Green Rules, Fragmented Fields: Member-State Approaches to Sustainability in EU Competition Law

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Abstract

This article examines whether, and under what conditions, EU competition law can accommodate sustainability-driven cooperation without undermining legal certainty in the internal market. It argues that the Treaties provide a constitutional basis for integrating sustainability into competition analysis, but that this opening remains constrained by the doctrinal structure of Arts. 101 and 102 TFEU and, in particular, by the evidentiary demands of Art. 101(3) TFEU. Combining doctrinal analysis with a comparative assessment of recent EU and national initiatives, including the Belgian guidelines adopted in April 2026, the article maps divergences across six Member States and the United Kingdom along three dimensions: legal source, concept of sustainability, and treatment of aggregate benefits. It shows that these divergences generate fragmentation and uncertainty for cross-border cooperation. The article concludes that competition law can support, but cannot replace, sector-specific sustainability regulation, and that greater convergence through the ECN and clearer evidentiary standards are needed to make sustainability-oriented cooperation more predictable.

Résumé

Cet article examine si, et dans quelles conditions, le droit européen de la concurrence peut s'adapter à une coopération axée sur la durabilité sans compromettre la sécurité juridique au sein du marché intérieur. Il soutient que les traités fournissent une base constitutionnelle pour intégrer la durabilité dans l'analyse de la concurrence, mais que cette ouverture reste limitée par la structure doctrinale des articles 101 et 102 du TFUE et, en particulier, par les exigences en matière de preuve prévues à l'article 101, paragraphe 3, du TFUE. En combinant une analyse doctrinale et une évaluation comparative des initiatives récentes de l'UE et des États membres, y compris les lignes directrices belges adoptées en avril 2026, l'article recense les divergences entre six États membres et le Royaume-Uni selon trois dimensions : la source juridique, la notion de durabilité et le traitement des avantages globaux. Il montre que ces divergences génèrent une fragmentation et une incertitude pour la coopération transfrontalière. L'article conclut que le droit de la concurrence peut soutenir, mais ne peut remplacer, la réglementation sectorielle en matière de

durabilité, et qu'une plus grande convergence par le biais du REC ainsi que des normes de preuve plus claires sont nécessaires pour rendre la coopération axée sur la durabilité plus prévisible.

Keywords: Sustainability; antitrust; ECN; consumer-welfare; horizontal cooperation guidelines; environment.

JEL: K21, K32, L40, Q01, L41

I. Introduction

Markets can play and are already playing a major role in sustainable development, broadly understood as the process of prioritising long-term resource management in the public interest over short-term individual economic objectives.[1] In parallel to the States' pursuit of the United Nations' Sustainable Development Goals,[2] firms are embracing corporate social responsibility initiatives also thanks to capital and consumer markets' growing preference for green and fair-trade products.[3]

In answering the global call for sustainability, firms face a fundamental legal question: whether their unilateral or cooperative sustainability initiatives are compatible with competition law. The tension is structural. A firm that coordinates with competitors to phase out less sustainable inputs may face antitrust liability, while a firm that undercuts more sustainable rivals by selling cheaper, less environmentally compliant products generally does not. This asymmetry creates a first-mover disadvantage that discourages private sustainability initiatives unless competition authorities provide coherent and predictable guidance.[4] Similarly, consumers willing to pay a premium for genuinely sustainable products may find that premium difficult to distinguish, in an enforcement context, from a price coordination outcome.[5] And competition law faces inherent limits in addressing

[1] Rahul Mitra, 'Sustainability and Sustainable Development' in Craig Scott and Laurie Lewis (eds) The International Encyclopaedia of Organisational Communication (2017 Wiley), 1.

[2] General Assembly United Nations, Transforming Our World: the 2030 Agenda for Sustainable Development (Resolution A/RES/70/1, 21 October 2015), 14.

[3] In this sense, see Ashley Reichheld, John Peto and Cory Ritthaler, 'Research: Consumers' Sustainability Demands Are Rising' Harvard Business Review (18 September 2023). For an older and less optimistic perspective on consumers' attitudes toward sustainable products, see Katherine White, David Hardisty and Rishad Habib, 'The Elusive Green Consumer' Harvard Business Review (1 July 2019).

[4] Respondents to the September 2020 European Commission's call for contributions called for more clarity on how the pursuit of sustainability objectives affects antitrust assessment, see Alexandra Badea and others, 'Competition Policy in Support of Europe's Green Ambition' (2021) 1 Competition policy brief 1, 2.

[5] Emanuela Lecchi, 'Sustainability in EU Merger Control' (2022) 44 European Competition Law Review 70, 74.

greenwashing, the pretence of sustainability used to gain market shares or facilitate collusion, unless such conduct crosses the threshold of anticompetitive harm.[6]

This article argues that EU competition law can support sustainability objectives, but cannot substitute for sector-specific regulation. The argument is narrower than some recent sustainability scholarship. The point is not that competition law should become a general instrument of green governance, but that it contains a limited constitutional opening for sustainability considerations and that this opening is currently administered in a fragmented way across European jurisdictions.

The argument proceeds in three parts. First, the Treaties provide a constitutional basis for integrating sustainability into competition analysis, most directly through Art. 11 TFEU and Art. 37 of the Charter of Fundamental Rights, read together with Arts. 2–3 TEU, but that mandate is subject to the doctrinal and evidentiary constraints inherent in Arts. 101 and 102 TFEU. Second, divergent national approaches, from Austria's narrow statutory environmental exemption to the Netherlands' broad soft law safe harbour and Greece's public-interest sandbox, generate legal uncertainty and regulatory fragmentation that discourages cross-border cooperative sustainability initiatives. Third, this fragmentation can be mitigated through coordinated guidance within the European Competition Network (ECN), complemented by binding instruments where appropriate, and by clearer evidentiary criteria for exemptions and enforcement priorities.[7]

Methodologically, the article adopts a normative-evaluative approach combining doctrinal legal analysis with selective economic reasoning. It does not offer a standalone economic model. Rather, it draws on economic insights into market failures, collective-action problems, and the limits of willingness-to-pay analysis to evaluate how competition law responds to sustainability claims. The comparative inquiry focuses on Austria, Belgium, Greece, the Netherlands, France, Portugal, and the United Kingdom.[8] These jurisdictions were selected because

[6] Mitra (n 1) 4.

[7] The empirical dimension of this claim is documented by Marios Iacovides and Konstantinos Stylianou, 'The New Goals of EU Competition Law: Sustainability, Labour Rights, and Privacy' (2024) 3 European Law Open 587, who find through a comprehensive review of 4,048 CJEU decisions, AG opinions, Commission decisions, and Commissioner speeches (1960–2022) that sustainability is only partially recognised as a goal of EU competition law, endorsed in 83% of thematically relevant Commission decisions but in only 29% of CJEU decisions, and that the Commission's public rhetoric on sustainability is significantly out of pace with its decisional practice. These findings underscore both the constitutional mandate invoked by this article and the enforcement gap that normative recommendations seek to address.

[8] See the Communication from the European Commission *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* (2023/C 259/01) published the 21st July 2023 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01). For a comment, see Roman Inderst and Stefan Thomas, 'Sustainability Agreements in the European Commission's Draft Horizontal Guidelines' (2022) 13 Journal of European Competition Law & Practice 571; For the Netherlands, see:

they have all addressed sustainability issues in their national laws explicitly and represent the full spectrum of variation across the three analytical dimensions examined in Section 5: the legal source of sustainability provisions (hard law versus soft law), the concept of sustainability endorsed (from narrow-environmental to broad-public-interest), and the treatment of aggregate sustainability benefits in competitive assessments. This variation makes the selected cases analytically representative for the purposes of a normative-evaluative comparison, without aspiring to exhaustiveness across all ECN members.[9]

Having clarified the terminology, the paper maps the ongoing debate on including sustainability goals in EU competition law as part of the broader discussion between the pre-eminence of the consumer welfare standard over other social objectives. From a constitutional perspective, the Treaties call for the integration of sustainable development into competition enforcement, yet this comes at the expense of the predictability of competitive assessments, a tension that is particularly acute in the current political moment. The 2024–2029 Commission, building on the Letta and Draghi reports, has signalled its commitment both to advancing EU leadership in sustainable development and to strengthening European industrial competitiveness vis-à-vis jurisdictions with lighter sustainability requirements.[10] Executive Vice-President Teresa Ribera Martínez, responsible for the Competition portfolio, bears direct responsibility for reconciling these objectives.[11] The comparative analysis of Section V maps the specific points at which that tension produces divergent outcomes, and Section VI draws the institutional implications.

The Netherlands Authority for Consumers and Markets, 'ACM's Oversight of Sustainability Agreements', Case no. ACM/23/182143 Document no. ACM/UIT/596876 (4 October 2023, unofficial English translation) <https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf>. For Austria, see: Section 2, para. 1 of the Cartel Act; Austrian Federal Competition Authority, 'Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperation (Sustainability Guidelines)' (2022).

[9] Maria Dreher and Tim-Erik Held, 'ESG & Supply Chains: A Practical Outlook on Opportunities and Challenges Under Antitrust Law' (2022) 43 European Competition Law Review 417, 419.

[10] Enrico Letta, *Much More Than a Market – Speed, Security, Solidarity* (EU, 2024), 12 and 50–51; Mario Draghi, *The Future of European Competitiveness: A Competitiveness Strategy for Europe* (EU, 2024), 37 and 42–48.

[11] Ursula von der Leyen, 'Mission Letter to Teresa Ribera Rodrìguez' (17 September 2024), 5–7; Teresa Ribera Martinez, 'Speech in the Annual CRA Brussels Conference 2024 on Competition Policy Adapted to the New Global Realities' (10 December 2024).

II. The international roots of sustainability and sustainable development

Sustainability has become a pervasive term in public discourse. Often used as a synonym for environmentally friendly, a closer analysis reveals that it and its companion concept, sustainable development, have a broader scope with significant implications for competition policy. This section does not attempt a general theory of sustainability and only isolates those elements of the concept that matter for competition law: the breadth of the objectives invoked, the temporal horizon of the benefits claimed, and the difficulty of identifying the beneficiaries of those benefits. These features explain why sustainability claims fit uneasily within a legal framework primarily designed to assess price, output, quality, and innovation in relatively bounded markets. The analysis proceeds from a clear methodological assumption, namely, that ongoing environmental, social and governance degradation can be mitigated through changes in human activity,[12] without rehearsing in detail the economic and sociological literature on sustainable consumption, which falls outside the scope of this article. The key point is that large multinational firms, through their coordinated and individual market practices, have both the resources and the structural capacity to make a difference; and it is precisely those practices that competition law regulates.

