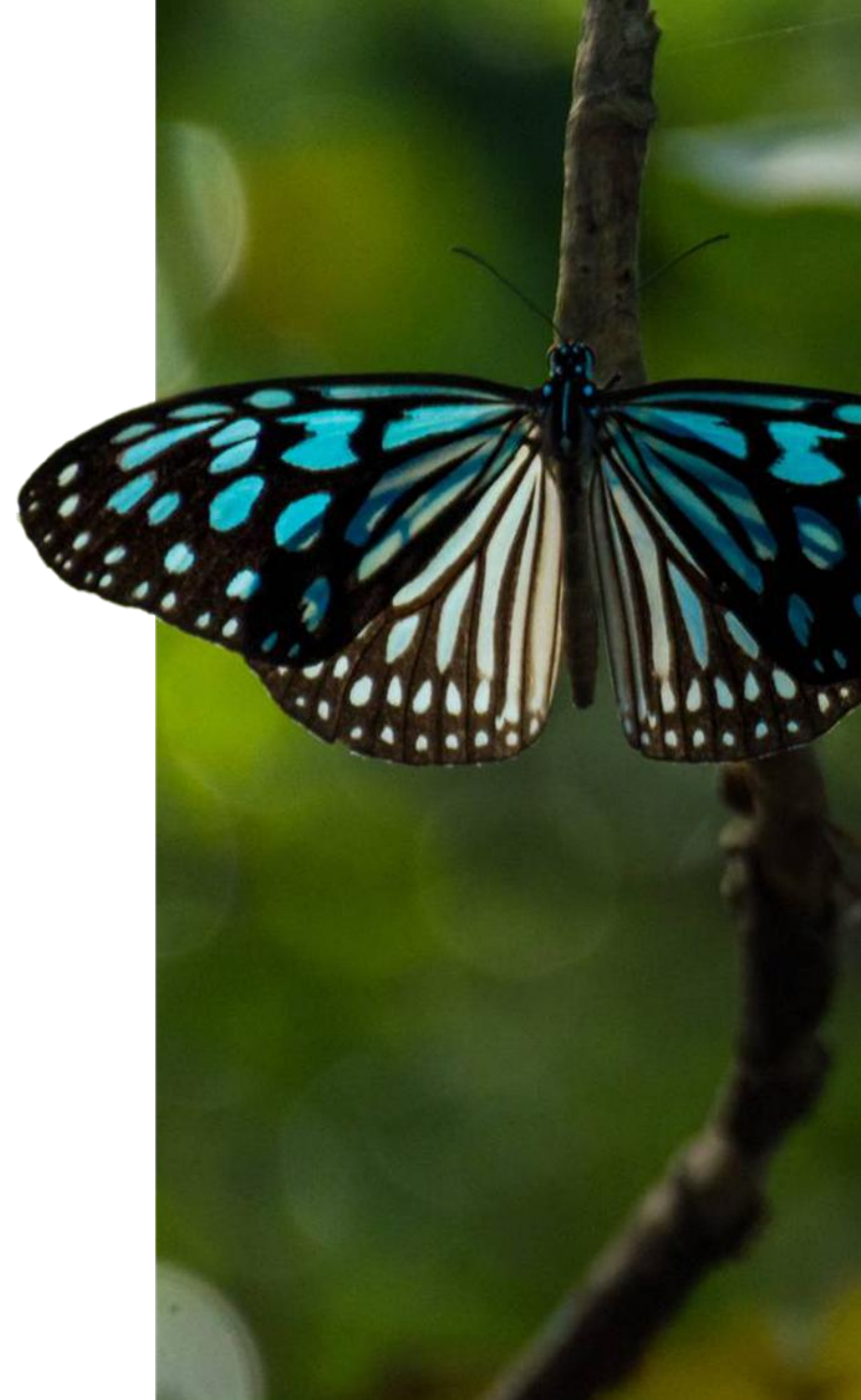
Corso di competenze trasversali
Sustainable development and climate Awareness: tRaining EU citizens and compAnies - S.A.R.A.
a.a. 2025/2026



