an agreement that contributes to sustainability could be considered as efficiency enhancing and thus exempted from the general prohibition of restrictive agreements.

CA.III.C.3 Method document – offence

The chart below shows that very few CAs issued public documents, such as soft laws(s) or guideline(s)) outlining the method used in past cases or planned to be used in prospective cases when assessing sustainability related competitive concerns in restrictive agreement cases.



Note: n=52

Their number is even lower than the number of CAs that had cases involving sustainability related competitive concerns.[80]

Although we did not ask about prospective methodological documents, one (European) CA indicated in the comment section that it is planning to issue guidelines in the near future.

Cross-tabulation with the geographical location of CA

Similarly to case experience, European CAs are predominant when it comes to methodological documents with regards to sustainability related competitive concerns. But here the situation is less extreme, as there is one non-European CA that has such a methodological document.[81]

Cross-tabulation with the level of experience of CA

There is only one of the 'more experienced' CAs that reported relevant methodological document(s). Since the 'more experienced' group is much smaller than the 'less experienced' group, the same ratio of CAs with methodological documents can be found in each group.[82]

Cross-tabulation with the level of experience of CA in offence cases

Interestingly, there is no overlap between CAs with case experience involving sustainability related competitive concerns and those with methodological documents on the subject. In other words, there is no such CA with methodological document(s) that also has cases in this category.[83]

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79 See section CA.II.A, especially CA.II.A.1.

80 See also table CA.III.B.1.i in Appendix A.1.

81 See table CA.III.C.3.ii in Appendix A.1.

82 See table CA.III.C.3.iii in Appendix A.1.

83 See table CA.III.C.3.v in Appendix A.1.

Cross-tabulation with the level of experience & geographical location of CA

While we did not identify significant differences, it is apparent that the responses of the 'less experienced' European CAs are almost the same as those of the 'more experienced' (and mostly European) CAs, and unlike those of the 'less experienced' non-European CAs.[84]

This suggests that the (very little) difference that we found here is between the European and non-European CAs rather than between the 'more' and 'less experienced' CAs (i.e., in this case geographical location rather than the level of experience matters). This is consistent with the fact, as highlighted above, that there is no overlap between CAs with relevant case experience and CAs with methodological documents.

There are various potential explanations for the apparent disconnect between case experience and methodological documents. It is possible that certain documents are not sustainability specific, although relevant in a sustainability context (thus they may have been drafted before sustainability considerations even emerged in enforcement). This would be consistent with the fact that the methods themselves tend to be general, as mentioned earlier.[85]

Also, some CAs may have a forward-looking attitude, whereby the preparation of such documents precedes actual cases, while other CAs do not start drafting such documents until they accumulate more case experience or even build a body of case law. This would suggest that competition law enforcement is in its early development stage in most jurisdictions, concerning sustainability considerations.

In addition, it is clear from the responses and subsequent clarifications that the notion as to what constitutes a methodological document dealing with the issue may vary greatly among CAs.

All of this may be consistent with the premature state of the topic, or with the possibility that the topic is not really viable or that it emerges rarely. A further possibility is that sustainability considerations can be handled well by the general toolkit. To sum up, a specific toolkit did not have either the time or the need (or neither) to develop.

CA.III.C.4 Method document details – offence

The non-confidential responses to this question can be found in Appendix B.

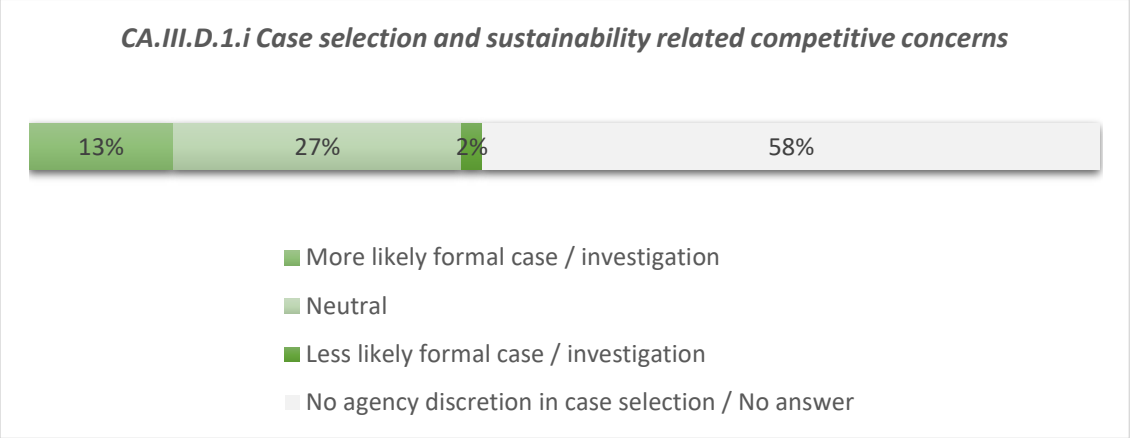
CA.III.D Prioritisation – offence

CA.III.D.1 Case selection and offence

More than half of the CAs report that they do not have discretion as to which cases they deal with (or at least not depending on whether a sustainability related competitive concern emerges).

[84] See table CA.III.C.3.iv in Appendix A.1.

[85] See section CA.III.C.1.



Note: n=52

The rest of the responses are mostly neutral, although a few CAs would be more likely to launch a formal case and only one would be less likely in the presence of sustainability related competitive concerns.

Remarks in the comment section show that in the absence of considerable case experience, most CAs can think about prioritisation only in the abstract, and some answers may even be speculative. One CA states that it would prioritise such a case, but it has never encountered one. Two other CAs note that they have prioritisation policies that do not specify sustainability, but they would or might regard cases with sustainability related competitive concerns to be a (potentially) serious infringement or an infringement that affects a high number of consumers. Thereby, they would link sustainability to well-established concepts that can be found in those prioritisation policies.

Cross-tabulation with the geographical location of CA

A much higher share of European CAs report discretion and a significantly higher share of them report an increased likelihood to launch a formal case as well as a neutral attitude in the presence of sustainability related competitive concerns. Decreased likelihood to launch a formal case is low in general.

None of the non-European CAs reported either an increased or a decreased likelihood to launch a formal case. In other words, discretion matters only among European CAs.[86]

Cross-tabulation with the level of experience of CA

A significantly larger share of the 'more experienced' CAs report increased likelihood to launch a formal case as well as a neutral attitude, which also means that they enjoy much more discretion in case selection. Decreased likelihood to launch a formal case is low in general (and non-existent among the 'more experienced' CAs).

While discretion is present in both groups, it is much more present among the 'more experienced' CAs.[87]

[86] See table CA.III.D.1.ii in Appendix A.1.

[87] See table CA.III.D.1.iii in Appendix A.1.

Cross-tabulation with the level of experience & geographical location of CA

The pattern of the responses of the 'less experienced' European CAs is much more similar to that of the 'more experienced' (and mostly European) CAs than to the pattern of the responses of the 'less experienced' non-European CAs.[88]

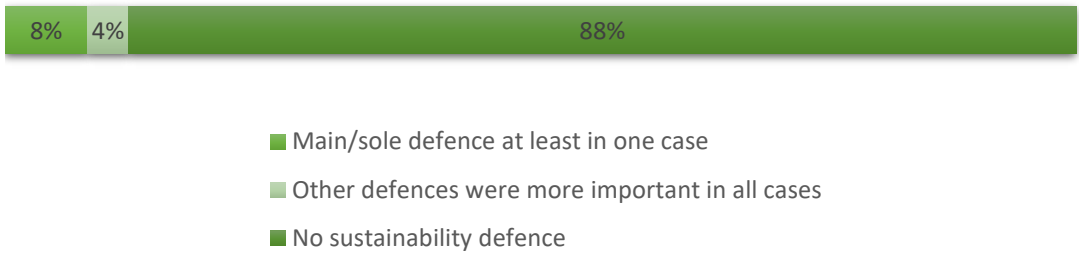
This suggests that geographical location matters more in this case than the level of experience.

CA.III.E Case record – defence

CA.III.E.1 Number of CAs with cases involving sustainability defence

The chart below shows that a small minority of CAs reported cases involving sustainability as a defence.

CA.III.E.1.i Number of competition agencies with cases involving sustainability defence(s)

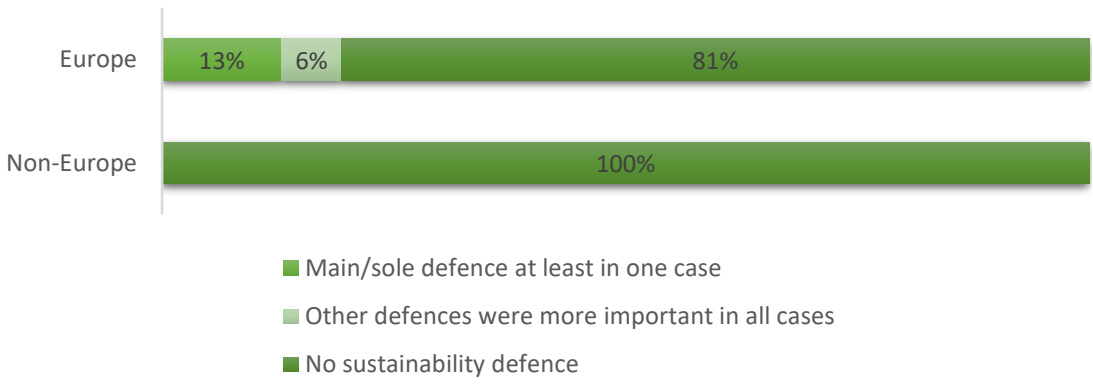


Note: n=52

Cross-tabulation with the geographical location of CA

Relevant case experience is limited to Europe, as shown in the chart below.

CA.III.E.1.ii Number of competition agencies with cases involving sustainability defence(s) by geographic location of CA



Note: $n_{Europe}=31$, $n_{Non\text{-}Europe}=21$

[88] See table CA.III.D.1.iv in Appendix A.1.

Therefore, we do not see any need to present cross-tabulation against this variable in the rest of section CA.III.E or in sections CA.III.F.1-2 which concern case record. The same applies to cross-tabulation against the level of experience of CAs, as questions about cases are about experience.

Comparison with offence

There are the same number of CAs with offence and with defence cases, but more CAs have had cases involving sustainability as a defence where sustainability was the main/sole concern or defence.

Note: Number of respondents is 52.

There is only one CA that had experience in both offence and defence cases, and there is no overlap between CAs with cases where the main/sole competitive concern was sustainability related and CAs with cases where the main defence was sustainability defence.

CA.III.E.1.iii Number of competition agencies by possible combinations of case experience involving sustainability issues

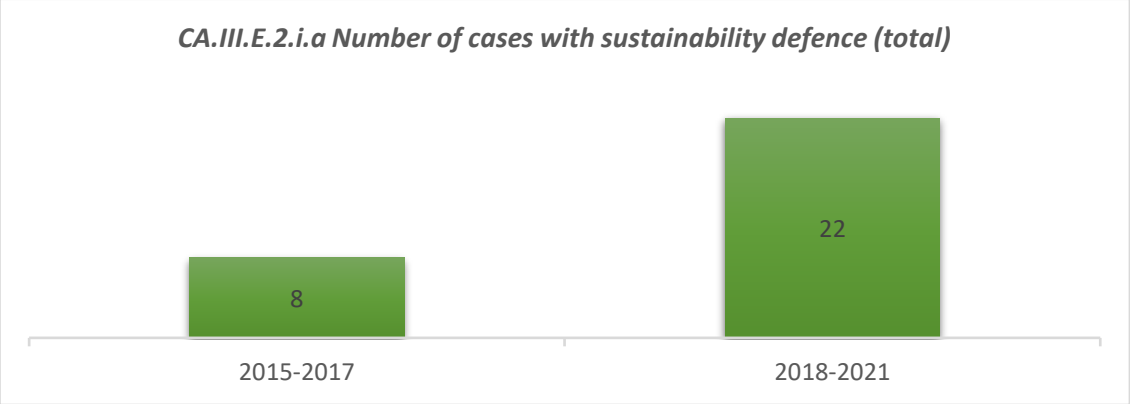
	Main/sole concern at least in one case	Other concerns were more important in all cases	No sustainability related competitive concern	*Together*
Main/sole defence at least in one case	0	1	3	4
Other defences were more important in all cases	0	0	2	2
No sustainability defence	1	4	41	46
Together	1	5	46	52

n=52

Both types of cases (offence and defence) have so far only occurred in Europe.

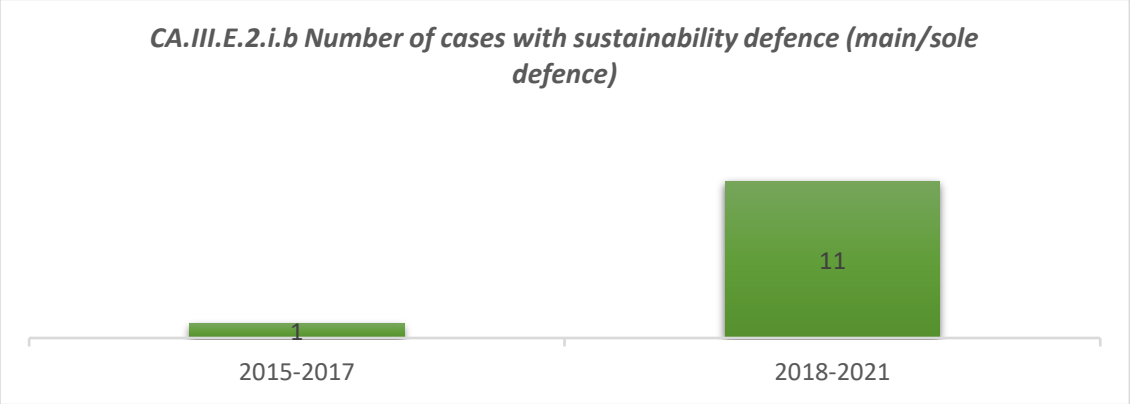
CA.III.E.2 Number of cases involving sustainability defence (by time period)

The chart below shows that there has been a fair number of cases involving sustainability defence, which has surged over time.



Note: Number of respondents is 52.

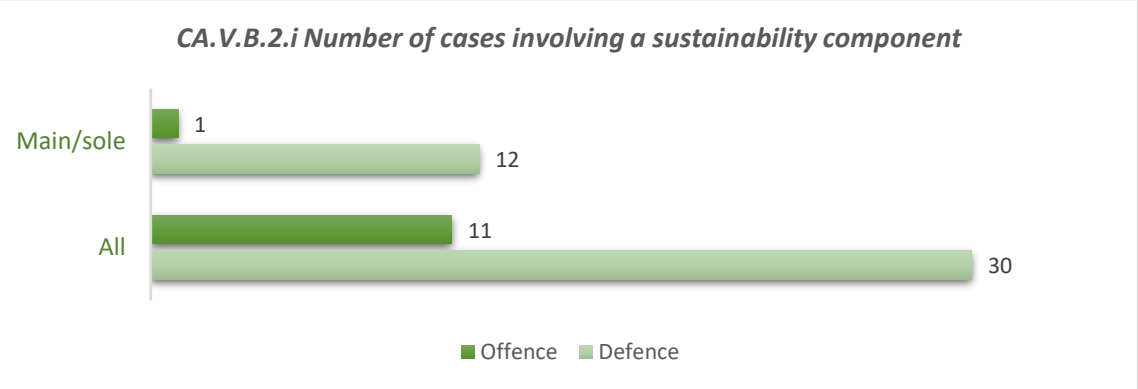
The number of cases where sustainability was the main/sole defence is more modest but significant; furthermore, it has an increasing trend.



Note: Number of respondents is 52.

Comparison with offence

CAs reported cases involving sustainability defence multiple times more than cases involving sustainability related competitive concerns.

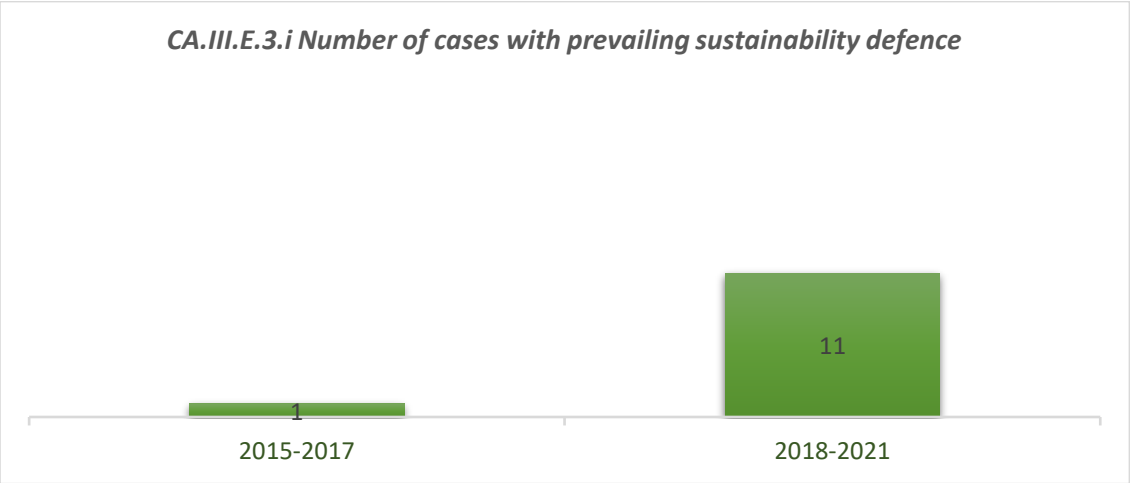


Note: Number of respondents is 52.

This applies to all cases as well as to those where this was the main/sole concern or defence.

CA.III.E.3 Number of prevailing sustainability defences

The chart below shows that the number of prevailing sustainability defences has become significant over time. Their vast majority led to the case being dropped or not launched in the first place. In one case the result was reduced fine(s) or softer remedies.



Note: Number of respondents is 52.

This translates into a 40% 'efficacy' rate on average,[89] but this average conceals considerable changes over time. First, the underlying number of cases involving a sustainability defence has increased,[90] while the number of prevailing sustainability defences has increased even more (by a factor of ten). Therefore, the rate of prevailing sustainability defences has also significantly increased.

Second, the only case where a sustainability defence led to reduced fine(s) or softer remedies was in the first period, while all other cases where it led to the case being dropped or not launched in the first place were in the second period.

Comparison with offence

We found more cases involving a prevailing sustainability defence than prohibition or remedy decisions involving sustainability related competitive concerns over the period of 6 years which was assessed.[91] However, when compared in relative terms, the 'efficacy' rate of sustainability defence is significantly lower than the rate of intervention concerning sustainability related competitive concerns.

The latter may indicate that 'greenwashing' is a real phenomenon, but also that competition law enforcement may not need to become its victim (neither may competition and sustainability).

CA.III.E.4 Court decisions/review in cases involving sustainability defence

Only one CA reports judicial review – in the case of which the sustainability defence(s) ultimately failed.[92]

89 See table CA.III.E.3.ii in Appendix A.1.

90 See table CA.III.E.2.i in Appendix A.1.

91 See tables CA.III.B.3.i and CA.III.E.3.i in Appendix A.1.

92 See table CA.III.E.4.i in Appendix A.1.

Comparison with offence

We cannot find much difference when comparing the number of CAs with relevant court procedures to those we identified in cases involving sustainability related competitive concerns.[93]

We do not have any information on how this translates into case numbers, as they were not covered by the survey. What is clear is that even the theoretical maximum of the 'court testing' ratio could not be 100% here, given that a portion of cases were informal consultations (which are part of the notion of 'case' for the purpose of this survey).[94]

CA.III.E.5 Sectors – sustainability defence

Responses as to which sectors are involved by defence cases are discussed later together with the responses to other questions concerning the involvement of sectors by offence cases as well as by other activities and experience.[95]

CA.III.E.6 Profile of defence cases involving sustainability defence

There is one CA reporting a profile different from those of the other restrictive agreement cases.[96] Remarks in the comment section seem to indicate that this involves one case. Its profile was different arguably because it was an *ex-ante* informal consultation which may be rather unusual in the practice of the CA in question concerning restrictive agreements.

Comparison with offence

We found a similar picture in cases involving a sustainability defence as in cases involving a sustainability related competitive concern (where there was no difference in profiles indicated at all).[97]

CA.III.E.7-8 Case presentation – sustainability defence

The non-confidential responses to question CA.III.E.7 can be found in Appendix B.

Responses to question CA.III.E.8 are taken into account in this analysis, but they are not detailed here for confidentiality reasons.

CA.III.F Assessment/methods – defence[98]

CA.III.F.1 Method's relation to general method

Responses indicate that the general analytical framework was applied by most CAs, but by half of them with a few appropriate interpretations and solutions.

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93 See tables CA.III.B.4.i and CA.III.E.4.i in Appendix A.1.

94 See section 'Approach' within 'Survey characteristics'.

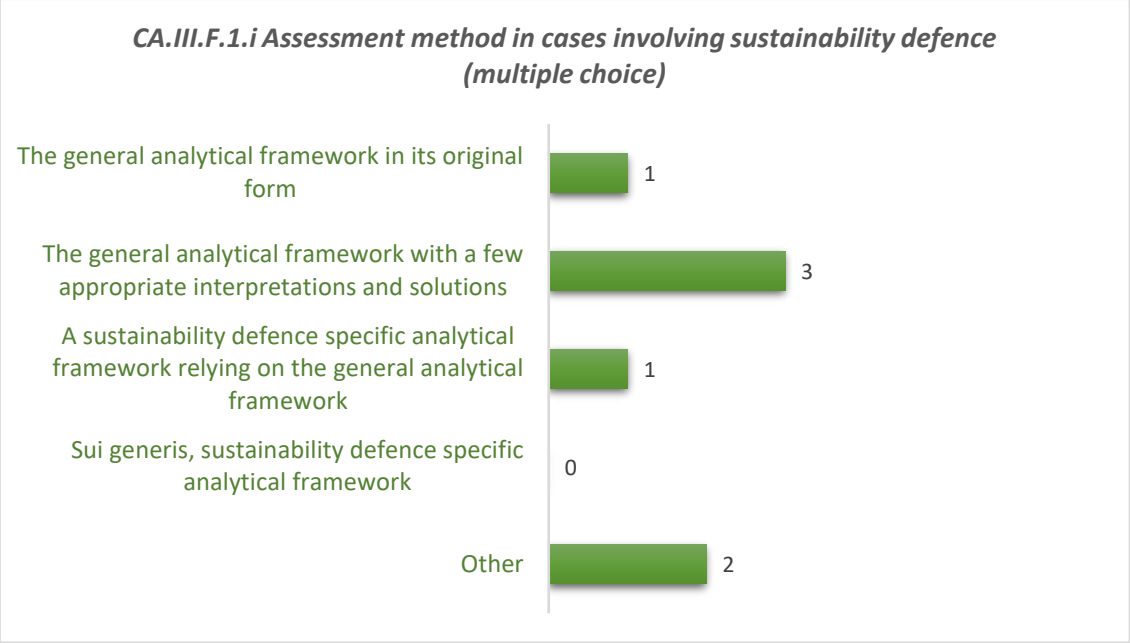
We are unaware of the exact size of that portion, as we only asked about the number of cases and not about the number of such informal consultations.

