A New ‘Green’ Era for the EU – What Role for Competition Law?

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Abstract

This dissertation explores the intersection of EU competition law and sustainability, asking whether the current framework can coherently integrate environmental objectives without undermining legal certainty, consistency, and effective enforcement. It focuses on the structural tension between competition law's traditional price-centred objectives and EU's constitutional commitment to sustainability. The dissertation is centred around competition law's three pillars, and analyses how sustainability agreements are treated under the more flexible Article 101 TFEU and EU Merger Regulation, and the rigid Article 102 TFEU. The study moreover identifies enforcement inconsistencies, focusing on the progressive Dutch ACM, the radical Austria and the more cautious Bundeskartellamt, alongside a comparative analysis of the more progressive UK CMA. It reviews academic sources to highlight concerns about fragmented enforcement and the lack of consistent legal methodology. The findings underline the limits of the current framework in accommodating sustainability and point to the need for reinterpretation or reform to ensure coherence between competition law and EU's wider constitutional objectives.

Key words

EU competition law, Article 101 TFEU, enforcement practices, price and non-price parameters, legal certainty

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List of abbreviations

ACM	Authority for Consumers and Markets, Netherlands
BWB	Austrian Federal Competition Authority
CAP	Common Agricultural Policy
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority, United Kingdom
CSR	Corporate Social Responsibility
CSDDD	Corporate Sustainability Due Diligence Directive
Draft Guidelines	Draft Commission Guidelines on exclusionary abuses under Article 102 TFEU
ECN	European Competition Network
EU	European Union
ESG	Environmental, Social and Governance
GCD	Green Claims Directive
GTD	Directive (EU) 2024/825 on Empowering Consumers for the Green Transition
Horizontal Guidelines	European Commission's Horizontal Cooperation Guidelines
HBERs	Horizontal Block Exemption Regulations
NCA	National Competition Authority
OJ	Official Journal of the European Union
Regulation 139/2004	EU Merger Regulation
Regulation 1/2003	Council Regulation (EC) No 1/2003 on the implementation of Articles 101 and 102 TFEU
SIEC	Significant Impediment to Effective Competition
SSNIP	Small but Significant Non-transitory Increase in Price
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCPD	Unfair Commercial Practices Directive
VBER	Vertical Block Exemption Regulation

INTRODUCTION

Introduction

European Union (EU) competition law, enshrined in Articles 101–109 Treaty of the Functioning of the EU (TFEU),[1] has long been the cornerstone of the internal market, ensuring undistorted competition, consumer welfare, and economic efficiency.[2] Its framework rests on three main pillars: Article 101 on anti-competitive agreements,[3] Article 102 on abuse of dominance,[4] and EU Merger Regulation (Regulation 139/2004).[5] These provisions have traditionally centred on economic parameters such as price, output, quality, and innovation, with legal certainty and predictability as the foundation of competition law.[6]

Yet the rise of sustainability imperatives has challenged this orthodoxy with their non-price characteristics.[7] Environmental objectives are embedded in the EU's constitutional framework:[8] Article 3 Treaty on European Union (TEU) sets sustainable development as a core aim,[9] Article 11 TFEU requires integration of environmental protection into all EU policies, and Articles 191–193 TFEU establish specific competences on environmental protection.[10] More recently, Article 37 of the Charter of Fundamental

[1] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, arts 101–109.
[2] Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd edn, OUP 2017) 509–10.
[3] TFEU, art 101.
[4] TFEU, art 102.
[5] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EU Merger Regulation) [2004] OJ L 24/1.
[6] Barnard and Peers (n 2) 510–11.
[7] Ibid 659-61.
[8] Ibid.
[9] Consolidated Version of the Treaty on European Union [2016] OJ C202/13, art 3(3).
[10] TFEU, art 11, 191-193.

Rights (Charter) affirms the principle of high environmental protection.[11] Supported by policy instruments such as the Paris Agreement (2015) and the European Green Deal (2019),[12] these legal texts place sustainability on equal constitutional footing with competition objectives, creating a potential tension when the two collide.

The central problem is whether and how non-price parameters can be integrated within the competition law framework without undermining its core principles. Consumer welfare, as interpreted by the Commission and the CJEU, requires tangible benefits to consumers in the relevant market.[13] By contrast, sustainability benefits are often accrued diffusely to society at large, envisaged long-term and qualitative measured.[14] This creates frictions in applying Article 101(3), which requires demonstrable efficiencies and consumer pass-on, and in merger control, where efficiencies are assessed in short-term economic terms.[15]

Research Question and Sub-Questions

This dissertation asks:

- Is the current EU competition law framework capable of coherently integrating sustainability objectives while ensuring consistency, legal certainty, and effective enforcement?

Sub-Questions

[11] Charter of Fundamental Rights of the European Union (Charter) [2012] OJ C326/391, art 37.
[12] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 3; European Commission, 'The European Green Deal' COM (2019) 640 final.
[13] Case C-209/10 *Post Danmark A/S v Konkurrencerådet* EU:C:2012:172, para 22.
[14] Charter, art 37; TEU, art 11; European Commission, *The European Green Deal* (n 12).
[15] TFEU, art 101(3); 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 C259/1, paras 522–45; EU Merger Regulation (n 5).

- Can competition law accommodate non-economic objectives such as sustainability without compromising its core identity?
- Or should non-economic objectives be excluded, separately assessed, or integrated into competition law?

Methodology

This paper adopts a doctrinal legal research approach centred on the EU competition law framework and its interaction with evolving EU principles. The aim is to analyse whether the legal structure, enforcement practices, and institutional choices can integrate non-price parameters while safeguarding legal certainty, consistency, and effective enforcement. The scope remains on competition law, while using sustainability objectives as a test case to conduct the research. A doctrinal approach allows for a nuanced assessment of legal reasoning, institutional choices, and tensions between areas of law. Primary sources include the Treaties, directives, regulations, and case law, while secondary sources comprise academic literature, guidelines, and policy papers. The research centres on the three core pillars of EU competition law: Articles 101 and 102 TFEU, and EU Merger Regulation.

Key definitions

Sustainability refers to practices and objectives that ensure long-term environmental protection and, but not limited to, resource efficiency, including climate change mitigation, CO_2-emission reduction, biodiversity preservation, circular economy, and

animal welfare. Measures that, within competition law, are treated as a non-price parameter generating diffuse, collective, and often intergenerational benefits.[16]

Non-price parameters mean competition parameters beyond price. That is, quality, innovation, choice, and environmental performance.[17]

Consumer welfare is defined as the core benchmark of EU competition law, assessed primarily through price, output, quality, and choice in the relevant market. Article 101(3) and EU Merger Regulation require measurable, tangible effects and immediate pass-on benefits to the consumers of the relevant market.[18]

Literature review and contribution

Most literature argues that competition law must adopt and accommodate sustainability objectives, focusing on how this should be achieved. By contrast, this paper asks whether such integration is of sustainability into competition law is possible competition law without undermining certainty, predictability, and consumer welfare. It contributed by: (i) reviewing academic literature and identifying gaps; (ii) analysing the EU framework and enforcement practice of the Commission, CJEU, and NCAs; (iii) identifying tension when integrating non-price parameters; and (iv) conducting a comparative analysis with the CMA and Serbia, a candidate country, as benchmarks for potential EU reforms.

[16] TEU. art 3; TFEU, arts 11, 191–93; Charter, art 37; Paris Agreement (n 12); European Commission, *The European Green Deal* (n 12).
[17] European Commission, *Competition Policy Brief: Non-price effects in merger control* (2020) 1–2.
[18] Case C-67/13 P *Groupement des cartes bancaires (Cartes Bancaires) v Commission* EU:C:2014:2204, para 49; *Post Danmark* (n 13) para 22; Case C-413/14 P *Intel v Commission* EU:C:2017:632, paras 133–34; Case 27/76 *United Brands v Commission* EU:C:1978:22, paras 65–66.

Limitations

This paper deliberately excludes state aid, vertical agreements (including the VBER), and joint ventures, focusing instead on horizontal cooperation agreements (HBERs), abuse of dominance under Article 102, and merger control, where sustainability is most directly at issue. Practical limitations arise from the research timeframe and from qualitative challenges where literature is complex or inconsistent. Policy developments or legislative changes during or after the research process may also influence the final analysis.

Structure of the Dissertation

This paper proceeds as follows. Chapter 1 outlines the competition law framework and its structural frictions with sustainability. Chapters 2 and 3 analyse enforcement practice at both EU and national level, corporate strategies, and related risks. Chapter 4 undertakes a comparative analysis of the EU, the UK CMA, Serbia, and other NCAs, highlighting divergences. The conclusion answers the research question and proposes short-, mid-, and long-term structural, institutional and procedural reforms to ensure coherence and consistency between competition law and sustainability.

CHAPTER 1: LITERATURE REVIEW AND ACADEMIC DEBATE

This chapter reviews the academic debate on integrating sustainability into EU competition law. It outlines integrationist, experimentalist, and sceptical positions, before identifying common gaps in literature.

1.1 Integrationists

A body of scholarship argues for the full integration of sustainability into competition law. Malinauskaite (2022) frames competition law as both sword and shield, underlining

that sustainability objectives are part of EU's core objectives. Competition law should not obstruct anchoring sustainability within its framework.[19] She highlights the risk of fragmentation if NCAs diverge but offers no method for quantifying benefits or integrating sustainability under Article 102 or merger control.[20] Monti and Mulder (2017) similarly argue for a broader reading of Article 101(3) to accommodate sustainability, emphasising the importance of initiatives by NCAs such as the Dutch ACM.[21] They criticise the narrow EU approach and inconsistent practice, calling for more harmonisation.[22] Like Malinauskaite, they provide little on how to balance sustainability benefits against anti-competitive effects, however, they do encourage a more flexible interpretation to accommodate non-price parameters. Holmes (2024) too has consistently supported integration, describing competition law as both a powerful sword and shield against climate change. His work is widely cited and influential, stressing that a restrictive consumer welfare model risks marginalising sustainability.[23] Yet his approach is more normative than doctrinal and offers limited guidance or suggestions for concrete legal test refinements. Keskin's (2025) recent work provides a structured summary of Chapter 9 of the 2023 Horizontal Guidelines on sustainability agreements and makes several policy recommendations to the Commission's continued cautious

[19] Jurgita Malinauskaite, 'Competition Law and Sustainability: EU and National Perspectives' (2022) 13(5) *Journal of European Competition Law & Practice* 336, 337–38.
[20] Ibid 342-45.
[21] Giorgio Monti and Jotte Mulder, 'Escaping the Clutches of EU Competition Law – Pathways to Assess Private Sustainability Initiatives' (2017) 42 *European Law Review* 635, 650–52.
[22] Ibid 649–56.
[23] Simon Holmes, 'Sustainability and Competition Policy in Europe: Recent Developments' (2024) 15(8) *Journal of European Competition Law & Practice* 562, 563–66; Simon Holmes, 'Competition Policy: A Powerful Sword and Shield to Fight Climate Change' *Green European Journal* (1 August 2024) https://www.greeneuropeanjournal.eu/competition-policy-a-powerful-sword-and-shield-to-fight-climate-change/ accessed 6 September 2025.

stance.[24] She calls for sector-specific examples, stronger enforcement to prevent greenwashing and greater NCA coordination.[25] The research remains primarily prescriptive and does not supply a doctrinal methodology for balancing sustainability benefits against anti-competitive effects under Article 101(3).

1.2 Experimentalists

Monti and Mulder also emphasise the role of NCAs as "laboratories" for testing sustainability agreements in a "trial-and-error" model, where the Commission can review the outcomes under Regulation 1/2003.[26] Monti (2024) later refined this experimentalist model, arguing that it allows sustainability to enter through practice rather than doctrinal reform,[27] but at the cost of uniformity and legal certainty, with reforms developing only slowly through this incremental trial-and-error.