Originally, sustainability concerns focused on environmental issues raised by international organizations.[13] This early policy discussion is key to correctly interpreting the concept of sustainability. The first significant international development on sustainability can be traced back to 1987, with the publication of the Gro Harlem Brundtland Report by the World Commission on Environment and Development (WCED) four years after its set up by the United Nations General Assembly.[14] This milestone document stated that critical global environmental problems were primarily the results of the enormous poverty of the South and the non-sustainable consumption and production patterns of the North. It called for a strategy that tackled development concerns and the environmental degradation together and emphasized the importance of not compromising the ability of future

[12] Among many contributions illustrating scientific evidence over the ongoing climate change, see IPCC, *2023: Summary for Policymakers*. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1–34, doi: 10.59327/IPCC/AR6-9789291691647.001.

[13] The international debate over the ongoing depletion of the environment was heated already in 1972 when the UN Conference on Human-Environment held in Stockholm laid the ground for future discussion over the impact of economic activity on the environment.

[14] United Nations, *Report of the World Commission on Environment and Development: Our Common Future* (1987) A/42/427.

generations to enjoy natural resources.[15] In this sense, the Report provided the most widely recognized definition of sustainable development, describing it as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[16]

The subsequent debate on sustainable development highlighted its three-dimensional nature. According to a widely accepted interpretation, sustainable development is ideally based on the balanced pursuit of three goals: environmental, economic, and societal goals. Considering environmental factors involves avoiding the over-exploitation and depletion of non-renewable natural resources, including water, energy, the climate, the oceans and all other terrestrial ecosystems.[17] The reference to economy implies creating a system capable of growth and prosperity while avoiding severe sectoral imbalances relating to poverty, hunger, health, education, safety, peace and justice. Lastly, sustainable development for society is inclusive of all people and equal regardless of gender, guided by principles of fairness, non-discrimination and the provision of adequate social services.[18] In light of the above, an unsustainable business practice is a practice that pushes the market away from sustainable development goals.[19]

Since the Rio Declaration on Environment and Development in 1992, political discussions on sustainable development have increasingly highlighted the potential contributions of private actors[20]. The Paris Agreement on Climate Change (2015), part of the 2030 Agenda, further integrated sustainable development principles into business activity[21]. There is a clear relationship between competition policy

[15] Markus Gehring, 'Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law' (2006) 15 Review of European, Comparative & International Environmental Law 172, 175.

[16] WCED, *Our Common Future*, 1987, 43, https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

[17] General Assembly United Nations (n 2) 14.

[18] See J.M. Harris, *Sustainability and sustainable development*, in *International Society of Ecological Economics. Internet Encyclopedia of Ecological Economics*, February 2003, https://isecoeco.org/pdf/susdev.pdf, 1.

[19] For a similar definition, see Marios Iacovides and Christos Vrettos, 'Radical For Whom? Unsustainable Business Practices as Abuses of Dominance' in Simon Holmes, Dirk Middelschulte and Martijn Snoep (eds) *Competition Law, Climate Change & Environmental Sustainability* (2021), 94; Marios Iacovides and Valentin Mauboussin, 'Sustainability Considerations in the Application of Article 102 TFEU: State of the Art and Proposals for a More Sustainable Competition Law' (2022) ssrn.com/abstract=4319866, 8.

[20] The Declaration of Rio (https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf) has been followed by two other international meetings (in New York in 1997 and in Johannesburg in 2002) aimed at assessing the progress made in the implementation of its principles.

[21] Among the seventeen sustainable development goals (SDGs) set down by the UN Resolution 70/1 (https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf), SDG 12.6 is specifically dedicated to goals achievable through the cooperation of private actors.

and UN sustainable development goals numbers 8 '*economic growth*', 9 '*resilient infrastructure, industrialisation and innovation*' and 12 '*sustainable consumption and production*'.

This brief overview illustrates some of the main difficulties in evaluating the achievement of sustainable development goals. These challenges mainly stem from its inter-generational and forward-looking nature, which necessitates considering non-economic values whose beneficiaries and impact are difficult to identify. This is a typical chicken and egg problem that, in competition law terms, could be framed as whether to favour the consumers of today with more products and lower prices or the consumers of tomorrow with less degraded living conditions. The perceived immeasurability of these factors, coupled with the impossibility of pursuing unlimited economic growth on a planet with finite resources, has led some authors to advocate for a different concept of sustainability. This alternative approach acknowledges an inherent contradiction between economic growth and natural resource preservation, favouring entirely environmental and non-economic frameworks, such as those related to the concepts of degrowth or *buen vivir*[22].

III. An EU constitutional perspective on sustainability and competition law

European institutions adhere to the UN concept of sustainable development, which presupposes the integration of economic growth with environmental and social sustainability concerns. The EU's commitment to sustainable development can be traced back to the Commission's 2005 Communication on Guiding Principles for Sustainable Development (COM(2005) 218), which established sustainable development as a foundational principle underlying all EU policies and actions[23] This commitment was subsequently deepened through the 2030 Agenda and the European Green Deal (COM(2019) 640 final), which sets medium- and long-term decarbonisation objectives culminating in climate neutrality by 2050.[24]

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[22] For a further analysis of the different approaches related to the need to balance environmental issues and economic growth, see C.A. Ruggerio, *Sustainability and sustainable development: A Review of principles and definitions*, in 786 *Science of Total Environment* (2021) 1 ff. See also the essential work of H.E. Daly, *Beyond Growth: The Economics of Sustainable Development*, Boston, 1997.

[23] Even prior to the Communication of 2005, «the Amsterdam Treaty, signed in 1997, introduced sustainable development as a core objective of the European Union as set out in Articles 2, 3 and 6 of the EC Treaty. In 2001, the European Union adopted its Sustainable Development Strategy in Gothenburg. In 2002, the external dimension of the Strategy was added by the European Council in Barcelona and the European Union was active in supporting the conclusions of the World Summit on Sustainable Development in Johannesburg».

[24] European Commission, The European Green Deal COM(2019)640 final. The European Green Deal in particular explicitly endorses a holistic line of action, founded on an "all-economy

Despite the recurring criticisms of sustainable development, due to its vague and allegedly contradictory nature of mixing far-apart public interests, it remains the primary concept underpinning international environmental policy. Consequently, we will consider it interchangeable with the term "sustainability". However, the subsequent comparative analysis shows that one of the main causes of the erratic application of sustainability competition law derives from the different notions of sustainability adopted at the national and European level.

The constitutional issue is not whether sustainability is a freestanding objective of competition law. It is whether the competition rules, as part of the EU legal order, must be interpreted and applied in a way that takes sustainability objectives into account. On that question, the strongest foundations are not diffuse references to general policy coherence, but the specific integration mandate of Art. 11 TFEU and the parallel formulation in Art. 37 of the Charter of Fundamental Rights. Those provisions do not dissolve the structure of competition law, but they do preclude treating environmental sustainability as legally irrelevant.

That conclusion is reinforced by the broader Treaty context. Arts. 2 and 3 TEU identify sustainable development, social progress, and a high level of environmental protection as objectives of the Union, while the commitment to a highly competitive social market economy makes clear that market integration and competition are instruments of a wider constitutional settlement rather than ends in themselves. The question, therefore, is not whether sustainability may displace competition analysis, but how far sustainability considerations can be integrated into that analysis without emptying Arts. 101 and 102 TFEU of their doctrinal content.

The EU's primary sources of law include a set of provisions that recognize sustainable development as a competence of its institutions and an overarching policy objective. From a constitutional angle, as we shall see, a systematic reading of the Treaties pleads for integrating sustainable development into EU competition law.[25] This interpretation is also in line with the European social market economy,[26] acknowledging that many things in life matter more than

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approach" towards environmental protection which requires the involvement of every sector of the society and the economy. The Taxonomy Regulation (Regulation (EU) 2020/852) establishes classification criteria for sustainable economic activities primarily for the purposes of investor disclosure and the direction of capital flows towards sustainable businesses; its direct implications for competition enforcement are limited and fall outside the scope of this article.

[25] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) 11 JECLAP 124, 129; FNV Kunsten Informatie en Media v Staat der Nederlanden C-413/14 EU:C:2014:2411, para 23; Brentjens' Handelsonderneming BV cv Stichting Bedrijfspensionfonds voor de Handel in Bouwmaterialen, Cases C-115/97 to C-117/97, EU:C:1999:434, paras 51–56.

[26] On the social market economy clause as a constitutional moderator of market liberalism in EU law, see Christian Joerges and Florian Rödl, 'Social Market Economy as Europe's Social Model?' (2004) EUI Working Paper LAW 2004/8; Norbert Reich, 'How Competitive is

competition, such as working conditions, family or health, and prevail over strict economic objectives.

Above all, sustainability, in its broad sense of economic, social and environmental components, emerges as a general principle of the EU in Arts. 2 and 3 of the Treaty on European Union. Social sustainability, including respect for human rights and dignity and non-discrimination, is inherent in the democratic foundation of the EU set by Art. 2 TEU and in the role of participatory democracy emphasized in Art. 11 TEU. Then Art. 3(3) further strengthens the EU's sustainable development objectives by tying it to establishing the internal market: "[t]*he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance*". The Article then specifies that the internal market shall promote social values for its citizens, cohesion and solidarity among Member States, while respecting their diverse cultures. Beyond the reference to sustainable development as a general goal of the European Union, special emphasis should be placed on its typical elements (economy, environment, society) as fundamental features of a highly competitive social market economy. Creating a common market, also through competition law, is not an end in itself, but rather serves the development of a social market economy, where the markets' pursuit of profits cannot jeopardise fairness and prosperity.[27] The competence to safeguard competition in the internal market, moved in 2008 from Art. 3(g) of the Treaty establishing the European Community to Protocol 27 annexed to the Treaties,[28] is a means to serve the internal market and achieve the fundamental values of the European Union. Accordingly, the TEU even places broad sustainability objectives before competition ones.[29] Furthermore, broad sustainable development goals are also mentioned in Art. 21(2) TEU as guiding principles for the EU's interactions with third countries and international organizations.

The allocation of competences in the TFEU also matters. Competition rules necessary for the functioning of the internal market fall within the Union's exclusive competence, whereas most environmental and social regulation remains

the "Social Market Economy" as Protected by the EU Lisbon Treaty?' (2012) 14 Cambridge Yearbook of European Legal Studies 613.

[27] See Maria Campo Comba, 'EU Competition Law and Sustainability' (2022) 3 Erasmus Law Review 190, 192.

[28] See *Consolidated version of the Treaty on European Union – PROTOCOLS – Protocol (No 27) on the internal market and competition Official Journal 115, 09/05/2008 P. 0309 – 0309* (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008M/PRO/27).