95 See section NGA.I.C.2.

96 See table CA.III.E.6.i in Appendix A.1.

97 See table CA.III.E.6.iii in Appendix A.1.

98 Questions in this section were partly tarnished in the questionnaire that was used to take the survey as the wording of the questions was mistyped (the wording wrongly mentioned sustainability related competitive concerns instead of sustainability defences). Consequently, the answers given to these questions may also be tarnished.



Note: n=6

None of the CAs report the use of a *sui generis* sustainability defence specific methodology, but one CA reports the use of a sustainability specific analytical framework based on the general analytical framework.

Comparison with offence

Overall, the analysis – on average – is somewhat less pointed towards the 'general analytical framework in its original form' end of the spectrum than in the cases involving sustainability related competitive concerns.[99] In other words, their analysis seems to be somewhat more tailor-made than that of sustainability related competitive concerns.

There may be multiple, in part interrelated, explanations for this. It is possible – and consistent with some other findings of this survey – that cases involving sustainability defence are more frequent, and therefore their analysis is in a less premature state than the cases involving sustainability related competitive concerns. It is also possible that the notion of a sustainability defence is more accepted than that of sustainability related competitive concerns, leading to more openness towards a sustainability specific metrics in the case of defence. In addition, parties are obviously more interested in presenting arguments, including sustainability specific ones, supporting a defence rather than an offence.

CA.III.F.2 Method description

Although responses are brief, they highlight a broad spectrum of practices that have been used in the last 6 years – from unsubstantiated, and possibly improvised statements on falsely alleged

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At the same time, the context must have been clear for respondents, and the question headings were correct. In question CA.III.F.1, even the response options mentioned, rightly, sustainability defence. Moreover, no respondents contacted us about being confused by the apparent contradictions, and the answers given to these questions do not mirror the answers given to the questions in CA.III.C concerning sustainability related competitive concerns.

All things considered, we believe that the interpretation of the answers given to these questions and the results based on them require additional caution and carefulness, but we do not believe that they should be disregarded.

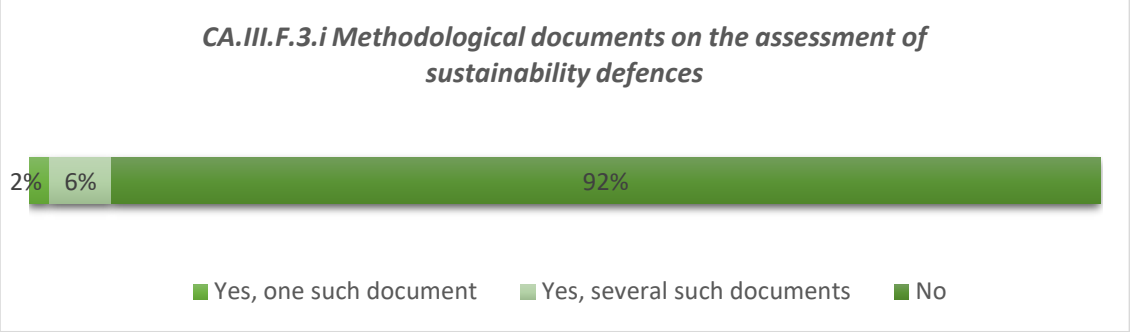
The mistyping has been corrected in Appendix C.1.

[99] See table CA.III.F.1.iii in Appendix A.1.

environmental benefits ('greenwashing') that can be refused outright by the CA under any analytical framework, to taking into account sustainability benefits qualitatively, to engaging into quantification.[100]

CA.III.F.3 Method document

The chart below shows that a small minority of CAs issued public documents, such as soft laws(s) or guideline(s)) outlining the method used in past cases or planned to be used in prospective cases when assessing sustainability defence in restrictive agreement cases.



Note: n=52

This is less than the number of those CAs that had cases involving sustainability defence.[101]

Although we did not ask about prospective methodological documents, one (European) CA indicated in the comment section that it is planning to issue guidelines in the near future.

Cross-tabulation with the geographical location of CA

Only European CAs reported methodological documents on sustainability defence.[102]

Cross-tabulation with the level of experience of CA

Not all of the CAs with methodological documents are among the 'more experienced' CAs, and only one of them had case(s) of this kind.[103]

Even so, a larger share of the 'more experienced' CAs have such documents (than that of the 'less experienced' CAs).

Cross-tabulation with the level of experience of CA in defence cases

There is little overlap between CAs with case experience involving sustainability defence and those with methodological documents on the subject. In other words, there are relatively few CAs (in terms of percentage) with methodological document(s) that also have cases in this category.[104]

100 Essential information on some of these cases is available in Appendix B.

101 See also table CA.III.E.1.i in Appendix A.1.

102 See table CA.III.F.3.ii in Appendix A.1.

103 See table CA.III.F.3.iii in Appendix A.1.

104 See table CA.III.F.3.v in Appendix A.1.

Cross-tabulation with the level of experience & geographical location of CA

The pattern of the responses of the 'less experienced' European CAs is about 'halfway' between that of the 'more experienced' (and mostly European) CAs and that of the 'less experienced' non-European CAs, and the distance from both is significant.[105]

This suggests that both the level of experience and geographical location matter in this case, at least to a certain extent.

This differs from our finding on the offence side,[106] where the level of experience does not seem to matter. Again, this may suggest that the issue of cases involving sustainability defence may be more accepted / more frequent / more evolved than of cases involving sustainability related competitive concerns.

Thus, the disconnect between case experience and methodological documents as seen above[107] exists here to a lesser extent, and therefore the same factors that explain it may be weaker.

Comparison with offence

We have found several, although not necessarily significant, differences between the offence and the defence sides.[108]

There is a large but not complete overlap between CAs reporting methodological documents on sustainability related competitive concerns and on sustainability defence – four CAs are involved in each subject, and three CAs are involved in both.[109] In total, 8 and 12 documents (reported by the respondent CAs) deal with offence and defence respectively, of which 4 documents (by 2 CAs) deal with both.

As mentioned earlier, we found a higher share of European CAs in this category than on the offence side. Also, methodological documents seem to be somewhat more linked to relevant case experience and to general experience related to sustainability than on the offence side.

Some of these differences might reflect differences in how much CAs are forward looking (as opposed to summarising only existing experience in guidance materials) and/or how much they are general (e.g.: whether guidance materials are aimed at addressing general issues, such as efficiencies or non-price variables or are aimed at addressing sustainability considerations specifically), depending on whether the subject is sustainability related competitive concerns or sustainability defences.

In any case, these differences may suggest that the notion of sustainability defence may be more accepted and/or more frequent and its analysis may be more evolved than that of sustainability related competitive concerns. Nevertheless, these differences, while they can be identified, are not large.

CA.III.F.4 Method document – details

The non-confidential responses to this question can be found in Appendix B.

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105 See table CA.III.F.3.iv in Appendix A.1.

106 See section CA.III.C.1.

107 See section CA.III.C.1.

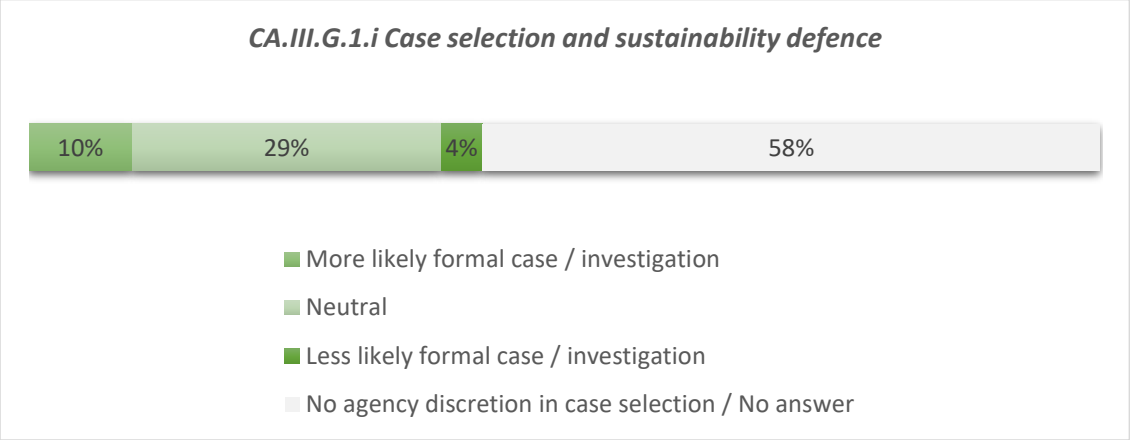
108 See tables CA.III.C.3.i-v and CA.III.F.3.i-v. in Appendix A.1.

109 See tables CA.III.F.3.vi-vii in Appendix A.1.

CA.III.G Prioritisation – defence

CA.III.G.1 Case selection and defence

More than half of the CAs report that they do not have discretion as to which cases they deal with (or at least not depending on whether sustainability defence emerges).



Note: n=52

The rest of the responses are mostly neutral, although a few CAs would be more likely to launch a formal case and only two would be less likely in the presence of sustainability defence.

The notion that the emergence of sustainability defence may increase the likelihood of a formal proceeding being launched may sound counterintuitive at first – after all, a defence should normally decrease rather than increase scrutiny.

We believe, however, that there may be several explanations for this. For instance, perhaps claims on environmental benefits do not always sound like a credible defence at first (i.e., giving the impression of a 'greenwashing' attempt). Alternatively, it is also possible that at an early stage of exploring the topic, certain CAs might think that they need to test the defence and gain more experience.

Remarks in the comment section suggest that these explanations are plausible. For instance, one CA states that in its practice while '*a sustainability defence may potentially decrease the likelihood of opening formal proceedings, it does not generally decrease the likelihood.*' Another CA notes, after emphasising the importance of removing obstacles out of the way of 'green initiatives', that '*if companies abuse the concept of 'sustainability', we will intervene*', while also clarifying that this intervention may be less severe when parties seek *ex-ante* informal guidance.

All this shows both the complexity of case selection and its relevance. Not surprisingly, one CA reports that (currently) it '*is considering whether the emergence of a sustainability defence should have some influence on the prioritization of a case.*'[110]

Cross-tabulation with the geographical location of CA

A much higher share of European CAs report discretion and a significantly higher share of them report an increased likelihood to launch a formal case as well as a neutral attitude in the presence of

[110] This CA made the same remark in the comment section of question CA.III.D.1 on the case selection aspects of sustainability related competitive concerns as well.

sustainability related competitive concerns. Decreased likelihood to launch a formal case is low in general.

None of the non-European CAs reported either an increased or a decreased likelihood to launch a formal case. In other words, discretion matters only among European CAs.[111]

Cross-tabulation with the level of experience of CA

A significantly larger share of the 'more experienced' CAs report an increased likelihood to launch a formal case as well as a neutral attitude, which also means that they enjoy much more discretion in case selection. Decreased likelihood to launch a formal case is low in general, but it is higher among the 'more experienced' CAs.

While discretion is present in both groups, it is much more present among the 'more experienced' CAs.[112]

Cross-tabulation with the level of experience & geographical location of CA

The pattern of the responses of the 'less experienced' European CAs is much more similar to that of the 'more experienced' (and mostly European) CAs than to the pattern of the responses of the 'less experienced' non-European CAs.[113]

This suggests that geographical location matters more in this case than the level of experience.

Comparison with offence

The same number of CAs report a lack of agency discretion/answer.[114] This is logical, provided that an agency's discretion does not depend on whether the type of case is an offence or a defence.

Overall, we do not see many differences, but there is slightly less inclination to launch a formal case here than on the offence side. In other words, even if the presence of a sustainability defence increases scrutiny in absolute terms and on average, it increases scrutiny less than the presence of sustainability related competitive concerns. This sounds logical, as sustainability defence is, after all, a defence.

CA.III.H Other case experience

CA.III.H.1 Government etc. intervention

An alternative way of channelling sustainability considerations into competition law enforcement in restrictive agreement cases is through the intervention of the government (i.e., ministries or other governmental bodies that otherwise are not involved in competition law enforcement) on sustainability grounds. It may take a wide variety of forms across jurisdictions, both in terms of procedure and in terms of substance.[115]

111 See table CA.III.G.1.ii in Appendix A.1.

112 See table CA.III.G.1.iii in Appendix A.1.

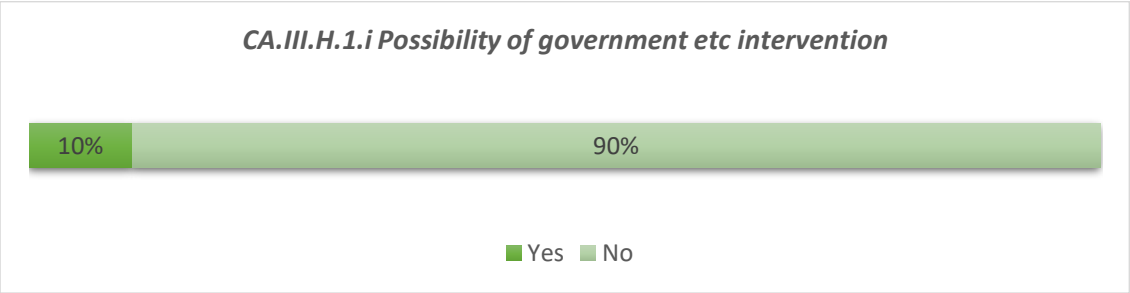
113 See table CA.III.G.1.iv in Appendix A.1.

114 See tables CA.III.G.1.v, CA.V.B.3.i-v in Appendix A.1.

115 In some jurisdictions such an intervention technically would not be regarded as part of competition law enforcement. This, however, is irrelevant for the purposes of this survey.

This survey was not aimed at exploring this area in detail; instead, the objective was to draw a rudimentary picture as to whether any form of this type of governmental intervention is at play in practice.

The chart below shows that only a small minority of CAs report such governmental power.



Note: n=52

Remarks in the comment section and answers to the next question[116] make it clear that even when such power exists, it is not necessarily used (and therefore there is little experience on it). They also highlight that in several cases it is not a sustainability specific power but a more general one, which might nevertheless cover sustainability as well.

Therefore, both the existence and use of such a power, seem to be rare at present, although this picture is admittedly rough.

Cross-tabulation with the geographical location of CA

A somewhat smaller share of European CAs (than of non-European CAs) report such power.[117]

Cross-tabulation with the level of experience of CA

At the same time, a much larger share of the 'more experienced' CAs (than of the 'less experienced' CAs) report such power in their jurisdiction.[118]

Cross-tabulation with the level of experience & geographical location of CA

The possibility of government intervention (in restrictive agreement cases on sustainability grounds) is just as common in the jurisdictions of the 'less experienced' European CAs as it is in the jurisdictions of the 'less experienced' non-European CAs, while it is much more common in the jurisdictions of the 'more experienced' (and mostly European) CAs.[119]

This suggests that the experience of CAs matters in this case, while geographical location does not. However, we do not have a theory of causality in either direction: more specifically, we cannot see why more CA experience would lead to such power or *vice versa*. One possible explanation is that both power and experience reflect more sustainability conscious societal attitudes, in the same way that was discussed earlier.[120]

116 Question CA.III.H.2.

117 See table CA.III.H.1.ii in Appendix A.1.

118 See table CA.III.H.1.iii in Appendix A.1.

119 See table CA.III.H.1.iv in Appendix A.1.

120 See section CA.II.B.1.

In any case, the procedural and substantive details of the intervention powers may matter a lot when it comes to their true significance and impact either on sustainability or on competition law enforcement. Therefore, results of the survey in this regard should be used with additional caution.

CA.III.H.2 Presentation of a government etc. intervention

Discussed in the previous section.[121]

CA.III.H.3 Further enforcement experience

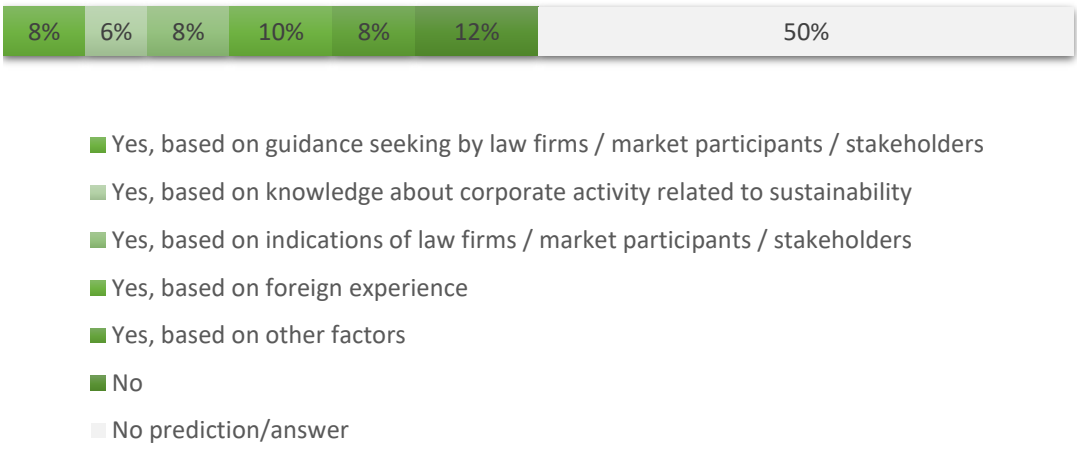
Only 10% of the CAs report further enforcement experience.[122] In fact, further enforcement experience hardly seems to exist: most remarks in the comment section mention enforcement options and enforcement plans rather than actual experience. Also, for the most part, they remain within the enforcement settings that were already covered.

For this reason, we do not present cross-tabulations with answers to this question.

CA.III.H.4 Enforcement outlook

The chart below shows that half of the CAs either did not make a prediction or did not give an answer. Among those that did, a large majority anticipate that they will encounter sustainability and competition in case work in the near future, for greatly varying reasons.[123]

CA.III.H.4.i Restrictive agreement enforcement outlook concerning sustainability issues



Note: n=52

121 See section CA.III.H.1.

122 See table CA.III.H.3.i in Appendix A.1.

123 The shares of the various 'yes' options do not reflect their true weight, as the remarks of the respondents in the comment section indicate that in several cases more than one 'yes' option is valid, even if the framing of this question did not allow multiple choice. This does not affect the cumulative share of 'yes' answers.

Cross-tabulation with the geographical location of CA

On average, European CAs are much more predictive than non-European ones; they also anticipate encountering with sustainability and competition in an enforcement context more often.[124]

Cross-tabulation with the level of experience of CA

The same applies even more to the 'more experienced' CAs; for instance, all of them made a prediction.[125]

Cross-tabulation with the level of experience & geographical location of CA

On average, the 'less experienced' European CAs and the 'less experienced' non-European CAs made very similar predictions, while the 'more experienced' (and mostly European) CAs made very different ones.[126] This suggests that the experience of CAs matters in this case, while geographical location does not. The 'more experienced' CAs anticipate more enforcement activity related to sustainability considerations than the 'less experienced' CAs.

Experience, in theory, may lead to anticipation through enhanced sensitivity. At the same time, the anticipation of the 'more experienced' CAs is based on the same wide range of factors as the anticipation of the 'less experienced' CAs, only it is a higher rate. Therefore, we believe it is equally plausible that both experience and anticipation (as well as sensitivity) are driven by common factors, such as underlying business practices, consumer preferences, political agendas, or enforcement philosophies.[127] [128] At the same time, the 'less experienced' CAs may be less predictive because of the lack of their own experience.

At first glance, this pattern is consistent with either convergence or divergence: CAs (as well as their jurisdictions and societies) may be on the same path, only the 'more experienced' ones are more ahead; or alternatively, the 'more experienced' and the 'less experienced' CAs may be on diverging paths.[129]

However, extreme divergence seems to be unlikely, as a significant degree of anticipation is present in all of the groups of CAs we looked at, but a large and permanent gap cannot be ruled out (according to these data). In addition, if we disregard CAs who replied with 'no prediction/answer', we find much less (although still significant) difference between the shares of answers of the 'more experienced' CAs and the 'less experienced' CAs. This may suggest that the main difference lies in the willingness and/or ability of CAs to predict rather than in the predictions themselves, which seems to be less consistent with divergence.

Still, it may be too early to determine whether there is (a delayed) convergence or divergence. This would require a deeper analysis, including an analysis of the answers given to other questions, external information, and perhaps even further research.

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124 See table CA.III.H.4.ii in Appendix A.1.

125 See table CA.III.H.4.iii in Appendix A.1.

126 See table CA.III.H.4.iv in Appendix A.1.

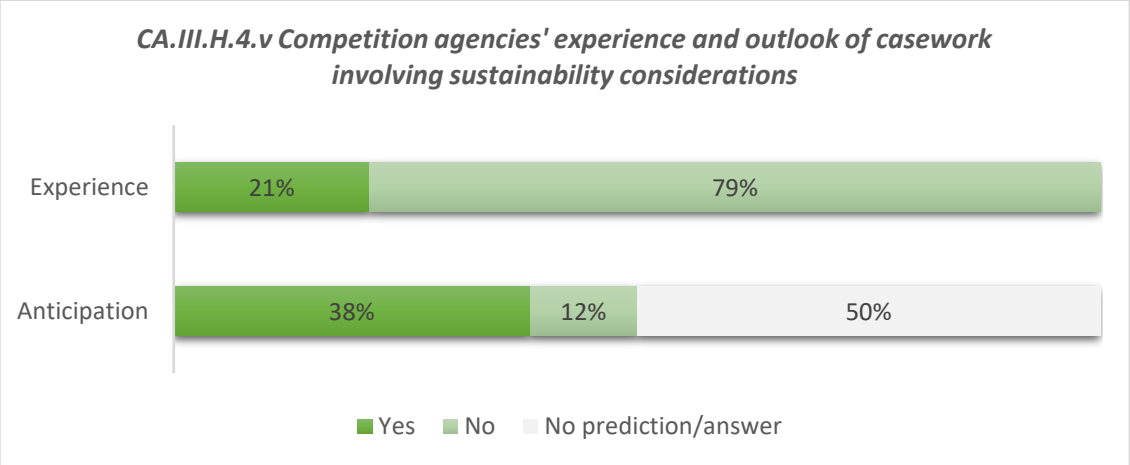
127 As far as anticipation is concerned, the role of some of those factors is confirmed by the remarks of the respondents in the comment section which refer to the green agendas of various governments.