1.3 Sceptics

Other scholars warn that integration threatens coherence and predictability. Stylianou and Iacovides (2024) argue that sustainability is an external policy pressure, integrating sustainability risks diluting legal certainty and predictability. They emphasise that consumer welfare and efficiency must remain central benchmarks.[28] They push back on integrationist enthusiasm but offers little doctrinal development of Article 101(3) or

[24] İremsu Keskin, 'Sustainability Agreements and EU Competition Law: A Critical Analysis of Article 101 TFEU and the 2023 Horizontal Cooperation Guidelines' (EU Law Working Papers No 107, 2025) 6–9.
[25] Ibid 78.
[26] Monti and Mulder (n 21) 650–52.
[27] Giorgio Monti, 'Shaping the EU's Competition Law and Policy: Space for Multiple Actors?' in Mariolina Eliantonio, Carlo Colombo and Kathryn Wright (eds), *The Evolving Governance of EU Competition Law in a Time of Disruptions: A Constitutional Perspective* (Hart 2024) 133, 146–49.
[28] Marios C Iacovides and Konstantinos Stylianou, 'The New Goals of EU Competition Law: Sustainability, Labour Rights, and Privacy' (2024) 3 *European Law Open* 587, 604–10.

merger control. Uffer (2023) too stresses the danger of politicisation and greenwashing if competition law pursues broader public policies.[29] He argues that only narrow, measurable efficiencies such as CO_2-reduction or recycling efficiency can be accommodated under Articles 101 and 102 without undermining legal certainty or consistency across the EU.[30] These limited efficiencies must therefore be closely tied to consumer welfare in the strict traditional, measurable sense. Zelger (2022) analyses Austria's statutory sustainability exemption that may conflict with the convergence principle in Regulation 1/2003, depending on whether you interpret Article 101 narrowly (solely economic parameters) or broadly (embracing wider non-price parameters). While recognising its ground-breaking value, she cautions that divergent national exemptions risk undermining uniformity and coherence at EU level.[31]

1.4 Common Gaps

The literature reflects a spectrum of views: integrationists urge a broader interpretation of Article 101(3) to accommodate sustainability, experimentalists highlight NCAs as drivers of incremental reform, while sceptics defend traditional consumer welfare and legal certainty against dilution.[32] Despite their divergence, the same structural gaps persist: First, occurring commonly, they fail to offer a coherent methodology for balancing sustainability benefits against competitive harm.[33] Second, Article 102 and merger control remain underexplored compared to the heavy focus on Article 101(3),

[29] Matthias Uffer, 'Competition Law: Sustainability Through Competition and Participation' in Eva Julia Lohse and Birgit Peters (eds), *Sustainability Through Participation?* (Brill Nijhoff 2023) 252, 260.
[30] Ibid 267-69.
[31] Bernadette Zelger, 'The New Sustainability Exemption According to § 2(1) Austrian Cartel Act and Its Relationship with Article 101 TFEU – European Spearhead or Born to Fail?' (2022) 18 *European Competition Journal* 514, 516–18.
[32] See generally Malinauskaite (n 19); Monti and Mulder (n 21); Iacovides and Stylianou (n 28).
[33] Keskin (n 24) 25–27.

partially because sustainability benefits are harder to frame as efficiencies in abuse or merger reviews.[34] Third, national divergence, whether through experimentalist practice or statutory exemptions, risks further fragmentation under Regulation 1/2003.[35] These gaps reflect the core tension at the heart of this paper's research question: whether EU competition law framework can integrate sustainability without undermining predictability, consistency, and effective enforcement.

CHAPTER 2: THE EU COMPETITION LAW FRAMEWORK AND OBJECTIVES

This chapter outlines the traditional framework, where Articles 101, 102 and the Merger Regulation remain anchored in consumer welfare and legal certainty. It sets out the structural standards of exemption and assessment under the three pillars, and the core objectives that shape EU competition law's identity.

2.1 The Three Pillars

The Treaties do not explicitly define the core objectives of competition law, leaving interpretation to the Commission and the CJEU.[36] Historically shaped by Ordoliberalism and market-integration goals, enforcement emphasised market order, predictability, and legal certainty.[37] Today, consumer welfare and efficiency continue to dominate, yet case law illustrates ongoing debate on whether broader public policy goals can and shall be integrated.[38]

[34] Matthias Uffer, *The Quest for Purity in Competition Law* (Brill Nijhoff 2023) 279–81.
[35] Monti (n 27) 146–49; Zelger (n 31) 516–18.
[36] Barnard and Peers (n 2) 511.
[37] Ibid 510.
[38] ibid 511–13; Commission, 'Guidelines on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU]' [2004] OJ C101/97, para 13.

2.1.1 Article 101 TFEU

Article 101 has two substantive parts: 101(1), which prohibits agreements restricting competition by object or effect, and 101(3), which permits legal exemptions if the four cumulative criteria are met: efficiencies, fair share for consumers, indispensability, and no elimination of competition.[39] The revised Horizontal Block Exemption Regulations (HBERs) provide safe harbours for common pro-competitive agreements.[40] Restrictions by object are presumed harmful to competition by nature and require no further effects analysis.[41] Agreements of minor importance fall outside 101 altogether under *de minimis* doctrine.[42] Common object restrictions include cartels, price-fixing, information exchange, and some sustainability agreements.[43] Restrictions by effect require economic and legal analysis to determine their likely impact on competition.[44] Where no block exemption applies, undertakings may invoke the individual exemption under 101(3), assessing if pro-competitive benefits offset anti-competitive harm.[45]

2.1.2 Article 102 TFEU

Article 102 has a narrower scope, there is no exemption mechanism like 101.[46] Abusive conducts are either exploitative (unfair pricing or trading conditions) or exclusionary (predatory pricing, refusal to supply and tying/bundling). The CJEU defines dominance

[39] Barnard and Peers (n 2) 521; TFEU, art 101(3).
[40] Commission Regulation (EU) 2023/1066 of 1 June 2023 on the application of Article 101(3) TFEU to categories of research and development agreements [2023] OJ L143/17; Commission Regulation (EU) 2023/1067 of 1 June 2023 on the application of Article 101(3) TFEU to categories of specialisation agreements [2023] OJ L143/37 (HBERs)
[41] *Cartes Bancaires* (n 18) para 49; Barnard and Peers (n 2) 524.
[42] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU (De Minimis Notice) [2014] OJ C291/1, para 2.
[43] Barnard and Peers (n 2) p 525.
[44] Ibid 527.
[45] Ibid 524, 526.
[46] Ibid 532.

as economic strength enabling an undertaking to hinder effective competition, consequentially harming consumers.[47] Establishing dominance requires defining the relevant product and geographic market, often using tools such as the *SSNIP* test, followed by an assessment of whether the position is abused.[48] The CJEU presumes dominance at 50 per cent market share.[49] It has moreover affirmed that abuse requires likely harm to competition and consumers, not merely competitors, emphasising an effects-based approach.[50] Evidently, the focus remains on harm to competition and consumers in a strict economic sense.

2.1.3 EU Merger Regulation

The dominance test was replaced in 2004 by the "significant impediment of effective competition" (*SIEC*) test,[51] designed to close legal gaps and recognise efficiencies.[52] Efficiencies may be invoked if verifiable, merger-specific, and beneficial to consumers.[53] Here, non-price parameters can be relevant for the test, but sustainability claims must show measurable consumer pass-on benefits.[54] The reform aimed for greater accuracy and consistency by eliminating ambiguous and divergence.[55] Merger regulation therefore demonstrates flexibility and capability to evolve with the internal market.

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[47]Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paras 38–39.
[48] Barnard and Peers (n 2) 533; Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission*EU:C:1978:22; Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372/5, paras 15–17.
[49] Case C-62/86 *AKZO Chemie v Commission* [1991] ECR I-3359, para 60.
[50] *Post Danmark* (n 13) para 22; *Intel* (n 18) paras 133–39; Commission Notice (n 48) paras 2–3.
[51] EU Merger Regulation (n 5).
[52] European Commission, 'Green Paper on the Review of Council Regulation (EEC) No 4064/89' COM (2001) 745 final.
[53] European Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (Horizontal Merger Guidelines) [2004] OJ C31/5, paras 79–88.
[54] Lars-Hendrik Röller and Miguel de la Mano, 'The Impact of the New Substantive Test in European Merger Control' (European Commission, 22 January 2006) 9.
[55] Ibid 7.

2.2 Core objectives

The core benchmarks of EU competition law are efficiency, consumer welfare, the prevention of dominance abuse, and the prohibition of cartels. These principles frame how sustainability-related parameters are assessed within the legal framework.

2.2.1 Consumer Welfare

EU competition law is anchored in the consumer welfare standard, measured through price, output, quality, and choice.[56] This narrow interpretation ensures predictability and legal certainty but risks undervaluing collective benefits such as sustainability gains. The "fair share for consumers" condition in Article 101(3) requires measurable, immediate pass-on benefits, which are difficult to quantify for non-price parameters.[57] The CJEU has consistently reaffirmed consumer welfare as the core objective. In *Cartes Bancaires*, the Court stressed that restrictions "by object" must be interpreted restrictively, reserved for conduct which by its very nature harms competition.[58] In *Post Danmark I*, the Court held that abuse requires likely harm to competition and consumers, not merely competitors.[59] In *Intel*, the Court confirmed that an effects-based analysis must consider whether conduct actually forecloses competition to the detriment of consumers.[60] Lastly, in *United Brands*, the Court defined dominance as economic strength enabling conduct that harms consumers by distorting market conditions.[61]

[56] *Cartes Bancaires* (n 18) para 49.
[57] TFEU, art 101(3); European Commission, 'Notice — Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C101/97, paras 84–87 (Commission Notice on Article 81(3)).
[58] *Cartes Bancaires* (n 60) para 58.
[59] *Post Danmark* (n 13) para 22.
[60] *Intel* (n 18) paras 133–39.
[61] *United Brands* (n 18) paras 189, 250–52.

2.2.2 Efficiencies

Efficiency is central to the application of Article 101(3) and to merger control under the SIEC test.[62] Efficiencies must be verifiable, merger- or agreement-specific, and sufficiently passed on to consumers in the relevant market.[63] These conditions reflect the need for objectivity, transparency, and predictability in assessing competitive effects. They may include improvements in production, distribution, or technical progress, but only where they outweigh the harm to competition.[64] Sustainability efficiencies rarely satisfy these requirements.[65]

2.2.3 Fair Share and Out-of-Market Benefits

Under Article 101(3), restrictive agreements may be exempted only where efficiencies are passed on to consumers, ensuring they receive a "fair share" of the benefit.[66] The Commission and the CJEU interpret this strictly: benefits must reach consumers in the relevant market and take the form of measurable, tangible benefits.[67] Moreover, the restriction must be indispensable to achieve the intended goal; less restrictive alternatives must be excluded.[68] Sustainability agreements, however, often generate out-of-market benefits that accrue to society at large or to future generations.

[62] EU Merger Regulation (n 5) art 2(2).
[63] Commission Notice on Article 81(3) (n 57) paras 76–87.
[64] Horizontal Merger Guidelines (n 53) paras 76–88.
[65] Horizontal Guidelines (n 15) paras 522–45.
[66] TFEU, art 101(3).
[67]Commission Notice on Article 81(3) (n 57) paras 84–87.
[68] *Post Danmark* (n 13) para 22-3.

These rarely satisfy the narrow pass-on test, creating legal uncertainty.[69] The unresolved question is whether, and how, such benefits can be integrated into competition law.[70]

2.2.4 Legal Certainty and Division of Competences

Legal certainty ensures that undertakings can predict the legality of their conduct, and that enforcement remains consistent across the EU.[71] This involves allocation of competences and division of powers,[72] and, as a result, translates into predictability through established legal standards, strict market definition, and quantifiable assessments. The EU Merger Regulation exemplifies this emphasis: Recitals 17 and 18 confirm the Commission's exclusive competence over concentrations with an EU dimension, while Recital 28 requires the Commission to publish guidance to ensure transparency and predictability.[73] This secures uniformity but underscores the limited room for long-term or out-of-market benefits. By contrast, the enforcement of Articles 101 and 102 is decentralised under Regulation 1/2003, where powers are shared to expand enforcement, yet at the risk of fragmentation and legal uncertainty.[74] The CJEU has, in narrow settings, accepted balancing of legitimate objectives. In *Wouters*, professional rules were upheld where necessary and proportionate to legitimate aims.[75] In *Meca-Medina*, sporting rules were tested under competition law but only allowed if

[69] Bernadette Zelger, 'The New Sustainability Exemption According to § 2(1) Austrian Cartel Act and Its Relationship with Article 101 TFEU – European Spearhead or Born to Fail?' (2022) 18 *European Competition Journal* 514, 516–18; Jurgita Malinauskaite, 'Sustainability and Competition Law Enforcement: Risks of Fragmentation' (2022) 13 *Journal of European Competition Law & Practice* 575, 582.
[70] Horizontal Guidelines (n 15) paras 522–45.
[71] Case C-280/93 *Germany v Council (Bananas)* EU:C:1994:367, para 58.
[72] Barnard and Peers (n 2) 105, 204, 509–10.
[73] EU Merger Regulation (n 5) recitals 17, 18, 28; ibid arts 1–3; Monti (n 27) 146–49.
[74] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, arts 3–5.
[75] Case C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* EU:C:2002:98, paras 97–110.