[29] Similarly, see Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 8 Journal of Antitrust Enforcement 354, 360, who notes further that even art. 3(5) TEU refers to the contribution of the EU to the sustainable development of the earth and to free and fair trade.

shared. This does not mean that competition law is insulated from sustainability objectives. It means, rather, that competition law is not the primary regulatory instrument for defining those objectives. Its role is supportive and reactive: it must operate consistently with sustainability commitments articulated elsewhere in EU law, but it cannot substitute for the sector-specific regulation through which those commitments are ordinarily specified.

The most direct constitutional basis for integrating sustainability into EU competition enforcement lies in Art. 11 TFEU and Art. 37 of the Charter of Fundamental Rights, which together establish a cross-cutting integration mandate of primary law. Article 11 TFEU provides that environmental protection requirements must be integrated into the definition and implementation of all Union policies and activities, in particular with a view to promoting sustainable development.[30] As a horizontal clause of primary law, this mandate applies with equal force to competition enforcement and is not merely aspirational: it binds the Commission and NCAs when exercising their functions under Arts. 101 and 102 TFEU.[31] Article 37 of the Charter reinforces this obligation by requiring that a high level of environmental protection and the improvement of the quality of the environment be integrated into Union policies in accordance with the principle of sustainable development. Taken together, these two provisions establish a constitutional floor below which competition authorities cannot legitimately treat environmental sustainability as irrelevant.[32]

[30] Literally art. 11 TFEU states that "[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development". About the drafting process of art. 11 TFEU, see J. Nowag, *The Sky is the Limit. On the Drafting of Article 11 TFEU's Integration Obligations and its Intended Reach* in S. Sjafjell – A. Wiesbrock (eds), T*he Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously*, London, 2014. The environmental component of sustainable development in the EU is also mandated by Art. 37 of the EU Charter of Fundamental Rights, which states that "[a] high level of environmental protection and improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".

[31] On Art. 11 TFEU as a constitutional foundation for integrating environmental protection into competition law, see Nikolaos Pitsos, 'Competition Law and Sustainability in Horizontal Agreements: Complex Boundaries' (2026) Journal of Antitrust Enforcement (advance access) DOI: 10.1093/jaenfo/jnaf031, 6, noting that Art. 11 TFEU requires environmental protection to be integrated into the implementation of all Union policies, and that competition authorities operating under a strict consumer welfare standard risk breaching that mandate; Suzanne Kingston, *Greening EU Competition Law and Policy* (CUP 2012); Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (OUP 2016).

[32] Iacovides and Stylianou (n 7) confirm empirically that the convergence of Art. 11 TFEU, Art. 37 of the Charter, and Arts. 7 and 3(3) TEU is the primary route through which sustainability has so far gained recognition in EU competition law, with the Commission relying on this constitutional basis in the majority of decisions and speeches that endorse sustainability as a competition law goal. For the argument that these provisions generate a 'mainstreaming obligation', a duty not merely to refrain from obstructing sustainability, but positively to pursue it, see Marios C Iacovides and Christoph Vrettos, 'Falling through the Cracks No More?

Across all its diverse competences, Art. 7 TFEU mandates the Union to "ensure consistency between its policies and activities taking all of its objectives into account", always in line with the principle of conferral of powers. Competition enforcement therefore cannot be conducted as if sustainability policy did not exist.[33] The remaining horizontal integration clauses of Arts. 8–10 and 13 TFEU extend analogous obligations to social policy dimensions: gender balance (Art. 8 TFEU), employment, social protection, and health (Art. 9 TFEU), non-discrimination (Art. 10 TFEU), and animal welfare (Art. 13 TFEU). Article 191 TFEU further articulates the guiding principles of EU environmental action, including the precautionary and polluter-pays principles, which form part of the constitutional context in which competition provisions must be applied consistently. These principles do not determine the outcome of individual competition cases, but they are normatively relevant when competition authorities exercise discretion in setting enforcement priorities or designing remedies.

In conclusion, according to the foundational values and principles of the EU Treaties, the Union shall pursue broad sustainability goals across all its policies, including the competition one. The issue then becomes whether the rules that protect competition in the market can do so and how. In particular, such a broad concept of sustainability in relation to the environment, society and the economy, is hard to reconcile with competition law, which focuses on harm to economic variables, such as price, quantity, quality and innovation, and countervailing efficiencies.

The following sub-section compares the Commission's and Member States' recent initiatives relating sustainability and competition enforcement. In doing so, we shall see what kind of sustainability efficiencies or harms are considered in competitive assessments. Furthermore, we will confront the question about which type of economic, environmental or social sustainability consideration should prevail in case of contrast.

IV. Integrating Sustainability into EU Competition Law: The Sword, the Shield, and the 2023 Horizontal Cooperation Guidelines

Integrating sustainability considerations into the grounded reality of EU competition policy is not as straightforward as the constitutional perspective of the Treaties would assume.[34] Sustainability-informed competition policy clashes with the more economic approach to antitrust, guided by the consumer welfare

Article 102 TFEU and Sustainability: The Relation between Dominance, Environmental Degradation, and Social Injustice' (2022) 10 Journal of Antitrust Enforcement 32, 40–43.

[33] Oles Andriychuk, 'The Concept of Sustainability in EU Competition Law: A Legal Realist Perspective' (2021) 14 Yearbook of Antitrust and Regulatory Studies 11, 14–15.

[34] As Holmes and Meagher put it, there is a difference between the possibility to use competition law for sustainability goals and the feasibility and willingness to do so; see Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power

standard focusing on more, cheaper, better and innovative products regardless of sustainability.[35] Beyond the systematic reading of the EU Treaties and the effective pursuit of interrelated public interest goals, supporters of sustainability consider competition law a powerful and flexible tool regulating the conduct of undertakings,[36] which bestows significant enforcement powers on antitrust authorities.[37] They stress the stronger deterrent effect of competition law, both general for society and specific for actual infringers, than the laws protecting sustainability and its broad extraterritorial reach. Accordingly, antitrust intervention against unsustainable market behaviour (i.e., the 'as-a-sword' approach) and benevolence for sustainable practices (i.e., the 'as-a-shield' approach) could send strong and broad market signals and accelerate private sustainable development initiatives.[38] Moreover, an EU move toward integrating sustainability into its competition policy would also lead the way for other jurisdictions to do the same, further accelerating firms' alignment with sustainable development at the international level.[39]

1. The case for sustainability-informed competition enforcement: deterrence, structural remedies, and extraterritorial reach

About deterrence, the Commission under Art. 23(2) Reg. 1/2003 and NCAs under Art. 15 ECN+ Directive might fine infringers up to 10% of the (group-wide) total worldwide turnover in the preceding business year.[40] In contrast, Art. 7(3)

Play a Part? Part 2. Using Competition Law to Tackle Unsustainable Practices As Abuses of Monopoly Power' (2023) 44 European Competition Law Review 61, 64.

[35] Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) 40 World Competition 539, 547–548; Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) 11 JECLAP 124, 125; Michal Konrad Derdak, 'Square Peg in a Round Hole? Sustainability as an Aim of Antitrust Law' (2021) 23 Yearbook of Antitrust and Regulatory Studies 39, 52; Jurgita Malinauskaite and Fatih Bugra Erdem, 'Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities' (2023) 61 Journal of Common Market Studies 1211, 1214.

[36] Iacovides and Vrettos (n 19) 96.

[37] Marios Iacovides and Christos Vrettos, 'Falling Through the Cracks No More? Article 102 TFEU and Sustainability – The Nexus Between Dominance, Environmental Degradation and Social Injustice' (2022) 10 Journal of Antitrust Enforcement 32, 34.

[38] Sandra Marco Colino, 'Antitrust's Environmental Footprint: Redefining the Boundaries of Green Antitrust' (2024) The Chinese University of Hong Kong Research Paper 2024-01, 3; Nowag formulates the metaphores of the sword as 'protective'integration of sustainability into competition law to protect against unsustainable practices, and of the shield as 'supportive' integration to green light sustainable practices; see Julian Nowag, 'Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview' (2022) 1 Nordic Journal of European Law 149, 151.

[39] Gehring (n 15) 173.

[40] Actually, the current record fine of €3.8 billion belongs to the 2016 Trucks Cartel case, which also had a sustainability angle since the truck manufacturers colluded not just on truck

Directive 2024/1203 on the protection of the environment through criminal law,[41] sets the minimum amount of the maximum level of fines for the most egregious environmental crimes to either 5% of the total worldwide turnover or a lump sum of €40 million. It should be noted that this comparison is illustrative rather than systematic: administrative competition fines and criminal environmental sanctions differ in their triggering conditions, procedural safeguards and enforcement contexts. The purpose of the comparison is not to equate the two regimes but to highlight that competition law's deterrence ceiling is structurally higher than that of the environmental criminal law framework.[42]

Furthermore, competition authorities under Art. 7(1) Reg. 1/2003 and Art. 10 of the ECN+ Directive may impose structural remedies, including divestitures of business units or assets, where behavioural remedies are impractical or insufficient to bring an infringement of Arts. 101 or 102 TFEU to an end.[43] Separately, the Commission may under Art. 8(3) of the EU Merger Regulation (Reg. 139/2004) attach structural conditions to merger clearance decisions, and regularly accepts structural commitments in that context.

In terms of geographical scope, EU competition law extends beyond the physical borders of the European Union when conduct occurring outside the EU has an anti-competitive impact within the Single Market.[44] This extraterritoriality is grounded on either the implementation through subsidiaries or distributors within the EU of anti-competitive practices originated entirely offshore (i.e., the implementation test),[45] or of substantial, immediate and foreseeable impact within the EU (i.e., the qualified effects test), irrespective of the seat or domicile of the

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pricing but also on the timing and passing on of costs related to the introduction of emission technologies required by the EURO 3 to 6 standards; see Summary of Commission Decision of 19 July 2017 relating to a proceeding under Art. 101 TFEU (Case AT.39824 – Trucks) OJ (2017) C 108/6, paras 9–10. On calculation of fines by the Commission, see Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 OJ (2006) C 210/2.

[41] The new Environmental Crime Directive aims to strengthen the role of criminal law against the most serious environmental offences for example by introducing new offence categories, such as unlawful ship recycling or unlawful water abstraction, and by defining concrete types and levels of penalties for natural and legal persons; see Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC OJ (2024) L.

[42] Pitsos (n 31), notes the same structural contrast in the context of arguing that competition law's deterrent capacity, including both fines and structural remedies, makes it a potentially more powerful instrument for market-level sustainability enforcement than sector-specific environmental regulation, provided that its doctrinal requirements are met.