128 See also sections CA.II.B.1 and CA.III.H.1.

129 Convergence and divergence in the main text of this report refer to global trends. Convergence at a regional level may nevertheless emerge: e.g., several remarks of the European respondents in the comment section refer to the EU Green Deal as a possible or even likely focal point for convergence in Europe.

Comparison with existing case experience

The chart below compares CAs' anticipation with their existing case experience.[130]



Note: n=52

It shows that a significantly higher share of CAs anticipate enforcement than the share of those that have already had such experience. The difference is much larger if we compare the share of 'no' answers to the share of the lack of existing case experience.

This is consistent with the existing trend – discussed earlier[131] – and suggests that sustainability considerations in competition law enforcement continue to be on the rise.

CA.IV.A Sector inquiries / market studies / research

Sector inquiries and market studies have different but, greatly overlapping characteristics across jurisdictions, e.g., in terms of information gathering power and in terms of intervention opportunities. In some cases, they do not really differ from academic research, or incorporate academic research, which was performed or commissioned by CAs.

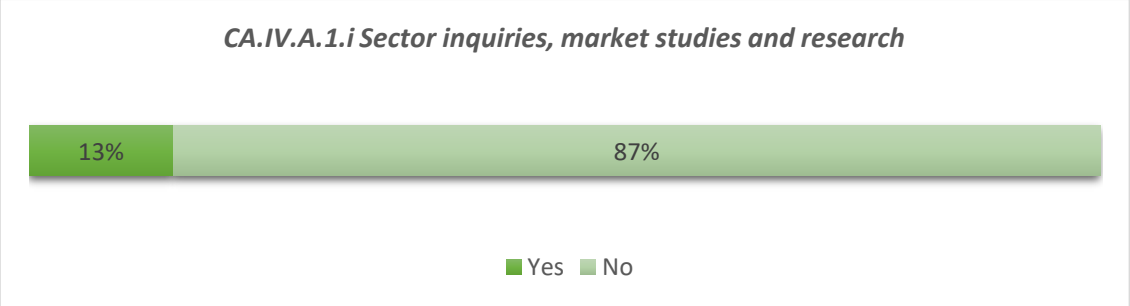
Although they do not form a homogeneous set, their differences are largely irrelevant for the purposes of this survey. Therefore, and for simplicity, in this survey we treated all of them under a single heading.

CA.IV.A.1 Number of CAs with sector inquiries / market studies / research

As the chart below shows, a relatively significant minority of CAs report sector inquiries / market studies / research where sustainability was a major issue (hereinafter in section CA.IV.A.1: relevant projects).

130 The set of CAs with case experience overlaps with the 'more experienced' CAs, but the two set of CAs are not identical. Case experience includes all cases (not only those where the sustainability related consideration was a main/sole concern or defence), but it does not include experience in sector inquiries / market studies / research.

131 See sections CA.III.E.2-3.



Note: n=52

The brief remarks of CAs in the comment section and in the answers given to question CA.IV.A.5 reveal a wide range of projects, including one on 'green products' statements and consumer behaviour.

The number of CAs reporting relevant projects is similar to those reporting restrictive agreement cases involving a sustainability defence and to those reporting restrictive agreement cases involving sustainability related competitive concerns. But it is higher than any of (or even than all of) those CAs that report cases where the sustainability related consideration was the main/sole concern or defence.[132]

Cross-tabulation with the geographical location of CA

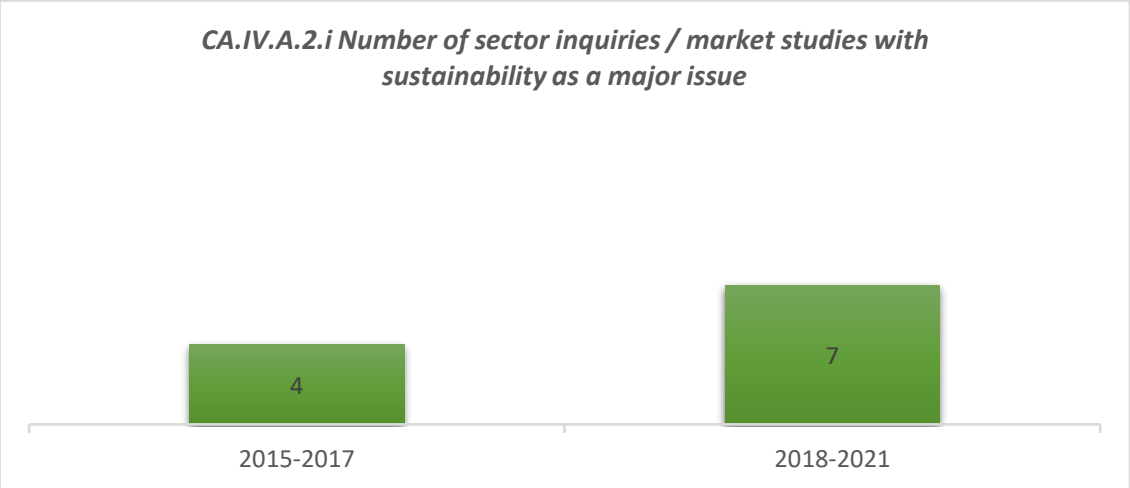
All but one CA that reported relevant projects are European.[133] This is, nevertheless, a difference compared to case experience, which is completely limited to Europe.

Cross-tabulation with the level of experience of CA

Since questions about relevant projects are about experience, we do not see any need to present cross-tabulation against the level of experience of CAs in section CA.IV.A.

CA.IV.A.2 Number of sector inquiries / market studies / research

The number of relevant projects is relatively low, but there has been an increase over time.



Note: Number of respondents is 52.

[132] See table CA.V.B.1.ii in Appendix A.1.

[133] See table CA.IV.A.1.ii in Appendix A.1.

The number of relevant projects is similar to those restrictive agreement cases where the main/sole defence was a sustainability defence. However, the dynamics is different. While the number of those defence cases has increased radically over time, the increase in the number of the relevant projects is much more modest. The number of relevant projects is also similar to all restrictive agreement cases (reported by CAs) involving sustainability related competitive concerns and lower than those involving sustainability defence.[134]

Cross-tabulation with the geographical location of CA

The predominance of Europe is even more accentuated when it comes to the number of relevant projects, as certain European CAs had more than one relevant project in the survey period.[135]

CA.IV.A.3 Sectors (sector inquiries / market studies / research)

Responses to which sectors are involved by relevant projects are discussed later, together with responses to other questions concerning the involvement of sectors by offence and defence cases as well as by NGA experience.[136]

CA.IV.A.4-5 Presentation of a sector inquiry / market study / research – main parameters

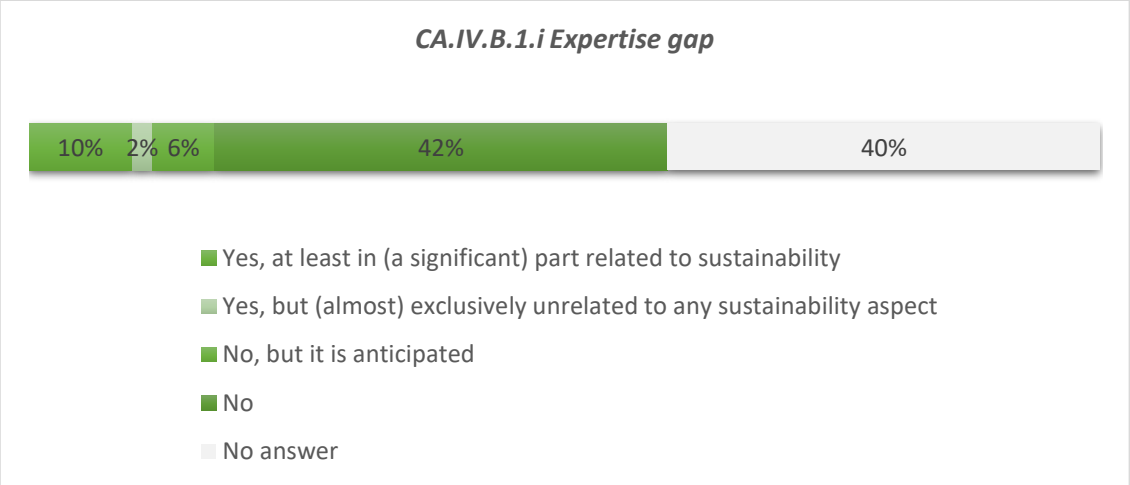
The non-confidential responses to question CA.IV.A.4 can be found in Appendix B.

Responses to question CA.IV.A.5 are taken into account in this analysis, but they are not detailed here for confidentiality reasons.

CA.IV.B Agency preparations

CA.IV.B.1 Number of CAs with an expertise gap

The chart below shows that a modest minority of CAs have encountered or anticipate encountering an expertise gap related to sustainability and competition in their work. The rest is split roughly evenly between (various sorts of) 'no' (including those unrelated to sustainability) and 'no answer'.



Note: n=52

134 See table CA.V.B.2.ii in Appendix A.1.

135 See table CA.IV.a.2.ii in Appendix A.1.

136 See section NGA.I.C.2.

If we disregard those CAs that did not give an answer, the share of CAs that have encountered or anticipate encountering an expertise gap remains a minority, however, a much more significant minority.

Cross-tabulation with the geographical location of CA

All CAs that have experienced an expertise gap are in Europe, and only one CA that anticipates one is located outside of Europe.[137] Thus, encountering an expertise gap is an issue for a significant minority of CAs in Europe, while it is almost non-existent for non-European CAs.

The split of 'no' and 'no answer' responses is quite different depending on the geographical location of the respondents. Within that, we found a much higher share of 'no' responses by European CAs and a much higher share of 'no answer' responses by non-European CAs. Therefore, disregarding those CAs that did not give an answer would not change the pattern of responses much in Europe.

Cross-tabulation with the level of experience of CA

When we compare the responses of the 'more experienced' CAs with those of the 'less experienced' ones,[138] we see similar but less extreme patterns to those related to the split between geographical locations.

The 'more experienced' CAs have a clearer 'yes profile' (compared to European CAs that we saw earlier), i.e., all of those in the 'yes' category[139] actually have encountered an expertise gap. They make up a significantly higher share of the 'more experienced' CAs (albeit still a minority) than the share of those 'less experienced' CAs that fall into the 'yes' category. The pattern of the responses of the 'less experienced' CAs almost replicates that of the average (i.e., the simple distribution of all CAs).

Cross-tabulation with the level of experience & geographical location of CA

The pattern of the responses of the 'less experienced' European CAs is in between but still closer to that of the 'more experienced' (and mostly European) CAs than to that of the 'less experienced' non-European CAs.[140]

This suggests that geographical location is a more significant factor in this case than the level of experience.

CA.IV.B.2 Activity area context of the expertise gap[141]

The chart below shows the distribution of CA responses as to what type of activities their expertise gap experience is related to. All options, other than 'other', are evenly mentioned by more than half of the CAs that are either experiencing or anticipating an expertise gap.

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137 See table CA.IV.B.1.ii in Appendix A.1.

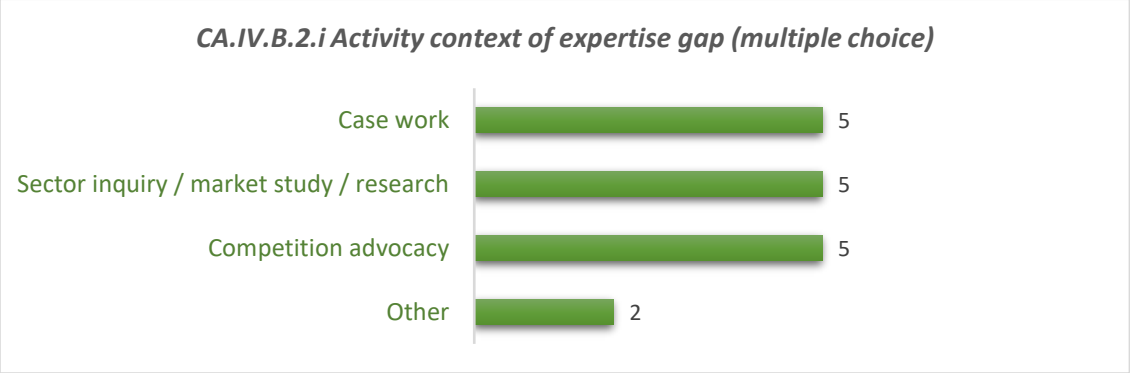
138 See table CA.IV.B.1.iii in Appendix A.1.

139 We considered 'Yes, at least in (a significant) part related to sustainability' and 'No, but it is anticipated' as falling into the 'yes' category (or being expertise gap 'positive'), while we considered 'Yes, but (almost) exclusively unrelated to any sustainability aspect' and 'No' as falling into the 'no' category (or being expertise gap 'negative').

140 See table CA.IV.B.1.iv in Appendix A.1.

141 Due to an error in the questionnaire design, the original question was not answered; instead, the following question was answered: '*The need for that additional expertise was / has been experienced in / is anticipated in:*'

The 'go to' command in CA.IV.B.1 was not consistent with the (original) question. The question was meant to be answered only by respondents who actually encountered an expertise gap. The command, however, allowed those who 'anticipated' an expertise gap to answer it as well. It is true that respondents that anticipated an expertise gap were expertise gap 'positive', but



Note: n=8

'Other' activities are mentioned much less often, and according to the remarks in the comment section they at least in part fall outside of the remit of most of the CAs (tariff regulation is a case in point).

Cross-tabulation with the geographical location of CA

Since only one non-European CA is expertise gap 'positive', we believe that the cross-tabulation of this question against geographical distribution is not very informative or relevant.[142]

Cross-tabulation with the level of experience of CA

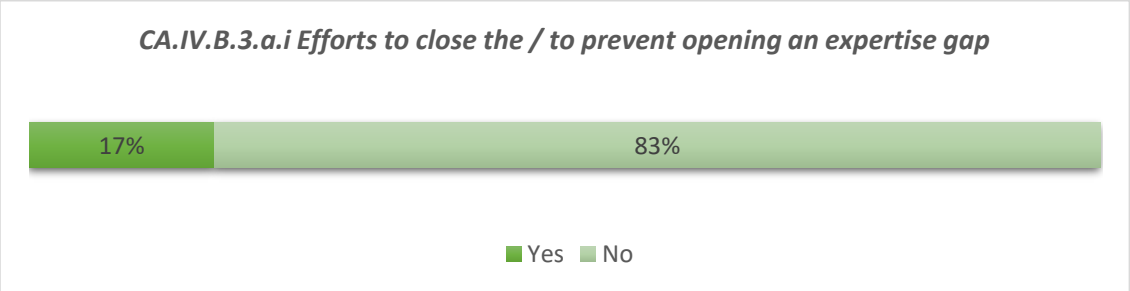
Sector inquiries / market studies / research is mentioned by all of the 'more experienced' CAs, while all other options are somewhat more often mentioned by them as compared to the 'less experienced' CAs.[143]

CA.IV.B.3 Efforts to close / to prevent opening up of an expertise gap

This section is about the efforts that CAs have made to close an expertise gap or to prevent one from opening up in the future. In other words, it is about past and present efforts. Future efforts are discussed later.[144]

Whether efforts have been made

The chart below shows that a significant minority of CAs have already taken or are currently taking action to close an expertise gap or to prevent one from opening up in the future.



Note: n=52

they did not have any actual experience concerning an expertise gap. Nevertheless, the modified question is also meaningful, as those respondents who 'only' anticipated an expertise gap, still may have had a particular activity in mind as to where they anticipate an expertise gap.

142 See table CA.IV.B.2.ii in Appendix A.1.

143 See table CA.IV.B.2.iii in Appendix A.1.

144 See section CA.IV.B.4.

Cross-tabulation with the geographical location of CA

Those efforts are concentrated in Europe and are marginal outside of Europe,[145] similarly to the perception of experience or anticipation of expertise gaps.[146]

Cross-tabulation with the level of experience of CA

A significantly larger minority of the 'more experienced' CAs have made or are making efforts compared to the 'less experienced' ones, which are still a significant minority.[147]

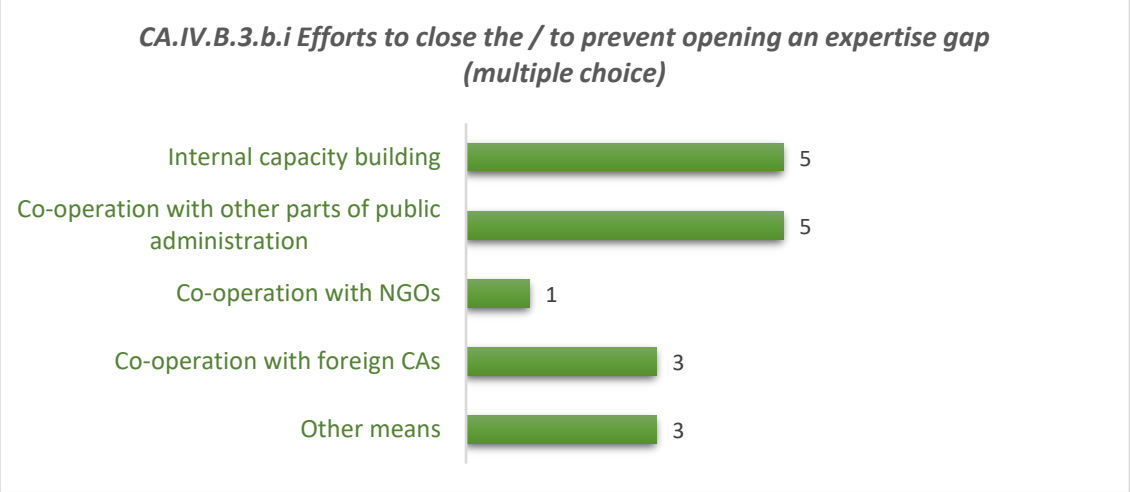
Cross-tabulation with the level of experience & geographical location of CA

The pattern of the responses of the 'less experienced' European CAs is more similar to that of the 'more experienced' (and mostly European) CAs than to the pattern of the responses of the 'less experienced' non-European CAs.[148]

This suggests that geographical location matters more in this case than the level of experience.

What efforts have been made

The chart below shows that internal capacity-building and co-operation with other governmental bodies are the most often mentioned efforts; they are mentioned by more than half of the CAs that have experienced or anticipate an expertise gap. Co-operation with NGOs[149] is the least often mentioned effort, and it is only mentioned by one such CA.



Note: n=9

In the comment section CAs report the hiring of environmental economists and experts, and the existence of a 6-people-strong 'sustainability team' within the CA. They also report co-operation with other parts of the public administration, such as the energy regulator. One CA refers to co-operation within the European Competition Network. Another CA mentions a research project complemented

145 See table CA.IV.B.3.a.ii in Appendix A.1.

146 See section CA.IV.B.1.

147 See table CA.IV.B.3.a.iii in Appendix A.1.

148 See table CA.IV.B.3.a.iv in Appendix A.1.

149 The term 'NGO' (non-governmental organisation) should not be confused with ICN 'NGA' (non-governmental advisor).

by a conference and a background paper.[150] The overview of foreign case law in case work and the possibility of commissioning research are also mentioned.

Cross-tabulation with the geographical location of CA

Since only one non-European CA is expertise gap 'positive', we believe that the cross-tabulation of this question against geographical distribution is not very informative or relevant.[151]

Cross-tabulation with the level of experience of CA

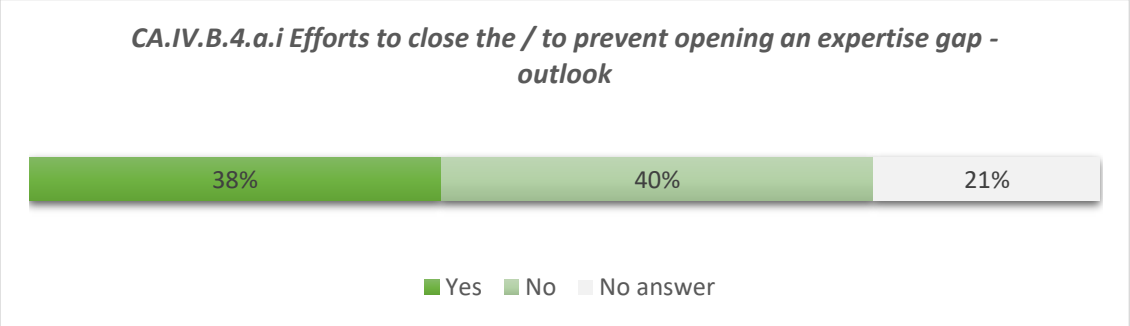
Co-operation with foreign CAs was mentioned by all of the 'more experienced' CAs, while, surprisingly, by none of the 'less experienced' CAs. Internal capacity-building and co-operation with other governmental bodies – on average – seem more important to the 'more experienced' CAs than to the 'less experienced' ones.[152]

CA.IV.B.4 Efforts to close / to prevent opening up of an expertise gap – outlook

This section is about the efforts that CAs are planning to make to close an expertise gap or to prevent one from opening up in the future. In other words, it is about (potential) future efforts. Past and present efforts were discussed earlier.[153]

Whether efforts are planned

The chart below shows that a substantial minority (more than a third) of CAs are planning to make efforts to close an expertise gap or to prevent one from opening up in the future. This is roughly half of those CAs that gave an answer.



