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ARMANDO SANTONI - NICCOLÒ GALLI
RICERCATORE, UNIVERSITÀ DEGLI STUDI DI FIRENZE – RESEARCH ASSOCIATE,
EUROPEAN UNIVERSITY INSTITUTE

Pursuing Sustainability: Can't EU Competition Law Do It?

SOMMARIO: 1. Introduction. – 2. The international roots of sustainability and sustainable development. – 3. An EU constitutional perspective on sustainability and competition law. – 4. Integrating sustainability into EU competition law: the policy debate vs the European way. 5. A comparative analysis of sustainability in EU and national competition laws. – 6. Conclusions.

1. Introduction

In the last few years, we have all felt the instability of the world economy. Just while recovering from the COVID-19 pandemic, States, firms and consumers have been challenged by the Russian invasion of Ukraine, the revamped conflict in the Middle East and the worsening of

environmental and social conditions.[1] International security and defence are core public competences of States, despite firms, investors and consumers can still help stop the ongoing wars through conscious decision-making. In this sense, private initiatives could include boycotting the invaders' economies and favouring business relationships with the invaded countries.[2] Instead, for what interests here, 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.[3] In parallel to the States' pursuit of the United Nations' Sustainable Development Goals,[4] firms are embracing corporate social responsibility initiatives also thanks to capital and consumer markets' growing preference for green and fair-trade products.[5]

In answering the global call for sustainability, firms face the question of whether their unilateral or multilateral initiatives, as with any other market practices, are lawful under competition law.[6] In the end, why should companies act to improve sustainability or avoid damaging it if, in so doing, they can be held liable for antitrust infringements? On the other

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[1] World Economic Forum, *The Global Risks Report 2024* (19th Edn), 22-23.
[2] On the reaction of financial markets to firms' decision to continue operating in Russia, see Onur Kemal Tosun and Arman Eshraghi, 'Corporate Decisions in Times of War: Evidence from the Russia-Ukraine Conflict' (2022) 48 Finance Research Letters 102920.
[3] Rahul Mitra, 'Sustainability and Sustainable Development' in Craig Scott and Laurie Lewis (eds) *The International Encyclopaedia of Organisational Communication* (Wiley 2017), 1.
[4] General Assembly United Nations, Transforming Our World: the 2030 Agenda for Sustainable Development (Resolution A/RES/70/1, 21 October 2015), 14.
[5] 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).
[6] Respondents to the September 2020 European Commission's call for contributions on the interplay between sustainability and EU competition law 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.

side of the market, some or all consumers might be willing to pay a premium price for truly sustainable products and services compared to conventional ones.[7] However, is this premium price lawful even if it results partly or exclusively from the individual or collective exercise of market power? Finally, companies might pretend to be sustainable, that is engage in greenwashing, only to gain market shares or to make collusion possible.[8] Can competition law intervene against these fake sustainability initiatives?

Against this uncertain legal background, this paper analyses the emerging European competition law framework on sustainability. To do so, it employs a normative-evaluative research approach based on a doctrinal legal analysis informed by both legal and economic perspectives. The paper begins by defining sustainability and sustainable development from international and European law perspectives (Section 2.). Having clarified the terminology, the paper maps the ongoing theoretical debate on including sustainability goals in EU competition law, where traditional supporters of the consumer welfare standard oppose sustainability enthusiasts calling for both more antitrust enforcement against unsustainable practices and more leeway for sustainable market behaviour. In a nutshell, although, from a constitutional angle, the Treaties plead for an integration of sustainable development into EU competition law (Section 3.), this comes at the expense of the predictability of competitive assessments (Section 4). The European Commission in 2023 chose a middle with the revised Horizontal Cooperation Guidelines ('HCG'), which accommodated sustainability considerations within the consumer welfare standard. Despite the balanced position of the 2023 HCG, the debate on the interplay between sustainability and competition law has been revamped by the 2024 EU political elections. If the 2024-2029 Commission, following

[7] Emanuela Lecchi, 'Sustainability in EU Merger Control' (2022) 44 European Competition Law Review 70, 74.
[8] Mitra (2017), 4.

both Letta's and Draghi's suggestions, advances the EU leadership in sustainable development, [9] its competition policy must care about sustainability. At the same time, the reports also call for greater European firms' competitiveness and scale vis-à-vis foreign competition, which might face lower sustainability regulatory requirements. [10] Teresa Ribera Martinez, the current Commissioner responsible for the Competition portfolio with the role of 'Executive Vice-President for a Clean, Just and Competitive Transition',[11] has the arduous task of reconciling sustainability goals while preserving the competitive position of the European industry.[12]