proportionate.[76] These cases illustrate that non-economic objectives are not entirely excluded, but their acceptance remains exceptional and case-by-case. Moreover, it illustrates the structural imbalance: while merger assessments maintain coherence and eliminate the experimentalist element, decentralised application of Articles 101 and 102 fosters inconsistency, legal uncertainty, and the risk of forum shopping.[77]

CHAPTER 3: SUSTAINABILITY WITHIN THE FRAMEWORK

3.1 Article 101 TFEU

Sustainability agreements are primarily assessed under Article 101. The key question is whether such agreements restrict competition by object or effect, and if so, whether they can qualify for exemption under Article 101(3).[78] Examples include joint R&D for cleaner and greener technologies or withdrawal/phase-outs of harmful products.[79] Sustainability may generate long-term benefits but reduce choice or increase prices in the short term, making them hard to quantify.[80] Some collaborations may resemble object restrictions yet generate environmental benefits, while others may use "green" claims to disguise traditional restrictions.[81] It can thus be hard for the Commission and the CJEU to determine whether a non-genuine sustainability agreement restricts by object.[82] The Commission attempts to balance out over- and under- enforcement: the withdrawn Green Claims Directive proposal (GCD), would require undertakings to substantiate environmental claims and included an *ex-ante* application,[83] illustrating the

[76] Case C-519/04 P *Meca-Medina and Majcen v Commission* EU:C:2006:492, paras 42–47.
[77] Monti (n 27) 146–149.
[78] European Commission, *Policy Brief: Ten Years of EU Merger Control* (2004) 13–14.
[79] Horizontal Guidelines (n 15) para 538.
[80] Ibid para 524.
[81] Ibid paras 534-535.
[82] Ibid paras 521-522, 533, 536, 549.
[83] Ibid 7.

wider regulatory efforts to overcome greenwashing.[84] More successful, the Commission addresses non-price parameters in its revised Horizontal Guidelines.[85] It confirms that genuine sustainability agreements may fall outside 101(1) or qualify under 101(3).[86] Collective benefits may be considered, but only if substantial, verifiable, and sufficiently passed on to consumers, as opposed to society at large.[87] Benefits are distinguished between direct (individual) use and indirect (non-individual) benefits.[88] They introduce new safe harbours, particularly an illustrative sustainability-exempted list, such as compliance with legally binding conventions, competitively neutral environmentally friendly benefits, collective databases to share (un)sustainable data yet agreements.[89] Yet, they mostly remain subject to case-by-case assessment.[90]

3.2 Article 102 TFEU

Unlike Article 101, Article 102 contains no formal exemption mechanism. Dominant undertakings may invoke objective justifications or efficiencies, but these are applied narrowly. The Commission's recent Draft Communication on Exclusionary Abuses confirms a strict focus on economic harms, without sustainability-specific justification, leaving little room for non-price parameters.[91] It reaffirms an effects-based approach to exclusionary conduct but do not introduce sustainability as a defence. The focus remains

[84] European Parliamentary Research Service, '"Green Claims" Directive: Protecting Consumers from Greenwashing' (EPRS Briefing, October 2024).
[85] Horizontal Guidelines (n 15) para 524.
[86] Ibid paras 523, 527.
[87] Ibid para 518.
[88] Ibid paras 577-578.
[89] Ibid paras 528-531.
[90] Ibid para 147.
[91] European Commission, 'Draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings' (public consultation, 1 August 2024) https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en accessed 9 September 2025; Barnard and Peers (n 2) 534–35.

traditional objectives.[92] The principle of *practical concordance*, developed in German constitution law, could provide an interpretative route. It requires that conflicting Treaty objectives are equally balanced instead of being scarified for the other. For instance, treating price increases caused by the ending of "environmental dumping prices" not as consumer prejudice but as internalising externalities would align efficiency with sustainability and competition law.[93]

The also introduced a two-limb test for determining when dominant conduct is abusive: (i) whether the conduct departs from competition on the merits; and (ii) whether it can produce exclusionary effects.[94] While not binding law, this framework provides a potential opening for sustainability objectives. The first limb assesses the competition on the merits. Just as Article 101 risks falling victim to "green" shields, dominant undertakings may use "grey" strategies: unsustainable conduct that undercuts competitors from investing in compliance.[95] Such practices include predatory pricing based on environmentally harmful inputs or exclusionary rebates that drive sustainable competitors out of the market.[96] The second limb asks whether such conduct has the capacity to produce exclusionary effects. Unsustainable practices can produce exclusionary effects by enabling dominant undertakings to offer artificially cheap "green" products, undermining competitors who bear higher costs of compliance.[97] Both

[92] Draft Guidelines on Article 102 (n 91).
[93] Matthias Uffer, 'Germany: Competition Law and Sustainability' in Markus Strand and Jurgita Malinauskaite (eds), Sustainability and Competition Law in Europe (Hart 2022) 279–80.
[94] European Commission, *Draft Revised Guidelines on exclusionary abuses under Article 102 TFEU* (2023) paras 47, 59.
[95] Oxera, 'Grey or Green Giants? Sustainability and Exclusionary Abuse of Dominance under Article 102 TFEU' (Oxera Agenda, 2023) 2–3 https://www.oxera.com/insights/agenda/articles/grey-or-green-giants-sustainability-and-exclusionary-abuse-of-dominance-under-article-102-tfeu/ accessed 11 September 2025.
[96] Ibid.
[97] Ibid.

Article 101 and 102 risks undertakings use "green" claims as an opportunistic to bypass competition infringements. Thus, it is imperative that Article 102 takes part in the sustainability concerns to condemn unsustainable practices that distort the competitive greener process, even if sustainability is not yet recognised as an autonomous competition law objective.[98]

Lastly, Article 2(1)(b) of Regulation 139/2004 requires assessing whether a concentration promotes technical or economic progress to the consumer's advantage without obstructing competition.[99] This could leave interpretative room for sustainability to be considered as a non-price parameter, just as case law has recognised them in merger reviews. In *Siemens/Alstom*, the Commission relied on innovation and quality loss in rail signalling markets to prohibit the transaction.[100] Similarly, in *Dow/DuPont*, environmental effects of reduced R&D were indirectly considered within innovation theories of harm.[101] Sustainability could be placed on the same footing, avoiding the artificial reduction of "consumer welfare" to traditional price/output metrics.

3.3 EU Merger Regulation

Merger control has evolved beyond a narrow price/output focus, with the introduction of the SIEC test, allowing a broader assessment of efficiencies and consumer harm.[102] It

[98] Or Brook and Magali Eben, 'Another Missed Opportunity? Case C-252/21 *Meta Platforms v Bundeskartellamt* and the Relationship between EU Competition Law and National Laws' (2024) 15 *Journal of European Competition Law & Practice* 25, 28.
[99] EU Merger Regulation (n 5) art 2(1)(b).
[100] Case M.8677 *Siemens/Alstom* [2019] Commission Decision, paras 330–340
[101] Case M.7932 *Dow/DuPont* [2017] Commission Decision, paras 1806–1818
[102] Commission, 'Green Paper on the Review of the Merger Regulation' COM (2001) 745 final, 11 December 2001.

requires weighting pro-competitive benefits against anti-competitive effects.[103] The Commission confirmed this in policy briefs, noting that merger review must account for qualitative factors, though non-price effects must still be linked to competition parameters like quality or innovation rather than solely environmental goals.[104] Merger control has evolved beyond a narrow price-output focus, with the adoption of the SIEC test, allowing a broader balance of efficiencies and potential consumer harm.[105] It requires weighting pro-competitive benefits against anti-competitive effects, rather than relying on a purely economic assessment.[106] The Commission confirmed this in its *Policy Brief*, noting that merger review must account for qualitative factors, though non-price effects must still be linked to competition parameters like quality or innovation rather than solely environmental goals.[107] This reform reflects a flexible but cautious approach, in which sustainability objectives may be accommodated in the assessment. Case law too illustrates the cautious interpretation. In *KPS Capital Partners/Real Alloy,*[108] *Norsk Hydro/Alumetal*,[109] and *SIKA/MBCC*,[110] the Commission considered innovation efforts and sustainability-related benefits as part of its assessment to support a more competitive and eco-friendly market environment, suggesting merger regulation adapts more readily than Articles 101 and 102.

[103] Commission, *Competition Policy Brief – Non-Price Competition: EU Merger Control Framework and Case Practice* (Policy Brief) (2024) 5; Commission, *Competition Merger Brief* No 2/2023 – *EU Green Mergers & Acquisitions Deals* (Merger Brief) (2023) 7.
[104] Policy Brief – Non-Price Competition (n 103) 5–6.
[105] Commission, 'Green Paper on the Review of the Merger Regulation' COM (2001) 745 final, 11 December 2001.
[106] Policy Brief — Non-Price Competition (n 103) 5; 'Competition Merger Brief (n 103) 7.
[107] Policy Brief – Non-Price Competition (n 103) 5–6.
[108] Commission Decision in Case M.10702 *KPS Capital Partners/Real Alloy Europe* (C/2022/7602) [2023] OJ C1026, para 6.
[109] Commission Summary Decision in Case M.10658 *Norsk Hydro/Alumetal* (C/2024/7525) [2024] OJ C7525, paras 5–6.
[110] Commission Decision in Case M.10560 *Sika/MBCC Group* (C/2023/2775) (20 April 2023).

3.4 Sustainability as Sword and Shield

Competition law functions both as a sword and a shield. As a sword, Articles 101 and 102 empower NCAs to block or reject anti-competitive conduct, including "green" cartels. As a shield, undertakings may invoke efficiencies or objective justifications under Article 101(3), including sustainability.[111] The revised Horizontal Guidelines recognise such claims, but the line between genuine agreements and greenwashing remains unsettled. This duality underscores the unresolved tension: competition law both restrains and incentivises sustainability conduct, yet without clear doctrinal limits risks drifting into political discretion.[112]

3.5 Frictions between Competition Law and Sustainability

In *Albany*, the CJEU excluded collective bargaining agreements from Article 101, noting that non-price objectives can be carved out when constitutionally embedded if they pursue social policy objectives integral to the EU legal order.[113] Similarly, Article 42 TFEU exempts agriculture, giving primacy to CAP objectives.[114] Sustainability, however, has no equivalent Treaty derogation. Article 11 TFEU requires environmental protection to be integrated into all EU policies, but it does not exclude competition law or set criteria for balancing both objectives.[115] This creates structural tension: competition law is constitutionally obliged to consider sustainability but lacks a doctrinal mechanism to reconcile it with the consumer welfare standard, creating legal uncertainty.

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[111] Malinauskaite (n 69) 577; Holmes, 'Competition Policy: A Powerful Sword and Shield to Fight Climate Change' (n 23).
[112] Horizontal Guidelines (n 15) paras 522–45; Holmes, 'Competition Policy: A Powerful Sword and Shield to Fight Climate Change' (n 23).
[113] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* EU:C:1999:28, paras 59–64.
[114] TFEU, art 42.
[115] TFEU, art 11; Monti and Mulder (n 22) 649.

CHAPTER 4: ENFORCEMENT PATTERNS AND LEGAL (UN)CERTAINTY

This chapter analyses the enforcement practice of the Commission's and the CJEU, exposing inconsistencies in integrating sustainability into competition law. It contrasts the Commission's ambitious intentions with fragile legislative outcomes, analyses case law caught between formalism and flexibility, and reviews divergent enforcement arising from decentralisation and methodological caution. Lastly, it considers how enforcement risks undermine legal certainty and coherence.