Note: n=52

Cross-tabulation with the geographical location of CA

The share of CAs that are planning action is significantly higher in Europe (than outside of Europe), but it is still a minority. It significantly increases and becomes a clear majority if we disregard those CAs that did not give an answer; such a change in calculation also increases the share of 'active' non-European CAs, but they remain a minority, although an even more significant one.[154]

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150 This element is mentioned in the comment section of question CA.IV.B.4.b on planned efforts, but it was already a completed project at the time of the survey; therefore, we list it here.

151 See table CA.IV.B.3.b.ii in Appendix A.1.

152 See table CA.IV.B.3.b.iii in Appendix A.1.

153 See section CA.IV.B.3.

154 See table CA.IV.B.4.a.ii in Appendix A.1.

Cross-tabulation with the level of experience of CA

The share of the 'more experienced' CAs that are planning action is way higher than the share of the 'less experienced' CAs planning to do the same. The former is a massive majority, while the latter is a substantial minority. If we disregard CAs that did not give an answer, both shares increase, but the share of 'less experienced' CAs increases more (thus the gap becomes somewhat narrower).[155]

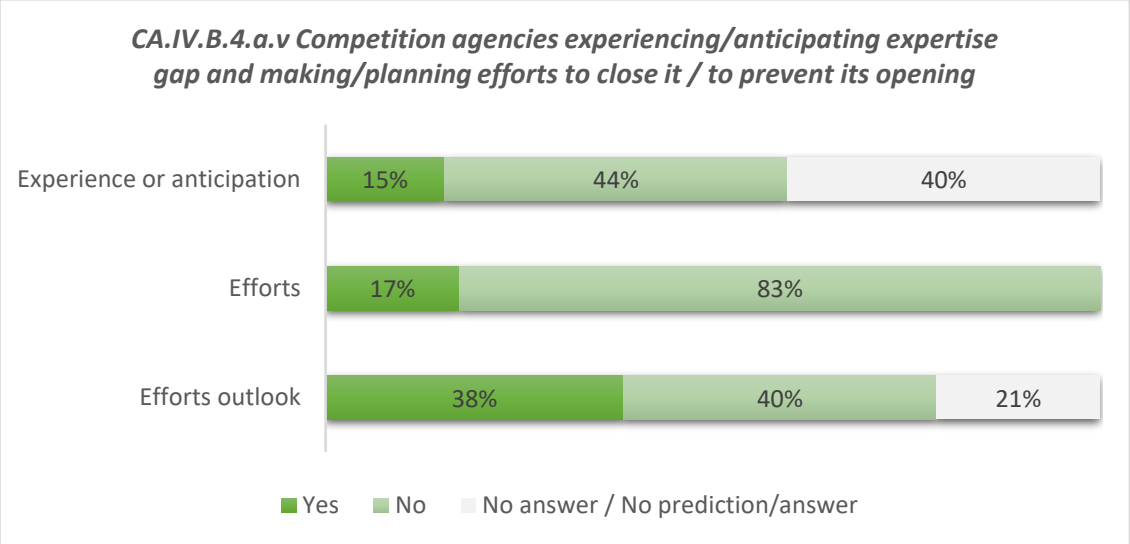
Cross-tabulation with the level of experience & geographical location of CA

The pattern of the responses of the 'less experienced' European CAs is very similar to the average (i.e., the simple distribution of the responses of all CAs (that have encountered or anticipate an expertise gap). It is between the pattern of responses of the 'more experienced' (and mostly European) and that of the 'less experienced' non-European CAs but, overall, closer to the latter.[156]

This suggests that both geographical location and the level of experience play a role in this case, but the latter plays a bigger role.

Comparison with experience/anticipation of gap and efforts already made

There is hardly any difference between the shares of CAs that report encountering or anticipating an expertise gap and those reporting past or present efforts to deal with those gaps. However, the share of CAs planning such effort is much higher, and the difference is even larger if we disregard those CAs that did not give an answer.



Note: n=52

The first finding is intuitive: problems are addressed only when they emerge or are foreseen.[157] The second finding, however, may suggest that though a number of agencies do not currently anticipate any particular expertise gap, they want to stay on the safe side, at least in the longer term. One CA notes that our survey sparked its interest in the topic.

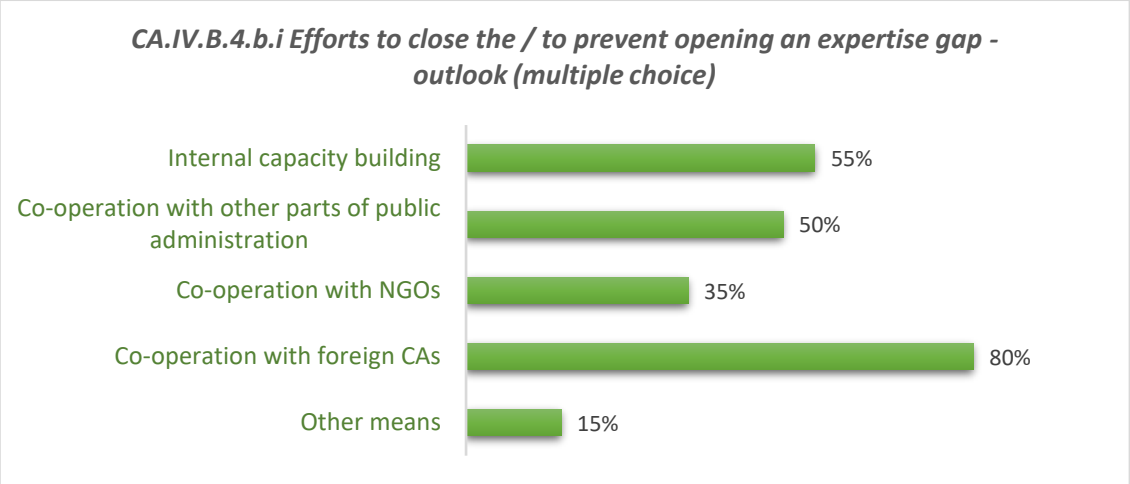
155 See table CA.IV.B.4.a.iii in Appendix A.1.

156 See table CA.IV.B.4.a.iv in Appendix A.1.

157 This is not in contradiction with the fact that the number of 'active' CAs slightly exceeds the number of CAs that have encountered or anticipate an expertise gap. It is possible that a CA took action in relation to an anticipated expertise gap that did not in fact emerge – such a CA will report action but will not report encountering or (currently) anticipating a gap.

What efforts are planned

Among the efforts which could be undertaken to close an expertise gap or to prevent one from opening up, co-operation with foreign CAs leads by far. Internal capacity-building and co-operation with other governmental bodies come second and are mentioned by roughly half of the CAs, while co-operation with NGOs comes third, and 'other means' is fourth.



Note: n=20

Remarks in the comment section mention engagement with academia.

Cross-tabulation with the geographical location of CA

Geographical distribution shows that internal capacity-building and co-operation with other public bodies are more 'popular', while co-operation with foreign CAs is less 'popular' in Europe.[158]

Cross-tabulation with the level of experience of CA

Internal capacity-building is named as the first effort among the 'more experienced' CAs, co-operation with foreign CAs comes second, while co-operation with NGOs is clearly the last one (except for 'other means').[159]

Among the 'less experienced' CAs, it is co-operation with foreign CAs which leads by far, and internal capacity-building falls within the same class of 'popularity' as other options (except of 'other means').

Comparison with past/ongoing efforts

The most interesting observations can be made on the 'dynamics' of the 'more experienced' / 'less experienced' split. In other words, when we compare the 'changes' in the differences between the responses of the 'more experienced' CAs and the 'less experienced' CAs in the past and present and in the future plans, following a similar logic to that of a *difference in differences* analysis.

Responses to past and present efforts suggest that from the various options available to close an expertise gap, co-operation with foreign CAs has only been important for the 'more experienced' CAs; nevertheless, for them it has been very important. Responses to future plans show that the importance of internal capacity-building has increased for the 'more experienced' CAs, while co-

158 See table CA.IV.B.4.b.ii in Appendix A.1.

159 See table CA.IV.B.4.b.iii in Appendix A.1.

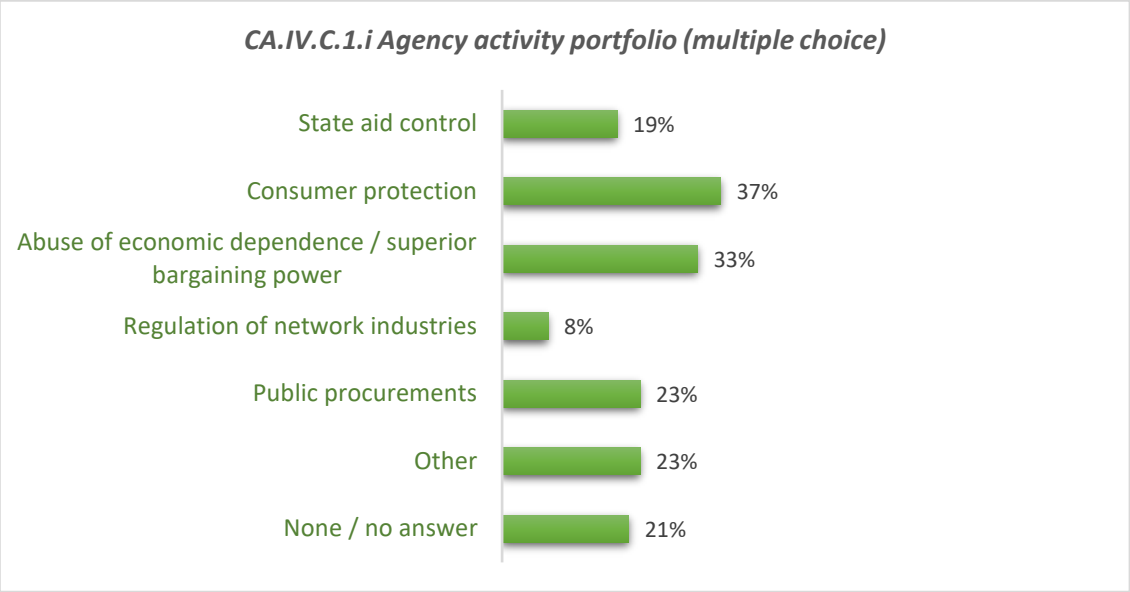
operation with foreign CAs has become much less important for them. At the same time, it has become very important for the 'less experienced' CAs.[160]

This suggests that international co-operation matters a lot. Perhaps it is the most important at the beginning, and while it remains important, internal capacity-building efforts take the lead later, as CAs try to switch from outside knowledge to inside knowledge.[161]

CA.IV.C Intra-agency synergies

CA.IV.C.1-2 CA activity portfolio and synergies with various elements of the activity portfolio

The chart below shows the activities of the (responding) CAs other than conducting cases concerning restrictive agreement, unilateral conduct and merger control (i.e., other than those considered as core enforcement activities).



Note: n=52

Prior to the survey, we hypothesised about potential synergies with energy regulation or consumer protection, which are in the activity portfolio of several CAs. However, responses to question CA.IV.C.2 suggest that no synergies exist, or that they are not presently realised by CAs. The reasons for this cannot be inferred from the survey.

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160 See tables CA.IV.B.3.b.iii and CA.IV.B.4.b.iii in Appendix A.1.

161 At least this is so if we believe that the 'more experienced' CAs are on the same trajectory as the rest of the CAs but are at a different, later stage of it. In such a case, the 'more experienced' CAs are only the first movers, followed by the others. (One caveat is that the past and present leg of this analysis is based on the responses of only 9 CAs.)

If, however, the 'more experienced' CAs are not mere first movers but are committed to sustainability while other CAs are not, then they may not be followed. In this case the 'more' and 'less experienced' CAs are on a different trajectory, instead of being on the same trajectory, only at different stages.

This, again, raises the question whether CAs' practices concerning sustainability considerations are converging or diverging. The fact that the share of CAs that are planning action is much higher than those that have done so in the past or are doing so in the present might point towards convergence. (However, we cannot project the same share to the set of *all* CAs. Quite the opposite, it is more likely that CAs that are planning action are an even smaller minority of *all* CAs.)

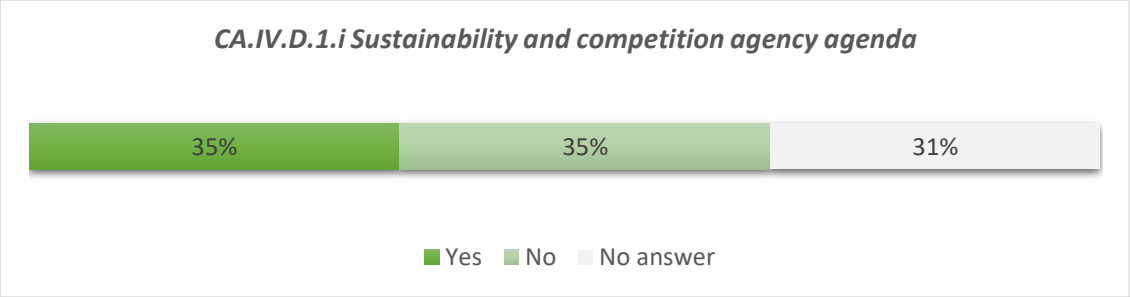
Still, it may be too early to determine whether there is (a delayed) convergence or divergence. This would require a more in-depth analysis, including an analysis of the answers given to other questions, external information, and perhaps even further research, as it is also noted in section CA.II.H.4.

Nonetheless, one CA notes in its response to question CA.III.E.8 that it has encountered a sustainability defence in several merger cases. Indeed, synergies between the core competition agency competences may emerge as well.

CA.IV.D Agency and international agenda

CA.IV.D.1 Agency agenda

The chart below shows that a substantial minority of CAs have the topic on their strategic agenda.



Note: n=52

If we disregard those CAs that did not give an answer, this share is about half.

Cross-tabulation with the geographical location of CA

Sustainability is a topic on the strategic agenda of a much bigger share of European CAs than of non-European CAs, but they are both minorities.[162]

If we disregard CAs that did not give an answer, the share of European CAs that have the topic on their strategic agenda becomes a substantial majority, and the difference between the European and non-European CAs increases. This is because a significantly larger share of European CAs did not answer (than of non-European CAs).

Cross-tabulation with the level of experience of CA

Sustainability is a topic on the strategic agenda of a much bigger share of the 'more experienced' CAs than of the 'less experienced' CAs. The former is a clear majority, while the latter is a substantial minority.

If we disregard those CAs that did not give an answer, both shares increase significantly.[163]

Cross-tabulation with the level of experience & geographical location of CA

The pattern of the responses of the 'less experienced' European CAs is much more similar to that of the 'less experienced' non-European CAs than to the pattern of the responses of the 'more experienced' (and mostly European) CAs.[164]

This suggests that, in this case, the level of experience is a more important factor than geographical location.

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162 See table CA.IV.D.1.ii in Appendix A.1.

163 See table CA.IV.D.1.iii in Appendix A.1.

164 See table CA.IV.D.1.iv in Appendix A.1.

Comparison with (any) experience in sustainability and competition of the CA

The share of CAs with a strategic agenda that includes sustainability and competition is higher than the share of those CAs with (any) actual experience in the topic. However, if we consider 'no prediction/answer' to mean 'no', the two shares are roughly the same.[165]

CA.IV.D.2 Agenda of international organisations

The chart below shows that a clear majority of CAs report that the topic should be among the 5 most important topics on the agenda of international organisations. This becomes an overwhelming majority if we disregard those CAs that did not answer the question.

Note: n=52

One CA noted in the comment section that international organisations are already active in the topic of sustainability and competition and that it obtained a substantial amount of input from international organisations when carrying out its own activities on the topic.

Cross-tabulation with the geographical location of CA

There is no significant difference depending on the geographical location of CAs.[166]

Cross-tabulation with the level of experience of CA

There is no significant difference depending on the level of experience of CAs.[167]

If we disregard those CAs that did not give an answer, the share of the 'less experienced' CAs reporting that the topic should be among the 5 most important topics on the agenda of international organisations is significantly higher than that of the 'more experienced' CAs, but both shares are very high.

Cross-tabulation with the level of experience & geographical location of CA

As there was no significant difference depending on the geographical location of CAs or depending on the level of experience of CAs, there are no differences to explain either.[168]

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165 See table CA.IV.D.2.v in section CA.IV.D.2 and in Appendix A.1.

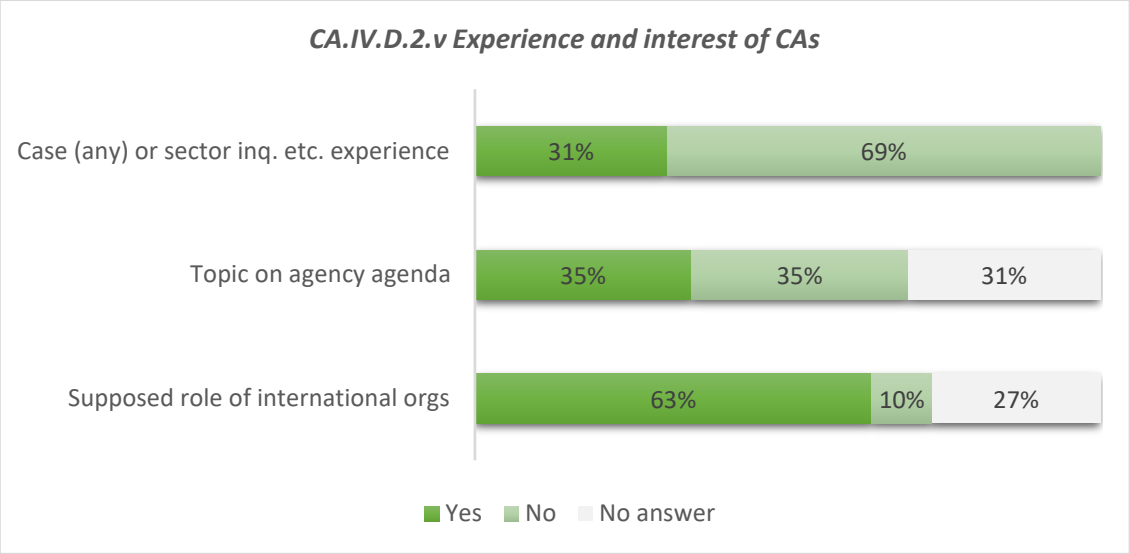
166 See table CA.IV.D.2.ii in Appendix A.1.

167 See table CA.IV.D.2.iii in Appendix A.1.

168 Nevertheless, we produced the (combined) cross-tabulation of answers to question CA.IV.D.2 against the geographical location and the level of experience of CAs: the patterns of the responses are very similar in all the three groups of CAs (namely (a) the 'more experienced' (and mostly European) CAs, (b) the 'less experienced' European CAs and (c) the 'less experienced' non-European CAs) (see table CA.IV.D.2.iv in Appendix A.1).

Comparison with (any) experience in sustainability and competition and with whether the topic is on the agenda of the CA

The share of CAs preferring the involvement of international organisations is much higher than the share of CAs with (any) actual experience in the topic or the share of CAs having sustainability on their strategic agenda, as the chart below shows.



Note: n=52

It is also much higher than the share of CAs that are planning efforts to close an expertise gap or prevent one from being opened.[169]

This implies that many CAs – that are not planning or that are not in the position to take action on their own – might only be able to rely on the work of international organisations.

CA.IV.D.3 Type of work product of international organisations

Among the predefined work products, 'collection of good practices' is first, 'recommendations' is second, and 'collecting the results of theoretical research' is a somewhat distant third. All these options are mentioned by more than half of the CAs.

Note: n=33

[169] See tables CA.IV.B.4.a.v and CA.IV.D.2.i earlier in this section and in section IV.B.4 and also in Appendix A.1.

'Other' option is almost non-existent – only one CA mentioned it; this CA indicated in the comment section that it would prefer the '*collection of real case examples*'.[170]

Cross-tabulation with the geographical location of CA

'Recommendations' and 'collecting the results of theoretical research' are significantly more popular among non-European CAs. All options are mentioned by more than half of the respective CAs.[171]

Cross-tabulation with the level of experience of CA

Both the 'more experienced' and 'less experienced' CAs mention 'collection of good practices' the most often (indeed, almost all of them mention it), but while the 'more experienced' CAs mentioned 'recommendations' and 'collection of the results of theoretic research' with equal frequency, 'recommendations' are much more preferred among the 'less experienced' CAs. Again, all options are mentioned by more than half of the respective CAs.[172]

[170] We hope that Appendix B is a step into that direction.

[171] See table CA.IV.D.3.ii in Appendix A.1.

[172] See table CA.IV.D.3.iii in Appendix A.1.

Non-governmental advisors

We received responses from 41 NGAs, which make up 6% of all the NGAs who we contacted.[173] However, it is important to note that NGAs were asked to participate in the survey if they had relevant experience. This served as a reasonable (and apparently strong) filter, and therefore – unlike in the case of competition agencies – all NGA responses are based on experience.

We presume, optimistically, that most NGAs with relevant experience responded to our questionnaire, so the responses cover most NGA experience. If that is the case, the number of responses shows that there are only a few NGAs with experience in sustainability and competition at present. This is so even if many practitioners and law firms are not NGAs, and therefore their experience is not covered.[174]

This and the fact that there are a few CAs with experience in the field[175] mean that there is little experience so far concerning sustainability and competition law.

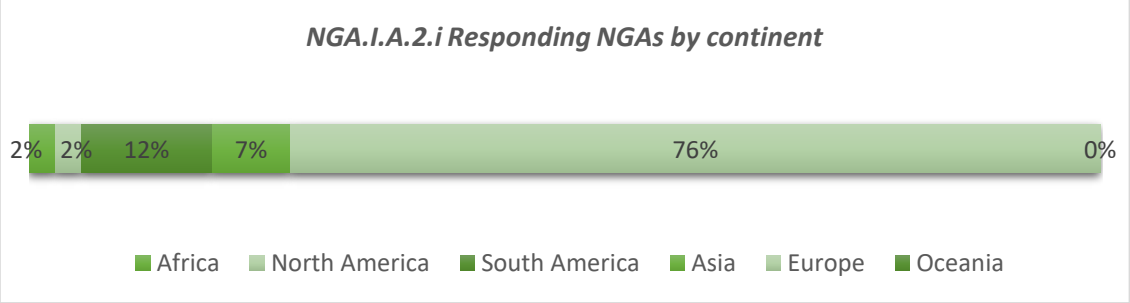
Unlike CAs, NGAs were asked to report not only facts (including their practice and predictions), but also some of their views; nevertheless, due to the aforementioned 'experience filter', those views are not mere speculations but based on experience.