PROMOTING SUSTAINABILITY THROUGH COMPETITION LAW

Miguel Moura e Silva
University of Lisbon
2nd April 2026

Funded by
the European Union

Plan

1. Competition law: Goals and tools

2. Sustainability as a shield: Cooperation between competitors to promote sustainability

3. Sustainability as a sword: Harm to the environment as an abuse of dominance

4. Sustainability as a wild card: Resilience, investment, sustainability and innovation in the context of merger control

Funded by the European Union

Corso di competenze trasversali
Sustainable development and climate Awareness: tRaining EU citizens and compAnies - S.A.R.A.
a.a. 2025/2026

1. Competition law: Goals and tools

Funded by
the European Union

Competition law: Goals
Focus on consumer welfare

- EU competition law reflects multiple goals (Ezrachi 2017, Lianos 2018);
- However, there is a key focus on consumer welfare and economic integration;
- Restrictions of competition tend to be viewed as reducing consumer welfare when they lead to higher prices, lower quality, less variety and less innovation;
- Conversely, competition promotes consumer welfare by leading firms to lower prices, improve quality and variety, and innovating.

Competition law: Goals

Integration of environmental protection in other policies

- Article 11 TFEU: Environmental protection *must* be integrated into all EU policies (see also Article 191 TFEU);
- Article 37 Charter on Fundamental Rights: EC must *promote* environmental integration (Art. 51(1));
- Articles 7 and 8 TFEU: policy consistency and elimination of all inequalities as constitutional goals.

Funded by
the European Union

Corso di competenze trasversali
Sustainable development and climate Awareness:
tRaining EU citizens and compAnies - S.A.R.A.
a.a. 2025/2026

Competition law: Tools

- Rules on conduct: Articles 101 and 102 TFEU;
- Rules on structure: EU Merger Control Regulation;
- Rules on State aid: Articles 107 to 109 TFEU (not addressed in this presentation).

2. Sustainability as a shield: Cooperation between competitors to promote sustainability

Two sides of the debate

- Industry perception: EU competition law’s strict approach to agreements between competitors is deterring business collaborations that promote sustainability;
- Conservative view: Competition rules should not be relaxed as firms should not be trusted to promote real public interests: these can be appropriately dealt with by publicly imposed standards and there is a significant risk that collusion may increase due to greenwashing;
- Is there a third way?

CECED

- Agreement between producers of washing machines aimed at removing less energy-efficient models;
- Article 101(1) TFEU: agreement between competitors that eliminates competition in low price ranges and leads to higher prices;
- Article 101(3) TFEU: expected benefits due to consumers paying lower energy bills (individual economic benefits to the same consumer group that pays higher prices) and less pollution as energy generation falls due to lower consumption (collective environmental benefits);
- Collective benefits were seven times greater than expected price increases and the Commission granted an exemption in 1999: competition would now be directed towards more efficient models.

Narrow view

Institutional constraints

- Before 2004: the Commission had exclusive competence to issue exemptions;
- After 2004: new Regulation 1/2003 extended the power to apply Article 101(3) TFEU to National Competition Authorities (NCAs) and national courts;
- Why does this matter: the Commission was worried about the risk of incoherence if Article 101(3) TFEU was applied with a wide discretion that it viewed was best reserved for the Commission as an EU institution;
- This led to a more conservative interpretation of the requirements for exemption - particularly the type of benefits that could be considered [2004 EC Guidelines on Article 101(3)]: by 2011, the collective benefits were no longer mentioned in the 2011 EC Guidelines on horizontal cooperation

Dutch Energy Accord

Dutch NCA

- Agreement between energy producers to close five coal plants;
- The Dutch NCA considered that the agreement had clear negative effects as it would reduce capacity by 10%, leading to higher prices;
- On the positive side, the Dutch NCA considered reduced emissions of sulphur dioxide and nitrogen oxide, but did not acknowledge the reduction of carbon dioxide emissions as these could be traded to others;
- The cost-benefit analysis was ultimately negative: costs amounted to € 75 million and benefits to only € 30 million (per year).

Funded by
the European Union

Chicken of tomorrow

Dutch NCA

- Dutch supermarkets and poultry producers agreed to transition entirely to "Chicken of Tomorrow" (Kip van Morgen) by 2015 — chicken raised under higher animal welfare standards: more space, slower-growing breeds, better living conditions;
- The agreement was sector-wide: from 2015, only welfare-certified chicken would be sold in Dutch supermarkets — effectively eliminating the cheaper conventional product;
- Initiated by the poultry sector, endorsed by retailers including major supermarket chains;
- Consumers would pay a higher price but receive a product with significantly better animal welfare credentials.