4.1 The Commission

4.1.1 Ambition and Fragility

The Commission has positioned sustainability as a central policy goal, notably in the European Green Deal, which pledged to "empower consumers" and strengthen transparency of environmental claims.[116] This ambition was translated into legislative initiatives such as the proposed Green Claims Directive, intended to supplement *lex specialis* the Unfair Commercial Practices Directive (UCPD) by requiring substantiation and third-party verification of environmental claims.[117] It aimed to eliminate misleading "green" labels such as 'natural', 'CO_2 neutral' or 'recycled content', and reduce the proliferation of unverified ecolabels.[118] However, the proposal was withdrawn in June 2025, possible administrative burdens on SMEs.[119] Thus illustrates the fragility of EU legislative ambition clashing with political decisions. As a result, enforcement tools

[116] European Commission, *The European Green Deal* (n 12); European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information' COM (2022) 143 final (Green Transition Directive)
[117] European Commission, 'Proposal for a Directive on substantiation and communication of explicit environmental claims' COM (2023) 166 final, 1, 7.
[118] European Commission, 'Proposal for a Directive on Green Claims' COM (2023) 166 final, arts 3–5, 11–12, 15–17.
[119] Council of the EU, 'Withdrawal of the Proposal for a Directive on Green Claims' (June 2025).

remain unstable, fragmented and optional. The withdrawal means an increased reliance on consumer law instruments such as the UCPD and the Green Transition Directive (GTD). These target misleading environmental claims but do not regulate collusion or restrictive conduct, creating pressure on competition law to regulate "green" cartels without a clear legal basis. This spillover leaves competition law facing additional pressure to address sustainability agreements without clear or uniform standards, heightening legal uncertainty. Sustainability claims may also be used by undertakings to disguise collusive or exclusionary conduct, directly affecting enforcement.[120] This creates the risk of over-enforcement, when rejecting genuine sustainability agreements, or under-enforcement, when approving harmful agreements disguised as sustainability. Scholars argue both outcomes undermine legal certainty, leaving undertakings uncertain whether sustainable cooperation will be condemned or exempted.[121]

4.1.2 Reliance on Instruments and Guidelines

The Commission has taken a cautious stance in its guidance. The revised Horizontal Guidelines recognise collective sustainability benefits if they are substantial, verifiable, and sufficiently passed on to consumers, and only where the consumers benefiting substantially overlap with those in the relevant market.[122] This narrow approach is difficult to reconcile with broader sustainability commitments as laid out in Articles 3 TEU and 11 TFEU.[123] The HBERs likewise contain no sustainability-specific safe harbours,

[120] Oxera, 'Sustainability and Article 102 TFEU' (2022) https://www.oxera.com accessed 9 September 2025.
[121] Malinauskaite (n 19) 344; Iacovides Stylianou (n 28) 606–08; Holmes (n 23) 567.
[122] Horizontal Guidelines (n 15) paras 574–80; Commission Notice on the definition of relevant market (n 48) paras 2–3; Ginevra Bicciolo and Lisa Mildt, 'Competition Law and Sustainability: The Case for Coherence' (*Hausfeld Competition Bulletin*, 27 February 2024) https://www.hausfeld.com/what-we-think/competition-bulletin/competition-law-and-sustainability-the-case-for-coherence accessed 11 September 2025.
[123] TEU, art 3; TFEU, art 11.

leaving collaborations to be assessed case-by-case under Article 101(3).[124] This absence of codified exemptions forces NCAs to exercise discretion without uniform standards, fuelling fragmentation, legal uncertainty, and discouraging undertakings.[125] Article 102 presents an even stricter barrier. Unlike Article 101(3), it has no exemption mechanism, and the Draft Article 102 Guidelines omit sustainability as an objective justification or efficiency defence.[126] The focus remains strictly on the traditional core objectives. Undertakings therefore cannot invoke sustainability as a shield in abuse cases. This results in negative integration, where NCAs are confined to a rigid framework with no discretion to adapt Article 102 assessments to sustainability agreements, leading undertakings without flexibility even where broader societal benefits might arise.[127]

4.1.3 Enforcement Across the Pillars

In practice, whether by case law or soft law, the Commission continues the cautious and narrow scope. In *CECED* (1999), an agreement to phase out less efficient washing machines was exempted under Article 101(3) despite higher prices and reduced choice.[128] The Commission recognised environmental benefits as efficiencies in this case, but only because they translated into quantifiable energy savings for consumers.[129] By contrast, in *Car Emissions Cartel* (2021), Volkswagen, BMW, and Daimler were fined for colluding on AdBlue tank technology.[130] Despite the environmental dimension, the conduct was treated as a restriction by object for limiting innovation in emission-

[124]Horizontal Guidelines (n 15).
[125] Uffer (n 29) 262–63.
[126] Commission, 'Draft Guidelines on exclusionary abuses of dominance under Article 102 TFEU' (2023).
[127] Uffer (n 34) 279–81; Bicciolo and Mildt (n 122).
[128] Commission Decision 2000/475/EC of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV.F.1/36.718 – CECED) [2000] OJ L187/47, paras 53–55.
[129] *CECED* (n 128) paras 50–55.
[130] Commission, 'Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel cars' (Press Release, 8 July 2021) IP/21/3581.

reduction systems beyond legal minimum standards. The Commission itself admitted it was still 'working on how to address sustainability under competition law', noting that several NCAs had already taken initiatives.[131] These contrasting cases highlight the Commission's formalism: sustainability agreements may be treated as a restriction by object under Article 101(1), while the evolvement of regulatory tools falls behind.

However, there has been occasions where the Commission eased its enforcement. In 2020, the Commission introduced temporary *comfort letters* in the pharmaceutical sector during the COVID-19 pandemic under Regulation 1/2003.[132] Undertakings were reassured that necessary and proportionate collaborations (e.g. coordinate production and distribution or share stock-level information) would fall outside Article 101.[133] Although exceptional and without granting blanket immunity, this practice reduced chilling effects by signalling when collaboration would not trigger enforcement. In 2022, it introduced the Revised Informal Guidance Notice, granting undertakings to request non-binding guidance letters on unresolved questions under Articles 101 and 102.[134] In 2025, the first two sustainability-related guidance letter were issued, concerning automotive licensing and joint procurement.[135] While they do not

[131] Ibid recital summary. Commission Decision of 8 July 2021 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40178 — Car Emissions) [2021] OJ C305/8.
[132] European Commission, 'Withdrawal of Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak' [2022] OJ C381/1, paras 1–2.
[133] European Commission, *Temporary Framework Communication on antitrust rules for business cooperation in response to situations of urgency stemming from the COVID-19 outbreak* [2020] OJ C116I/7, paras 12–19.
[134] European Commission, *Revised Informal Guidance Notice on the application of Articles 101 and 102 TFEU to novel or unresolved questions* [2022] OJ C 381/7, paras 3–5.
[135] European Commission, 'Informal Guidance Letter: Automotive Licensing' IP/25/1768 (2025) https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1768 accessed 11 September 2025; European Commission, 'Informal Guidance Letter: Joint Procurement' IP/25/1769 (2025) https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1769 accessed 11 September 2025.

formally bind NCAs or courts, it establishes a permanent tool for enhancing legal certainty which has already been taken use of in the Netherlands.[136]

For Article 102, as stated, the Draft Guidelines on exclusionary abuses introduced the two-limb case.[137] While not binding law, this framework provides a potential opening for sustainability objectives. The concept of "competition on the merits" is central here, particularly the *Meta* case where the CJEU confirmed that breaches of other laws can be vital to determine competition is not on the merits and, subsequently, abuse under Article 102.[138] Therefore, non-compliance with environmental obligations such as ignoring emissions standards or engaging in "environmental dumping" could likewise be treated as conduct off the merits.[139] This opens a potential route for incorporating sustainability, yet is has not been formally recognised by the Commission.[140]

By contrast, mergers reveal more experimentation and flexibility. In *KPS/Real Alloy* (2022), recycling capacity was assessed as a competition parameter.[141] In *SIKA/MBCC* (2023), innovation in sustainable construction chemicals was explicitly considered and prioritised,[142] while *Norsk Hydro/Alumetal* (2023) recognised low-carbon aluminium as a competitive parameter.[143] Evidently, sustainability efficiencies are considered in some of the Commission's decisions, yet these cases lack a transparent

[136] Authority for Consumers and Markets, *Policy Rule on Oversight of Sustainability Agreements* (2023) 8-9 https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf accessed 8 September 2025.
[137] Draft Revised Guidelines on Article 102 (n 126) paras 47, 59.
[138] Case C-252/21 *Meta Platforms Inc and Others v Bundeskartellamt* EU:C:2023:537, paras 47, 51; Draft Guidelines on Article 102 (n 126) para 60.
[139] Tim Lubbers, *Abuse of Dominance and Sustainability Using Article 102 TFEU* (2024) 33–35.
[140] Brook and Eben (n 98) 28.
[141] *KPS Capital Partners/Real Alloy Europe* (n 108) paras 92–98.
[142] *Sika/ MBCC* (n 110), para 4-5, 104-10.
[143] *Norsk Hydro/Alumetal* (n 10), paras 134-141.

methodology. It remains uncertain when sustainability will be treated with relevance and to what extent.

What consequences do those irregular enforcement pattern have? The Commission is reluctance to codify sustainability across the three pillars results in selective and *ad hoc* integration. This creates a chilling effect, discouraging undertakings from pursuing sustainability agreements for fear of liability.[144] Until formal criteria, non-price parameters will continue to enter enforcement inconsistently and indirectly, undermining coherence and legal certainty.[145]

4.2 The CJEU – Formalism vs. Flexibility

The CJEU's case law fluctuates between strict economic analysis and cautious willingness to modernise competition law's core objectives. Evidently, to maintain a narrow application of these objectives and to preserve institutional and structural legal certainty, other policy areas are sacrificed. When reviewing case law, either the CJEU sacrifices these broader goals, or rebuke the Commission and the NCA for applying competition objectives too narrowly.

On one hand, in *Cartes Bancaires*, the Court reaffirmed the prioritisation of legal certainty and predictability.[146] This rigidity sidelines broader aims such as sustainability effects by maintaining a strict interpretation of 'sufficient degree of harm' to competition.[147] In *Post Danmark I* consumer welfare as the benchmark, anchoring the abuse of dominance assessment in short-term measurable harms, rather than wider societal effects.[148] The need for an effects-based assessment was reaffirmed in *Intel*,

[144] Malinauskaite (n 19) 344–46; Iacovides and Stylianou (n 28) 606–08.
[145] Uffer (n 34) 279–81; Holmes (n 23) 567.
[146] *Cartes Bancaires* (n 19) para 58.
[147] Ibid para 48-9.
[148] *Post Danmark I* (n 13) paras 20-22, 44.

illustrating the CJEU is not always rigid in its interpretation, but still limits the scope to consumer welfare.[149] These two cases implicitly shows that the CJEU is not shy from leaving diffuse and long-term benefits out of the equation in favour of upholding the core objectives.

On the other hand, the CJEU has also criticised the NCAs and Commission for being too narrow in their application of Article 101(3), insisting on a more effects-based, flexible approach.[150] In *Wouters*, the Court accepted professional regulation may fall outside the scope of 101 if proportionate to legitimate objectives, insisting on flexibility compared to the NCAs stricter scope.[151] In *Eturas*, uniform application of 101/102 was underlined to reduce the risk of fragmentation or procedural divergence under Regulation 1/2003.[152] Significantly, in the recent *Meta Platforms v Bundeskartellamt* ruling, the CJEU confirmed that NCAs may, when assessing abuse under Article 102, consider compliance or non-compliance with other areas if it affects competition objectives.[153] The Court underlined that GDPR compliance could be a "vital clue" in determining whether conduct departs from "competition on the merits" and has exclusionary capacity.[154] This judgment is important because it confirms that non-price parameters can be integrated. By analogy, a breach of environmental obligations could equally be treated as "off the merits" conduct under the two-limb test developed for exclusionary abuse.[155] While the Court did not recognise sustainability as an autonomous objective, arguably it allows Article 102 to evolve incrementally towards

[149] *Intel* (n 18) paras 134-136.
[150] Zelger (n 31) 514–31.
[151] *Wouters* (n 75).
[152] Case C-74/14 *Eturas and Others v Lietuvos Respublikos konkurencijos taryba* EU:C:2016:42, paras 32, 35-36.
[153] *Meta Platforms* (n 138) paras 36–39.
[154] Ibid para 47-50.
[155] ibid para 51; see also Lubbers (n 139) 33–34.

addressing non-sustainable behaviour.[156] However, economic analysis and consumer welfare remain dominant, and sustainability is neither included nor explicitly excluded. Conducts may be pro-competitive or anti-competitive depending on which objective you assess it against.[157]

4.3 National Competition Authorities (NCAs)

While the Commission and the CJEU shape the formal doctrine of EU competition law, the NCAs increasingly determine how sustainability is handled in practice. Regulation 1/2003 replaced the Commission's exclusive competence to grant exemptions under Article 101(3) with a system of parallel competences, empowering NCAs and national courts to apply Article 101(3) directly.[158] The ECN+ Directive (2019) further entrenched this framework by harmonising investigative and sanctioning powers.[159] Scholars such as Dobosz and Keskin (2023) argue that NCAs are best placed to identify gaps between sustainability claims and competition law objectives, and are lawfully entitled to fill them with their own national tests.[160] However, the decentralisation risks worsening legal divergence and certainty and undermining EU uniformity.[161]

4.3.1 Progressive Mindset

On one hand, there is the ACM. The ACM has positioned itself as one of the most progressive NCAs experimenting with sustainability. In its *Vision Document* (2014), it

[156] Brook and Eben (n 98) 26.
[157] *Bicciolo and Mildt (n 122).*
[158] Green Transition Directive (n 116) art 3.
[159] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (ECN+ Directive) [2019] OJ L11/3. TEU, art 3(3).
[160] Kamil Dobosz, 'Competition Law and Sustainability in the EU' in *Sustainability and Competition Law* (Presses de l'Université Saint-Louis 2023) 95–97; İremsu Keskin, 'Sustainability and Article 3(3) of Regulation 1/2003' (Stanford Law School, Law Working Paper No 107, April 2025) 7–10.
[161] Malinauskaite (n 69) 590.

argued that sustainability initiatives should not automatically be seen as contrary to consumer welfare if the broader balance of benefits is considered.[162] Yet in the controversial *Chicken of Tomorrow* (2014), animal-welfare benefits were deemed insufficient under Article 101(3), hence the "fair share" requirement was not fulfilled.[163] Chicken producers agreed to raise chickens in more organic conditions, increasing costs and limiting consumer choice, which in this case did not outweigh collective societal benefits. This illustrates the structural difficulty of integrating out-of-market benefits into Article 101(3) framework.