[43] Simon Vande Walle, *Remedies in EU Merger Control – An Essential Guide* (2021)

[44] Marek Martyniszyn, 'Intel, iiyama and Air Cargo: Far-Reaching Extraterritorial Application of EU Competition Law' (2022) 43 European Competition Law Review 505.

[45] Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85, C-129/85 *Ahlström Osakeyhtiö and Others v Commission* (28 September 1988) EU:C:1988:447, paras 16–17.

involved companies or the place of contractual performance.[46] In this sense, EU competition law overcomes the jurisdiction-specific scope of sustainability-related regulations that might rely on stronger territorial links such as the *locus commissi delicti*, nationality or domicile of the infringer or the *locus damni* for environmental crime (see Art. 12 Dir. 2024/1203).[47] For example, the agreements between extra-EU manufacturers not to implement cleaner production technologies might be lawful for local sustainability requirements, but can be sanctioned by EU competition law as anti-competitive if the affected products might be sold within the EU. Vice versa, the same extra-EU manufacturers might refrain from agreeing to phase-out least energy-efficient products destined for the European market due to EU competition law fears.

2. Competition law as a sword: sustainability harms as antitrust violations

Despite the shared supportive arguments, the as-a-shield approach is more controversial than the as-a-sword one, since the former refers to a conflicting legal scenario where sustainability effects redeem any anti-competitive ones.[48] Consider a dominant incumbent that justifies its refusal to supply downstream competitors on the ground of their non-compliance with product sustainability standards. As shown in Table 1 (row 4: 'Sustainable but anticompetitive'), this is the paradigmatic shield scenario: the sustainability impact is positive, but the competition impact is negative, making the competitive assessment genuinely controversial. The concern here is antitrust over-enforcement that deters private sustainability initiatives.[49] In contrast, the as-a-sword approach is more acceptable since it refers to two consistent legal scenarios where competition and sustainability work in tandem, and none takes precedence at the expense of the other.[50] As a scenario where sustainability and competition are negatively related, think of a dominant incumbent that keeps selling energy-inefficient widgets thanks to the abusive foreclosure of more sustainable competition and, in so doing, breaches Art. 102 TFEU. Vice-versa, sustainability and competition would be positively related if a manufacturer of widgets pro-competitively licenses its greener production technology to a manufacturer of gizmos in an unrelated product market. In practice, the as-a-sword approach is applied every time

[46] Case C-413/14 P Intel v Commission (6 September 2017) EU:C:2017:632, paras 40ff.
[47] Holmes and Meagher (n 34) 68.
[48] Nowag (n 38) 151.
[49] Maurits Dolmans, 'The "Polluter Pays" Principle As a Basis for Sustainable Competition Policy' (2020) WP, 8.
[50] Dolmans (n 49) 7.

the practice at hand concerns current or future sustainability features of product or services, which essentially correspond to the competitive parameters of quality and innovation, respectively.[51]

However, the as-a-sword approach still faces the limitation of formal and substantial antitrust liability requirements precluding over-enforcement against business behaviour that might be unsustainable but otherwise lawful under EU competition law.[52] Harm to sustainability by entities other than undertakings carrying on economic activity in the market,[53] belonging to a single economic unit,[54] lacking market power,[55] fully compelled by national legislation[56] or not implying any restriction of competition by object or effect is beyond the antitrust remit.[57] For example, Art. 102 TFEU does not prevent a non-dominant firm from undercutting more sustainable competition by selling cheaper widgets due to breaches of sustainability requirements.[58] Accordingly, even endorsing

[51] Simon Holmes and Michelle Meagher, 'A Sustainable Future: How Can Control of Monopoly Power Play a Part? Part 1. Monopoly Power: A Barrier to a Sustainable Future' (2023) 44 European Competition Law Review 16, 25.

[52] Gehring (n 15) 173.

[53] The CJEU has clarified that EU competition rules apply only to undertakings defined as any entity that carries out economic activities, consisting of offering goods or services on a market, irrespective of the legal status, the way of financing or the profit orientation; see Case C-41/90 *Höfner and Elser v Macrotron* (1991) EU:C:1991:161, para 21; Case C-180/98 *Pavlov and others v Stichting Pensioenfonds Medische Specialisten* (2000) EU:C:2000:151, paras 75–77.

[54] Under the CJEU case law, entities that are part of a single economic unit due to common control, unity of action and absence of autonomy cannot be held liable for anti-competitive agreements between them, as they are considered one undertaking; see Case C-73/95 P *Viho v Commission* (1996) EU:C:1996:164, para 16.

[55] The *De Minimis* Notice essentially excludes from the prohibition of Art. 101(1) TFEU agreements without hardcore restrictions such as price-fixing between parties lacking any market power individually and jointly; see Communication from the Commission , Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) OJ (2014) C 291/1. The abuse of dominance prohibition also requires that the undertaking concerned enjoys substantial market power over a period of time; see Communication from the Commission , Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ (2009) C 45/7, as amended by Communication from the Commission Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ (2023) C 116/1, paras 9ff.

[56] Pursuant to the state action defence, undertakings are not liable under Arts. 101–102 TFEU for anti-competitive behaviour compelled by national legislation; see Case 267/86 Pascal Van Eycke v ASPA (1988) EU:C:1988:427, paras 16–20; Case C-198/01 CIF v AGCM (2003) EU:C:2003:430, para 51.

[57] Nowag (n 38) 153; Giorgio Monti and Jotte Mulder, 'Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives' (2017) 42 European Law Review 635, 644.

[58] Iacovides and Vrettos (n 19) 101.

the as-a-sword approach, competition policy does not become a panacea and cannot substitute sector-specific regulations in remedying negative sustainability externalities that do not meet the threshold of antitrust liability.[59]

3. Competition law as a shield: sustainability efficiencies as justifications for restrictions

Indeed, most of the criticism against integrating sustainability considerations in EU competition law focuses on the risks of the as-a-shield approach, which would call for case-specific positive decisions (e.g., inapplicability decisions under Art. 10 Reg. 1/2003), comfort letters, or informal guidance[60] and general ex-ante soft law guidelines confirming the competition lawfulness of sustainability practices.[61] The main argument against promoting sustainable behaviour through laxer competition law is the legal uncertainty of substituting the consumer welfare standard for vague sustainability considerations. Since the decentralisation of enforcement with Reg. 1/2003, EU competition policy has committed to a more economic approach.[62] This approach, which promoted social welfare through increased economic efficiency as the primary goal of competition policy, has ensured consistency and predictability in the Single Market despite the plurality of public (i.e., the Commission and NCAs) and private actors (i.e., plaintiffs and defendants) involved at the Regional and national enforcement levels.[63] Allowing non-economic interests into competition policy through inconsistent and broad sustainability definitions and measures might fragment EU competition law enforcement at any such level.[64]

Antitrust authorities and judges know how to assess competitive harm and efficiency claims in economic terms; they have neither the institutional mandate nor the methodological toolkit to evaluate the long-term, diffuse, and often inter-generational consequences of market practices on sustainability.[65] Developing that toolkit would be possible in principle by borrowing expertise from sector regulators, but it would substantially increase the complexity and cost of antitrust

[59] OECD, *Competition Policy and Environment* (1996, OECD/GD(96)22), 5.

[60] See Recital 38, Reg. 1/2003; Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters) OJ (2022) C 381/9.

[61] Dreher and Held (n 9) 421.

[62] Marco Colino (n 38) 17; Gehring (n 15) 173; Lecchi (n 5) 73.

[63] Norman Hawker and Thomas Edmonds, 'Avoiding the Efficiency Trap: Resilience, Sustainability and Antitrust' (2015) 60 Antitrust Bulletin 208, 209.

[64] Malinauskaite and Erdem (n 35) 1227; Thibault Sire, 'Oldie but Goldie: The Obsolence Effects of Horizontal Concentrations and the Importance of Merger Control in a Circular Economy' (2024) 2 Concurrences 42, 45.

[65] Malinauskaite and Erdem (n 35) 1217.

assessment[66] and expose the framework to opportunistic greenwashing (i.e., firms using sustainability claims to dress up coordinated pricing or exclusionary conduct).[67]

Finally, the distributive dimension compounds the problem. In those cases where market practices improve sustainability but raise product prices or diminish variety, the enforcer would be called to a balancing act that is better left to the democratic process since it would inevitably favour given stakeholders at the expense of other interest groups.[68] Choosing sustainability over price might put poor consumers out of the market unless they can afford sustainable but more expensive products.[69] Instead of a case-specific administrative solution through competition law, the democratic process should lead to more sustainable policies. On the one hand, tax law should align consumers' willingness and ability to pay with sustainability objectives by taxing less sustainable products and subsidising more sustainable ones.[70] On the other hand, increased consumer favour for sustainability should be reflected in higher sustainability requirements in product rules and regulations, such as the Ecodesign for Sustainable Products Regulation.[71]

Table 1. Scenarios of interplay between sustainability and competition

	Sustainability impact	**Competition impact**	**EU competition law intervention**
Overall negative impact	Negative	Negative	Warranted (as-a-sword approach)
Overall positive impact	Positive	Positive	Excluded
Unsustainable but (pro)competitive	Negative	Positive	Excluded
Sustainable but anticompetitive	Positive	Negative	Controversial (as-a-shield approach)

[66] Iacovides and Mauboussin (n 19) 10.

[67] Monti (n 25) 127; OECD (n 59) 8–9 and 25.

[68] Michal Konrad Derdak, 'Square Peg in a Round Hole? Sustainability as an Aim of Antitrust Law' (2021) 23 Yearbook of Antitrust and Regulatory Studies 39, 45.

[69] Marco Colino (n 38) 11.

[70] In this sense, see the development of 'green' taxation in the EU: <https://taxation-customs.ec.europa.eu/green-taxation-0_en>.

[71] The Ecodesign for Sustainable products Regulation enhances the circular economy, energy performance and other environmental sustainability aspects of products placed on the Single Market; see Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC OJ (2024) L 1.