Chicken of tomorrow

Dutch NCA

- ACM issues informal opinion: the agreement restricts competition and does not meet the efficiency defence — benefits accrue to third parties (animal welfare, environment), not to consumers of the product;

- The arrangement restricts price competition and consumer choice. Animal welfare and environmental benefits are real but accrue to society at large, not to the purchasing consumers. Under the then-prevailing view animal welfare and environmental externalities are out-of-market benefits that cannot justify a restriction of competition as third-party benefits could not be counted under Article 101(3) TFEU.

Chicken of tomorrow
Dutch NCA

- Individual consumers face a prisoner's dilemma: each prefers sustainable chicken if all others buy it too, but no individual will pay the premium unilaterally;
- The agreement was designed precisely to solve this collective action problem — a function competition law could theoretically support;
- The ACM's refusal meant the market failure remained unaddressed...

Funded by
the European Union

The 2023 Guidelines on horizontal cooperation

Sustainability agreements

- Sustainability agreements: agreements between competitors that pursue sustainability objectives - chapter 9 of the 2023 EC Guidelines on horizontal cooperation operates as a sort of *lex specialis*;
- Sustainable development is recognised as a core principle of the TEU and a priority objective of EU policies - alignment with UN SD goals and with the European Green Deal: decoupling economic growth from resource use (§ 516);
- Broad concept of sustainability: "ability of society to consume and use the resources available today without compromising the ability of future generations to meet their own needs": economic, environmental and social goals (§ 517)

The 2023 Guidelines on horizontal cooperation

Sustainability agreements

- How can competition law contribute to sustainability?
    - “518. Competition law enforcement contributes to sustainable development by ensuring effective competition, which spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare.”
- However, this is nothing new: business as usual…

The 2023 Guidelines on horizontal cooperation

Sustainability agreements

- To further promote sustainability, a reframing of the analytical matrix is required: consumption decisions may create negative externalities - not all increases in production and consumption are welfare maximising once social costs are internalised;

- Externalities are market failures that can be addressed through collective action: EC has a clear preference for public policies with private arrangements operating as a subsidiary means to promote sustainable production or consumption, coping with residual market failures insufficiently addressed by public policies;

- Public policy failures delineate the scope of private measures.

Funded by
the European Union

The 2023 Guidelines on horizontal cooperation
Sustainability agreements

- Analysis of sustainability agreements: as any other agreements, they will only be caught by the prohibition of Article 101(1) TFEU if they restrict competition, either by object or by effect (and affect trade between member States);
- So the first step is determining whether there is such a restriction of competition;
- The EC sets out a category of sustainability agreements that are not deemed to raise competition concerns.

Agreements unlikely to raise competition concerns

- General concept: agreements that do not negatively impact parameters of competition (non-exhaustive list of examples):

1. Agreements aiming solely at ensuring compliance with “sufficiently precise requirements or prohibitions in legally binding international” agreements (§ 528);

2. Agreements that concern internal corporate conduct, not economic activity (§ 529);

3. Agreements to set up a database on suppliers with (un)sustainable value chains, production processes, or supply (un)sustainable inputs (§ 530);

4. Agreements organising industry-wide awareness campaigns (§ 531);

Agreements of sustainability agreements

- Framework: does the agreement restrict competition by object or by effect?
- By object: prohibited agreements restrict competition by its very nature, where they create a sufficient degree of harm to competition having regard to their provisions, their objectives and the economic and legal context;
  - Sustainability objectives should be clear and not disguised by object restrictions of competition (sham justifications or greenwashing);
- By effect: requires a full analysis of market conditions (market power, degree to which decision-making independence regarding parameters of competition is limited, market coverage, and whether the agreement leads to an appreciable increase in price or an appreciable reduction of output, variety, quality or innovation.

Sustainability standardisation agreements

- Agreements to create or comply with sustainability standards (not limiting output): specification of requirements that producers and other agents in the value chain have to meet to comply with sustainability metrics;
- Examples:
  - Phase out, withdraw or replace non-sustainable products and processes;
  - Harmonising packaging materials and sizes to reduce waste;
  - Purchase only inputs produced in a sustainable manner;
  - Standards to promote animal welfare.