It adopted its *Policy Rule on Oversight of Sustainability Agreements* in response to the Commission's 2023 Horizontal Guidelines,[164] specifying the two categories where it will refrain from enforcement: (i) agreements complying with international or EU standards, and (ii) agreements preventing or reducing environmental damage that offset anti-competitive effects.[165] The ACM may also issue non-binding preliminary decisions, similar to the Commission's informal guidance letters, to provide undertakings with *ex ante* reassurance.[166]

The ACM is both a competition authority and a consumer protection regulator. Its Guidelines on Sustainability Claims (2023, second version) set requirements for substantiating environmental claims, aiming to reduce greenwashing.[167] The purpose is to encourage undertakings to enter into sustainability agreements. The guidelines

[162] Authority for Consumers and Markets, Vision Document on Competition and Sustainability (May, 2014), available at: https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability
[163] Authority for Consumers and Markets, *The Chicken of Tomorrow* (Case No 13.0196.53, 2014).
[164] Authority for Consumers and Markets, Policy Rule on Oversight of Sustainability Agreements (2023) 7.
[165] Holmes (n 23) 564; ACM Vision Document (n 162) 20–25.
[166] ACM Vision Document (n 162) 25-40.
[167] Authority for Consumers & Markets, *Guidelines regarding Sustainability Claims*, Version 2 (2023), available at https://www.acm.nl/en/publications/guidelines-regarding-sustainability-claims 14.

implicitly indicate that sustainability agreements which do not appreciably affect competition, will likely not be captured by Article 101, interpreting the framework in a new light.[168] 'Sustainability' has been broadly interpreted as 'the identification, prevention, restriction, or mitigation of the negative impact of economic activities on people animals, the environment, or nature'.[169] Thus, encouraging undertakings to enter into agreements or collaborations that favours sustainable developments and choices. The guidelines moreover propose revised conditions under Article 101(3), assessing efficiencies based on both price and non-price parameters.[170] The second condition, a 'fair share' passed on to consumers, will include society at large, not purely consumers on the relevant market.[171]

ACM's approach therefore reflects pragmatic experimentation within soft law, offering predictability to undertakings while testing the boundaries of Article 101(3): expanding the criteria of Article 101(3) and explicitly differentiate sustainability agreements from cartel agreements.[172] However, it does not resolve the underlying doctrinal tension with consumer welfare.[173] Dobosz argues this dual competence allows NCAs to address sustainability claims more effectively under the subsidiarity principle, whereby action is taken at national level when objectives are better achieved

[168] Malinauskaite (n 19) 343.
[169] Ibid
[170] ACM Draft Guidelines (n 169) 41-42; Malinauskaite (n 19) 343.
[171] ACM Draft Guidelines (n 169) 43-45; Malinauskaite (n 19) 343.
[172] Malinauskaite (n 19) 344.
[173] Kamil Dobosz, 'In the Quest for Sustainability – How Can National Competition Authorities Contribute?' (Presses universitaires Saint-Louis Bruxelles 2023) 201–24.

nationally.[174] Keskin similarly highlights that decentralisation enables NCAs to accommodate sustainability through national instruments.[175]

On the other hand, there is Germany. The Bundeskartellamt represents an orthodox approach to sustainability and competition law. It has tolerated voluntary initiatives such as *Initiative Tierwohl* (animal welfare), where agreements did not significantly restrict competition, but firmly rejected uniform surcharges in sectors such as milk.[176] This reflects a cautious but structured line. Malinauskaite observes that the assessments are detailed and transparent, but fundamentally restrictive: agreements are supported only where effects are limited, measurable, and directly tied to consumer welfare.[177] Keskin likewise underlines that while the Bundeskartellamt acknowledges sustainability, it resists broader balancing exercises and refuses to treat diffuse, out-of-market benefits as sufficient under Article 101(3).[178] Uffer goes further, suggesting that this stance reflects Germany's role as the 'guardian of doctrinal purity' aiming to preserve predictability and resist politicisation of competition law.[179]

Compared to the ACM's experimentalism, Germany illustrates the opposite pole of decentralised enforcement: emphasising legal certainty through orthodox interpretation, but at the cost of excluding broader societal objectives such

[174] Kamil Dobosz, 'The Quest for Sustainability – How Can National Competition Authorities Contribute?' in Delia Ferri and Fernando Pastor-Merchante (eds), *EU Competition Law and Sustainability in the Digital Era* (Presses de l'Université Saint-Louis 2022) 289, 294–295.
[175] Keskin (n 24) 26–27.
[176] Bundeskartellamt, *Initiative Tierwohl to Abolish Compulsory Premium* (Press Release, 2 June 2023); Bundeskartellamt, *Position Paper on Competition and Sustainability* (2020) https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapier/Competition_and_Sustainability.pdf accessed 5 September 2025.
[177] Malinauskaite (n 19) 344–45.
[178] Keskin (n 24) 25–26.
[179] Uffer (n 29) 267–69.

sustainability. However, the Bundeskartellamt's approach is not uniformly conservative: even though it is portrayed strictly orthodox in its Article 101(3) approach, its ruling in *Meta/Bundeskartellamt* illustrates a willingness to innovate under Article 102 by integrating non-price parameters. In this case, GDPR compliance was treated as a competitive parameter, where the court acknowledged that consumer choice and quality extend beyond price.[180] This demonstrates that, although Germany resists broad welfare balancing under Article 101, it has experimented with Article 102 to address non-traditional harms. The parallel for sustainability is evident: just as data protection was recognised as competition-relevant, ecological standards could be treated similarly if integrated into the "competition on the merits" analysis.[181]

4.3.2 Radical Mindset

Austria has adopted the most radical approach. When transposing the ECN+ Directive in 2021, Austria introduced an explicit sustainability exemption under 2(1) of the Cartel and Competition Amendment Act (Kartell und Wettbewerbsrechts Änderungsgesetz).[182] Unlike the Netherlands' soft-law experimentation or Germany's orthodox case-by-case practice, Austria gave statutory force to sustainability as a ground for exemption under Article 101(3), directly challenging the Commission's narrow scope. The provision presumes that agreements generating substantial ecological benefits for society at large may qualify for exemption, even if consumer benefits are indirect or delayed.[183] Austria is the first member state to explicitly allow out-of-market efficiencies, yet the focus

[180] *Meta Platforms (n 138) paras 83–88.*
[181] Lubbers (n 139) 23–4.
[182] K KaWeRÄG 2021, § 2(1); Malinauskaite (n 19) 345; OECD, *Environmental Considerations in Competition Enforcement*DAF/COMP/WD(2021)46.
[183] OECD Environmental Considerations (n 1182) paras 3, 5.

remains on environmental protection rather than a broad spectrum of sustainability objectives like the Netherlands.[184]

Zelger describes the reform as potentially the "world's first green exemption", but warns it risks conflict with EU law, in particular the convergence rule in Article 3(2) Regulation 1/2003 that requires uniform application of Articles 101 and 102.[185] The exemption clause tests the legal boundary of implementing explicit sustainability provisions. It depends on whether the articles are read narrowly (price parameters) or broadly (broader societal benefits), and by the Commission or the CJEU, to determine whether the provision is compatible.[186] Zelger argues that Austria's intention is not to enforce more stringent national rules, but to explicitly clarify when sustainability agreements may be eligible for exemption.[187] Malinauskaite stresses that such national divergence fuels fragmentation and incentivises forum shopping, undermining coherence, especially when this exemption only applies domestically.[188] It may create regulatory arbitrage within the ECN when the agreement may be approved in Austria, but subject to scrutiny or informally tolerated in other member states.[189] Monti frames Austria's move as 'Plan D', favouring legislative amendment over doctrinal reinterpretation, while Keskin suggests Article 3(3) Regulation 1/2003 leaves scope for member states to integrate sustainability objectives in national law.[190] Whether viewed as innovation or fragmentation, Austria's exemption exposes the unresolved tension between EU uniformity and national experimentation.

[184] Malinauskaite (n 19) 345–46.
[185] Zelger (n 31) 516–18; Regulation 1/2003 (n 74) art 3(2).
[186] Zelger (n 31) 520–24.
[187] Ibid 519–20.
[188] Malinauskaite (n 19) 345–47.
[189] Ibid.
[190] Monti (n 27) 148–49; Keskin (n 24) 28.

4.3.3 Comparative Observations

The three NCAs illustrate the spectrum of national approaches. The ACM pursues soft-law experimentation, offering undertakings *ex ante* reassurance through policy rules and guidance but without doctrinal reform.[191] The Bundeskartellamt insist on orthodox, allowing limited cooperation under Article 101(3) only where competition is not seriously restricted, emphasising legal certainty but excluding diffuse benefits.[192] Austria, by contrast, legislated a statutory exemption, testing the convergence rule in Article 3(2) Regulation 1/2003 and raising the risk of fragmentation.[193] Together, these approaches expose the structural tension created by decentralisation: experimentation encourages innovation, orthodoxy preserves predictability, and statutory divergence risks undermining EU uniformity. The lack of a common methodology leaves NCAs to become regulatory laboratories and undertakings facing legal uncertainty, and fuels forum shopping across the ECN.

4.4 Enforcement Risks and Legal Uncertainty

Competition law faces structural risks when sustainability claims enter enforcement. The absence of harmonised practice makes it difficult to distinguish between genuine agreements and disguised collusion. This exposes the systemic over-enforcement, which occurs when authorities reject agreements that could deliver long-term collective benefits, while under-enforcement arises where “green” cartels are legitimised.[194] Both outcomes undermine consumer welfare and reduce incentives to innovate. This

[191] ACM, ‘Policy Rule on Oversight of Sustainability Agreements’ (2023).
[192] Uffer (n 34) 274–76; Malinauskaite (n 19) 344–45.
[193] Zelger (n 31) 520–23.
[194] Lars-Hendrik Röller and Miguel de la Mano, ‘The Impact of the New Substantive Test in European Merger Control’ (2006) 2(1) *European Competition Journal* 9, 15–17.

uncertainty produces chilling effects: undertakings face the risk that agreements may either be exempted or condemned under Article 101(3) in another Member State without clear criteria.[195] Free-rider concerns also emerge: firms outside agreements may still benefit from eco-efficiencies, while first-movers bear costs of untested products, demand creation, and the risk of liability.[196] The Commission has attempted to address these concerns in the 2023 Horizontal Guidelines, but the criteria remain narrow and demanding. By contrast, the Article 102 Draft Guidelines offer no sustainability-specific justifications, leaving undertakings unable to rely on broader policy goals regardless.

Greenwashing poses an additional enforcement challenge. The proposed Green Claims Directive aimed to regulate misleading claims by requiring substantiation and verification, but its withdrawal leaves enforcement to consumer law instruments such as the UCPD and Green Transition Directive.[197] These, however, target consumer protection rather than anti-competitive conduct, widening the regulatory gap and highlighting the policy spillover in the absence of uniform guidance. Scholars caution against bypassing Article 101(3)'s structured balancing altogether. Uffer stresses that removing sustainability agreements from the scope of Article 101(1) would undermine legal certainty and transparency, while Röller and de la Mano highlight the risk of systemic error in a decentralised enforcement regime without uniform standards.[198]

[195] Malinauskaite (n 19) 344–46.
[196] Keskin (n 24) 26–27.
[197] European Commission, Proposal for a Directive on substantiation and communication of explicit environmental claims COM (2023) 166 final.
[198] Uffer (n 34) 279–81; Röller and de la Mano (n 194) 10–12.

CHAPTER 5: SUSTAINABILITY CLAIMS BY COMPANIES – LEGAL AND STRATEGIC RISKS

This chapter examines how undertakings invoke sustainability within competition law, highlighting the dual risk of greenwashing and strategic claims. It demonstrates the spillover effect between consumer law and competition law to regulate sustainability claims. The chapter explores how claims may function as shields for "green" cartels or abusive conduct, creating uncertainty in enforcement, and assesses whether competition law can coherently and effectively separate genuine claims from opportunistic misuse.