Data in this report mentioning NGAs mostly concern respondent NGAs and not all NGAs, unless indicated otherwise. Still, in certain cases – for the sake of prudence – we highlight the fact that they concern only respondent NGAs.

NGA.I.A NGA

NGA.I.A.2 Geographical presence of NGA[176]

The chart below shows that NGAs located in Europe represent the large majority of the respondents.



Note: n=41

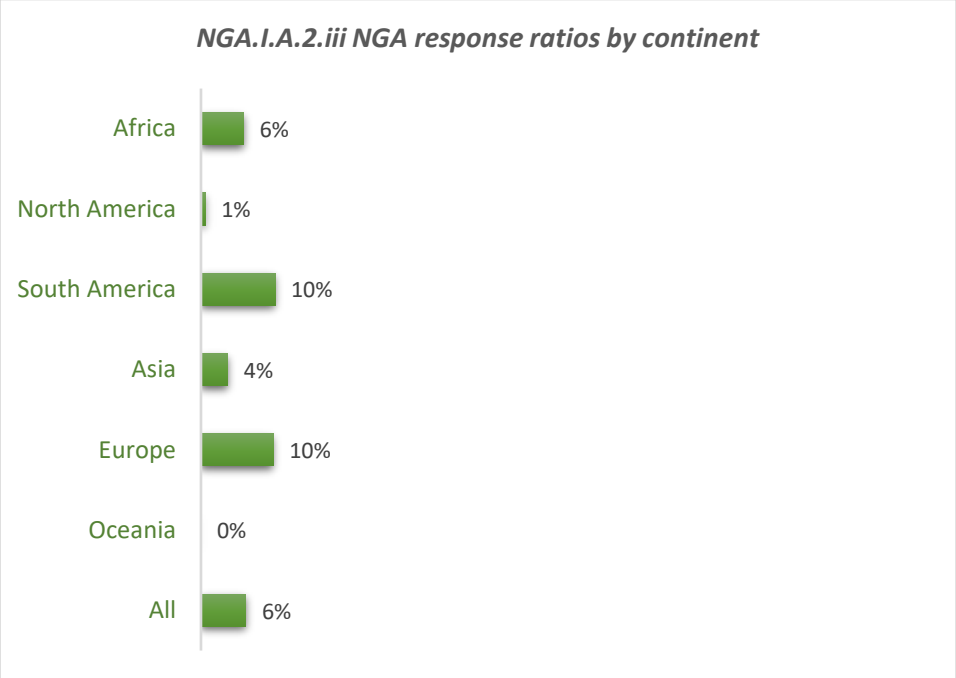
[173] We managed to contact 662 NGAs, by relying on the contact list provided by the ICN Secretary.

[174] At the same time, we do not see any reason why the experience of non-NGA practitioners would differ significantly and systematically from those of the NGAs.

[175] See for example sections CA.III.B.2-3, CA.III.E.2-3, CA.IV.A.1.

[176] Questions NGA.I.A.1 and NGA.I.A.3 were technical questions about the name of the NGA and the contact person.

To put these data into context, we compared the shares of continents among respondent NGAs to their shares among all NGAs,[177] by calculating the response ratios[178] of NGAs for each continent, as shown in the next chart.



Note: Number of respondents is 41, number of all (contacted) NGAs is 662.

This shows that the relative number of NGAs with experience is the highest in Europe and South America, and the lowest in Oceania and North America, while Africa and Asia are in between, but differences are much smaller than (falsely) suggested by chart NGA.I.A.2.i.

It is important to note that this is the distribution of NGAs among continents and not the distribution of their *experience*. NGAs – unlike competition agencies – may be, and many of them are, active in multiple jurisdictions and even in multiple continents. Accordingly, the geographical coverage (or source) of the experience of the respondent is more relevant for our substantive analysis. The experience of NGAs was addressed by another question, as discussed later.[179]

NGA.I.B NGA background

NGA.I.B.1-2 Type and expertise of NGAs

About 80% of the respondent NGAs are affiliated with either law firms or academia.[180] Accordingly, the primary area of their expertise is mostly related to competition law and is very limited to other issues that we asked about, including environmental issues.[181] Although we do not have the

177 See table NGA.I.A.2.ii in Appendix A.2.

178 We do not consider this response ratio a 'response rate', because for the purposes of this survey, the true response rate compares the number of respondents to the number of all *experienced* NGAs (instead of all NGAs). Obviously, we cannot calculate the true NGA response rate, but in any case, it should be higher than the observed response ratio – perhaps even close to 100% if our presumption holds that most NGAs with relevant experience responded.

179 Question I.C.3 of the NGA questionnaire.

180 See table NGA.I.B.1.i in Appendix A.2.

181 See table NGA.I.B.2.i in Appendix A.2.

comparable data concerning *all* NGAs, our understanding is that ICN NGAs tend to be related to law firms or are legal scholars in academia.

This is not to say that environmental issues (legal, economic, or policy) are alien to almost all respondents, as NGAs were asked only about their *primary* expertise, though in a multiple-choice setting.

NGA.I.C NGA experience

NGA.I.C.1 Type of experience

A large majority of NGAs reported 'own experience' on sustainability and competition, while a substantial minority of them reported 'own research' (which also means that only a small minority reported both).

Note: n=41

We did not give an exact definition of these categories in the questionnaire, although the wording of the question made it clear that 'own experience' refers to more direct experience than 'own research', and that very indirect experience does not qualify. It was also made clear that involvement in enforcement is regarded as 'own experience'. If remarks in the comment section are any guide, NGAs seem to have responded accordingly.

Cross-tabulation with the geographical source of experience

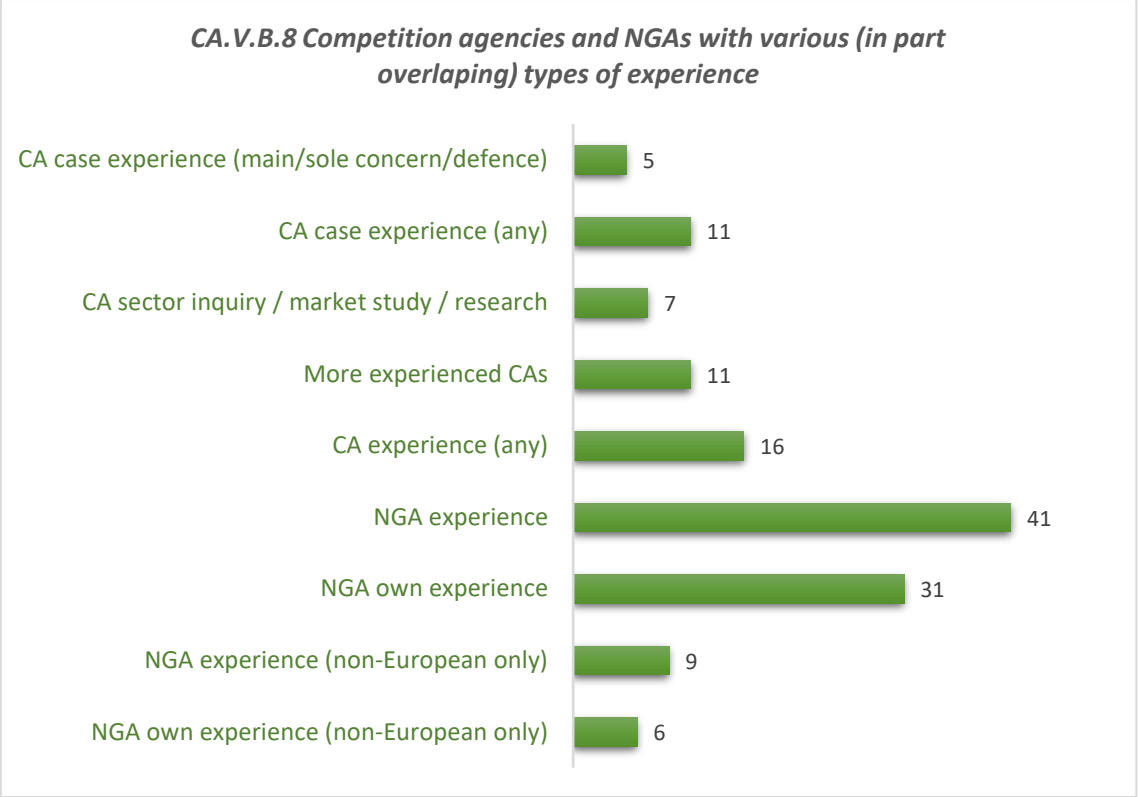
There is no significant difference depending on the geographical source of experience.[183]

Comparison with CA experience

A much larger number of NGAs than CAs reported experience. This is the case even if we count only those NGAs with 'own experience'.

[182] See also table NGA.I.C.1.ii in Appendix A.2 for the answers of only those NGAs that reported a single type of experience.

[183] See table NGA.I.C.1.iii in Appendix A.2.



Note: Number of responding CAs is 52, number of responding NGAs is 41.

Several factors may explain this difference. First, NGAs may be involved in law enforcement related to mergers or unilateral conduct, which were not covered by the relevant parts of the CA questionnaire. Second, restrictive agreement cases involve multiple parties and thus multiple NGAs, even if they involve only one CA. Third, different NGAs may be involved in different restrictive agreement cases even within a single jurisdiction where there may be only one CA.

Fourth, NGAs may have a broader set of experience concerning any case type, as they may not only be involved in actual cases (formal or informal) but may also be consulted by business entities in order to prevent those cases. The former involves CAs too, but the latter does not. In other words, NGAs may gain additional experience from activities linked to compliance efforts that remain under the radar of CAs. Private law enforcement may also be the source of additional experience not involving CAs.

We cannot infer from our survey which combination of these (or any other) factors are at play, or the extent to which business activity on sustainability and competition law is invisible to CAs. Nevertheless, the fourth explanation is likely to play a role, as non-European CAs report no case experience (meaning no case outside of Europe), whilst several NGAs with only non-European experience report 'own experience' even if their absolute numbers are modest. We can find the same if we only consider NGAs with only non-European experience from only the last 6 years, which is the same timeframe CAs were asked about (so, the gap between the 'own experience' of the NGAs with only non-European experience and that of the non-European CAs cannot be explained by their different timeframe).[184]

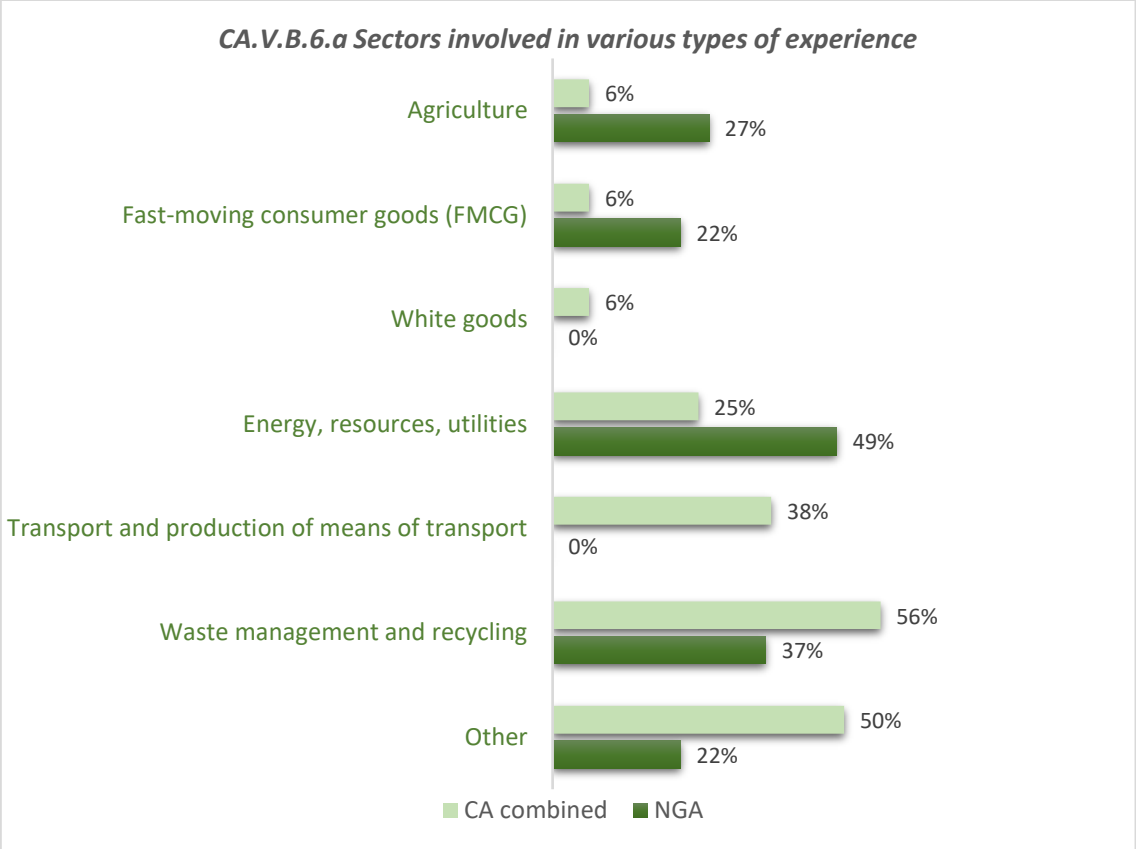
[184] See table NGA.I.C.4.iv in Appendix A.2.

It is worth noting that these data are for the most part not about the number of cases (or the number of involvements related to compliance), but rather about the number of CAs and NGAs with experience. The number of cases is obviously larger but unknown in the case of NGAs.

On the other hand, the percentage of experienced NGAs is smaller than the percentage of experienced or even 'more experienced' CAs. If our assumption of the high response rate of NGAs is correct, it seems reasonable to conclude that sustainability and competition is still very much a niche topic, which is relevant only for a tiny subset of NGAs, while CAs are not necessarily able to control which cases they are dealing with.[185]

NGA.I.C.2 Sectors

The chart below shows the number of times the sectors were mentioned by CAs and NGAs as concerned by their experience. In this version of the chart various types of experience of CAs are pooled together.[186]



Note: n_{CA}=16, n_{NGA}=41

We do not have any information on how this translates into case numbers, as they were not covered by the survey. It is interesting that none of the NGAs mentioned 'transport and production of means of transport', while a substantial portion of CAs (with experience) did.

185 See also sections CA.III.D and CA.III.G.

186 In this chart a CA is counted in if it identified the sector either concerning offence case(s) (question CA.III.B.5.), or defence case(s) (question CA.III.E.5) or sector inquiries / market studies / research (question CA.III.B.5.).

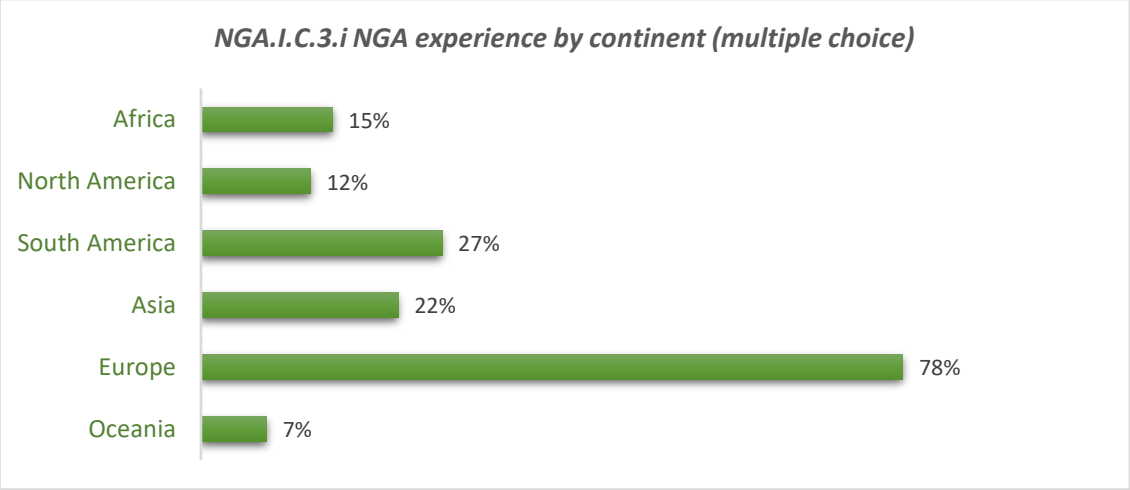
For individual tables – experience by experience – see tables CA.III.B.5.i-ii, CA.III.E.5.i-ii, CA.IV.A.3.i-ii in Appendix A.1, and table NGA.I.C.2.i in Appendix A.2.

One explanation for the relatively significant difference between the answers of CAs and NGAs may be that NGA experience is different as it covers more than that of the CAs, as discussed earlier.[187] Also, cases and sector inquiries / market research / research involving various sectors may be distributed differently among CAs and among NGAs. In addition, NGA experience may be different, or at least less rich from that of *all* the practitioners, because obviously most of them are not an NGA.

'Other' sectors include technological industries, chemicals, construction, financial services, tourism and clothing, but some 'other' activities are closely related to sectors named in the pre-defined option list, such as the food chain or chemicals used in agriculture.

NGA.I.C.3 Geographical coverage of NGA experience

The chart below shows that NGAs with experience from Europe represent the large majority of the respondents.



Note: n=41

This is less striking if we consider that NGAs located in Europe make up the majority of all the NGAs, as discussed earlier.[188] However, if our assumption that most NGAs with relevant experience responded to the questionnaire is correct, the numbers in table NGA.I.C.3.i do not need to be adjusted to give a true picture of the share of European experience.

In order to get a sensible distribution for cross-tabulations with answers to other questions, we selected NGAs with only European experience and those with only non-European experience (experience from multiple continents, other than Europe, were allowed in the second group). This way we have two groups divided in a substantively meaningful way, including a reasonable number of NGAs (7 NGAs with experience from Europe and any other continent were left out); furthermore, they do not overlap with each-other, as shown in the table below.

NGA.I.C.3.iii Europe vs Non-Europe NGA experience

Europe only	25	74%
Non-Europe only	9	26%

n=34

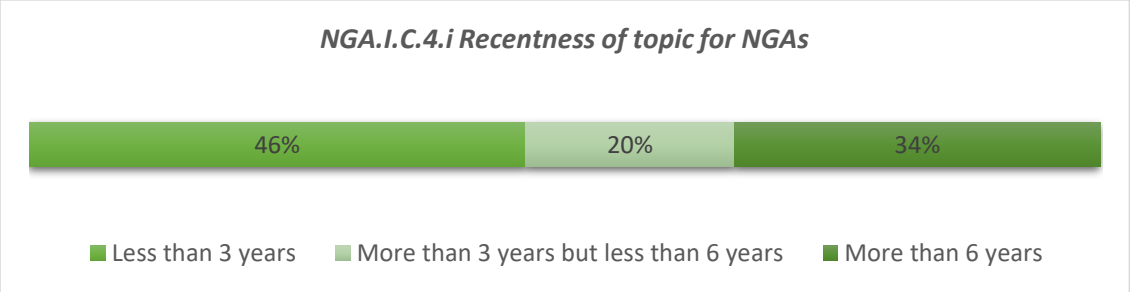
187 See section NGA.I.C.1.

188 See section NGA.I.A.2.

Despite the fact that not all the NGAs reported experience from the continent where they are based, all NGAs but one with only European experience are based in Europe, and all NGAs but one with only non-European experience are based in continents other than Europe.

NGA.I.C.4 Recentness of topic for NGAs

The chart below shows for how long sustainability and competition has been a topic of interest for NGAs.



Note: n=41

It is remarkable that for almost half of the NGAs the topic is relatively new, while for about a third of the NGAs it goes back even further than 6 years (which does not mean that those NGAs do not have more recent experience) – one NGA reports continuous experience of more than 35 years in the comment section.

Cross-tabulation with the geographical source of experience

On average, European only experience tends to be somewhat more recent,[189] which may be related to the recent surge in the number of cases involving a sustainability defence in Europe (and only in Europe), as discussed earlier.[190]

Cross-tabulation with the type of experience

On average, 'own research' tends to be somewhat more recent than 'own experience'.[191]

Cross-tabulation with the geographical source of experience among NGAs reporting 'own experience'

There is no significant difference depending on the geographical source of experience among those NGAs that report 'own experience'.[192]

NGA.I.C.5 Degree of challenge of NGA

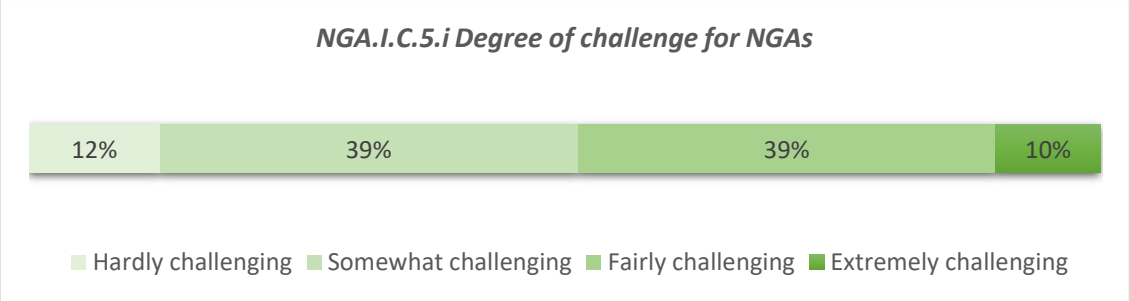
The chart below shows how challenging the topic is for NGAs according to their perception.

189 See table NGA.I.C.4.ii in Appendix A.2.

190 See section CA.III.E.2.

191 See table NGA.I.C.4.iii in Appendix A.2.

192 See table NGA.I.C.4.iv in Appendix A.2.



Note: n=41

It is remarkably balanced, with only a few answers at both ends of the spectrum.

Cross-tabulation with the geographical source of experience

On average, it may be more challenging for NGAs with only non-European experience, but none of them perceive it as extremely difficult, while some NGAs with only European experience do.[193]

Remarks in the comment section not only illustrate the challenges that NGAs – and for the most part CAs – are facing, but also present a set of insights that are relevant for various other parts of the survey.