Between the supporters and the detractors of sustainability-oriented competition law, the EU in 2023 opted for a middle ground: its revised Guidelines on Horizontal Co-operation Agreements (the Horizontal Cooperation Guidelines, or 'HCG') dedicate the last chapter to Sustainability Agreements.[72] The HCG accommodate sustainability considerations within the consumer welfare paradigm. They introduce the distinction between the alternative concepts of individual use value benefits, individual non-use value benefits and collective benefits. Such concepts are the limited instances where sustainability effects can outweigh the anti-competitive ones and exempt otherwise anti-competitive agreements under Art. 101(3).[73] The first reflects the direct utility of the consumer from using the sustainable product or services at issue in terms of better quality, more variety, reduced price or energy-efficiency.[74] The second addresses the issues of measuring consumer willingness to pay for products' sustainable features, which might benefit third parties outside the relevant market too.[75] The latter integrates into the effects assessment the positive externalities for society deriving from the relevant horizontal cooperation agreement if such collective benefits also accrue to the consumers negatively impacted by the agreement and overall compensate these for the harm suffered due to the restriction.[76]

A significant recent development in the shield debate is the Opinion of Advocate General Emiliou delivered on 15 May 2025 in Case C-209/23 *RRC Sports GmbH v FIFA*.[77] In the context of sports and antitrust, the AG argued that 'benefits of a non-economic nature, provided that they have tangible positive repercussions on the relevant markets or on markets strictly connected to them, can also be relevant under Article 101(3) TFEU'. Interpreting the concept of 'promotion of technical or economic progress', the AG observed that '"progress" means not only increasing the size of the cake but improving its quality, sharing more equitably or ensuring that an equally tasty cake can be baked in future', a formulation that, by implication, opens space for environmental and social

[72] Communication from the European Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023) OJ C/259/1. For a comment on the 2022 draft Horizontal Cooperation Guidelines, see Roman Inderst and Stefan Thomas, 'The Scope and Limitations of Incorporating Externalities in Competition Analysis Within a Consumer Welfare Approach' (2022) 45 World Competition 351, 381–383.

[73] Roman Inderst and Stefan Thomas, 'Legal Design in Sustainable Antitrust' (2023) 19 Journal of Competition Law and Economics 556, 557; Julian Nowag, 'Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview' (2022) 1 Nordic Journal of European Law 149, 152 and 160.

[74] HCG, paras 571–574.

[75] HCG, paras 575–581.

[76] HCG, paras 582–589.

[77] Opinion of AG Emiliou delivered on 15 May 2025, Case C-209/23 *RRC Sports GmbH v Fédération internationale de football association (FIFA*), ECLI:EU:C:2025:362. The case had not yet been decided by the Court at the time of writing.

sustainability benefits within the Art. 101(3) framework. The AG also embraced a broader understanding of 'consumer', potentially including 'anyone exposed to the relevant economic activity', which would ease the substantial-overlap requirement between harmed and benefiting consumers that has been the principal bottleneck in sustainability exemption claims.[78] The judgment of the Court, when delivered, will be consequential for sustainability agreements.

The Commission's guidance framework is beginning to generate operational practice. In July 2025 it issued an informal guidance letter, the first in a new series following the 2023 HCG's open-door policy, concerning a sustainability agreement for the joint purchasing and the setting of technical specifications for electric container-handling equipment used in EU ports.[79] The Commission found that the proposed agreement did not raise concerns under Art. 101 TFEU, provided that safeguards were included ensuring that the exchange of commercially sensitive information between participating terminal operators remained limited to what was strictly necessary for the functioning of the agreement. The decision illustrates both the workability of the HCG's soft safe harbour in practice and the Commission's continuing insistence on proportionality in the scope of permitted information exchange, an evidentiary constraint that the comparative analysis in Section 5 shows is operationalised differently across national frameworks.[80]

The next section compares how national regimes have adopted, adapted, or departed from the Commission's model, and how those choices contribute to fragmentation.

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[78] For analysis of the AG's reasoning in the context of sustainability agreements and its potential significance for the Art. 101(3) fair share requirement, see Pitsos (n 31) 9, noting that the opinion 'facilitates' the HCG's framework 'by allowing benefits for different consumer groups to be weighed together when balancing them against any restrictive effects, as long as they relate to closely connected markets.

[79] European Commission, Press Release IP/25/1769 (9 July 2025). See also Pitsos (n 31) 12, noting that the guidance letter provides 'a useful example regarding the interpretation of certain safeguards' within the soft safe harbour framework and illustrates that the Commission's assessment turns on the proportionality of information sharing relative to the sustainability objective pursued.

[80] A second informal opinion issued on 15 July 2025 concerned the first application of Art. 210bis of the CMO Regulation: the Commission approved an agreement among wine producers in the Occitanie region setting indicative prices for organic and high environmental value (HVE) wine, finding the price orientation mechanism to be the least restrictive means of ensuring producers could continue to meet sustainability standards in the face of inflationary cost pressures: European Commission, Opinion of 15 July 2025 on a sustainability agreement in the French wine sector, AT.40977, Secteur du vin en Occitanie. The Belgian Guidelines provide a detailed case study on this opinion at paras. 42 and 46.

V. Comparative analysis of sustainability in EU and national competition laws

The comparative analysis that follows examines six Member States, Austria, Belgium, Greece, the Netherlands, France, and Portugal, alongside the United Kingdom. These jurisdictions were selected because they have all explicitly addressed sustainability issues under their national competition law. Taken together, they represent three main lines of variation that matter for the present analysis: (i) the legal source through which sustainability was introduced into competition law (statutory amendment versus soft law guidance); (ii) the concept of sustainability endorsed (from narrow-environmental to broad-public-interest); and (iii) the treatment of aggregate sustainability benefits in the competitive assessment (within-market versus out-of-market). Belgium has been added to this comparator group because it published stand-alone soft law guidelines on sustainability agreements in April 2026, the most recent national instrument examined, confirming the ECN trend of convergence around the HCG framework while introducing doctrinally distinctive features on the scope of the binding-rules safe harbour and the evidentiary standard for the fair share condition. This variation makes the selected cases analytically representative of the range of national approaches that generates the fragmentation this article identifies; the aim is not exhaustiveness across all ECN members, but coverage of the explicit positions that matter most for normative evaluation.[81] The three dimensions are examined in turn below as the comparative variables structuring the analysis.

Besides the Commission, several Member States have addressed sustainability issues mostly in relation to agreements under the national equivalents of Art. 101 TFEU.[82] This focus on multilateral sustainable practices addresses the so-called

[81] For a global survey of competition authority initiatives on sustainability, see Pranvera Këllezi, Paul Kobel and Bruce Kilpatrick (eds), *Sustainability Objectives in Competition and Intellectual Property Law* (Springer 2025). The present selection is consistent with those jurisdictions examined in the most recent comparative analyses: see Pitsos (n 38) passim (Netherlands, Austria, UK); Jurgita Malinauskaite and Fatih Bugra Erdem, 'Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities' (2023) 61 Journal of Common Market Studies 1211. On Belgium specifically, see Autorité belge de la concurrence (ABC/BMA), 'Lignes directrices relatives aux accords de durabilité' (2 April 2026), adopted under Art. IV.25, 2° Code de droit économique and published in the Belgian *Moniteur belge* (hereafter 'Belgian Guidelines').

[82] HCG (n 72) para 521. Most authorities adopted an open-door policy that protects from parties that engaged in good faith in a regulatory dialogue. For an earlier review of the sustainability practices of several NCAs see J. Malinauskaite, *Competition Law and Sustainability: EU and National Perspectives*, in 13 *J. Eur. Comp. L. & Pr.* (2022) 336, 343 ff.; A. Burnside – M. De Backer – D. Strohl, *Competition law and sustainability: Where have we reached? An analysis of decisional practice by national competition authorities*, in *Concurrences* 2023, 10. The Belgian guidelines establish two parallel channels for informal guidance: a 'point de vue informel' issued by the President of the Authority for novel legal questions (Art. IV.19,

first mover disadvantage:[83] an individual firm has no incentive to switch to more sustainable but costlier inputs or suppliers unless competitors do the same. The first mover would also risk missing customers for the competition, unless they immediately understand or value the sustainable switch and overcome their short-term bias for lower prices over an uncertain future payback.[84] Finally, the first mover might also suffer from the free-rider problem. Its sustainability investments, such as in marketing and consumer-awareness campaigns, may benefit competitors that do not make such investments but nonetheless sell more sustainable products.[85] To tackle such coordination problems and also considering agreements' lower threshold of relevance compared to dominance-qualified unilateral behaviour,[86] he Commission and several NCAs have sought to reduce first-mover disadvantage by offering guidance and informal channels for sustainability cooperation. They do so by providing the market with general guidelines and open-door policies for firms that seek case-specific informal guidance on their sustainability agreements, which exclude fines for those that followed such guidance in good faith.[87]

A comparison of EU and national competition policies on sustainability reveals three axes of variation that determine how far sustainability considerations can penetrate the competitive assessment:[88] the legal source through which they were introduced, the concept of sustainability each regime endorses, and the range of sustainability effects that may be weighed against competitive harm (see Table 2).

These variations acquire particular salience in light of the coordinating role of the European Competition Network (ECN).[89] Through regular exchanges,

§ 1er, 5° Code de droit économique) and an informal opinion from the auditorat, available without restriction on agreement type or novelty. For sustainability agreements specifically, the auditorat commits not to open proceedings against parties who disclosed their agreement transparently and implemented it conformably with the guidance: Belgian Guidelines, paras. 56–61.

[83] Jordan Ellison, 'A Fair Share: Time For the Carbon Defence? (2024), 3.

[84] UK Competition & Markets Authority, 'Green Agreements Guidance: Guidance on the Application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements' (2023) CMA 185, para 1.8.

[85] Monti and Mulder (n 57) 636.

[86] Marco Colino (n 38) 8.

[87] See, for instance, the Dutch broad open-door policy on sustainability agreements: The Netherlands Authority for Consumers and Markets, 'ACM's Oversight of Sustainability Agreements', Case no. ACM/23/182143 Document no. ACM/UIT/596876 (4 October 2023, unofficial English translation), para 30 and 39–40.

[88] For a global survey over sustainability competition law, see Këllezi, Kobel and Kilpatrick (n 81). Besides the Netherlands and Austria, the Hellenic Competition Commission published a staff discussion paper on sustainability competition law and a sandbox where companies can submit sustainability initiatives: for further information, visit https://www.epant.gr/en/enimerosi/sandbox.html.

[89] Commission Notice on cooperation within the Network of Competition Authorities OJ 2004 C 101/43; Joint Statement of the Council and the Commission on the functioning of the Network of Competition Authorities (Brussels, 10 December 2002).

convergence procedures, case-allocation mechanisms and the sharing of best practices and interpretative guidance, the ECN mitigates fragmentation, fosters common evidentiary standards and promotes consistent application of EU competition across Member States. Yet the ECN's soft law and peer-coordination tools have limits: they depend on political will, resource parity among NCAs and the Commission's willingness to step in under Reg. 1/2003 where divergence threatens the single market. Strengthening ECN-led templates, joint guidance and peer review would therefore be pivotal to reduce legal uncertainty for cross-border sustainability initiatives.