Funded by
the European Union

Corso di competenze trasversali
Sustainable development and climate Awareness: tRaining EU citizens and compAnies - S.A.R.A.
a.a. 2025/2026

Sustainability standardisation agreements

- Positive aspects: enable the development of new products or markets, increase product quality, improve conditions of supply and distribution, empower better-informed consumer choices, create level-playing field between producers subject to different regulatory requirements;
- Negative aspects: standardisation agreements may be used to restrict competition through coordination of prices, foreclosing alternative standards, and excluding or discriminating competitors.

Sustainability standardisation agreements

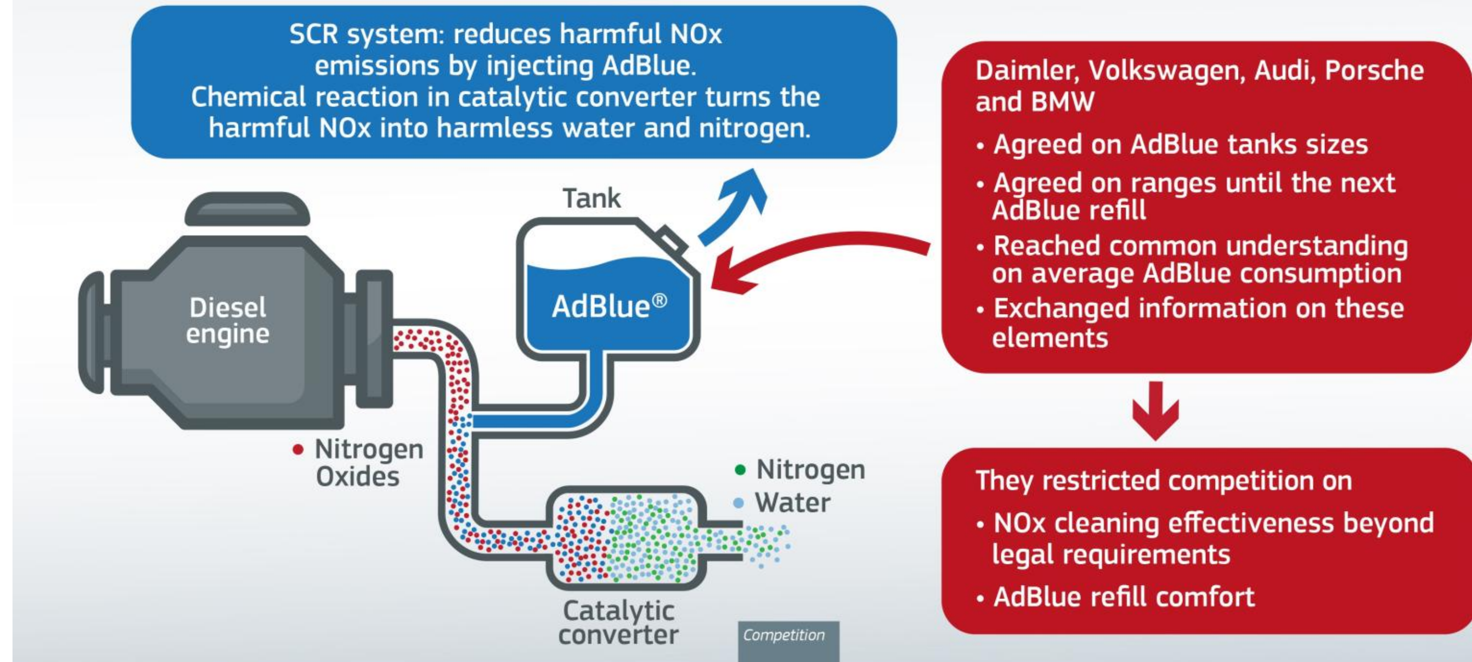
By object restrictions

- High risk:
  - Agreements on how to pass on to consumers higher costs of compliance with higher standards (e.g., increasing prices);
  - Agreements to pressure competing third-parties to not market non-complying products (participation in standards should remain voluntary);
  - Agreements to limit technological development to the minimum level required by law (e.g., car emissions cartel).

Funded by
the European Union

Car Emissions Cartel 2021

- The EC provided guidance on aspects of SCR-system (Selective Catalytic Reduction) that do not raise competition concerns:
  - Standardisation of the AdBlue filler neck;
  - Discussion of quality standards for AdBlue;
  - Joint development of an AdBlue dosing software platform.