The last section compares the broad EU law concept of sustainability adopted by the 2023 HCG with the ones endorsed by several of Member States' domestic competition policies,[13] such as the Dutch and Austrian ones. [14] This comparison highlights the shortcomings of a fragmented competition law approach toward sustainability. The lack of a coherent terminology exacerbates the legal uncertainty over the cross-border treatment of firms' sustainability practices that might affect trade between Member States. In turn, this legal uncertainty might explain the limited

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

[10] Letta (2024), 50-51; Draghi (2024), 37-38.

[11] Ursula von der Leyen, 'Mission Letter to Teresa Ribera Rodrìguez' (17 September 2024), 5-7.

[12] Teresa Ribera Martinez, 'Speech in the Annual CRA Brussels Conference 2024 on Competition Policy Adapted to the New Global Realities' (10 December 2024).

[13] See 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 (the 2023 Horizontal Cooperation Guidelines, or '2023 HCG'). For an early comment on the draft version, 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.

[14] For the Netherlands, see: 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).

number of sustainability initiatives being brought forward with the European antitrust authorities.[15]

2. The international roots of sustainability and sustainable development

Sustainability has become a buzzword. In layman's terms, it is the ability to continue or be continued for a long time. Often, it is used as a synonym for environmental-friendly, although a more in-depth analysis shows that it and its companion term, sustainable development, have a much broader scope with significant implications for competition policy. Highlighting their key characteristics helps in understanding how, and to what extent, competition law stands in the way or can contribute to achieving sustainability goals. While this article focuses on a law and economics perspective, particularly on the potential role of competition law in promoting sustainability, it assumes, as a matter of fact, that the ongoing environmental, social and governance degradation can be mitigated through changes in human activities.[16] While consumers can do only so much for a more sustainable future with more responsible purchasing and consumption behaviour, large multinational firms have the resources and the footprint to make a change. In their quest for sustainability through coordinated and individual actions, competition law applies to firms' practices as usual.

Originally, sustainability concerns focused on environmental issues raised by international organizations.[17] This early policy discussion is key to

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[15] 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.

[16] Among many contributions illustrating scientific evidence over the ongoing climate change, see Hoesung Lee and José Romero (eds), *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* (2023) IPCC.

[17] 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.

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.[18] 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 generations to enjoy natural resources.[19] 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".[20]

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.[21] Considering environmental factors involves avoiding the over-exploitation and depletion of non-renewable natural resources, including water, energy, the

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

[19] 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.

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

[21] Among many, see Ben Purvis, Yong Mao and Darren Robinson, 'Three Pillars of Sustainability: In Search of Conceptual Origins' (2019) 14 Sustainability Science 681.

climate, the oceans and all other terrestrial ecosystems.[22] 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.[23] In light of the above, an unsustainable business practice is a practice that pushes the market away from sustainable development goals.[24]

Since the Rio Declaration on Environment and Development in 1992, political discussions on sustainable development have increasingly highlighted the potential contributions of private actors.[25] The Paris Agreement on Climate Change (2015), part of the 2030 Agenda, further integrated sustainable development principles into business activity.[26] There is a clear interplay between competition policy and UN sustainable development goals numbers 8 '*economic growth*', 9 '*resilient infrastructure,*

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

[23] See Jonathan Harris, *Sustainability and sustainable development*, in *International Society of Ecological Economic* (2003) Internet Encyclopedia of Ecological Economics https://isecoeco.org/pdf/susdev.pdf, 1.

[24] 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.

[25] 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.

[26] 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.

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 citizens and 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*.[27]

3. 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 adoption of a sustainable development agenda at the EU level can be traced back to the Communication from the Commission to the Council and the European Parliament (COM/2005/0218), known as the Draft Declaration on Guiding

[27] For a further analysis of the different approaches related to the need to balance environmental issues and economic growth, see Carlos Alberto Ruggierio, 'Sustainability and sustainable development: A Review of principles and definitions (2021) 786 Science of Total Environment 147481, 1 ff. See also the essential work of Herman Daly, *Beyond Growth: The Economics of Sustainable Development* (Beacon, 1997).