1. Legal source: hard law versus soft law

The first axis of divergence concerns legal source. At EU level, and in the Netherlands, France, Portugal, and now Belgium, sustainability has entered competition analysis primarily through soft law and informal guidance. Austria and Greece, by contrast, supplemented guidance with statutory intervention.[90] Significantly, the soft laws increase transparency, legal certainty, and interpretative guidance on how the antitrust authorities apply and enforce the rules in the described circumstances. However, they do not have legal force and bind only the issuing authorities' practice due to the principles of legitimate expectations and good administration,[91] not the Courts or the other antitrust authorities.

Belgium joined this soft law group with the adoption of stand-alone guidelines on 2 April 2026, the most recent national instrument among those examined.[92] The Belgian guidelines are structured in three parts: general principles for sustainability

[90] The German NCA's position is worth mentioning. The Bundeskartellamt's 2020 discussion paper *Offene Märkte und nachhaltiges Wirtschaften* maps the sustainability-competition interface without issuing a safe harbour or operational guidance, reflecting an approach that is engaged but deliberately cautious about laxer enforcement being exploited as a cover for collusion. The German NCA confirmed this restraint: in *Production laitière* (B2-87/21, March 2022) it declined to exempt a dairy sector cooperative agreement, reasoning that ensuring adequate farm incomes did not directly contribute to environmental protection, pesticide reduction, or animal welfare in the sense required for a sustainability exemption; Bundeskartellamt, 'Offene Märkte und nachhaltiges Wirtschaften, Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis' (October 2020); see also Bundeskartellamt, B2-87/21, *Production laitière* (8 March 2022), refusing an exemption on the ground that ensuring farm income does not contribute directly to environmental protection, cited in Belgian Guidelines, fn 63.

[91] See Case C-111/63 *Lemmerz-Werke v High Authority of the ECSC* [1965] EU:C:1965:76, para, where the concept of protection of legitimate expectations was first explicitly enunciated: see Eleanor Sharpston, 'European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom' (1990) 11 Northwestern Journal of International Law & Business 87.

[92] Autorité belge de la concurrence (ABC/BMA), 'Lignes directrices relatives aux accords de durabilité' (2 April 2026) ('Belgian Guidelines'), adopted under Art. IV.25, 2° Code de droit économique and published in the Belgian *Moniteur belge*; explicitly described in para. 7,

agreements (mirroring the HCG's three-tier categorisation of agreements unlikely to restrict competition, standardisation agreements, and restrictive agreements), specific rules for the agricultural sector under Art. 210bis of the CMO Regulation, and a dedicated procedure for seeking informal guidance. Two features distinguish them from the other soft law instruments surveyed. First, on the binding-rules safe harbour: the HCG applies only where parties seek to comply with requirements from legally binding international instruments.[93] The Belgian guidelines explicitly extend this safe harbour to agreements aimed at complying with national and European legally binding rules not yet fully implemented or enforced in Belgium or the EU, a practically significant expansion that mirrors the Dutch ACM's approach to national regulatory requirements and goes beyond the Commission's own guidelines.[94] Second, the Belgian guidelines include a noteworthy institutional commitment: the Belgian NCA undertakes not to open proceedings against parties who have transparently submitted their sustainability agreement for informal opinion and implemented it in conformity with the guidance given, creating a de facto procedural safe harbour analogous in function to the Greek No-Action Letter.

Although soft laws can be better than no laws, they fall short of complete legal certainty and accountability of the issuing authority compared to hard laws. Furthermore, the proliferation of both soft and hard laws at the EU and national level on similar sustainability issues leads to confusion among firms, uncertainty about which guidelines to follow, high compliance costs and risks of misapplication. Finally, the introduction of sustainability considerations directly into the competition statutes in relation to a specific provision, such as the national equivalents of Art. 101 TFEU, allows the application, *mutatis mutandis*, of the same considerations also to the other provisions.[95] Instead, soft law guidance on specific horizontal agreement cases can more hardly be extended by analogy to other cases. Nonetheless, at least Arts. 101 and 102 TFEU and their national equivalents must be interpreted consistently without contradictions since they target the same competitive goal.[96] Accordingly, in practice, dominant companies might borrow the efficiency analysis given for sustainability agreements by non-binding guidelines and try to justify their alleged abuses.

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fn 4 as complementing, rather than replacing, the Commission's HCG and the 2023 Lignes Directrices 210bis.

[93] HCG, para 528.

[94] Belgian Guidelines, para. 15(a). The BMA considers that this extension applies provided the relevant national or European rules are not yet fully implemented or enforced, and that it will 'normally not intervene' against such agreements. This contrasts with the HCG, para. 528, which confines the equivalent safe harbour to international treaties, conventions, and agreements. For the Dutch approach, which similarly extends the safe harbour to national standards, see ACM, 'ACM's Oversight of Sustainability Agreements', para. 14.

[95] Greece did this explicitly for Art. 102 TFEU and the national equivalent.

[96] Case C-124/21 P *International Skating Union v Commission* [2023] EU:C:2023:1012, para 128.

2. Concept of sustainability: from narrow-environmental to broad-public-interest

The second axis concerns the concept of sustainability itself. Here the divergence is not merely semantic. Some regimes adopt the classic tripartite understanding of sustainability as encompassing environmental, social, and economic dimensions, while others confine the inquiry to environmental protection or even more specifically to climate-related gains. Greece goes further still by embedding sustainability within a broader public-interest framework. These conceptual differences matter because they determine, at the threshold stage, which claimed benefits may even enter the competition analysis.

The soft law policy instruments adopting the classic international concept of sustainability include the Commission's 2023 Horizontal Cooperation Guidelines, with its sustainability agreements chapter,[97] the Dutch Authority for Consumers and Markets 2023 Oversight of Sustainability Agreements,[98] the French Autorité de la Concurrence's 2024 Notice on Informal Guidance from the Autorité in the area of sustainability,[99] and the Portuguese Autoridade da Concorrencia's 2024 Best Practices on Sustainability Agreements.[100] Despite the similar concept of sustainability, the Dutch guidelines go further and apply their safe harbour to agreements ensuring compliance with either international or national sustainability requirements.[101] In contrast, the European Commission's Guidelines focus exclusively on compliance with binding sustainability rules from international law.[102] Arguably, the European guidelines should protect cooperation between firms even if it targets national sustainability requirements.

Belgium's guidelines adopt the same broad classic concept, grounding it simultaneously in the Brundtland definition, the 17 UN SDGs, and Belgium's federal sustainable development strategy, which identifies four long-term challenges spanning inclusive society, resilient economy, environmental preservation, and public sector responsibility.[103] As with the Dutch, French,

[97] HCG (n 72) para 517.

[98] ACM (n 87) para 14.

[99] French Autorité de la Concurrence, 'Notice on informal guidance from the Autorité in the area of sustainability' (27 May 2024), para 1.

[100] Portuguese Autoridade da Concorrencia, 'Best Practices on Sustainability Agreements' (2024), 3. The Spanish Comisiòn Nacional de los Mercados y la Competencia also endorsed the broad notion of sustainability in its submittion to the Commission's Call for Contributions on 'Competition Policy Supporting the Green Deal', see Spanish Comisiòn Nacional de los Mercados y la Competencia, 'Competition Policy Supporting the Green Deal – Call for Contributions' (2020).

[101] ACM (n 87) paras 20–21.

[102] HCG, para 528.

[103] Belgian Guidelines, para. 9, citing the Brundtland Report, the Belgian loi du 5 mars 1997 relative à la coordination de la politique fédérale de développement durable, and the Arrêté royal du 18 juillet 2013 portant fixation de la stratégie fédérale de développement durable.

and Portuguese instruments, the Belgian guidelines apply the full triple-pillar definition of sustainability, explicitly covering environmental, social, and economic dimensions. The social dimension is illustrated by an informal assessment from March 2023 on an initiative to identify and bridge the gap between actual and living wages in the banana supply chain, assessed by the BMA under the normalisation agreement framework and found compatible with competition law.[104] This constitutes one of the few instances in European competition practice where a social sustainability objective, income adequacy for upstream agricultural workers, has been substantively assessed under Art. 101 TFEU, rather than being excluded as either irrelevant or falling outside the concept of sustainability. It stands in direct contrast with Austria's approach, which explicitly excludes social aspects from its sustainability exemption, and with the Bundeskartellamt's *Production laitière* decision, which reached a similar exclusionary outcome through the indispensability criterion.[105]

On the opposite side of the sustainability spectrum, there is Austria, which amended its Cartel and Competition Law Act (*Kartell- und Wettbewerbsrechtsänderungsgesetz – KaWeRÄG*) in 2021 to include a statutory environmental exemption.[106] The current § 2(1) of the Act, which corresponds to Art. 101(3) TFEU, specifies that "*Consumers shall also be deemed to enjoy a fair share of the benefits which result from improvements to the production or distribution of goods or the promotion of technical or economic progress if those benefits contribute substantially to an ecologically sustainable or climate-neutral economy*." Thus, Austria adopts a narrow interpretation of sustainability limited to ecological benefits.[107] Arguably, the application of this narrow concept of sustainability is more administrable given the limited resources of NCAs.[108] To clarify what are the possible ecological benefits, Section 5.2.3 of the 2022 Sustainability Guidelines of the Austrian Federal Competition Authority (*Bundeswettbewerbsbehörde – BWB*) specifies that these include climate neutrality, climate protection, transition to

[104] ABC/BMA, Communiqué de presse n° 11/2023 (30 March 2023), 'L'Autorité belge de la Concurrence examine une initiative durable visant à garantir des "salaires décents dans la filière bananière"'; Belgian Guidelines, after para 19 (Cas pratique 2). The BMA assessed the agreement under the six cumulative conditions for normalisation agreements, including transparency of the standard-setting process, voluntary participation, minimum-only requirements, proportionate information exchange, non-discriminatory access, and absence of significant competitive impact, and found them satisfied, notably because the agreement included a third-party monitoring mechanism tracking performance indicators.

[105] Bundeskartellamt, B2-87/21, *Production laitière* (8 March 2022), refusing an exemption on the ground that ensuring farm income does not contribute directly to environmental protection, cited in Belgian Guidelines, fn 63.

[106] See V. Robertson, *Sustainability: A World-First Green Exemption in Austrian Competition Law*, in 13 *J. Eur. Comp. L. & Pr.* (2022) 426.

[107] Austrian Bundeswettbewerbsbehörde, 'Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines)' (2022), para 7–8.