5.1 Consumer-facing Greenwashing

Greenwashing risks fragmenting enforcement for several reasons. Undertakings label products and brands with green or environmentally friendly symbols, schemes or claims without independent authorisation or verification. Such practices mislead consumers and undermine trust in genuine sustainability initiatives. The proposed Green Claims Directives aimed to standardise independent verification and substantiation of environmental claims by eliminating ambiguous, self-claimed labels.[199] Yet, its withdrawal means enforcement is once again left at the NCAs discretion, primarily through instruments such as the Unfair Commercial Practices Directive and the Green Transition Directive.[200] These two instruments serve to prohibit misleading practice, including vague or unverifiable environmental claims, and the Green Transition Directive introduces a hardcore ban on offset-only neutrality claims.[201]

[199] Uffer (n 34) 279–81; Röller and de la Mano (n 194) 10–12.
[200] Green Transition Directive (n 116) recs 11-17.
[201] UCPD, art 6, Green Transition Directive (n 116) recs 12–16, art 3.

Due to the lack of a uniform EU framework, enforcement has nationally developed along two tracks: *ex post* under consumer law and *ex ante* under competition law. Recently, the Danish Ombudsman fined Royal Unibrew DKK 4 million for advertising beverages as "CO_2-compensated" without independent evidence.[202] Article 5-6 and 13 of the Danish Marketing Practices Act (Markedsføringsloven), which transposes the UCPD, prohibit misleading information and practice omissions and require substantiation.[203] In a similar case, the Danish Courts found Danish Crown's "climate-controlled pork" label unlawful for lack of independent verification.[204] In 2024, the government issued a new guidance paper, requiring environmental claims to be substantiated on "solid science and law", resulting in both a spike of alleged infringement cases and the possible creation of a new chilling effect: 'greenhushing' where undertakings refrain from sustainability effects in fear of liability or fines.[205] The Amsterdam District Court also found KLM's advertisement of sustainable aviation fuel and reforestation to be exaggerated and overstated, misleading consumers with vague environmental benefits promises choosing their flights.[206] Similarly, the German Federal Court of Justice (BGH) ruled that "climate neutral" fruit gum was misleading where

[202] Forbrugerombudsmanden, 'Royal Unibrew betaler bøde på 4 millioner kroner for vildledende klimaudsagn' (17 June 2025) https://forbrugerombudsmanden.dk/nyheder/forbrugerombudsmanden/pressemeddelelser/2025/20250617-royal-unibrew-betaler-boede-paa-4-millioner-kroner-for-vildledende-klimaudsagn accessed 10 September 2025; *Forbrugerombudsmanden v Royal Unibrew* (Copenhagen City Court, 2023).
[203] *Markedsføringsloven (Consolidation Act No 426 of 3 May 2017, as amended) § 5–6, 8, 13, 37.*
[204] *The Guardian*, 'Danish firm's "climate-controlled pork" claim misleading, court rules' (1 March 2024) https://www.theguardian.com/environment/2024/mar/01/danish-firm-climate-controlled-pork-claim-misleading-court-rules accessed 2 September 2025; Danish Crown (U 2021.3547 H); BGH, *Klima-Neutral Fruit Gum* Case I ZR 98/22 (2023).
[205] DM Kommunikation, 'Greenwashing: nye anbefalinger fremmer klar kommunikation' (11 November 2024) https://dm.dk/kom/alle-artikler/2024/greenwashing-nye-anbefalinger-fremmer-klar-kommunikation/ accessed 2 September 2025.
[206] *The Guardian*, 'Dutch airline KLM misled customers with vague green claims, court rules' (20 March 2024) https://www.theguardian.com/world/2024/mar/20/dutch-airline-klm-misled-customers-green-claims-court-rulesaccessed 3 September 2025; Amsterdam District Court, *Stichting Fossielvrij NL v KLM* (ECLI:NL:RBAMS:2023:3813).

neutrality was based solely on offsetting.[207] Most recently, Germany prohibited Apple from advertising its newest Apple Watch as "Co_2-neutral", ruling that offsetting schemes based on plantation credits lacked permanence and scientific independent credibility.[208]

Although Apple contested the final decision, it announced that the "carbon neutral" label on its Apple Watches will phase out to ensure conformity with Article 101 and the Green Transition Directive amendment, which takes effect in September 2026.[209] This is another example of the growing chilling effect 'greenhushing'. These cases illustrate the dual enforcement effect, where national consumer law provides an *ex post* framework for disciplining unverified or misleading environmental claims, while competition law must determine whether sustainability claims are genuine or opportunistic under Article 101(3).

5.2 Strategic Sustainability Claims in Competition Law

The greater challenge arises when undertakings invoke sustainability strategically within competition law proceedings. Undertakings increasingly frame agreements, mergers, or collaborations as environmentally beneficial or friendly long-term, relying on Article 101(3) or efficiency defences to justify their restrictive conduct. Article 101(3) allows restrictive agreements to be exempted if they generate efficiencies indispensable to the agreement and passed on to consumers. Opportunistic claims emerge when undertakings disguises collusion with "green" labels or schemes. The indispensability requirement and the ancillary restraints doctrine function as filters against "green"

[207] Crowell & Moring, 'Green Claims: German "Climate-Neutral" Product Case' (2024) https://www.crowell.com/en/insights/client-alerts/green-claims-german-climate-neutral-product-case accessed 6 September 2025.
[208] Reuters, 'Apple Watch not a "CO_2-neutral product," German court finds' (26 August 2025) https://www.reuters.com/sustainability/climate-energy/apple-watch-not-co2-neutral-product-german-court-finds-2025-08-26/ accessed 6 September 2025.
[209] Ibid.

shield claims: if the same environmental benefit can be achieved by less restrictive means, the agreement or conduct fails to meet the conditions.[210]

Case law illustrates both willingness to expand the current scope and remaining cautious about sustainability claims used as a shield. In *CECED* (1999), the Commission approved an agreement to phase out less efficient washing machines. Here, reduced consumer energy costs offset higher prices and limited choice.[211] This shows that environmental efficiencies can be recognised, but only when translated into quantifiable consumer welfare benefits. By contrast, the *Car Emissions cartel* (2021) concerned Volkswagen, BMW and Daimler colluding on design and size of AdBlue tanks used in diesel cars, limiting innovation and distorting competition. The Commission ruled this a restriction by object, even if the selective catalytic reduction technology would reduce harmful NOx emissions beyond the legal minimum.[212] Zelger argues this decision shows the Commission's conservatism: even with environmentally beneficial outcomes, collusion remains a cartel prohibited by antitrust law.[213]

At national level, divergence deepens uncertainty for undertakings.[214] On one hand, the ACM rejected long-term ecological gains in the controversial *Chicken of Tomorrow* (2015), holding that animal welfare benefits were too diffuse to satisfy the fair share test – upholding a narrow interpretation of consumer welfare under Article

[210] Commission Notice on Article 81(3) (n 57) paras 73–86; Malinauskaite (n 69); Case 42/84 *Remia BV v Commission*EU:C:1985:327, paras 17–20; *Wouters* (n 75) paras 97–110.
[211] *CECED* (n 128).
[212] *Car Emissions* Commission Decision (n 131) paras 1, 56–60.
[213] Zelger (n 31) 520–21; European Commission 'Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars'(8 July 2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581 accessed on 13 September 2025.
[214] *Car Emissions* Commission Decision (n 131) paras 384–85.

101(3).[215] The Commission initially contested the ACM's strict assessment,[216] illustrating the tension between interpreting Article 101(3) either a narrowly according to the consumer welfare test or broadly including sustainability benefits, consequently producing divergent enforcement and practices. On the other hand, Austria legislated the statutory sustainability exemption under §2(1) of its Cartel Act, presuming ecological benefits may fulfil Article 101(3), even if indirect or delayed.[217] Germany, by contrast, maintains a cautious, case-by-case orthodoxy, approving some agreements but rejecting broader welfare balancing as a sustainability justification.[218]

Scholars underline the risks of "green" cartels invoking competition law as a shield, yet they are divided between which practice is the best. Malinauskaite warns of 'green shields' used to disguise cartels,[219] yet Dobosz believes NCAs are 'best placed' to assess sustainability but warns of opportunistic manipulation.[220] Holmes more sceptical view warns that sustainability guidance risks strengthening existing weak practices rather than accelerating substantive change,[221] while Monti likewise cautions that stretching 101(3) via soft law undermines legal certainty.[222] Lastly, Uffer stresses that bypassing Article 101(3)'s structured balancing to exclude sustainability agreements from 101(1) would undermine transparency and legitimacy.[223]

[215] TFEU, art 101(3).
[216] European Commission, Letter to the Dutch Authority for Consumers and Markets on the 'Chicken of Tomorrow' case (Case ACM/13/016, 2015).
[217] § 2(1) Cartel Act (Austria, KaWeRÄG 2021); Zelger (n 31) 427.
[218] Uffer (n 93) 150.
[219] Malinauskaite (n 69) 582
[220] Dobosz (n 160) 110.
[221] Simon Holmes, 'Climate Change, Sustainability, and Competition Law' (2020) 15(8) *Journal of European Competition Law & Practice* 561, 567.
[222]Malinauskaite (n 19) 344–46; Monti (n 27) 148–49; Holmes (n 23) 568; Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) 11 *JECLAP* 1, 5.
[223] Uffer (n 34) 279–81.

5.3 The Dual Enforcement Issue

The absence of harmonised doctrinal standards creates this dual enforcement framework. Consumer law addresses greenwashing *ex post* by requiring substantiation and verification of claims, while competition law assesses sustainability *ex ante* under Articles 101 and 102. This division produces both gaps and overlap/spillover: consumer law ensures that misleading or unfair conduct can be disciplined, but it cannot regulate collusion, while competition law can sanction collusion, yet it struggles to accommodate diffuse, long-term efficiencies. The CJEU has consistently refused to expand competition law to cover broader policy objectives. In *Albany*, collective bargaining was excluded from Article 101 because it was inherent to social policy; in *BIDS*, industrial policy justifications were rejected; and in *Cartes Bancaires*, the Court reaffirmed that competition law protects "competition as such" rather than broader goals.[224] Evidently, these rulings highlight why consumer-facing greenwashing suits better within consumer law, while competition law is ill-suited for vague sustainability claims and remains focused on collusion and abuse.

However structural systemic incoherence undermines predictability and transparency. The sword and shield dynamic illustrates this challenge: NCAs may block genuine sustainability agreements may (false negatives), while cartels invoking "green" claims may escape scrutiny (false positives).[225] Yet, as laid out in the Horizontal Guidelines, the scope of such justifications is narrow.[226] Nonetheless, this produces a

[224] *Albany* (n 113) paras 59–64; Case C-209/07 *Beef Industry Development Society (BIDS) v Competition Authority*EU:C:2008:643, paras 21–23, 66–72; *Cartes Bancaires* (n 18) paras 37–38.
[225] Röller and de la Mano (n 194) 16–18; Uffer (n 34) 275–77.
[226] Horizontal Guidelines (n 15) para 544.

chilling effect where undertakings hesitate to invest, innovate or collaborate in sustainability projects for fear of liability or infringements.

5.4 Enforcement Challenges

Enforcement authorities across the EU face structural difficulties when dealing with sustainability claims as a non-price parameter. On one hand, consumer law enforcers must verify the accuracy of environmental advertising *ex post*, often from undertakings with complex unsubstantiated evidence. Yet, these exaggerated and misleading claims are mostly rejected by the national courts. On the other hand, competition law enforcers face a different but equally complex task: assessing *ex ante* whether alleged sustainability efficiencies under Article 101(3) are genuine or opportunistic. The *Chicken of Tomorrow* demonstrates the difficulty of weighing diffuse sustainability benefits (in this case animal welfare) against immediate consumer costs, and similar challenges arise in merger control when undertakings present overstated environmental efficiencies.[227]

The risks of misapplication are substantial. Over-enforcement may chill genuine conduct: the emerging of 'greenhushing' may refrain undertakings from entering into sustainability agreements. Conversely, under-enforcement risks allowing "green" shields, where sustainability claims masks cartelisation or exclusionary conduct.[228]

Article 102 deepens these challenges as, unlike Article 101(3), it contains no exemption mechanism. Dominant undertakings may raise efficiency or objective justification defences, but the 2024 Draft Guidelines confirm a narrow focus on price, output, and consumer welfare within the relevant market. Here, sustainability is absent

[227] *Chicken of Tomorrow* (n 163); *CECED* (n 128).
[228] Malinauskaite (n 69) 344–45, 582.

as a defence.[229] Bicciolo and Mildt argue that this structural rigidity creates negative integration, where both NCAs and undertakings are locked into a rigid framework that excludes diffuse, long-term efficiencies.[230] Bear in mind, these guidelines are the most recent statements on abuse of dominance, yet the Commission has continued to adopt a narrow approach, underlining continued institutional conservatism.