Principles for Sustainable Development.[28] This document sees sustainable development as a fundamental principle underlying all European Union policies and actions, and outlines a set of key objectives and guiding principles that align with the internationally recognized interpretation of sustainable development. This approach is also reflected in the European implementation plan for the Sustainable Development Goals, as outlined in the 2030 Agenda. Specifically, it is followed in the Communication from the Commission COM(2019) 640 final, known as the European Green Deal, and in Regulation (EU) 2020/852, commonly referred to as the Taxonomy Regulation.[29] The Taxonomy Regulation itself is part of the European Green Deal, which provides a set of medium- and long-term policy objectives with the ultimate goal of making the European Union climate-neutral by 2050. The main objective of the Taxonomy Regulation specifically is to stream capital flows toward sustainable businesses. The European Union adopted this regulation in order to pursue the integration of sustainability considerations in investment decisions and, more generally, the establishment of common standards for the assessment of sustainable investments. Therefore, the Taxonomy Regulation has a limited impact on competition enforcement, mainly focusing on enhancing investors' awareness to distinguish truly sustainable financial products from mere greenwashing activities.

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[28] 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».

[29] 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 approach" towards environmental protection which requires the involvement of every sector of the society and the 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 following paragraphs provide an overview of the constitutional foundations of EU sustainable competition law. This analysis of the legal framework may guide the balancing test between competition enforcement and sustainable development objectives.

The EU's primary sources of law include a set of provisions that recognise sustainable development, as 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.[30] This interpretation is also in line with the European social market economy, acknowledging that many things matter more in life than 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

[30] Monti (2020), 129; Case C-413/14 *FNV Kunsten Informatie en Media v Staat der Nederlanden* EU:C:2014:2411, para 23; Cases C-115/97 to C-117/97, *Brentjens' Handelsonderneming BV cv Stichting Bedrijfspensionfonds voor de Handel in Bouwmaterialen* EU:C:1999:434, paras 51-56.

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.[31] 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,[32] 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.[33] Furthermore, broad sustainable development goals are also mentioned in

[31] See Maria Campo Comba, 'EU Competition Law and Sustainability: The Need for an Approach Focused on the Objectives of Sustainability Agreements' (2022) 15 Erasmus Law Review 190, 192.

[32] 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).

[33] 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.

Art. 21(2) TEU as guiding principles for the EU's interactions with third countries and international organizations.

Moreover, the Treaty on the Functioning of the EU even tasks the Union with several legislative competencies that relate to sustainability directly. Art. 3(1)(d) TFEU gives exclusive competence to the EU as much as on *the competition rules necessary for the functioning of the internal market* than on *the conservation of marine biological resources under the common fisheries policy*. Instead, the internal market, with the abovementioned sustainability goals of Art. 3 TEU, social policy, cohesion, agriculture, environment, transport and energy are among the shared competences between the Union and the Member States under Art. 4 TFEU relevant for sustainability purposes. Finally, the protection of human health and education are supporting competences pursuant to Art. 6 TFEU that are also core to the social component of sustainable development.

Across all its diverse competences, Art. 7 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. In this sense, competition enforcement does not occur in a vacuum but must be consistent with all other EU policies, including those relating to sustainability.[34] For the avoidance of doubts, Arts. 8-11 and 13 TFEU, explicitly impose this holistic and integrated interpretation of European constitutional values. They require the EU to account across all its policies, including competition enforcement, for gender balance (Art. 8 TFEU), employment, social protection, social inclusion, education and health (Art. 9 TFEU), non-discrimination (Art. 10 TFEU), environmental considerations (Art. 11 TFEU),[35] and animal welfare(Art. 13 TFEU). Art. 37 of the Nice

[34] 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.

[35] Literally art. 11 TFEU states that «[e]nvironmental protection requirements must be integrated into the definition and interpretation and interpretation of the Union policies

Charter adopts the same holistic approach, which requires that environmental protection and sustainable development are incorporated into all EU policies. Even Art. 191 TFEU outlines the objectives and key principles of EU action in environmental matters, emphasizing further the Union's commitment to addressing environmental challenges and promoting sustainability. Among these principles, particular relevance is attributed to the sustainability principle, which mandates the integration of environmental protection into broader economic and social policies to ensure sustainable development.

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 next section moves beyond the constitutional perspective and focuses on the more practical policy debate on the interplay between sustainability and competition law.