[108] Malinauskaite and Erdem (n 35) 1212.

circular economies, protection of biodiversity and ecosystems, and responsible use of natural resources.[109] At the same time, the Austrian NCA explicitly excludes '*aspects of sustainability other than ecological sustainability, social aspects, for example*.'[110] The Austrian narrow definition of sustainability mirrors the first Commission's Horizontal Cooperation Guidelines of 2001,[111] which were limited to environmental agreements that abated pollution in accordance with environmental laws or improved environmental conditions as defined by Art. 191 TFEU (then 174 TEC).[112] Outside the EU, also the UK Competition and Markets Authority, in its 2023 "Green Agreements Guidance" focuses on environmental sustainability and climate change agreements,[113] leaving out other societal objectives.[114]

Greece is a unique case. Like Austria, it amended its Competition Law to cater for sustainability. Unlike any other Member State, it recognised an exception not just for sustainability but for any public interest grounds in both multilateral and unilateral practices.[115] Since 2022, Art. 37A of Greek Law introduced the 'No-Action Letter' procedure that assesses whether proposed initiatives, even if restrictive of competition under either Arts. 101(1) and 102 TFEU or the national equivalents, can be justified based on the public interest. In such a case, the Hellenic Competition Commission might issue a No-Action Letter. This latter is a non-binding document where the authority states that no action will be taken against the proposed initiative as long as the factual circumstances remain constant. Furthermore, just for sustainable development initiatives, the HCC implemented a sophisticated open-door policy through a so-called 'sandbox' that is a supervised environment where undertakings can submit and test with

[109] Austrian BWB (n 107) paras 31–40.

[110] Austrian BWB (n 107) para 28.

[111] The 2010 Horizontal Cooperation Guidelines dropped the ad-hoc chapter on environment agreements and included sparse environmental considerations under the remaining chapters, chiefly the standardisation one for the purposes of environmental standards of products or processes but also the one on R&D cooperation. Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011) OJ C11/1, fn 14 and paras 257, 329, 331–332 and 149.

[112] Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001) OJ C 3/2, para 179. excluded agreements that improved environmental conditions as a by-product of other measures. Examples of environmental agreements: environmental performance standards of products or processes, setting common environmental targets, collection/recycling agreements, see Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001) OJ C 3/2, paras 181–182; see also Eva van der Zee, 'Quantifying Benefits of Sustainability Agreements Under Article 101 TFEU' (2020) 43 World Competition 189, 193–194.

[113] CMA (n 84) para 2.1. Environmental sustainability agreements are aimed at preventing, reducing or mitigating the adverse effects of economic activities have on the environment or to assist with the green transition: improving air or water quality, conserving biodiversity or natural habitats, promoting the sustainable use of raw materials.

[114] CMA (n 84) para 2.3.

[115] Art. 37A(2) Greek Competition Law no. 3959/2011.

the NCA the competition lawfulness of their business proposals. Through the sandbox, which operates as a platform linked to its website, the HCC assesses the proposed initiatives. If some competition law problems are identified, the HCC can still allow the implementation of proposals that are justified on public interest grounds, possibly subject to its supervision as outlined in the No-Action Letter.[116]

3. Treatment of aggregate sustainability benefits

The third axis concerns the treatment of aggregate benefits. The European policies differ in the type of sustainability benefits that can be considered in the competitive assessment and offset the anti-competitive effects. Although all recognise that both individuals and the general public can benefit from sustainable business practices, most policies limit the relevance of aggregate environmental benefits in the competitive assessment.[117] For the soft-safe harbour of sustainability agreements that might have restrictive effects, the 2023 HCG, to which the Dutch, French and Portuguese guidance refer,[118] requires at least a neutral overall effect on consumers in the relevant market. In other words, the sustainability efficiencies must (also) accrue to the same consumers negatively affected by the agreement and match the anti-competitive harm.[119]

Belgium's guidelines broadly reproduce the HCG's approach to collective benefits, requiring that the sustainability efficiency gains accrue to consumers substantially overlapping with those harmed by the restriction.[120] However, the Belgian guidelines include two refinements that modestly increase their flexibility relative to a strict reading of the HCG. First, the BMA clarifies that the overlap condition is satisfied even where the group of efficiency beneficiaries is broader

[116] https://sandbox.epant.gr/en/; Hellenic Competition Commission, Decision 78972022 of 11 July 2022.

[117] The 2001 HCG considered both individual and aggregate environmental benefits. It accepted that aggregate environmental benefits might outweigh negative effects on the relevant consumers. Commission Notice , Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001) OJ C 3/2, paras 193–194.

[118] The Autoridade da Concorrencia in its 2024 Best Practices on Sustainability Agreements, endorses the narrow interpretation of relevant consumers, excluding that benefits to out-of-market consumers can offset harm to consumers in the relevant market. See Portuguese Autoridade da Concorrencia (n 100) 21.

[119] HCG (n 72) para 569.

[120] Belgian Guidelines, para. 23(c) and fn. 37. The BMA specifies: 'L'Autorité considère que cette condition est également susceptible d'être remplie dans le cas où le groupe des bénéficiaires des gains d'efficience est plus large que le groupe des consommateurs affectés, mais inclut l'ensemble de ces consommateurs affectés.' On the graduated evidentiary standard, see also para. 23(c) final sub-bullet: 'si un accord ne génère qu'une restriction minime mais des gains importants pour les consommateurs sur le marché en cause, il n'est pas nécessaire de quantifier précisément ces gains.'

than the group of harmed consumers, provided it encompasses all of those harmed consumers, a formulation that reduces uncertainty for agreements with diffuse environmental benefits affecting a wide public.[121] Second, the guidelines adopt an expressly proportionate evidentiary standard: where an agreement generates only a minimal restriction but gains that manifestly outweigh the harm, precise quantification is not required; a succinct demonstration of the overlap suffices. Conversely, the more indirect the benefit and the greater the harm, the more rigorous the proof required.[122] This graduated evidentiary approach is more explicitly articulated than in either the HCG or the Dutch ACM guidelines, and offers practical guidance for firms uncertain about the threshold of proof needed for different agreement types.

Accordingly, whereas any individual use and non-use value benefits can always offset competitive harm, collective benefits beyond the relevant market can do so only if they substantially affect the same group of consumers.[123] Such an approach is consistent with the notion of consumers that must receive a fair share of the countervailing efficiency gains under the Art. 101(3) TFEU exemption.

In contrast, the Austrian Sustainability Guidelines, despite the narrow interpretation of environmental sustainability, interpret the efficiency gains requirement for the justification of otherwise anti-competitive sustainable agreements in a broad sense of out-of-market efficiencies.[124] They admit that the efficiency gains from ecological benefits can be attained even on markets other than the relevant one affected by the restriction of competition. In other words, substantial ecological benefits can be relevant even if they accrue to the general public outside Austria. This is possible due to the legal presumption under § 2(1) of the Austrian Cartel Act, which assumes that consumers in the relevant market always receive a fair share of the efficiency gains resulting from substantial ecological benefits. Differently from the HCG, the agreement might be exempted because of substantial efficiency gains from ecological benefits to the general public, also on other markets.[125] Austria's broader scope potentially includes transnational agreements affecting the entire internal market.

The Dutch ACM has gone furthest among soft law jurisdictions in operationalising an out-of-market approach. For environmental damage agreements, the ACM does not require full compensation of affected consumers if the agreement helps, in an efficient manner, to comply with an international or national sustainability requirement or to realise a concrete environmental policy goal; in such cases, a 'fair

[121] Ibid.
[122] Ibid.
[123] HCG (n 72) para 583. Dutch Policy Rule, § 22–24.
[124] Austrian BWB (n 107) para 75; on the differences between out-of-market and within-market benefits, see also Inderst and Thomas (n 72) 354–356.
[125] Austrian BWB (n 107) paras 85–87.

share' accrues to 'society at large'.[126] This approach has been put into practice most consequentially in the energy sector. In the *VEMW* case (February 2022), the ACM approved the joint purchase of electricity from a wind farm by business associations, finding that the sustainability gains from promoting renewable energy generation and helping realise climate goals outweighed the competition costs. In a more significant decision, the ACM issued a no-action letter approving an agreement between Shell and TotalEnergies for the joint marketing of carbon capture and storage services, storage of CO_2 in empty natural gas fields in the North Sea, concluding that the benefits for customers and society as a whole surpassed the costs of the restriction of competition.[127] These decisions illustrate the practical scope of the Dutch framework and provide a benchmark against which the Commission's more restrictive approach to collective benefits can be assessed.

Between the two extremes, the UK CMA has a middle way.[128] It acknowledges that environmental benefits might reach beyond the UK and applies the sustainability exemption not only if benefited UK consumers coincide with harmed ones, but also if they are on related-complementary markets and so substantially overlap with those in the relevant market.[129] As an exception to this rule, the CMA's soft-safe harbour applies to climate change agreements as long as the environmental benefits accrue to UK consumers even in unrelated markets. For the avoidance of doubt, the United Kingdom is included in this comparison as an external reference point, not as part of the EU legal order. Post-Brexit, the CMA applies UK competition law independently of EU obligations, and its guidance has no direct bearing on fragmentation within the Single Market. Its inclusion is justified by the substantive overlap between the questions it addresses and those facing EU Member States, and by the CMA's institutional influence on the broader European debate.[130]

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[126] ACM, 'ACM's Oversight of Sustainability Agreements', Case no ACM/23/182143 (4 October 2023), paras 20–21 and 48; Pitsos (n 31) 15, noting that the Dutch approach exempts environmental damage agreements where 'full compensation' for affected consumers is not necessary if the agreement efficiently helps comply with a sustainability standard, treating 'society at large' as the relevant beneficiary class.

[127] ACM, No-Action Letter, *Shell/TotalEnergies (Project Aramis)*, CO_2 storage in the North Sea; ACM, *VEMW*, joint purchasing of renewable energy (February 2022); see Pitsos (n 31) 19–20 for detailed analysis of both decisions and the conclusion that 'the models provided by the NCAs from Austria, Belgium, and the Netherlands, as well as the UK, provide a more flexible way forward that perhaps achieves a better balance between sustainability and competition in the EU.'

[128] CMA (n 84) para 5.5.

[129] CMA (n 84) paras 5.20–5.23.