Some scholars have proposed interpretative routes. Uffer suggests applying the German constitutional principle of practical concordance.[231] More sceptical scholars like Holmes warns that soft-law sustainability guidance risks consolidating inconsistent practice.[232] Malinauskaite similarly highlights that the absence of EU-level guidance leaves NCAs improvising, fuelling inconsistency and legal uncertainty.[233] These challenges are in practice acute and, ultimately, leads to fragmentation. Evidently, such divergence generates forum-shopping risks and undermines predictability for undertakings.[234] The enforcement challenge is therefore not just doctrinal, but institutional. NCAs lack the expertise to evaluate environmental science and may not be properly equipped for the task, yet they are increasingly expected to adjudicate and receive discretion to assess efficiencies and exemptions.[235] Without harmonised EU standards, courts will remain resistant to spillovers, NCAs will continue experimenting, and undertakings will remain uncertain whether their sustainability claims will be approved or rejected. The result is incoherence across Articles 101, 102, and merger control, and a chilling effect on genuine sustainability innovation.

[229] Draft Guidelines on Article 102 (n 126) paras 22–28.
[230] Giuseppe Bicciolo and Lisa Mildt, 'Sustainability and EU Competition Law: Negative Integration under Article 102 TFEU' (2023) 19(3) *European Competition Journal* 245, 252–53.
[231] Uffer (n 34) 210–212.
[232] Holmes (n 23) 567.
[233] Malinauskaite (n 69) 344–45, 582.
[234] Bicciolo and Mildt (n 230) 253.
[235] Dobosz (n 160) 110.

CHAPTER 6: COMPARATIVE ANALYSIS

This chapter compares the EU's cautious approach with the UK's post-Brexit framework and, briefly, Serbia's reforms as a candidate country. It highlights how the CMA's Green Agreements Guidance has adopted a more permissive and transparent stance, recognising climate change agreements as a distinct category, while the EU remains tied to Article 101(3)'s narrow welfare test and case-by-case formalism. The comparison illustrates alternative institutional models and enforcement practices that the EU may draw lessons from to strengthen coherence, avoid opportunistic claims, and better integrate sustainability without undermining competition law's doctrinal core.

6.1 The UK CMA (2023 Guidance)

6.1.1 Approach and Practice

The CMA follows similar sustainability patterns like the EU and its Member States, yet post-Brexit the CMA adopted a more progressive stance, positioning itself as the frontrunner in integrating sustainability into competition law.[236] The CMA has drawn inspiration from the ACM guidelines, and its Green Agreements Guidance (2023) offers a detailed framework for how undertakings may cooperate to achieve environmental objectives without infringing competition rules. The CMA similarly wishes to encourage undertakings to enter into sustainability agreements.[237] Unlike the EU's Horizontal Guidelines, which remain cautious and equivocal, the CMA explicitly recognises "climate change agreements" as a special category warranting more permissive treatment.[238] The CMA included in its guidance a standard-setting process to assess industry-based

[236] Malinauskaite (n 19) 347.
[237] Ibid.
[238] UK Competition and Markets Authority, *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements* (2023).

standards that states achieving sustainability benefits must be 'fair, reasonable and non-discriminatory'.[239] It also strikes down on "green" cartels misusing sustainability agreements: restrictions set higher than what is necessary for the standards is prohibited.[240] Zelger highlights that this reflects a willingness to provide concrete guidance rather than abstract criteria, in sharp contrast to the Commission's strict reliance on Article 101(3).[241]

The CMA takes a broader view of consumer benefit than the Commission. Benefits to all UK consumers, including diffuse environmental gains such as reduced carbon emissions, can be considered under its assessment.[242] In practice, this means that collective benefits accruing to society at large are deemed sufficient, even if direct price or quality improvements to individual consumers are limited. Holmes notes that this marks a significant departure from the EU's narrow, market-specific consumer welfare focus.[243]

The authority has also developed innovative procedural mechanisms to reduce chilling effects. Businesses may approach the CMA under an "open-door policy" to seek informal comfort, and reliance on the Green Agreements Guidance shields undertakings from fines if they act in good faith.[244] Examples include the CMA's endorsement of supermarket collaborations with Fairtrade suppliers and WWF-backed initiatives to cut emissions across agricultural supply chains, which would have faced much stricter

[239] Competition and Markets Authority, *Environmental Sustainability Agreements and Competition Law* (27 January 2021) https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law accessed 12 September 2025.
[240] Malinauskaite (n 19) 347.
[241] Zelger (n 31) 520–22
[242] Competition and Markets Authority, *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements* (2023) paras 3.23–3.27.
[243] Holmes (n 23) 565–67
[244] CMA, *Green Agreements Guidance* (n 238) paras 4.8–4.13; Malinauskaite

scrutiny under EU law.[245]Scholars contrast this proactive, transparent model with the EU's conservatism. Malinauskaite and Zelger both highlight the CMA's willingness to experiment with concrete guidance where the EU offers only abstract criteria, while Holmes describes the CMA's approach as "the most permissive in Europe" for climate-related agreements.[246] Yet critical voices remain: Holmes cautions that permissiveness risks entrenching weak practices if the substantive tests are not carefully enforced, echoing concerns that sustainability rhetoric can be misused as cover for anticompetitive conducts.[247] Compared to the ACM's guidelines, the CMA omit answering concrete questions and left out whether out-of-market efficiencies or benefits to society at large takes part of the assessment, and if so, how they are measured.[248]

6.1.2 Lessons for the EU

The UK demonstrates the value of clear, accessible guidance. The Green Agreements Guidance gives undertakings practical templates, a broader conception of consumer benefit, and procedural assurances through an open-door policy.[249] This reduces chilling effects by assuring businesses that good faith reliance will not trigger sanctions, while simultaneously warning against "green" cartels. The EU could learn from this pragmatic model: greater certainty would encourage undertakings without compromising enforcement. At the same time, Holmes cautions that excessive permissiveness risks consolidating weak practice, underscoring that clarity must be matched with substantive rigour.[250]

[245] Holmes (n 23) 566.
[246] Malinauskaite (n 69) 212–15; Zelger (n 31) 530
[247] Holmes (n 23) 566.
[248] Malinauskaite (n 19) 347–48.
[249] CMA, *Green Agreements Guidance* (n 238).
[250] Holmes (n 23) 567.

6.2 Serbia (Candidate Country)

6.2.1 Approach and Practice

Serbia, as an EU candidate state, illustrates how the Union's approach to sustainability in competition law travels beyond its borders. As part of the accession process, Serbia has gradually aligned its competition law framework with the EU acquis, including the decentralised enforcement of Regulation 1/2003 and the institutional requirements of the ECN+ Directive.[251] Its Competition Commission applies Articles 101 and 102 TFEU equivalents and cooperates with the European Commission on enforcement priorities. Unlike Austria or the UK, however, Serbia lacks scope for innovation: the accession conditions require strict conformity with EU practice and case law.[252] In practice, this produces two dynamics. On the one hand, Serbia cannot experiment with radical statutory exemptions or bespoke guidance, since any divergence would run counter to accession obligations. On the other hand, institutional weaknesses, limited resources, political influence, and underdeveloped judicial oversight, mean that enforcement often remains weaker than in Member States.[253] As a result, Serbia must uphold EU conservatism on sustainability in competition law, but may in reality operate with less stringency, thereby creating potential enforcement gaps at the Union's periphery. This position is revealing. If the EU itself fails to develop a coherent sustainability framework, candidate states like Serbia will be left mirroring its ambiguities without the institutional capacity to fill the gaps. Rather than taking part in the experimentation laboratories like

[251] European Commission, *Serbia 2023 Report* SWD(2023) 700 final, available at https://enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_695_Serbia.pdf 65–67.
[252] ibid 66.
[253] ibid 65–67; Beatrice Pirri and Filipa Cvetanova, *At a Crossroads: Serbia's Prospects and Future in the EU Enlargement* (CEP Presents, April 2025) available at https://cep.org.rs/wp-content/uploads/2025/05/CEP-Presents-At-a-Crossroads_Serbias-Prospects-and-Future-in-the-EU-Enlargement.pdf

Austria or the UK, accession countries risk becoming passive recipients of a fragmented model, reinforcing the case for greater EU-level certainty and consistency.

6.2.2 Lessons for the EU

Serbia illustrates what happens when EU conservatism is exported beyond the Union. As a candidate country, Serbia must formally align its competition law with the acquis, but in practice operates with weaker enforcement capacity.[254] This produces a paradox: strict adherence to EU orthodoxy in principle but eased enforcement in practice. For the EU, the lesson is twofold. First, without a coherent sustainability framework, accession states will replicate the Union's ambiguity, embedding inconsistency at the borders. Second, credibility in enlargement policy depends on the EU itself clarifying how sustainability fits within competition law, lest candidate countries import a fragmented model that undermines the uniformity of future membership.

6.3 Austria and the Netherlands (Experimentation Laboratories)

6.3.1 Lessons for the EU

Austria's statutory exemption and the ACM's soft-law experimentation highlight both the potential and the dangers of decentralisation.[255] On one hand, they show that national authorities can act as laboratories for sustainability integration, offering creative models that might inspire EU-level reform. On the other hand, they generate fragmentation and forum shopping risks, since agreements permitted or encouraged in Austria or the Netherlands may be condemned in Belgium or Germany.[256] The lesson for the EU is that

[254] Ibid 65-67.
[255] § 2(1) Cartel Act (Austria, KaWeRÄG 2021); ACM, *Policy Rule on Sustainability Agreements* (2023) 8–9 https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf accessed 12 September 2025.
[256] Malinauskaite (n 69) 582.

decentralised innovation must be channelled through a common framework; otherwise, sustainability becomes another source of incoherence in the enforcement of Articles 101 and 102.

6.4 Overall lessons the EU could learn

The comparative analysis reveals that the EU's cautious approach is neither consistent nor without consequence. The CMA offers a pragmatic clarity, Austria and ACM highlights risks of fragmented decisionmaking, and Serbia illustrates how EU conservatism is mirrored abroad and limits other countries. The overarching lesson is that the EU must provide both substantive clarity, such as when do sustainability benefits count under Article 101(3), and procedural guidance in the form of policy briefs or templates in the Commission's guidelines, to give undertakings confidence. Without this, it risks being outpaced by NCAs and even by non-Member States.

CHAPTER 7: Recommendations

This chapter proposes reforms to Articles 101, 102, and the Merger Regulation. It distinguishes short-, mid-, and long-term measures, recognising the pillars evolve at different speeds and under different constraints. The focus is on risks identified earlier: namely, fragmentation, forum shopping, inconsistent NCA practice, legal uncertainty, and chilling effects such as greenhushing. These undermine predictability and the integration principle in Article 11 TFEU and Article 37 of the Charter.

7.1 Article 101 TFEU

7.1.1 Short-Term Reforms

In the immediate term, the Commission should continue to expand the use of informal guidance letters to reassure and encourage undertakings to pursue sustainability

agreements. The ACM and Bundeskartellamt's practice show that such preliminary tools can reduce chilling effects and greenhushing by clarifying *ex ante* which agreements will not be pursued.[257] Though, as stated, these letters are a soft-law tool and needs EU-level coordination to avoid conflicting positions or divergent outcomes. The CJEU should also explicitly confirm whether non-price parameters such as sustainability efficiencies fall within the scope of Article 101(3), at least where benefits are substantial, verifiable, and evidently linked to consumer welfare enhancement.[258] Finally, a standardised template for assessing qualitative sustainability benefits could provide NCAs practical tools and help undertakings substantiate claims. Though not binding, such templates would harmonise procedure, reduce fragmentation, and improve predictability.