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and activities, in particular with a view to promoting sustainable development». About the drafting process of art. 11 TFEU, see Julian Nowag, 'The Sky is the Limit. On the Drafting of Article 11 TFEU's Integration Obligations and its Intended Reach' in Beate Sjafjell and Anja Wiesbrock (eds), T*he Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 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».

4. Integrating sustainability into EU competition law: the policy debate vs the European way

Integrating sustainability considerations into the grounded reality of EU competition policy is not as straightforward as the constitutional perspective of the Treaties would assume. [36] Sustainability-informed competition policy clashes with the more economic approach to antitrust, guided by the consumer welfare standard focusing on more, cheaper, better and innovative products regardless of sustainability. [37] 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,[38] which bestows significant enforcement powers on antitrust authorities.[39] 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.[40] Moreover, an EU

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[36] 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 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.

[37] Monti (2020), 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.

[38] Iacovides and Vrettos (2021), 96.

[39] 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.

[40] Sandra Marco Colino, 'Antitrust's Environmental Footprint: Redefining the Boundaries of Green Antitrust' (2024) The Chinese University of Hong Kong Research Paper 2024-01,

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.[41]

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.[42] In contrast, Art. 7(3) Directive 2024/1203 on the protection of the environment through criminal law,[43] 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. Furthermore, antitrust authorities under Art. 7(1) Reg. 1/2003 and Art. 10 ECN+ Directive might also impose structural remedies (i.e., divestitures of business or assets to a third party), when behavioural remedies are impractical or insufficient to remedy Arts. 101 or 102 TFEU infringements, and regularly accept structural commitments in the context of merger control.[44] Such changes to the market structure go beyond the environmental criminal law sanctions

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 Nowag (2022), 151.

[41] Gehring (2006), 173.

[42] 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 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.

[43] 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.

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

under Art. 7(2) Directive 2024/1203 mandating the closure of establishments used for committing the offence or judicial winding-up.

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.[45] 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), [46] or of substantial, immediate and foreseeable impact within the EU (i.e., the qualified effects test), irrespective of the seat or domicile of the involved companies or the place of contractual performance.[47] 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).[48] For example, the agreements between extra-EU manufacturers not to implement cleaner production technologies might be lawful for local sustainability requirements. At the same time, they 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.

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

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[45] Marek Martyniszyn, 'Intel, iiyama and Air Cargo: Far-Reaching Extraterritorial Application of EU Competition Law' (2022) 43 European Competition Law Review 505,
[46] 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.
[47] Case C-413/14 P Intel v Commission (6 September 2017) EU:C:2017:632, paras 40ff
[48] Holmes and Meagher (2023a).

conflicting legal scenario where sustainability effects redeem anti-competitive ones.[49] Think of a dominant incumbent that justifies its refusal to supply downstream competition in light of non-compliance with product sustainability standards (See Table 1. Scenarios of the interplay between sustainability and competition). Here the concern is antitrust over-enforcement that deters private sustainability initiatives.[50] 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.[51] 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 the practice at hand concerns current or future sustainability features of products or services, which essentially correspond to the competitive parameters of quality and innovation, respectively.[52]

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.[53] Harm to sustainability by entities other

[49] Nowag (2022), 151.
[50] Maurits Dolmans, 'The "Polluter Pays" Principle As a Basis for Sustainable Competition Policy' (2020) WP, 8.
[51] Dolmans (2020), 7.
[52] 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.
[53] Gehring (2006), 173.

than undertakings carrying on economic activity in the market,[54] belonging to a single economic unit,[55] lacking market power,[56] fully compelled by national legislation,[57] or not implying any restriction of competition by object or effect is beyond the antitrust remit.[58] 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.[59] Accordingly, even endorsing 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.[60]

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[54] 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.

[55] 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.

[56] 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.

[57] Pursuant to the state action defense, 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.

[58] Nowag (2022), 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.

[59] Iacovides and Vrettos (2021), 101.