'Challenges appear in some cases, but not all. Challenges result mainly from (i) misunderstanding on client's side about the persuasiveness of the sustainability argument; (ii) vagueness of sustainability definition and measurement of benefits in specific case; (iii) reluctance on authority's side to accept sustainability argument.'

'Perhaps the most challenging aspect is that it is difficult to measure sustainability; also the guidelines are unclear, therefore business people feel uneasy initiating programs fearing that they will be caught by the competition authorities; finally, the fact that a possible outcome is the increase of prices in a short-term cast doubt about the implementation of wider environmental programs.'

'Means of sustainability efforts are often combined with marketing efforts. The latter are not allowed to share with competitors, but on the level of sustainability a common approach is supposed to be welcome. Often difficult to unlink these two areas. It is also separate from "standards" and "norms", as companies often try to get a competitive advantage with their "forced" new sustainability efforts.'

'Because most clients and agencies it is a new topic, there is little guidance and the policy debate has no consensus yet, it is still emerging - so fairly challenging for my clients and I see it as challenging for agencies I work with for whom it is new too.'

'Here the key point is assessing whether art. 101.1 and 101.3 [of the Treaty on the Functioning of the European Union] result applicable to voluntary agreements intended to address sustainability issues that are adopted by multilateral organizations, which includes different categories of stakeholders (including representatives of the European Commission and EU Member States).'

'Difficult to advise with any comfort about co-operations with competitors with sustainability objectives despite businesses being put under considerable pressure to find more sustainable solutions (in circumstances where there is a first mover disadvantage)'

'The fact that shipping pools reduce empty sailings is easy to get across, but at what point full sailing which result in higher prices outweighs benefit to the environment is difficult to pinpoint.'

[193] See table NGA.I.C.5.ii in Appendix A.2.

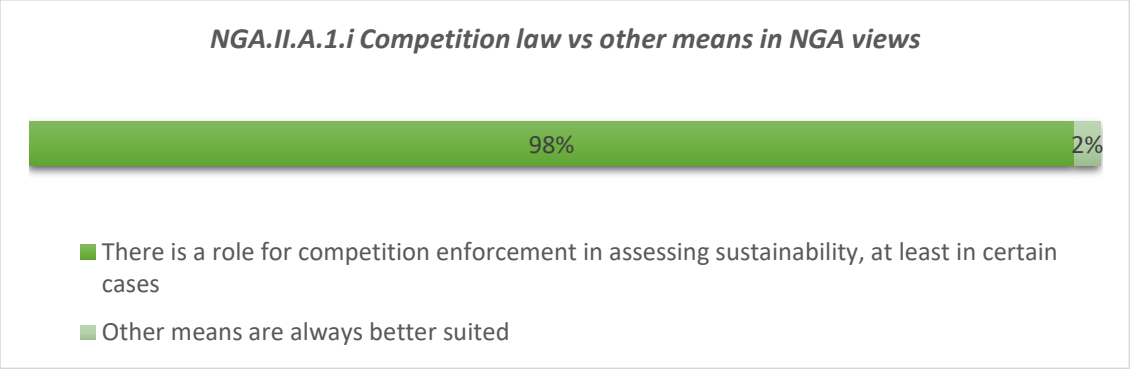
NGA.II.A NGA view on the relevance of sustainability considerations in competition law

NGA.II.A.1 Competition law vs other means

We asked NGAs about their views as to whether sustainability should be assessed in some competition cases, or whether sustainability should exclusively belong to other domains of public policy, such as regulation, or statutory prohibitions and exemptions.[194]

Our question was intentionally asymmetric: other public policies *only* vs at least *some* competition law enforcement. The reason behind this is that in our understanding even those who are pushing for more sustainability 'conscious' competition law enforcement admit that other public policies are often better positioned and should bear the lion's share of achieving sustainability objectives. Therefore, the division is between those who believe that competition law enforcement may have a role in certain cases and those who believe that it does not.[195]

The chart below shows that there is almost a consensus among respondents that competition law enforcement has a role to play. The only exception is an NGA located in Europe, with only European experience.



Note: n=41

Remarks in the comment section reflect the view that competition law enforcement should play a complementary, though essential role, and that it should do so without changing its fundamental standards and objectives. Comments vary as to how strong this role should be.

One NGA who answered with 'yes' to this question, nevertheless, warns against overvaluing the private 'green initiatives' which are often referred to as a major reason to incorporate sustainability considerations into competition law enforcement. In the view of this NGA, '*there is a tendency that states agree to refrain from environmental measures based on promises of the private sector to promote sustainability voluntarily. This hardly ever works. Therefore, overemphasising sustainability goals within competition goal could also lead to the false assumption that the private sector is better suited to promote sustainability than the State.*'

This remark shows that scepticism towards a broader or more preeminent role of competition law (or indeed any role of competition law) can be rooted in scepticism towards the merit of private 'green initiatives'. In other words, it may not only stem from scepticism towards the consistency of

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194 CAs were not asked the same question since their perception and views may be constrained by the particular competition law regime within which they operate as an enforcer.

195 For instance, because, in their opinion, competition policy is incapable of assessing sustainability, or because it would somehow hijack competition law enforcement from its genuine mission, or because there are always better solutions to achieve sustainability objectives than those that competition law enforcement can offer.

sustainability considerations with the objectives and toolkit of competition law or its effectiveness to support sustainability objectives compared to other public policies.

Private 'green initiatives' may also be viewed by some with suspicion because – as one NGA notes in the comment section of another question – '*means of sustainability efforts are often combined with marketing efforts.*'

Cross-tabulation with the geographical source of experience

We did not perform cross-tabulations for this question: since responses are almost unequivocal, we would obviously see the same results irrespective of the geographical source of experience of the respondents.

This does not mean that the positive view is universal among *all* the NGAs (or among all the practitioners or all the stakeholders),[196] though it may well prevail among all the *experienced* NGAs (provided that our assumption of the high response rate of the NGAs is correct). It does not mean that the respondent NGAs are right, either. Nevertheless, it apparently confirms the relevance and timeliness of the topic and this survey.

NGA.II.A.2. Possible enforcement context(s)

In this section NGAs were asked about whether, in their view, the two sustainability related considerations may play a role in various case types, such as merger cases; in other words, about where (i.e., in which case types) they are possible/plausible in terms of substance.[197]

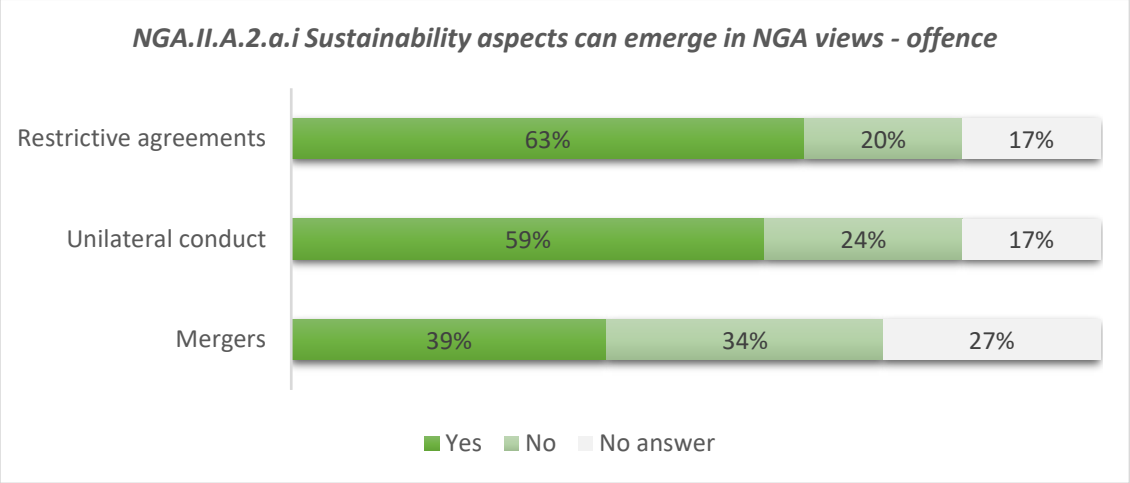
For each case type, we asked separately about sustainability related competitive concerns and about sustainability defences.

Possibility – offence

The chart below shows that the majority of NGAs identify restrictive agreements and unilateral conduct as areas where sustainability related competitive concerns could, in theory, play a role in enforcement. This majority is much bigger if we disregard those NGAs who did not give an answer (in relation to those areas). On average, the idea seems to be somewhat more accepted by NGAs concerning restrictive agreements.

[196] This is technically the case in all questions; however, we thought that it should be highlighted here because this is a question where the opinion of non-experienced NGAs may be equally relevant.

[197] The word 'possible' refers to the substantive plausibility – e.g., whether NGAs believe that a sustainability defence is a meaningful concept in merger cases and that it should therefore be recognised, in an ideal world, as a valid element of merger control.



Note: n=41

As far as mergers are concerned, significantly less than half of the NGAs identify them as such an area, and it is about half-half when we disregard those who did not give an answer.

Cross-tabulation with the geographical source of experience

In the case of restrictive agreements, there seems to be no significant difference depending on the geographical source of experience.[198]

The idea that sustainability related competitive concerns could play a role in unilateral conduct cases seems to be much more accepted by NGAs with only non-European experience (and they all gave an answer, while a significant portion of NGAs with only European experience did not answer the question). NGAs with only non-European experience also tend to accept the idea more than not, and if we disregard those who did not give an answer, the 'yes' answers become a large majority.[199]

In contrast, NGAs with only non-European experience believe significantly less often (than those with only European experience) that such concerns could play a role in merger cases. The difference is even bigger if we look at those NGAs who replied with 'no', as a significantly higher share of NGAs with only non-European experience gave an answer compared to NGAs with only European experience. The share of these non-reporting NGAs among those with only European experience is so large that for every 'no' answer there are almost two 'yes' answers, even if they are in a minority in absolute terms.[200]

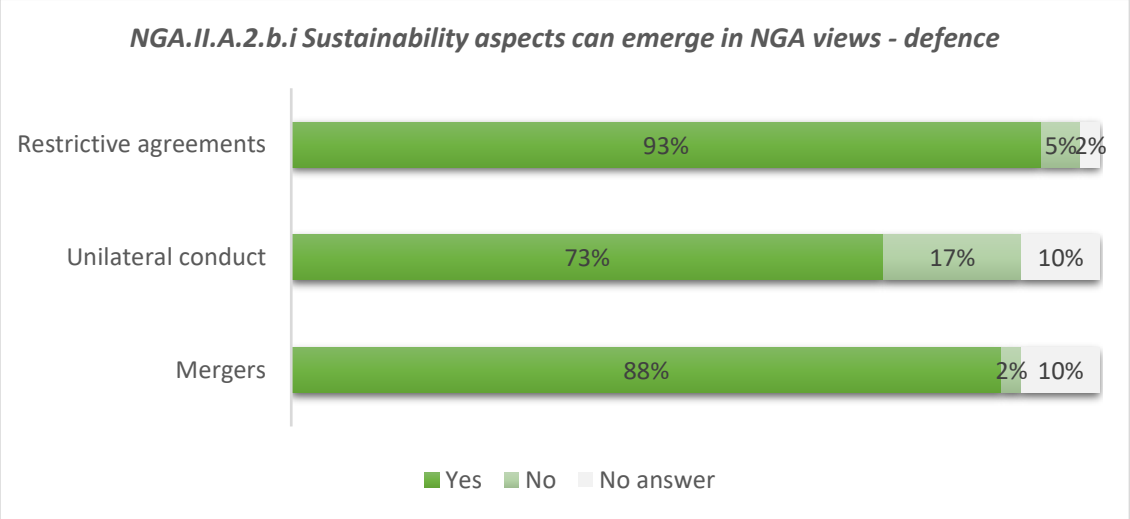
Possibility – defence

The overwhelming majority of NGAs believe that sustainability defences may play a role in restrictive agreement and in merger cases. Less NGAs, but still a large majority of them, believe that they may also play a role in unilateral conduct cases. The proportion of those NGAs who did not give an answer (with respect to any particular case type) is low.

198 See table NGA.II.A.2.a.ii in Appendix A.2.

199 See table NGA.II.A.2.a.iii in Appendix A.2.

200 See table NGA.II.A.2.a.iv in Appendix A.2.



Note: n=41

Cross-tabulation with the geographical source of experience

NGAs with only European experience universally accept the possibility of sustainability defences in restrictive agreement cases. This view is shared by a large majority of NGAs with only non-European experience. No NGA from either group replied with 'No answer'.[201]

Responses concerning unilateral conduct cases follow this scheme, but at a lower rate of acceptance (of the notion of sustainability defence in those cases) and with a higher rate of 'No answer'.[202]

In the case of mergers, there seems to be no significant difference depending on the geographical source of experience.[203]

Comparison with offence

If we compare responses about the possible role of sustainability related competitive concerns and the possible role of sustainability defences in competition cases, we see that the latter is much more accepted by NGAs in general. The gap is especially large with regard to mergers.[204]

The only exception concerns the views of NGAs with only non-European experience with regard to unilateral conduct. Here, the idea that sustainability defences may play a role is much less accepted than the same idea applied to sustainability related competitive concerns.[205]

NGA.II.A.3 Primary enforcement context(s)

In this section NGAs were asked about the expected (relative) prevalence of the two sustainability related considerations across case types. In other words, the question was about where (i.e., in which case types) the two sustainability related considerations are expected by NGAs to be concentrated (if at all).[206]

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201 See table NGA.II.A.2.b.ii in Appendix A.2.

202 See table NGA.II.A.2.b.iii in Appendix A.2.

203 See table NGA.II.A.2.b.iv in Appendix A.2.

204 See tables NGA.II.A.2.a.i-iv and NGA.II.A.2.b.i-iv in Appendix A.2.

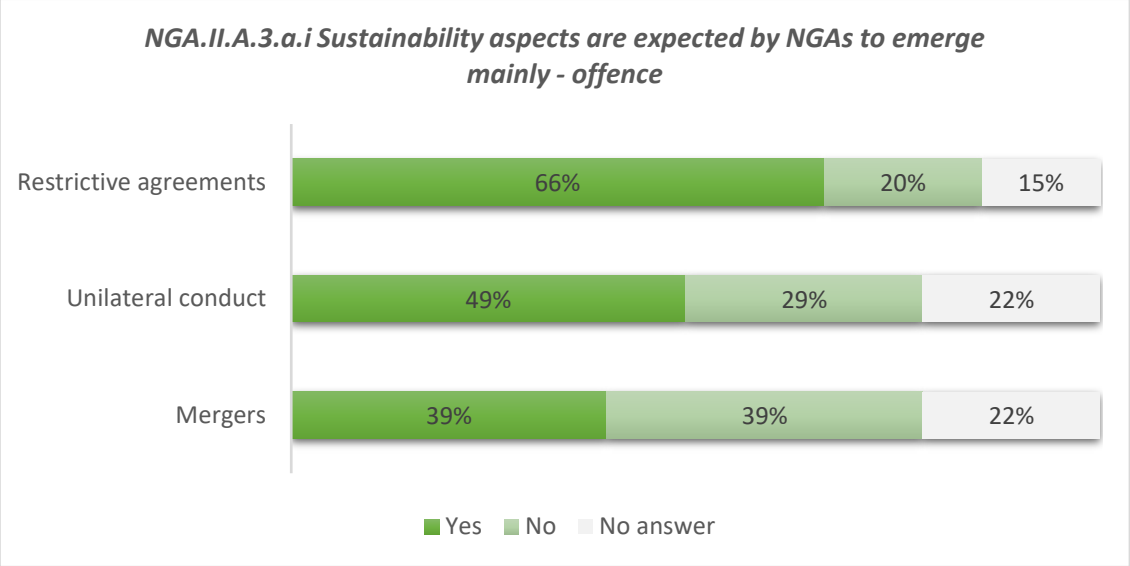
205 See tables NGA.II.A.2.a.iii and NGA.II.A.2.b.iii in Appendix A.2.

206 The word 'primary' refers to relative prevalence – e.g., whether in practice NGAs expect sustainability defences to be used in merger cases significantly more often than in other case types.

For each case type, we asked separately about sustainability related competitive concerns and about sustainability defences.

Expected (relative) prevalence – offence

The chart below shows that the majority of NGAs identify restrictive agreements as a primary area where sustainability related competitive concerns are expected in practice. This majority is significantly larger if we disregard those NGAs who did not give an answer. Unilateral conduct is identified as such by about half of the NGAs, which becomes a clear majority when we disregard those who did not give an answer.



Note: n=41

As far as mergers are concerned, significantly less than half of the NGAs identify them as a primary area of sustainability related competitive concerns, and it is half-half when we disregard those who did not give an answer (with regard to mergers).

As one NGA puts it in the comment section '*there are already several cases in the field of restrictive agreements, and none so directly in these other areas.*' Another NGA takes a more dynamic view and notes that '*I see this as initially primarily a restrictive agreements issue and debate, but could be relevant in certain contexts in mergers and unilateral conduct going forward.*'

Cross-tabulation with the geographical source of experience

All case types are expected to be the primary area of sustainability related competitive concerns by a somewhat higher share of NGAs with only non-European experience than those with only European experience. However, in the case of restrictive agreements and mergers, the difference becomes much bigger if we disregard those NGAs who did not give an answer (with regard to those case types). In the case of unilateral conduct, the increase in this difference is less striking.[207]

Comparison with plausibility

The share of those NGAs that expect unilateral conduct cases to be a primary area for sustainability related competitive concerns is significantly smaller than the share of those NGAs that regard them as an area where these kinds of concerns are plausible. In the case of restrictive agreements and

[207] See tables NGA.II.A.3.a.ii-iv in Appendix A.2.

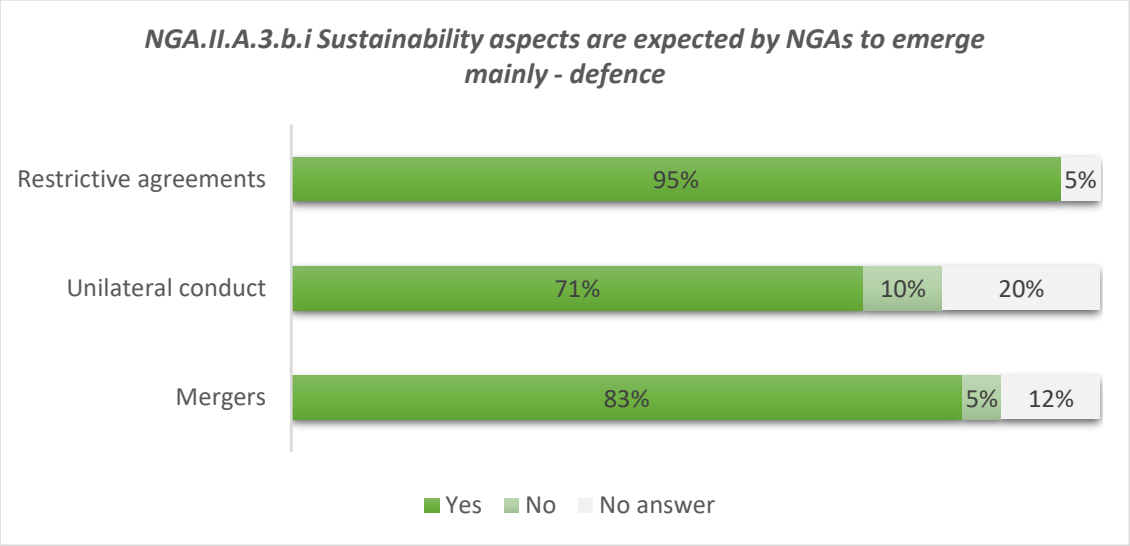
mergers, there is no significant difference. In other words, some NGAs believe that while sustainability related competitive concerns may be possible concerning unilateral conduct, they will remain relatively rare among such cases.[208]

It is remarkable, however, that – according to the corresponding numbers in tables NGA.II.A.2.a.i and NGA II.A.3.a.i – at least one NGA that expects restrictive agreements to be the primary area of sustainability related competitive concerns does not believe that those same concerns are possible in those same types of cases. Implicit to this pattern may be the criticism that apparently, in the view of several NGAs, non-plausible competitive concerns (or theories of harm) – that should not exist in an ideal world – may well be applied relatively frequently in real life. It is an open question whether this criticism (if it holds) concerns the competition agencies that launch those cases or other stakeholders who are pushing for them.[209]

This pattern appears in the distribution of responses of NGAs with only non-European experience concerning restrictive agreements and mergers (but in the latter case it does not 'hijack' the aggregated result).[210] In fact, the same pattern appears in 15 answer-pairs by 9 NGAs in total (i.e., about every fifth NGA, most of whom were NGAs with only European experience), involving all case types (in total), but most of the time they are compensated by the answers of other NGAs (who thought the same combination of concern and case type was possible, but did not expect them to be relatively frequent).[211]

Expected (relative) prevalence – defence

Almost all of the NGAs identify restrictive agreements to be a primary area of sustainability defences in practice. A large majority of NGAs think the same about mergers. Less, but still a large majority of NGAs think the same about unilateral conduct, in relation to which the highest share of NGAs did not give an answer.



Note: n=41

208 See tables NGA.II.A.2.a.i and NGA.A.3.a.i in Appendix A.2 and above.

209 This is not mere speculation – we reached out to one NGA (based in Europe, with only European experience) seeking for clarification, who then expressed the same criticism (of other stakeholders rather than CAs in that particular case).

210 See tables NGA.II.A.2.a.ii and NGA.II.A.3.a.ii, as well as tables NGA.II.A.2.a.iv and NGA.II.A.3.a.iv in Appendix A.2.

211 See table NGA.II.A.3.a.v in Appendix A.2.

Cross-tabulation with the geographical source of experience

All case types are expected to be a primary area for sustainability defences by a higher share of NGAs with only European experience (than those with only non-European experience). This difference is significant in the case of mergers, and even more significant in the case of unilateral conduct. A larger share of NGAs with only non-European experience than those with only European experience also tended to give no answers concerning all case types. This difference is especially significant in the case of mergers.

Comparison with plausibility

For each case type, there is no significant difference between the share of NGAs who regard sustainability defences as plausible and the share of those who expect them to be primarily used. There are no significant differences between responses about 'possibility' and 'expected frequency' in terms of 'no' answers or in terms of 'no answers'.