[130] For the CMA's approach, including its 'open-door policy' and the distinction between environmental sustainability agreements and climate change agreements (the latter receiving more favourable treatment for out-of-market benefits), see Pitsos (n 31) 18, noting that the CMA's willingness to allow 'by-object' restrictions as 'ancillary restraints' to broader sustainability

Within the EU, the comparison of Member State approaches does reveal a lack of a unified EU-wide position, which undermines consistency in competition enforcement on the Single Market. Undertakings willing to engage in sustainable practices face a certain degree of regulatory fragmentation and possibly divergent competition law treatment in Europe. Without a single standard of assessment, firms lack a level playing field on which to design EU-wide business strategies without having to check them against all relevant national sets of competition rules. The applicable competition laws in any given case depend on the cross-border trade criterion of Art. 3(1) Reg. 1/2003. On the one hand, practices that impact just a national or sub-national market fall under the unique purview of national competition laws. In this case, the same practice promoting sustainability objectives might benefit from a more lenient treatment in one jurisdiction but not in others due to legitimate different policy choices. Given the soft law nature of the HCG, which bind the Commission only, inconsistencies at the national level are inevitable absent enforcement dialogue and international cooperation between NCAs within the European Competition Network.[131] For example, the same cooperation agreement ameliorating animal welfare might be within the Dutch safe harbour, adopting the classic international concept of sustainability, but outside the Austrian exemption, which concerns just environmental agreements. Vice versa, an environmental damage agreement that raises prices but has long-term collective benefits might be exempted under § 2(1) of the Austrian Cartel Act but less likely benefits from the Dutch soft-safe harbour.

On the other hand, practices with a direct or indirect, actual or potential appreciable impact on cross-border trade between two or more Member States fall within the scope of EU competition law. This latter can be enforced by the Commission, whose enforcement initiatives take precedence even over ongoing NCAs' ones under Art. 11(6) Reg. 1/2003. Alternatively, NCAs or national courts can enforce EU competition law in parallel with national competition laws, subject to the primacy of EU law.[132] Pursuant to the convergence rules of Art. 3(2) Reg. 1/2003, national competition laws cannot deviate neither *in peius* nor *in melius* from the Art. 101 TFEU standard vis-à-vis multilateral practices, while they can be more aggressive than Art. 102 TFEU in regulating unilateral conduct. However, in parallel enforcement cases, different national priorities and the uncertain interpretation of EU competition law can lead to variations in

agreements is a point of notable divergence from the Commission's final 2023 HCG, which dropped a similar provision present in the 2022 draft.

[131] Commission Notice on cooperation within the Network of Competition Authorities (n 89).

[132] Austrian BWB (n 107) para 27.

assessing sustainable practices. Interpretative and administrative discretion at the national level can lead to protectionism and less independent NCAs.[133]

The result is a fragmented landscape. For purely national practices, that may reflect legitimate differences in domestic policy choice. But where conduct is capable of affecting trade between Member States, divergence becomes more problematic because national authorities and courts apply EU competition law within a decentralised system that presupposes a meaningful degree of convergence.[134] The present mix of soft law, selective statutory intervention, and uneven evidentiary thresholds does not yet provide that convergence. For some, a sustainability block exemption regulation would have been a more effective approach than the HCG followed by several national policies.[135] Unlike soft laws, a block exemption regulation would be binding on NCAs and national courts, providing a more cohesive framework for sustainability-related agreements.

Table 2. Comparison of sustainability initiatives within EU and national competition laws

	Legal source	**Concept of sustainability**	**Relevant practices**	**Relevance of aggregate sustainability benefits**
EU (NL, FR, PT)	Soft law guidance	Classic	101	Limited to overlapping consumers in the relevant market
BE	Soft law guidance	Classic (+ Belgian federal sustainability strategy)	101	Limited to overlapping consumers; but broader beneficiary group acceptable if it includes all harmed consumers; proportionate evidentiary standard
GR	Hard law + soft law guidance	Public interest	101 and 102	Limited to overlapping consumers in the relevant market

[133] Lecchi (n 5) 71. In addition, the common antitrust enforcer is more independent than the national authorities since Member States are concerned about the Commission being captured by the other countries, more than they are attracted by the opportunity to capture it themselves; see Lecchi (n 5) 71.

[134] Since 2004, the EU competition provisions have been applied in a multi-level governance enforcement system by the Commission and the network of NCAs: see Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, O.J. 2003, L 1/1, Arts. 3 – 5; Correctly emphasizing such a need Or Brook, 'Struggling with Article 101(3) TFEU: Diverging Approaches of the Commission, EU Courts, and five Competition Authorities' (2019) 56 Common Market Law Review 121, 138 ff.

[135] In this sense, see Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go' (2021) 12 Journal of Competition Law & Practice 430, 440 f.

Table 2. (cont.)

	Legal source	Concept of sustainability	Relevant practices	Relevance of aggregate sustainability benefits
AT	Hard law + soft law guidance	Narrow – environmental	101	Not confined to overlapping consumers in the relevant market; substantial ecological benefits may accrue beyond the affected market
UK	Soft law guidance	Narrow – environmental	101	Limited to overlapping consumers in the relevant market

VI. Conclusions

This article examined whether, and under what conditions, EU competition law can contribute to sustainability objectives without displacing the sector-specific regulation that remains the primary instrument for delivering the sustainable transition. The starting point of the analysis is constitutional. The EU Treaties provide a clear mandate for integrating sustainability into competition enforcement: the environmental integration principle of Art. 11 TFEU and Art. 37 of the Charter of Fundamental Rights are binding horizontal provisions that require competition authorities to account for environmental sustainability in all aspects of their activity, while Arts. 2–3 TEU and 7–11 TFEU extend this obligation to social and economic sustainability dimensions. Yet as recent empirical research confirms, sustainability remains only partially recognised as a goal in the actual decisional practice of EU institutions, with the Commission's enforcement record falling significantly short of its public rhetoric, a gap that underscores the need for clearer normative standards rather than reliance on political commitment alone.[136] The constitutional mandate moreover operates within the doctrinal constraints of Arts. 101 and 102 TFEU. Competition enforcement is calibrated to detect and remedy relatively immediate, quantifiable harms to price, output, quality, and innovation. Many sustainability effects, being diffuse, inter-temporal, or accruing to out-of-market beneficiaries, resist capture within standard antitrust economics, and the 'fair share' criterion of Art. 101(3) TFEU has emerged as the principal bottleneck between the constitutional aspiration and its practical realisation.[137]

[136] Iacovides and Stylianou (n 7) 612, finding that 'the Commission's rhetoric is seemingly out of pace with decisional practice': while Commissioner speeches endorsing sustainability as a competition law goal are concentrated between 2016 and 2021, the Commission's own decisions endorsing it are concentrated between 1998 and 2003, suggesting that the two streams have moved independently. The authors identify this disconnect as itself a normative problem requiring institutional clarification.

[137] Pitsos (n 31) 5, identifying the 'fair share' criterion and the 'efficiency gains' condition of Art. 101(3) as the main 'bottleneck' for sustainability agreements, noting that it remains

The comparative analysis of Section 5 shows that this tension between constitutional mandate and doctrinal constraint is compounded by regulatory fragmentation. On legal source, the proliferation of both soft and hard law at EU and national levels on overlapping sustainability questions creates compliance costs and risks of misapplication for firms designing cross-border cooperative strategies. On the concept of sustainability, the range from Austria's narrow ecological exemption to the Netherlands' broad international-standard safe harbour to Greece's open-ended public-interest procedure generates divergent outcomes for materially similar cooperation agreements. Belgium's social sustainability engagement, illustrated by the BMA's assessment of a living-wage initiative in the banana supply chain under normalisation agreement criteria, highlights that the concept's breadth varies not just between narrow-environmental and broad-public-interest, but also in the depth of engagement with the social pillar even among jurisdictions nominally adopting the classic triple-pillar concept. On the treatment of aggregate benefits, the contrast between the HCG's within-market consumer requirement and the ACM's 'society at large' standard means that agreements generating substantial ecological benefits, of the kind recently approved in the Dutch CCS and renewable energy cases, may be assessed very differently depending on which authority asserts jurisdiction. The Commission's own enforcement practice illustrates the paradox: the July 2025 informal guidance letter on electric container-handling equipment confirms that the HCG's framework is workable in principle, yet its evidentiary conditions are stringent in ways that not all national frameworks replicate, producing rather than resolving divergence.[138]

The most immediate implication of these findings is the need for greater convergence. The Commission and NCAs should use the ECN to develop more concrete evidentiary standards for sustainability agreements, especially as regards fair share, overlap, and proof of collective benefits. Consideration may also be given to more structured forms of informal guidance and to calibrated safe harbours or exemptions for categories of sustainability cooperation that present limited competitive risks and clear benefits. More generally, competition authorities would benefit from closer cooperation with sectoral regulators where the assessment of long-term or non-market sustainability effects exceeds ordinary antitrust expertise. The central challenge is not to transform competition law into a general instrument of sustainability governance, but to ensure that sustainability

unclear how undertakings can demonstrate that consumers receive a fair share of benefits when those benefits are diffuse, inter-temporal, or accrue to society beyond the relevant market. On the measurement challenges, see Roman Inderst and Stefan Thomas, 'Integrating Benefits from Sustainability into the Competitive Assessment, How Can We Measure Them?' (2021) 12 JECLAP 705.

[138] European Commission, Press Release IP/25/1769 (9 July 2025); Pitsos (n 31) 12.

claims are assessed more consistently and predictably within the doctrinal limits of Arts. 101 and 102 TFEU.[139]

The analysis has focused on Art. 101 TFEU, where sustainability considerations have generated the most doctrinal activity and where the comparative evidence is richest. The sword-and-shield typology suggests that transposing the same framework to Art. 102 TFEU and merger control is both possible and analytically necessary: the asymmetry between the treatment of sustainability-impairing dominance and sustainability-promoting cooperation cannot be resolved within Art. 101 TFEU alone, and the divergence documented in Section V between out-of-market benefit approaches and within-market consumer requirements raises questions whose implications for merger remedies and abuse assessments remain underdeveloped. Those questions require further treatment; the constitutional and comparative framework elaborated here provides an analytical foundation.[140]

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[139] On the methodological challenges of measuring sustainability benefits, including willingness-to-pay approaches and the limitations of both cost-benefit and revealed-preference models, see Pitsos (n 31) 16–17; Inderst and Thomas (n 73), 565–566. The ACM's *Chicken of Tomorrow* decision provides an instructive, if cautionary, example: having used consumer surveys and willingness-to-pay analysis, the ACM concluded that the additional costs to consumers from the agreement outweighed the animal welfare benefits, illustrating both the utility and the limits of quantitative balancing methods.

[140] For preliminary analysis of the Art. 102 TFEU dimension, see Marios Iacovides and Christoph Vrettos, 'Falling through the Cracks No More? Article 102 TFEU and Sustainability' (2022) 10 Journal of Antitrust Enforcement 32; on merger control, see Emanuela Lecchi, 'Sustainability in EU Merger Control' (2022) 44 European Competition Law Review 70; Jacques Buhart and David Henry, 'think green Before You Apply: EU Competition Law and Climate-Change Abatement' (2021) 44 World Competition 147, 161–164.