[60] OECD (1996), 5

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[61] and general ex-ante soft-law guidelines confirming the competition lawfulness of sustainability practices.[62] 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.[63] 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.[64] 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.[65] Second, antitrust authorities and judges, as well as businesses, know how to assess harm to competition and countervailing efficiencies in economic terms. They would lack the resources and expertise to assess the impact of market practices on sustainability.[66] Third, such resources and

[61] 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.
[62] Dreher and Held (2022), 421.
[63] Colino (2024), 17; Gehring (2006), 173; Lecchi (2022), 73.
[64] Norman Hawker and Thomas Edmonds, 'Avoiding the Efficiency Trap: Resilience, Sustainability and Antitrust' (2015) 60 Antitrust Bulletin 208, 209.
[65] Malinauskaite and Erdem (2023), 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.
[66] Malinauskaite and Erdem (2023), 1217.

expertise could be developed or borrowed from other sectors, but their use would likely make the antitrust assessment standard less administrable due to increased complexity and cost.[67] Fourth, through such a fragmented and complex antitrust assessment, fake sustainability initiatives (i.e., greenwashing) could proliferate and bring anti-competitive effects such as collusion or foreclosure by changing economic conditions.[68] Finally, 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.[69] Choosing sustainability over price might put poor consumers out of the market unless they can afford sustainable but more expensive products.[70] Instead of a case-specific administrative solution through competition law, sustainable policies should emerge through the democratic process. 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.[71] 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.[72]

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[67] Iacovides and Mauboussin (2022), 10.
[68] Monti (2020), 127; OECD (1996), 8-9 and 25.
[69] Derdak (2021), 45
[70] Colino (2024), 11.
[71] In this sense, see the development of 'green' taxation in the EU: <https://taxation-customs.ec.europa.eu/green-taxation-0_en>.
[72] The Ecodesign for Sustaianable products Regulation enhances the circular economy, energy performance and other enviornmental 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.

Table 1. Scenarios of the 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)

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. [73] 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).[74] The first concept reflects the direct utility of

[73] 2023 HCG.
[74] Roman Inderst and Stefan Thomas, 'Legal Design in Sustainable Antitrust' (2023) 19 Journal of Competition Law and Economics 556, 557; Nowag (2022), 152 and 160.

the consumer from using the sustainable product or services at issue in terms of better quality, more variety, reduced price or energy efficiency.[75] The second concept of individual non-use value benefits addresses the issues of measuring consumer willingness to pay for products' sustainable features, which might benefit third parties outside the relevant market too.[76] The latter, collective benefits, 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.[77]

The following section compares how the European solution of encouraging sustainability-focused cooperation while ensuring competition principles has been matched, complemented and even extended, not necessarily in a harmonised way by certain Member States' recent national competition law initiatives

5. A comparative analysis of the concept of sustainability in EU and national competition laws

Besides the Commission, several Member States have addressed sustainability issues mostly in relation to agreements under the national equivalents of Art. 101 TFEU.[78] This focus on multilateral sustainable practices addresses the so-called first mover disadvantage:[79] an individual

[75] 2023 HCG, paras 571-574;
[76] 2023 HCG, paras 575-581.
[77] 2023 HCG, paras 582-589.
[78] 2023 HCG, 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 Jurgita Malinauskaite, Competition Law and Sustainability: EU and National Perspectives (2022) 13 Journal of European Competition Law & Practice 336, 343 ff.; Alec Burnside, Marjolein De Backer and Delphine Strohl, 'Competition law and sustainability: Where have we reached? An analysis of decisional practice by national competition authorities' (2023) 10 *Concurrences* 2023.
[79] Jordan Ellison, 'A Fair Share: Time For the Carbon Defence? (2024), 3.

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.[80] 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.[81] To tackle such coordination problems and also considering agreements' lower threshold of relevance compared to dominance-qualified unilateral behaviour, [82] European competition authorities incentivise cooperation with sustainable development objectives that overcome the first mover disadvantage. 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.[83]

A comparison of the EU and the national competition policies dealing specifically with sustainability highlights three key variables that impact the role of sustainability in the relevant competition laws:[84] 1. the legal

[80] 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.
[81] Monti and Mulder (2017), 636.
[82] Colino (2024), 8.
[83] 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.
[84] For a global survey over sustainability competition law, see Pranvera Kellezi, Pierre Kobel and Bruce Kilpatrick (eds), *Sustainability Objectives in Competition and Intellectual Property Law* (LIDC Springer 2024). 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.

source that introduced sustainability considerations into antitrust; 2. the concept of sustainability endorsed by the policies; 3. the range of sustainability effects considered in the competitive assessment (see Table 2. Comparison of sustainability initiatives within European competition laws).