In the case of restrictive agreements, the pattern (and possible implicit critique) appears again that more NGAs expect the occurrence of sustainability defences to be relatively frequent than those that regard sustainability defences as plausible. It also appears in the responses of NGAs with only non-European experience concerning restrictive agreements.

In fact, the same pattern appears in 6 answer-pairs by 4 NGAs (i.e., about every tenth NGA, half of them are NGAs with only European experience), involving (in total) all case types, but most of the time they are compensated by the answers of other NGAs (who thought the same combination of defence and case type is possible, but did not expect them to be relatively frequent).[212]

In addition, among non-European NGAs the share of those who expect sustainability defences to be used relatively often in merger cases in practice is much lower than the share of those who regard them as plausible in theory.

Comparison with offence

If we compare responses about the expected relative frequency of sustainability related competitive concerns and that of sustainability defences in competition cases, we see that the latter is much more accepted by NGAs in general. The gap is especially large in the case of mergers. We find this scheme irrespective of the geographical source of experience.[213]

The only exception concerns the views of NGAs with only non-European experience with regard to unilateral conduct, where sustainability related competitive concerns and sustainability defences are expected to be relatively frequent by the same number of respondents (the same applies to their 'no' answers and 'no answers' as well).[214]

Also, the possible critique that 'impossible' cases are expected to be launched relatively often is significantly less common concerning sustainability defences than concerning sustainability related competitive concerns, both in terms of the number of pairs of answers (6 and 15 respectively) and in terms of the number of NGAs (4 and 9 respectively). There is a substantial overlap between these two sets of NGAs, as altogether 10 NGAs gave answers showing the pattern in question.[215]

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212 See table NGA.II.A.3.b.v in Appendix A.2.

213 See tables NGA.II.A.3.a.i-iv and NGA.II.A.3.b.i-iv in Appendix A.2.

214 See tables NGA.II.A.3.a.iii and NGA.II.A.3.b.iii in Appendix A.2.

215 See table NGA.II.A.3.b.vi in Appendix A.2.

One NGA notes in the comment section that '*sustainability aspects in competition enforcement emerge mainly as a defence*' because '*when sustainability is related with an offense usually affects other domains of public policy*'. Thus – in the view of this NGA – the asymmetry in competition law enforcement can be traced back to an asymmetry in regulations, or more precisely, probably to the existence of various environmental protection regulations.

NGA.II.B NGA view on the appropriateness of competition law and enforcement

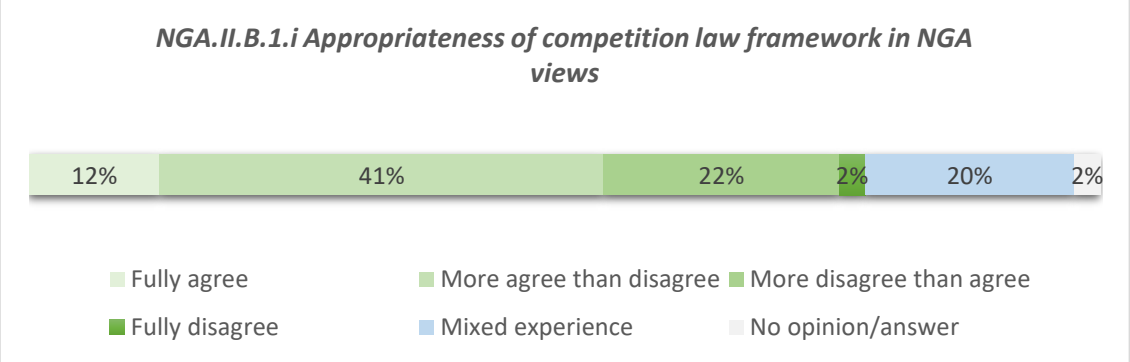
In this section, NGAs were asked whether they believe that competition law and its enforcement are capable of incorporating sustainability considerations when appropriate. We asked about the legal framework and enforcement in separate questions, though in a unified structure. Also, within enforcement, we differentiated between the recognition of sustainability and whether analysis is adequate.

These questions are built on each-other in the same way as matryoshka dolls are placed inside each other: even if the legal framework allows for the recognition of (relevant) sustainability related considerations, actual recognition may be missing from enforcement; recognition in enforcement does not automatically entail adequate analysis.

In addition, NGAs were asked about their views on the transparency of the analysis performed by CAs and the possible ways of enhancing that transparency.

NGA.II.B.1 Competition law framework

The chart below shows that more than half of the NGAs at least tend to believe that the competition law framework is flexible enough to incorporate those sustainability considerations that are relevant. In addition, a significant share of the NGAs report both positive and negative experience.



Note: n=41

Of course, this does not imply that they believe that all sustainability considerations (or any of them) are relevant, but answers given to other questions do suggest that many of them believe that at least some of them are relevant.[216]

In the comment section one such NGA expresses the view that '*the consumer welfare standard, which has been adopted in most jurisdictions across the world, allows the inclusion of sustainability (it can be seen in the form of quality or innovation).*' Another NGA states that '*sustainability issues have*

[216] See sections NGA.II.A.1-2.

indirect effects on consumers and current competition law rules do not limit considering indirect effects.'

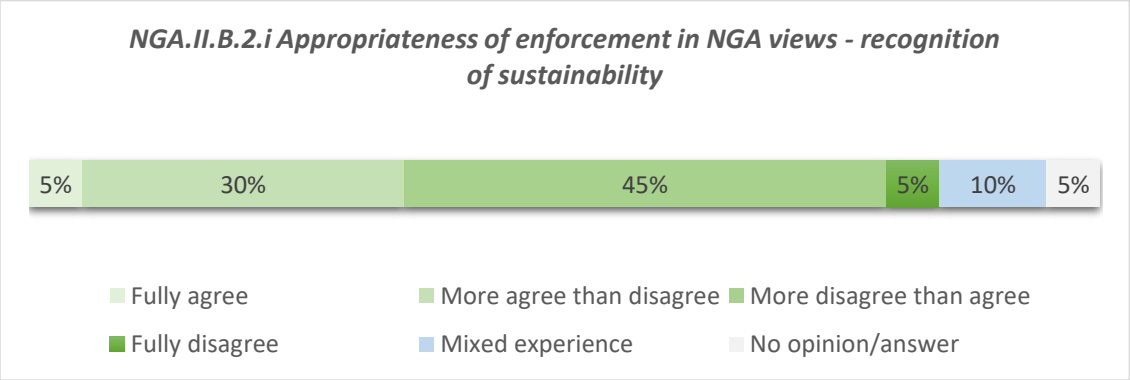
These remarks echo our findings about the assessment methods applied by CAs to sustainability considerations, which tend to follow the general analytical framework, which in most cases is based on the efficiency/welfare paradigm, as discussed earlier.[217]

Cross-tabulation with the geographical source of experience

On average, NGAs with only non-European experience have a significantly more positive view towards the appropriateness of competition law.[218]

NGA.II.B.2 Competition law as enforced – recognition of sustainability

The chart below shows that significantly less than half of the NGAs tend to believe that (relevant) sustainability considerations are recognised in competition law enforcement. Even if the mixed experience of those who report it was tipping towards the positive side, they would still remain a minority.



Note: n=40

Again, this does not imply that they believe that all sustainability considerations (or any of them) are relevant, but the answers given to other questions do suggest that many of them believe that at least some of them are relevant.[219]

Cross-tabulation with the geographical source of experience

There is no significant difference depending on the geographical source of experience of the NGAs, other than that the NGAs with only non-European experience have a larger share of answers from both ends of the spectrum.[220]

NGA.II.B.3 Competition law as enforced – analysis

The chart below shows that only a (significant) minority of NGAs tend to believe that (relevant) sustainability considerations are adequately analysed in competition law enforcement.

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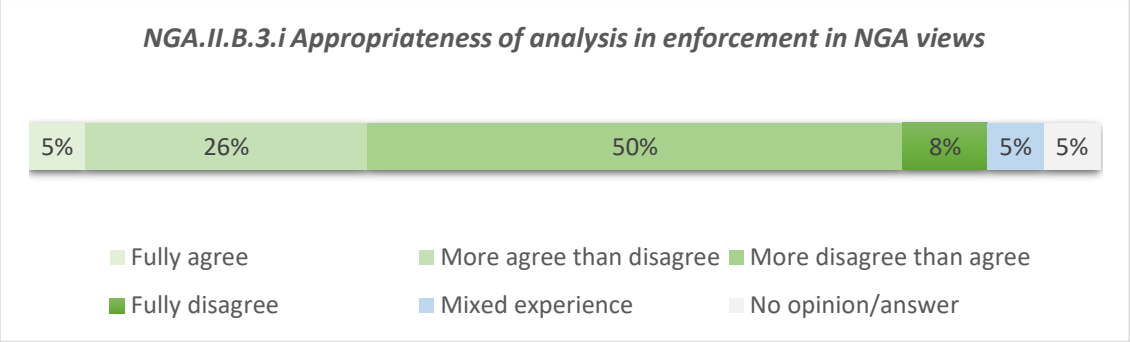
217 See sections CA.III.C.1 and CA.III.F.1.

218 See table NGA.II.B.1.ii in Appendix A.2.

219 See footnote 216.

220 See table NGA.II.B.2.ii in Appendix A.2.



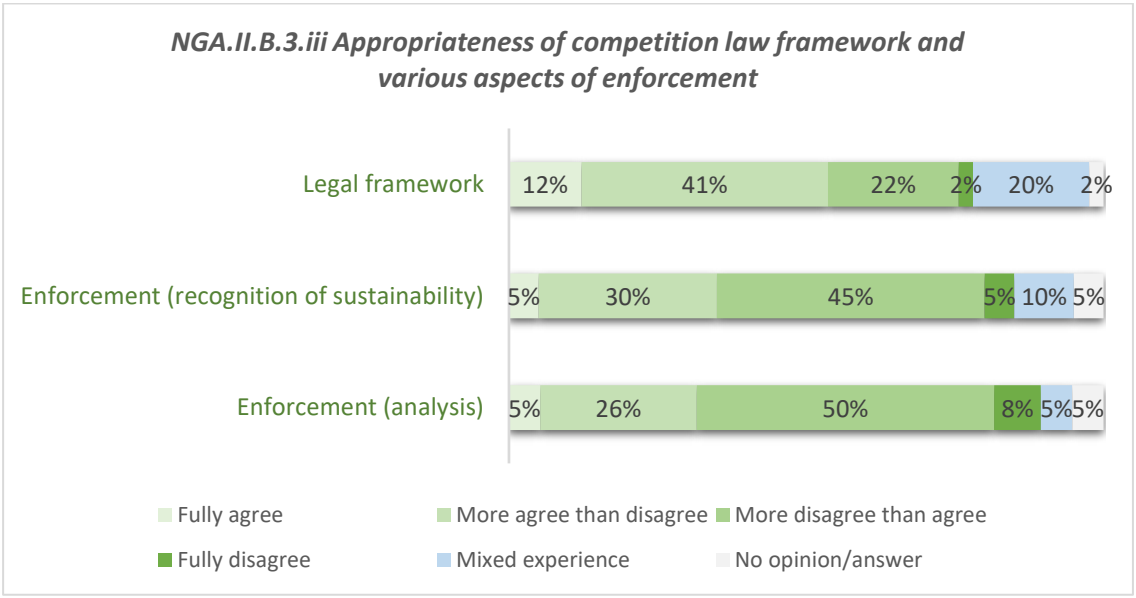
Note: n=38

Cross-tabulation with the geographical source of experience

There is no significant difference depending on the geographical source of experience of NGAs, other than that NGAs with only non-European experience have a significantly larger share of answers from both ends of the spectrum and also a larger share of them answered the question.[221]

Comparison between the appropriateness of the legal framework, enforcement in terms of recognition of sustainability, and enforcement in terms of analysis of sustainability and competition

The chart below shows that – on average – NGAs are significantly more positive about the legal framework than enforcement, and within enforcement, they are slightly more positive about the recognition of (relevant) sustainability considerations than they are about the adequacy of their analysis.



Note: $n_{Framework}=41$ $n_{Enforcement\ (recognition)}=40$, $n_{Enforcement\ (analysis)}=38$

This suggests that, in the view of NGAs, the existing competition law framework has greater potential than what is being utilised by current enforcement, and within enforcement, analysis is slightly lagging behind recognition.

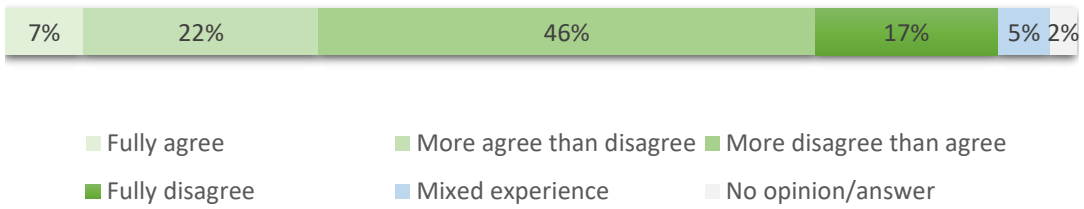
The same view is expressed by one NGA in the comment section of another question, where it noted that (EU) competition law '*is flexible enough, but this flexibility is not used*'.

[221] See table NGA.II.B.3.ii in Appendix A.2.

NGA.II.B.4 Transparency of analysis

The chart below shows that only a (substantial) minority of NGAs are basically satisfied with the current state of transparency CAs provide as to their analysis of sustainability considerations and competition.

NGA.II.B.4.i Apropriateness of transparency of analysis in NGA views



Note: n=41

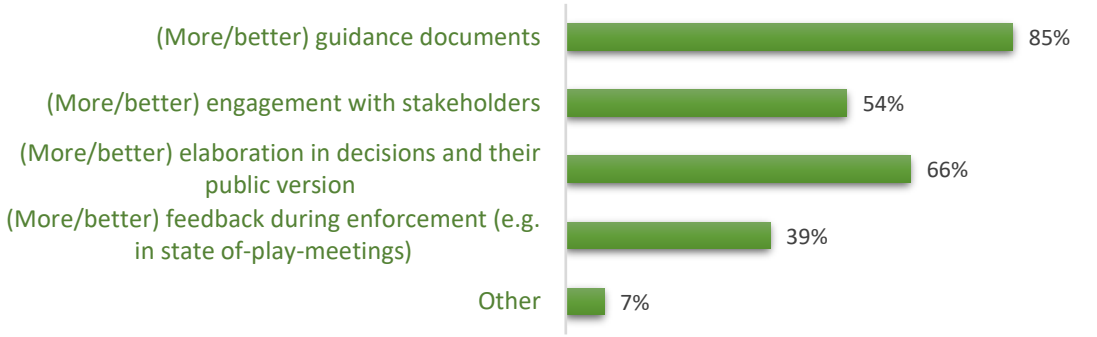
Cross-tabulation with the geographical source of experience

NGAs with only non-European experience are significantly more satisfied, on average, but satisfied NGAs are still in the minority within that group.[222]

NGA.II.B.5 Ways of enhancing transparency

Each predefined option for enhancing transparency was identified as 'most needed' by a large share of NGAs, unlike the 'other' option.

NGA.II.B.5.i Ways of enhancing transparency in NGA views (multiple choice)



Note: n=41

The option of '(more/better) guidance documents' has very strong support in general, with '(more/better) elaboration in decisions and their public version' being a distant second. This is irrespective of the geographical source of experience of the NGAs, subject to two caveats. First, they are identified as 'most needed' by a significantly larger majority of NGAs with only European experience (than those with only non-European experience). Second, the number of those NGAs with

[222] See table NGA.II.B.4.ii in Appendix A.2.

only non-European experience who identified '(more/better) engagement with stakeholders' is equal to the number of those identifying '(more/better) elaboration in decisions and their public version'.[223]

On the other hand, '(more/better) feedback during enforcement (e.g., in state-of-play meetings)' was the least frequently identified by NGAs as 'most needed'. Also, informal guidance by CAs – which was not listed among the predefined options – was not explicitly mentioned by NGAs in the comment section, although one NGA praised the ACM for its elaborated 'informal decisions'.

The explanation for these relative positions may be that there are only a few guidance documents (as also confirmed by CA responses)[224] and well-elaborated decisions available (as far as sustainability aspects are concerned), while providing informal guidance and other interactions between CAs and parties work well. It is also possible that NGAs – many of which are affiliated with law firms – prefer not to gain experience in the hard way (i.e., from their own cases), but instead, if possible, through guidance obtained in other ways, such as from guidance documents and decisions on others' cases.

Remarks in the comment section (of this and the previous question) emphasise the need for proper guidance and guidelines, while maintaining the importance of other means too. They also indicate possible reasons for deficiencies in transparency: one NGA points out that '*theories of harm regarding sustainability choices are not rife yet*'; another NGA highlights that CAs '*probably cannot be yet as transparent as they would like given the lack of orientations on the best way forward.*' This suggests that developing proper theoretical and empirical analysis of sustainability considerations, or the better preparedness of CAs, is a precondition for enhancing transparency.

Indeed, analysis seems to be a core issue, interlinked with several topics of the survey. Perhaps even general recognition depends on the development of analysis and not *vice versa*.[225] Research (and the lack of it) may be even more fundamental. Certainly, the importance of proper or more developed analysis and research is highlighted by the remarks of the NGAs in the various comment sections.

'I think that NCAs need to develop proper tools to be able to measure sustainability factors, which will provide market players with certainty.' (NGA.II.B.2)

'Indeed, what is required is the development of clear tools to be able to measure sustainability considerations.' (NGA.II.B.3)

'… the issue is how to calculate the benefit in cash as against higher cost …' (NGA.II.A.3)

'There is not enough empirical research, policy guidance and consensus even within most jurisdictions worldwide yet …' (NGA.II.B.2)

NGA.II.C NGA view on the preparedness of CAs

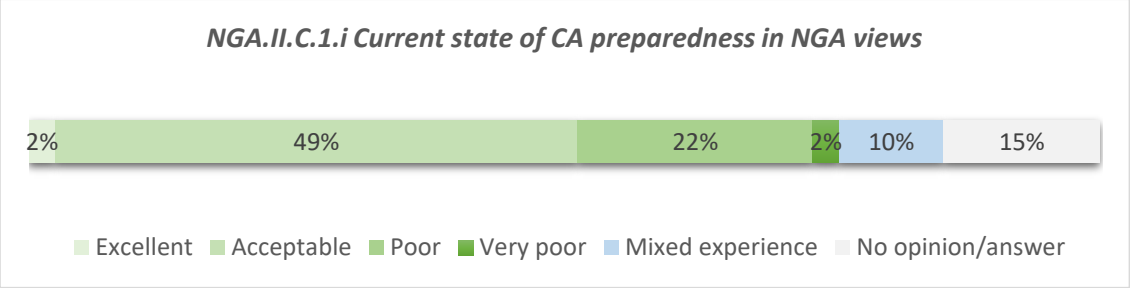
NGA.II.C.1 Current state of preparedness

Roughly half of the NGAs find the current state of preparedness of CAs to be at least acceptable, while only a fragment find it to be excellent. However, they become a clear majority if we disregard those who did not answer the question.

223 See table NGA.II.B.5.ii in Appendix A.2.

224 See sections CA.III.C and CA.III.F.

225 See section NGA.II.B.3.



Note: n=41

Remarks by NGAs in the comment section (of this and the following question) highlight the novelty of the topic for most CAs and that it is a challenge even for the more advanced ones.

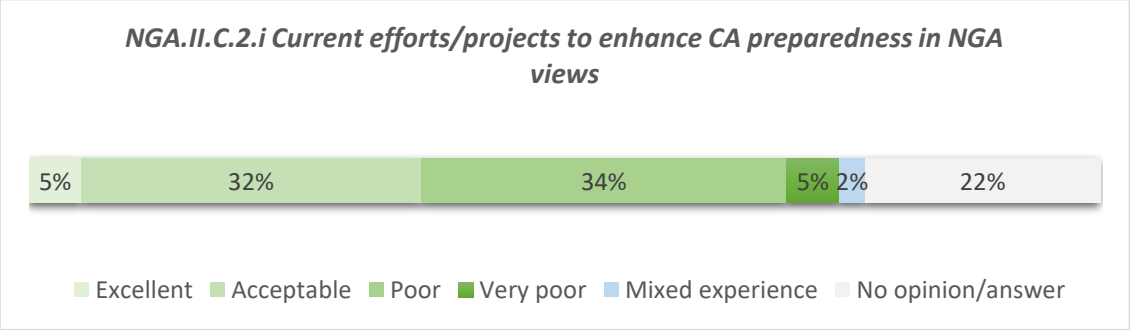
Cross-tabulation with the geographical source of experience

On average, NGAs with only non-European experience are much less impressed by the current preparedness of CAs than those with only European experience, although none of them thinks of it as very poor, while some NGAs with only European experience do.[226]

The reason behind this may be either that European CAs are better prepared (and perhaps more evolved in this field),[227] or that NGAs with only European experience are less demanding for some reason (or perhaps they are more experienced and realistic in their expectations), or a combination of the two.

NGA.II.C.2 Current efforts/projects to enhance preparedness

The chart below shows a roughly symmetric distribution of positive and negative views. However, both the positive and negative views are those of a minority, as more than every fifth NGA did not give an answer to the question.



Note: n=41

Of course, NGAs may or may not have accurate information about the efforts of CAs. Thus, negative perceptions can be caused by either a lack of appropriate efforts or by a lack of knowledge about them (or a combination of the two).

[226] See table NGA.II.C.1.ii in Appendix A.2.

[227] This second part is consistent with our finding that only European CAs have case experience concerning either sustainability related competitive concerns or sustainability defences, as discussed earlier (see sections CA.III.B.1-2 and in CA.III.E.1-2).