7.1.2 Mid-Term Reforms

The Revised Informal Guidance Notice made guidance letters a permanent mechanism, thus they also serve a mid-term role by embedding a more predictable framework for unresolved sustainability questions. However, they remain resource-intensive and time-consuming – it took the Commission six to seven months to conclude and issue its first two sustainability-related guidance.[259] Moreover, without coordination through the ECN, divergent outcomes risk encouraging forum shopping or creating over-reliance on non-binding instruments. A specific ECN Sustainability Taskforce should be established within the framework of Regulation 1/2003.[260] While there are already European Competition Network (ECN) operating in different sectoral working groups (e.g., food,

[257] ACM, *Policy Rule on Sustainability Agreements* (2023) 8-9.
[258] C*artes Bancaires* (n 18) para 49.
[259] Arnold & Porter, 'First Informal Guidance Letters on Sustainability-Related Agreements' (2025) https://www.arnoldporter.com/en/perspectives/blogs/environmental-edge/2025/07/first-informal-guidance-letters-sustainability-related-agmts accessed 12 September 2025.
[260] Regulation 1/2003 (n 74) arts 11–12.

pharma, digital market),[261] it lacks a forum dedicated to sustainability. Such taskforce could collect and consolidate national practice, develop common qualitative templates for assessing non-price parameters, such as sustainability benefits, and channel experimentation into EU-wide objectives rather than leaving NCAs to improvise in isolation.[262] Such a body would reduce divergent national standards, mitigate forum-shopping risks, and improve predictability for undertakings across the internal market. Its mandate, however, would remain limited to Articles 101 and 102, and political resistance could constrain its role to soft coordination rather than binding harmonisation.

A more systematic reform would be to introduce a permanent Commission Notice on sustainability efficiencies, clarifying how diffuse or out-of-market benefits may satisfy the "fair share" consumer test under Article 101(3).[263] This would ensure uniform application and reduce reliance on *ad hoc* NCA divergent experimentation, without legislative reform. It should also provide methodological guidance on how to quantify long-term efficiencies and balance them against short-term consumer harm. Parallel to this, NCAs should be equipped with technical expertise (such as environmental economists) to verify and authorise such claims consistently.

7.1.3 Long-Term Reforms

Ultimately, Article 101 requires a structural amendment. Options include a sustainability-specific block exemption regulation or a provision amendment expressly

[261] European Commission, *European Competition Network (ECN) – Working Groups* (2023) https://competition-policy.ec.europa.eu/european-competition-network/working-groups_en accessed 11 September 2025.
[262] Jurgita Malinauskaite, *Sustainability and Competition Law in the EU and the UK* (Routledge 2024) 134–37; Giorgio Monti 130–132.
[263] Revised Informal Guidance Notice (n 134) paras 3–5, 10–12.

recognising sustainability as a legitimate efficiency under Article 101(3). While politically ambitious, such reforms would enhance legal certainty, eliminate the chilling effect, and remove the risk of divergent national approaches such as Austria's statutory exemption. The CJEU would then play a central role in ensuring uniform interpretation, preventing damaging fragmentation across NCAs, and integrating sustainability coherently within the competition law framework.

7.2 Article 102 TFEU

Article 102 remains structurally resistant to integrate non-price parameters such as sustainability, and it lacks an exemption mechanism equal to Article 101. There are two potential options to consider: a rigid or flexible framework.

For the former, maintaining a rigid efficiency/objective justification framework ensures legal certainty and prevents opportunistic "green shields" for exclusionary conduct[264] For the latter, the Commission could introduce a flexible, modern reinterpretation of Article 102 within certain limits. Sustainability could be accepted as an objective justification or efficiency defence where demonstrable, proportional, and unavoidable. This approach would acknowledge broader Treaty obligations (Article 11 TFEU) but risks undermining predictability and expanding NCAs' discretion.[265] The recent enforcement under Article 102 in the *Meta* case shows that non-price parameters can, in fact, play a decisive role in defining abuse. As stated, (non-)compliance with the GDPR was vital to determine abuse of dominance.[266] Incorporating sustainability obligations into the "competition on the merits" analysis would not require a fundamental doctrinal

[264] *Intel (n 18) para 134.*
[265] Pablo Ibáñez Colomo, 'Sustainability and Article 102 TFEU: Objective Justification Revisited' (2023) 60(4) *Common Market Law Review* 1123, 1130–33.
[266] *Meta Platforms (n 138) paras 83–88.*

shift,[267] but rather an extension of established practice to a new category of non-price parameters. If the Guidelines included such category, Article 102 would align with its Treaty obligations to integrate environmental protection and reduce uncertainty.[268]

Both routes carry risks: strictness chills innovation, flexibility weakens uniformity. Scholars warn that the absence of guidance leaves NCAs improvising, producing divergent outcomes and legal uncertainty.[269]

7.3 EU Merger Regulation

7.3.1 Short-Term Reforms

As stated, Article 2(1)(b) Regulation 137/2004 leaves interpretive space for systematically integrating sustainability as another non-price parameter, at least in the short-term.[270] Case law illustrates that the Commission does in fact recognise some non-price parameters, however that is done so inconsistently and without clear methodology (e.g. *KPS/Real Alloy*, *SIKA/MBCC*, *Norsk Hydro/Alumetal*). Environmental innovation, resource efficiency, and low-carbon output may be factored in alongside price and output.[271] Thus, it is imperative that the Commission provides reasoned decisions in its cases to guide both the NCAs and undertakings to understand when merger control will consider sustainability as a non-price parameter in its assessment, and, reversely, when such objectives fall outside the traditional test.

7.3.2 Mid-Term Reforms

The core challenge remains on methodology: how to weigh long-term, diffuse sustainability benefits against short-term, quantifiable price effects. Currently, price is

[267] Draft Guidelines on Article 102 (n 126) para 50.
[268] Lubbers (n 139) 21–24; Oxera, 'Grey or Green Giants' (n 95).
[269] Zelger (n 31) 520; Malinauskaite (n 19) 27–29.
[270] EU Merger Regulation (n 5) art 2(1)(b).
[271] Commission, *KPS/Real Alloy* (n 108); *SIKA/MBCC* (n 110); *Norsk Hydro/Alumetal* (n 109).

the ‘core’ indicator of harm, even where dynamic efficiencies are claimed. In the 2004 Horizontal Merger Guidelines, the Commission briefly notes that efficiencies may include quality improvements and environmental factors but provide no methodology for balancing them against consumer harm.[272] Without explicit thresholds or criteria, undertakings cannot predict whether sustainability efficiencies will outweigh anti-competitive effects. Drawing on the Horizontal Guidelines’ cautious treatment of collective benefits, the Commission could likewise issue formal guidance letters under Article 2(1)(b), clarifying how these efficiencies weigh against traditional price/output effects. If not, undertakings face unpredictability and pro-competitive green innovation may be disregarded if consumer welfare is defined narrowly.[273] For instance, the UK CMA’s 2023 Green Agreements Guidance offers a comparative model, signalling willingness to balance environmental benefits against short-term consumer harm.[274] Malinauskaite warns that without methodological tools, sustainability risks being rhetorically acknowledged but substantively discounted.[275]

7.3.3 Long-Term Reforms

A legislative reform of the EU Merger Regulation may be required if non-price parameters such as sustainability is to be placed on equal footing with traditional competition parameters. An amendment could codify sustainability as a recognised efficiency, reducing reliance on *ad hoc* interpretation.[276] While politically ambitious, codification would give NCAs and undertakings structural certainty and close the legal

[272] Horizontal Merger Guidelines (n 53) paras 76–88.
[273] Malinauskaite (262) 25–28.
[274] CMA, *Green Agreements Guidance* (n 238) paras 4.8–4.13.
[275] Malinauskaite (262) 216–219.
[276] EU Merger Regulation (n 5); Röller and de la Mano (n 194) 15–17; Horizontal Merger Guidelines (n 53) paras 76–88.

gap. On long-term, Article 2 may be amended to expressly include sustainability objectives within the list of factors to be assessed. This would mirror the constitutional status of sustainability in Article 3(3) TEU and the integration clause in Article 11 TFEU, thus aligning merger control with broader Union objectives.[277]

CONCLUSION

Summary of Findings

The analysis shows that the EU's approach to sustainability in competition law remains cautious and incremental. Chapter 9 of the Horizontal Guidelines acknowledges sustainability agreements under Article 101(3) but leaves questions unresolved, for instance how to measure "fair share" and account for diffuse or intergenerational benefits. Reliance on soft-law guidance risks undermining legal certainty, while decentralised enforcement fuels fragmentation as NCAs adopt divergent mechanisms, for instance Austria's statutory exemption to ACM's soft-law policy. The Commission's reluctance to move beyond an efficiency-driven framework contrasts with more progressive models, such as the UK CMA, leaving the EU at risk of lagging behind.

Implications and limitations

There are several implications and limitations to consider these suggestions. For undertakings, greater structural and procedural certainty would reduce chilling effects and first-mover disadvantages, but similarly increase compliance burdens.[278] For enforcement, NCAs would remain first movers on integrating sustainability, yet the challenge is converting their experimentalists policies into coherent EU-wide standards.

[277] EUMR, art 2; TEU, art 3(3); TFEU, art 11; see also Monti.
[278] ACM, *Vision Document on Competition and Sustainability* (n 162) 12.

Competition law risks being sidelined as other regulatory tools dominate the sustainability agenda (such as the CSR, CSDDD, Green Deal). The enforcement challenge is therefore not merely one of doctrinal interpretation but of institutional design. In the absent of clearer EU-level standards, NCAs will continue to improvise, courts will encounter policy spillovers, and undertakings will face uncertainty. Referring back to Monti and Malinauskaite, relying too heavily on 101(3) is dangerous, expanding its scope through soft law erodes legal certainty and opens the door to opportunistic claims or forum shopping.[279] Thus, as Uffer recommends, the Commission could keep sustainability within 101(3) but publish detailed annexes or examples (such as the 'Car Emission' illustration), focusing on qualitative benefits that provides the NCAs common reference points.

Recommendations

Evidently, the three pillars of EU competition law are evolving unevenly. Article 101 is cautiously opening up to sustainability efficiencies, while Article 102 remains tied to exclusionary logic, and merger control has begun to consider non-price parameters but without systematic guidance or transparent decision-making. This lack of parallel development creates uncertainty: undertakings cannot predict *ex ante* how sustainability will be formally assessed in neither of the pillars. A more fundamental issue is whether competition law can integrate wider EU policy objectives without losing its traditional identity, irrespective of EU integration obligations. Expanding its framework risks transforming competition law into a general regulatory tool, while simultaneously refraining from integration entrenches incoherence and fragmentation.

[279] Monti (n 27) 146–49; Malinauskaite (n 69) 582; *Cartes Bancaires* (n 18) para 49.

The challenge is therefore to find a balance between emerging non-price parameters and traditional price-centred parameters.

First, institutional reforms would ensure consistency across all pillars by strengthening coordination without amending substantive law. As discussed, a dedicated ECN Sustainability Taskforce would consolidate national practice, channel experimentation into common templates, and improve predictability and transparency. Although non-binding, greater transparency of guidance letters could reduce chilling effects and, specifically to sustainability, greenhushing or -washing. Lastly, there needs to be a clear division of labour between Commission, CJEU, and the NCAs to reduce fragmentation and uncertainty, yet still leave room for national experimentation in a "trial-and-error" model as proposed by Monti.[280]

Secondly, structural reforms would standardise the NCAs divergent practice by harmonising procedures rather than redefine objectives. As discussed, developing common sustainability impact templates or guidance would ensure NCAs apply consistent criteria when weighing qualitative benefits. More ambitiously, codifying sustainability explicitly, for instance as a safe harbour in the HBERs, as part of the list in Article (2)(1)(b) for Merger Regulation, or as a specific part of the new two-limb test for Article 102. This could provide clarity, though risks stretching competition law beyond its proper scope if not carefully framed. Formal integration of non-price parameters, such as sustainability objectives, could risk diluting competition law's core mandate.

Finally procedural reforms remain the most immediate. Extending informal guidance tools and publishing more guidance letters could reassure undertakings and

[280] Monti and Mulder (n 21) 650–52.

reduce chilling effects. Stronger ECN coordination would limit forum shopping and divergence. The NCA should continue to develop *ex ante* comfort tools to reduce chilling effects but still coordinate and confirm with the Commission post-decision to avoid divergence or clashes with EU law. Clearer CJEU judgments and more referrals for opinions on non-price parameters would help align the pillars without demanding legislative overhaul. By clarifying in judgments how sustainability may be or is weighed, case law coherence and methodological procedures are encouraged. Rulings like *Meta/Bundeskartellamt* is imperative to understand how non-price parameters, and (non-)compliance in other areas of law, can serve as 'vital clues' for the possible breach of competition law objectives. Evidently, non-price parameters are slowly, and cautiously, considered in the competition tests. However, for a broader use of sustainability claims, as well as other non-price parameters, the Commission and the CJEU needs to expand its definition of harm to consumer welfare. These steps suggest a pathway for integrating sustainability into the competition framework that respects Treaty obligations while preserving legal certainty and consistency. The question remains whether the current incremental approach is sufficient, or whether only deeper structural reform can resolve the incoherence between the three pillars. Incremental adjustments, rather than revolutionary legal change, may be the path forwards.

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