First, regarding the legal source, the EU, the Netherlands, France, and Portugal introduced through their NCAs soft law guidance on sustainability within horizontal cooperation agreements. Instead, Austria and Greece went through the legislative process and introduced sustainability within their hard laws, followed by their NCAs' soft law guidance too. 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,[85] not the Courts or the other antitrust authorities. 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.[86] Instead,

[85] 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.
[86] Greece did this explicitly for Art. 102 TFEU and the national equivalent.

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.[87] 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.

Second, the concepts of sustainability range from the most general Greek recognition of sustainability among the public interests, to the most used international concept of the three traditional facets of economic, environmental and social sustainability, and the narrow one limited to environmental considerations of Austria (and the UK). 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,[88] the Dutch Authority for Consumers and Markets 2023 Oversight of Sustainability Agreements,[89] the French Autorité de la Concurrence's 2024 Notice on Informal Guidance from the Autorité in the area of sustainability,[90] and the Portuguese Autoridade da Concorrencia's 2024 Best Practices on Sustainability Agreements.[91] Despite the similar concept of sustainability, the Dutch guidelines go further and

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[87] Case C-124/21 P *International Skating Union v Commission* [2023] EU:C:2023:1012, para 128.
[88] 2023 HCG, para 517.
[89] 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 14.
[90] French Autorité de la Concurrence, 'Notice on informal guidance fromthe Autorité in the area of sustainability' (27 May 2024), para 1.
[91] 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 submission 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).

apply their safe harbour to agreements ensuring compliance with either international or national sustainability requirements.[92] In contrast, the European Commission's Guidelines focus exclusively on compliance with binding sustainability rules from international law.[93] Arguably, the European guidelines should protect cooperation between firms even if it targets national sustainability requirements.

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.[94] 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.[95] Arguably, the application of this narrow concept of sustainability is more administrable given the limited resources of NCAs.[96] 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*)[97] specifies that these include climate neutrality, climate protection, transition

[92] 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), paras 20-21.
[93] 2023 HCG, para 528.
[94] See Viktoria Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law' (2022) 13 Journal of European Competition Law & Practice 426.
[95] Austrian Bundeswettbewerbsbehörde, 'Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines)' (2022), para 7-8.
[96] Malinauskaite and Erdem (2023), 1212.
[97] On this point, see Anton Hartl, Alexander Koprivnikar and Ralph Taschke, 'Law Goes Green – The Austrian "Sustainability Exemption" and its interpretation by the FCA' (2023) 1 Concurrences 25.

to circular economies, protection of biodiversity and ecosystems, and responsible use of natural resources.[98] At the same time, the Austrian NCA explicitly excludes '*aspects of sustainability other than ecological sustainability, social aspects, for example*.'[99] The Austrian narrow definition of sustainability mirrors the first Commission's Horizontal Cooperation Guidelines of 2001,[100] 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).[101] Outside the EU, also the UK Competition and Markets Authority, in its 2023 "Green Agreements Guidance" focuses on environmental sustainability and climate change agreements,[102] leaving out other societal objectives.[103]

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[98] Austrian Bundeswettbewerbsbehörde, 'Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines)' (2022), para 31-40.
[99] Austrian Bundeswettbewerbsbehörde, 'Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines)' (2022), para 28.
[100] 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.
[101] 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.
[102] 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 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
[103] 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) CMA185, para 2.3.

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.[104] 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 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.[105]

As a third comparison factor, 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

[104] Art. 37A(2) Greek Competition Law no. 3959/2011.
[105] https://sandbox.epant.gr/en/; Hellenic Competition Commission, Decision 78972022 of 11 July 2022.

benefits in the competitive assessment.[106] 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,[107] 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.[108] 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.[109] 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.[110] 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

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[106] 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.

[107] 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, 'Best Practices on Sustainability Agreements' (2024), 21.

[108] 2023 HCG, para 569.

[109] 2023 HCG, para 583. Dutch Policy Rule, § 22-24.

[110] Austrian Bundeswettbewerbsbehörde, 'Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines)' (2022), para 75.

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.[111] Austria's broader scope potentially includes transnational agreements affecting the entire internal market.

Between the two extremes, the UK CMA has a middle way.[112] 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.[113] 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. The comparison highlights varied approaches and the lack of a unified EU-wide position which would ensure greater 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

[111] Austrian Bundeswettbewerbsbehörde, 'Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines)' (2022), para 85-87.
[112] 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 5.5.
[113] 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, paras 5.20-5.23.