Cross-tabulation with the geographical source of experience

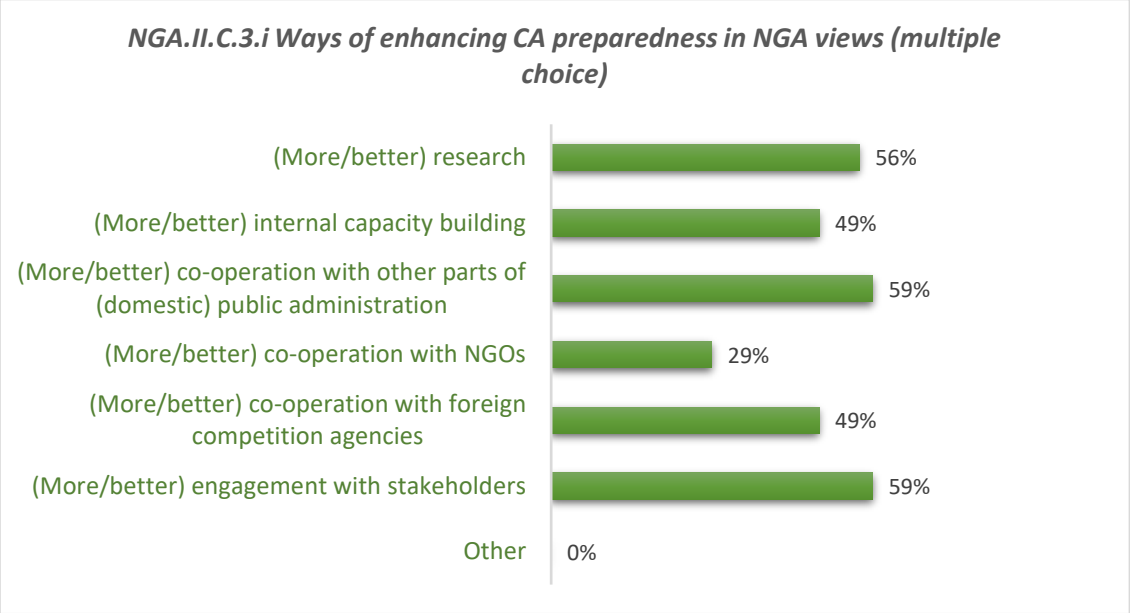
On average, NGAs with only non-European experience are much less impressed by the current efforts and projects of CAs than those with only European experience, though none of them thinks of it as very poor, while some NGAs with only European experience do.[228]

The reason behind this may be either that European CAs are more active in this respect (perhaps triggered by experience), or that, again, NGAs with only European experience are less demanding for some reason (or perhaps they are more experienced and realistic in their demands), or a combination of the two.

Indeed, we found that European CAs have been more active in making efforts to close a perceived expertise gap or to prevent one from opining up in the future, as discussed earlier.[229] We also found that a larger portion of European CAs are planning such efforts.[230]

NGA.II.C.3 Ways of enhancing preparedness

The chart below shows that almost all of the predefined ways of enhancing CA preparedness are identified as 'most needed' by more or less half of the NGAs. The exception is '(more/better) co-operation with NGOs', which is identified as such by a much smaller share of NGAs. The option of 'other' was not chosen by any NGAs.



Note: n=41

Remarks in the comment section (of this and the previous two questions) are also split as to how preparedness should be enhanced. The activities of the ACM, the CMA and the Hellenic Competition Commission are mentioned as exemplary, but one NGA highlights the limitations of actions taken by individual CAs by noting that the efforts of pioneering CAs are '*not helpful in isolation given that sustainability agreements often have effects in multiple countries.*' The significance of the

228 See table NGA.II.C.2.ii in Appendix A.2.

229 See section CA.VI.B.3.

230 See section CA.IV.B.4.

international dimension and the importance of international co-operation emerges in other comments too.

Cross-tabulation with the geographical source of experience

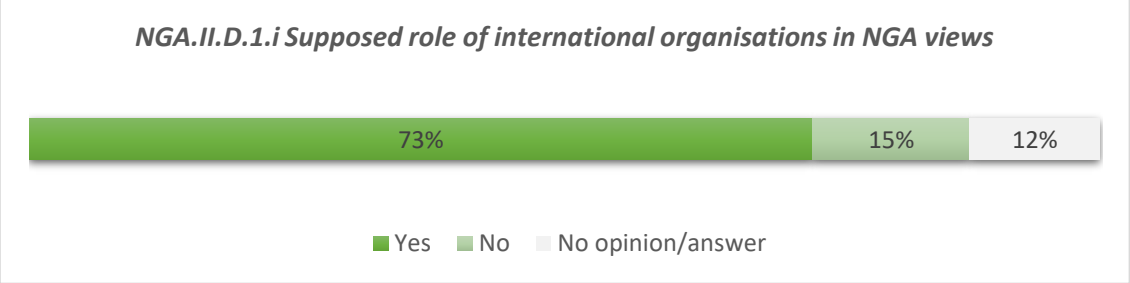
There is not much difference depending on the geographical source of NGA experience, except for two options. First, '(more/better) research' is identified as 'most needed' by a much larger share of NGAs with only European experience (than by those with only non-European experience). Second, '(more/better) internal capacity-building' was identified as such by a much larger share of NGAs with only non-European experience.[231]

Although we found that internal capacity-building is much more prevalent among non-European CA *respondents* (than among European CA *respondents*),[232] they are still a small minority of *all* non-European CAs, while the majority of European CAs responded.[233] Therefore, we cannot rule out that internal capacity-building is in fact less prevalent outside of Europe than in Europe.

NGA.II.D NGA view on the role of international organisations

NGA.II.D.1 Participation in addressing sustainability and competition

A large majority of NGAs believe that sustainability and competition is among the top 5 topics that international organisations should deal with.



Note: n=41

Remarks in the comment section reiterate this general sentiment. One NGA simply notes that '*this is a global issue*'. The importance of international co-operation is also highlighted by remarks in the comment section of earlier questions.[234]

Cross-tabulation with the geographical source of experience

Of the NGAs with only European experience, a significantly smaller portion support the idea, while a significantly larger portion did not give an answer (compared to those with only non-European experience).[235]

231 See table NGA.II.C.3.ii in Appendix A.2.

232 See section CA.IV.B.3.

233 See section CA.I.A.2.

234 E.g., see section NGA.II.C.3.

235 See table NGA.II.D.1.ii in Appendix A.2.

Comparison with CA responses

A larger majority of NGAs than of CAs believe that sustainability and competition is among the top 5 topics that international organisations should deal with. This is reversed if we disregard those respondents that did not give an answer to the question.

The difference observed in the case of NGAs depending on the geographical source of experience (when 'no / no opinion' answers are not disregarded) is not mirrored in the responses of CAs split according to their geographical location (where there is no (significant) difference).[236]

NGA.II.D.2 Type of preferred work product

The options of 'collection of good practices' and 'recommendations' are preferred by a large majority of NGAs. 'Collecting the results of theoretical research' is preferred by a much smaller share of them, but still by roughly every second NGA. The option of 'other' (options) is identified by a small majority.

Note: n=30

Cross-tabulation with the geographical source of experience

There is a great difference depending on the geographical source of experience. A significantly smaller share of NGAs with only European experience prefer the 'collection of good practices', and a much smaller share of them prefer 'collecting the results of theoretical research', while a much larger share of them prefer 'recommendations', which is the most preferred option among them.[237]

Comparison with CA responses

The aggregate distribution of responses follows the same pattern in both groups, although with higher shares preferring each option in the responses of CAs. Surprisingly, however, the differences according to the geographical location of CAs and the geographical source of experience of NGAs are contrary to each other.[238]

[236] See tables CA.IV.D.2.i-ii and NGA.II.D.1.i-ii in Appendix A.2.

[237] See table NGA.II.D.2.ii in Appendix A.2.

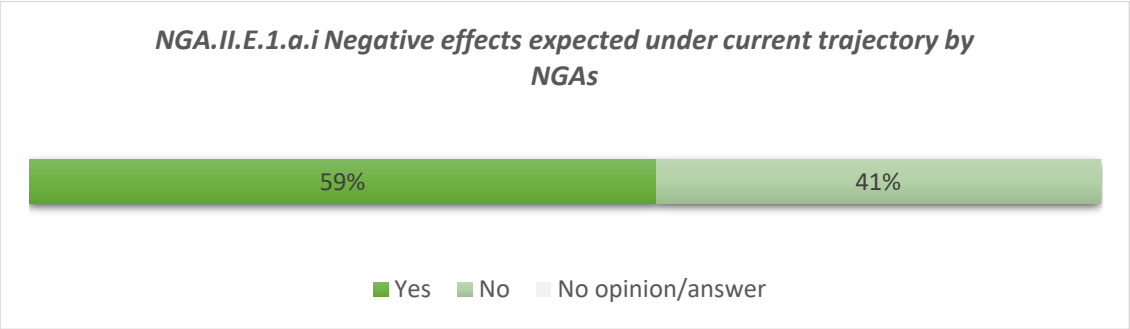
[238] See tables CA.IV.D.3.i-ii and NGA.II.D.2.i-ii in Appendix A.2.

NGA.II.E NGA outlook

NGA.II.E.1 Extrapolation supposing that the current trajectory of enforcement remains the same

Whether negative effects are expected

The chart below shows that the majority of NGAs expect negative effects to occur if the current trajectory of enforcement does not change.



Note: n=41

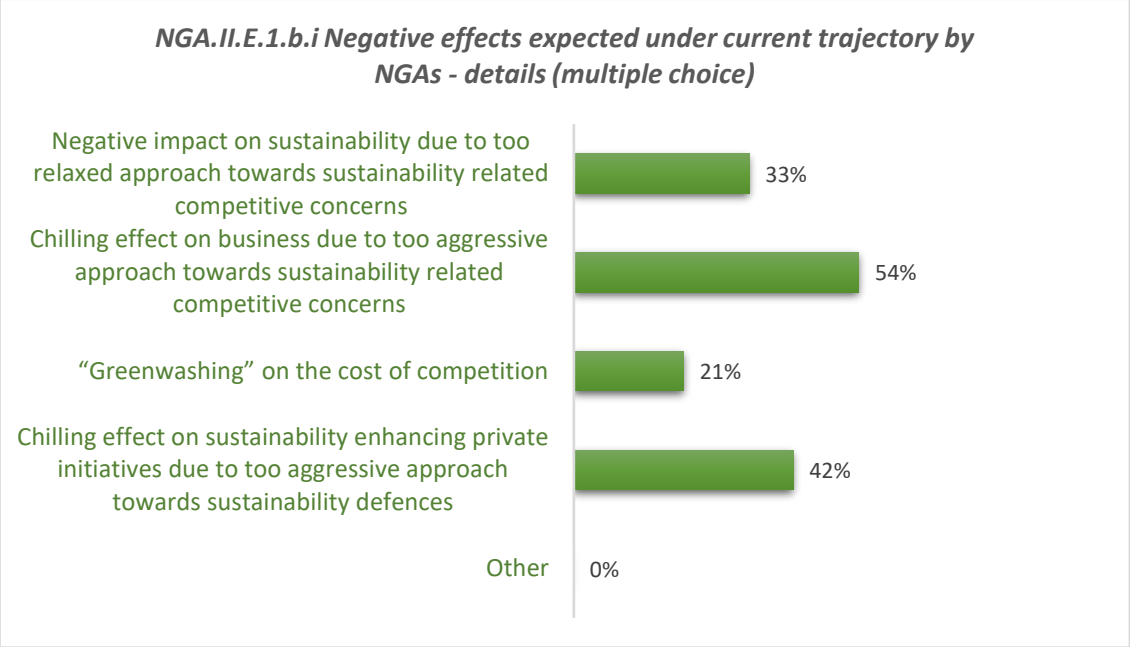
Cross-tabulation with the geographical source of experience

There is no significant difference depending on the geographical source of experience of NGAs.[239]

What negative effects are expected

The chart below shows that the majority of NGAs expect a 'chilling effect on business due to too the aggressive approach towards sustainability related competitive concerns' if the current enforcement trajectory remains unchanged, while other negative effects are significantly less expected. The least expected is '"greenwashing" on the cost of competition'. All of the predefined negative options are expected by a significant share of the NGAs, while none of those NGAs identified other fears.

[239] See table NGA.II.E.1.a.ii in Appendix A.2.



Note: n=24

Negative effects caused by overenforcement are expected by a larger share of NGAs than negative effects caused by underenforcement. In other words, current enforcement is perceived by NGAs – on average – as being sufficient, and perhaps even too aggressive, when it comes to sustainability considerations. Traditional law firm sentiment may also play a role (as a large portion of NGAs are law firms, as discussed earlier).[240]

The fact that a relatively low share (but still a significant minority) of NGAs expect '"greenwashing" on the cost of competition' does not necessarily imply that 'greenwashing' is an uncommon business practice. It is also possible that enforcement recognises what 'greenwashing' is and treats it accordingly, or that enforcement is too immune to sustainability considerations in general, which may have a positive side effect when it comes to 'greenwashing'.[241]

One NGA warns, in the comment section, that uncertainty has a similar effect to that of overenforcement, and it is magnified by private law enforcement, as '*if agencies, laws and courts are not agreed on how to approach this topic, private actors may also be chilled from taking on green initiatives for fear of private litigation too.*'

Cross-tabulation with the geographical source of experience

There are large differences depending on the geographical source of experience. A much higher share of NGAs with only non-European experience expect '"greenwashing" on the cost of competition' (if the current enforcement trajectory remains the same), and a significantly higher share of them expect a 'negative impact on sustainability due to too relaxed enforcement towards sustainability related competitive concerns'. At the same time, a much smaller share of NGAs with only non-European experience expect chilling effects on business or private sustainability initiatives due to too aggressive enforcement either towards sustainability related competitive concerns or sustainability defences.[242]

240 See section NGA.I.B1.

241 See also section CA.III.E.3.

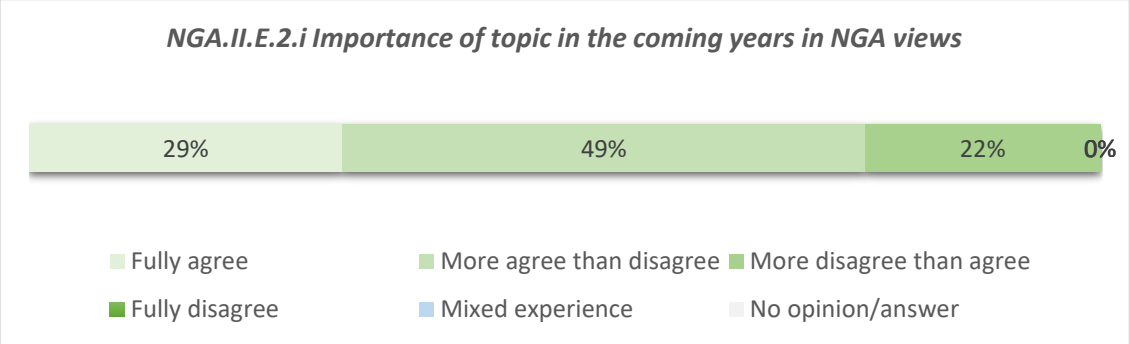
242 See table NGA.II.E.1.b.ii in Appendix A.2.

As a result, the 'fear profile' of NGAs with only non-European experience is more or less the reverse of that of those with only European experience: they expect negative effects more from too relaxed enforcement, while NGAs with only European experience expect negative effects more from too aggressive enforcement. (The 'fear profile' of the 'average' NGA is similar to the NGAs with only European experience – they predominate the set of respondent NGAs.)[243]

This stark difference may reflect the differences between the enforcement of European and non-European CAs, as well as differences between local business practices and the sensitivity of NGAs towards sustainability or competition.[244]

NGA.II.E.2 Importance of topic in coming years

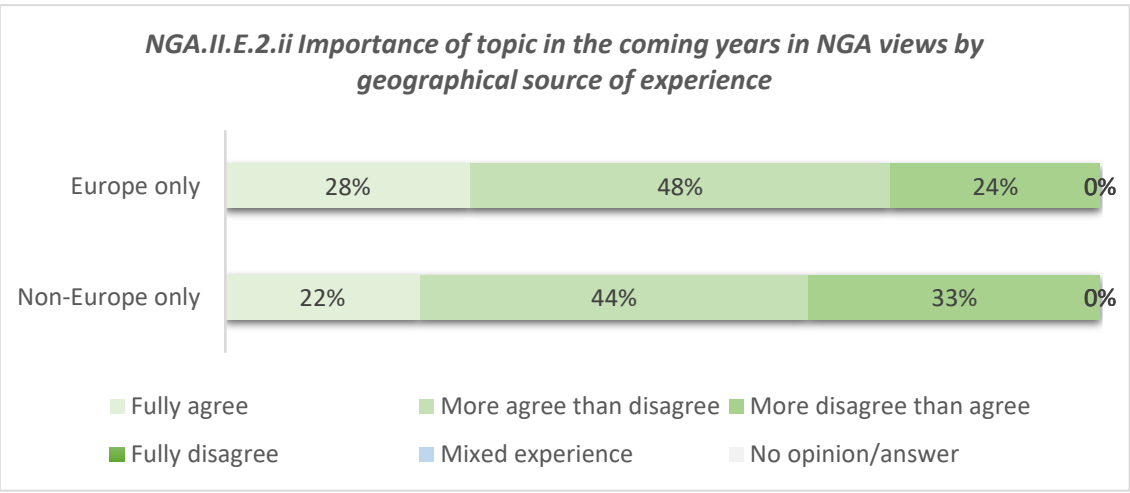
The chart below shows that a large majority of NGAs tend to regard sustainability and competition as a major topic in the coming years, while none of the NGAs rejected the idea outright.



Note: n=41

Cross-tabulation with the geographical source of experience

The chart below shows that NGAs with only non-European experience – on average – tend to regard the topic somewhat less as a major one in the coming years. Still, it is the majority view even within the group of NGAs with only non-European experience.



Note: $n_{Europe\ only}=25$, $n_{Non\text{-}Europe\ only}=9$

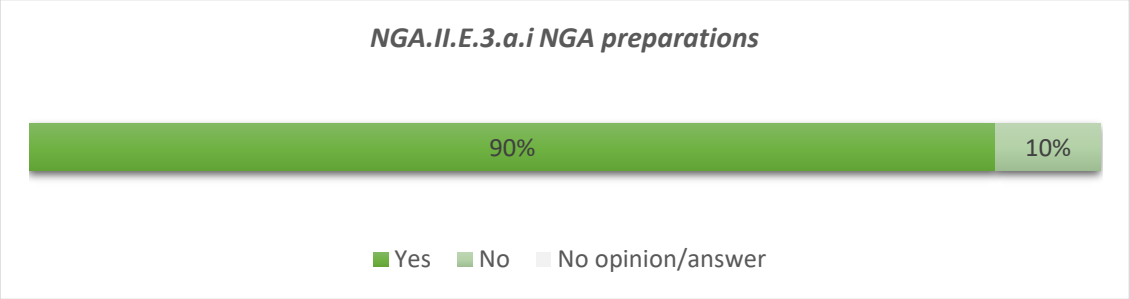
243 See section NGA.I.C.3.

244 See also sections CA.II.B.1 and CA.III.H.1.

NGA.II.E.3 NGA preparations outlook

Whether any efforts are planned

The chart below shows that the overwhelming majority of NGAs are planning to enhance their knowledge and preparedness on sustainability and competition.



Note: n=41

Cross-tabulation with the geographical source of experience

A significantly smaller share of NGAs with only non-European experience are planning to enhance their knowledge and preparedness on sustainability and competition. Still, they are a large majority within the group of NGAs with only non-European experience.[245]

What efforts are planned

The chart below shows that 'following the work of CAs', 'following research in the topic' and 'following the work of international organisations' are planned by a majority of the NGAs, while 'following the topic in other ways' and 'learning by doing' are planned by a significant minority.

Note: n=37

[245] See table NGA.II.E.3.a.ii in Appendix A.2.

Cross-tabulation with the geographical source of experience

The only difference depending on the geographical source of experience is that a somewhat larger share of NGAs with only European experience are planning to engage in each effort, except for 'learning by doing', and a significantly larger share of them are planning to enhance their knowledge and preparedness by following the work of CAs and by following the topic in other ways (without further specification in the comment section).[246]

[246] See table NGA.II.E.3.b.ii in Appendix A.2.

List of respondents

The time respondents spent on taking part in this survey is much appreciated by the GVH and its Special Project Team.

Competition agencies[247]

Albanian Competition Authority

Comision Nacional de Defensa de la Competencia (Argentina)

Australian Competition and Consumer Commission

Bangladesh Competition Commission (BCC)

Belgian Competition Authority

The Bulgarian Commission on Protection of Competition

Canadian Competition Bureau

CARICOM Competition Commission

Superintendence of Industry and Commerce (Colombia)

Commission to Promote Competition (Coprocom) (Costa Rica)

Croatian Competition Agency

Office for the Protection of Competition (Czech Republic)

Danish Competition and Consumer Authority

EAC Competition Authority (East African Community)

Competition Superintendence of El Salvador

Eswatini Competition Commission

DG Competition, European Commission

Finnish Competition and Consumer Authority

Autorité de la concurrence (French Competition Authority)

Georgian National Competition Agency

Bundeskartellamt (Germany)

Hellenic Competition Commission (HCC)

Hong Kong Competition Commission

Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH)

Competition and Consumer Protection Commission (Ireland)

Italian Competition Authority – AGCM

Japan Fair Trade Commission (JFTC)

Korea Fair Trade Commission

Kosovo Competition Authority

The Lithuanian Competition Council

Luxembourg Competition Council

Competition Commission of Mauritius

Competition Council Republic of Moldova

Commission for Protection of Competition of the Republic of North Macedonia

The Netherlands Authority for Consumers and Markets, ACM

Norwegian Competition Authority / Konkurransetilsynet

Autoridade da Concorrência – Portuguese Competition Authority (AdC)

FAS Russia

Commission for Protection of Competition (Serbia)

[247] Responding CAs are listed in alphabetical order, according to their respective jurisdictions, under the name they specified in their response to question I.A.1. of the questionnaire for competition agencies. Where those names do not refer to the jurisdiction, we complemented the name of the agency with that of the jurisdiction in brackets.

Seychelles Fair Trading Commission

Competition and Consumer Commission of Singapore

Antimonopoly Office of the Slovak Republic

Slovenian Competition Protection Agency (CPA)

Swedish Competition Authority

Swiss Competition Commission

Taiwan Fair Trade Commission

Trinidad and Tobago Fair Trading Commission

Turkish Competition Authority

Competition and Markets Authority (CMA) (United Kingdom)

United States Department of Justice, Antitrust Division

Competition and Consumer Protection Commission – Zambia

Competition and Tariff Commission, Zimbabwe

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[248] NGAs are listed in alphabetical order, and in the case of individuals, according to their surname. One NGA was not identifiable, and 13 NGAs have not authorised us to share their name in this document.