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.[114] 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.[115] 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

[114] Commission Notice on cooperation within the Network of Competition Authorities OJ (2004) C 101/43.
[115] Austrian Bundeswettbewerbsbehörde, 'Guidelines on the Application of Sec. 2 para. 1 Cartel Act to Sustainability Cooperations (Sustainability Guidelines)' (2022), para 27.

interpretation of EU competition law can lead to variations in assessing sustainable practices. Interpretative and administrative discretion at the national level can lead to protectionism and less independent national authorities.[116]

Given the decentralized nature of competition enforcement following the modernization of EU competition law[117], it would be important to ensure a uniform interpretation of sustainability within competition enforcement.[118] For some, a sustainability block exemption regulation would have been a more effective approach than the HCG followed by several national policies. [119] 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 European 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

[116] 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; Lecchi (2022), 71.

[117] Since 2004, the EU competition provisions have been applied in a multi-level governance enforcement system by the Commission and the network of national competition authorities: 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.

[118] 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.

[119] 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 European Competition Law & Practice 430, 440 ff.

GR	Hard law + soft law guidance	Public interest	101 and 102	Limited to overlapping consumers in the relevant market
AT	Hard law + soft law guidance	Narrow - environmental	101	Unlimited?
UK	Soft law guidance	Narrow – environmental	101	Limited to overlapping consumers in the relevant market

6. Conclusions

Sustainability, encompassing environmental, economic, and social dimensions, is grounded in the EU Treaties and, as such, must be integrated across all its policies, including competition law. Further key EU policies like the European Green Deal and the Taxonomy Regulation, position sustainable development as a guiding objective. However, this broad concept of sustainability often conflicts with the narrower focus of competition law on consumer welfare and traditional economic variables like price and output. The 2023 HCG strike a balance by accommodating limited sustainability considerations within the consumer welfare framework, allowing for exemptions where sustainability benefits clearly outweigh anti-competitive effects.

Despite the role of sustainability in EU competition policy, the article concludes that this latter cannot be the primary tool for a more sustainable future. In fact, the burden of proving the economic effects of long-term sustainable processes or outcomes is more challenging than showing static short-term effects on price or output on today's consumers. The further the sustainability process or outcome is from a tangible result (e.g., at the research stage rather than at the commercialisation stage), the harder the competition assessment is of the future impact on the sustainability of any

given conduct. Competition authorities are not even best placed for this assessment compared to regulators specialised in sustainability issues, such as the environmental, health or employment protection authorities. At the same time, EU competition enforcement can support sustainability initiatives or, at least, not discourage firms' efforts for sustainable development, for example, by including sustainability consideration in the authority's priorities or in determining the level of fines.[120] Meanwhile, the various soft-law and even hard-law initiatives undertaken by several Member States underscore the need for a consistent interpretation and application of European competition law. This consistency is particularly at risk due to the decentralized nature of its enforcement. Indeed, while the HCG aim to provide a level playing field, their non-binding nature does not necessarily ensure a harmonized approach by the Member States, resulting in legal uncertainty and increased compliance costs.

The paper lays the ground for a comprehensive analysis of the role of sustainability in the enforcement of the traditional EU competition law tools, also considering that competition law scholarship and practice has mainly focused on sustainability issues under Art. 101 TFEU. Nevertheless, we advocate for a holistic and consistent application of analytical and policy advancements made under Art. 101 TFEU to Art. 102 TFEU and the control of concentrations.[121] In fact, sustainability, both as the process of improving long-term resource management and as the quality of products and services, can be scrutinised under each competition law provision. On the

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[120] For a similar conclusion, see Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) 11 JECLAP 123, 127.

[121] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C-326/1, 26.10.2012, Arts. 101-102; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings OJ L 24/1Most recently, the CJEU has reminded the need for a consistent application of Arts. 101(3) and 102 TFEU also in relation to the possibility of justifying anti-competitive practices in the Superleague judgment, see Case C-333/21 *European Superleague Company* EU:C:2023:1011, paras 186 and 201-208.

one hand, sustainable processes are made of complex activities, such as research and development for greener technologies, recycling, renewable energy use or pollution prevention, that can be economic activities with an ambivalent competitive impact on the relevant market. On the other hand, the quality of sustainable products or services, such as biodegradable materials or energy-efficient appliances, is one of the direct competitive benchmarks on which to define the relevant market, assess anti-competitive theories of harm and design remedies.