Sustainability standardisation agreements
By effect restrictions

- The EC sets out a soft safe harbour (§ 549) with six cumulative conditions:

1. Open and transparent procedures to develop and select the standard;
2. No imposition of duty to comply on firms not wishing to participate;
3. Binding requirements may be imposed but participants should be free to apply higher sustainability standards (competition in improving standards remains);
4. No exchange of commercially sensitive information not objectively necessary and proportionate;
5. Effective and non-discriminatory access to the outcome of the process;
6. EITHER the standard does not lead to a significant increase in price or reduction in quality OR combined market share of parties does not exceed 20% of the relevant affected markets.

Sustainability standardisation agreements

By effect restrictions

- Outside the safe harbour: no presumption that agreement restricts competition but an individual assessment is required;
- Does the agreement leave sufficient competition open from alternative sustainability labels or standards?
- If participating firms are free to operate outside the label, consumers will have greater choice and competition is unlikely to be restricted;
- If there is a significant price increase, the agreement will have to be justified under Article 101(3) TFEU.

Funded by the European Union

Corso di competenze trasversali
Sustainable development and climate Awareness: tRaining EU citizens and compAnies - S.A.R.A.
a.a. 2025/2026

Assessment under Article 101(3) TFEU

Condition 1: Efficiency gains

- Efficiency gains: does the agreement create objective efficiencies in the form of reductions in production and distribution costs, increases in product variety and quality, improvements in production and distribution processes, increases in innovation;

- The 2023 EC Guidelines admit a broad concept of efficiency gains to take into account sustainability benefits: agreement leads to the use of less polluting technologies in production or distribution, improves conditions of production or distribution, leads to more resilient infrastructure or better quality products, reduces supply-chain disruptions, shortens the time for more sustainable products to reach the market, enables consumers to make better-informed choices;

- Parties to the agreement must demonstrate that these efficiency gains are substantiated, objective, concrete and verifiable.

Assessment under Article 101(3) TFEU

Condition 2: Indispensability

- There is no practicable less restrictive alternative to achieve those gains;
- May be problematic in some cases: if demand for sustainable products exists, cooperation may be deemed as not indispensable - unless demonstrated that cooperation is indispensable to reach the goal in a more cost-efficient or faster way;
- e.g., consumers may find it difficult to evaluate whether the benefits outweigh the costs and overestimate immediate negative effects - in packaging, the bigger is better fallacy may lead to perceive less wasteful packaging as a quality reduction;
- e.g., excessive discounting of future benefits over present costs (as in the Chicken of Tomorrow case): how to measure: WTP (willingness to pay): how much of a price increase am I willing to pay today for a certain future benefit;

Assessment under Article 101(3) TFEU

Condition 2: Indispensability

- Private versus public measures to address negative externalities: EC gives clear preference for public regulation (§ 564): once the legislator has decided the appropriate level of a sustainability objective there is no room for firms to act…

- Unless there is a public policy failure as the measure does not address all aspects of the negative externality, creating a space for cooperation agreements (e.g., higher standards), or where cooperation allows the public goal to be reached more efficiently or quicker;

Assessment under Article 101(3) TFEU

Condition 2: Indispensability

- Other market failures may need to be addressed through cooperation:
  - First mover disadvantage (§ 566): agreement may be necessary in an initial stage to avoid free-riding on investments to promote a sustainable product and provide information to consumers;
  - Achieving economies of scale (§567): to successfully adopt a sustainability standard a minimum scale may be required to cover fixed costs of operating the standard or label; agreement may also be required to focus parties efforts on the standards objects: a common minimum standard is likely to achieve this in a proportional way;

Assessment under Article 101(3) TFEU

Condition 3: Pass-on of benefits to consumers

- This condition requires that impact on consumers is at least neutral (benefits outweigh costs): but what benefits count and to whom?
- § 569: "… the sustainability benefits that result form an agreement must accrue to the consumers of the products covered by that agreement."
- Cases where a detailed assessment is not needed: (i) where competitive harm is clearly insignificant compared to potential benefits to consumers in the affected relevant market; and (ii) where it is obvious that claimed sustainability benefits do not accrue to consumers in the relevant market or they are insufficient to compensate for harm to those consumers (§ 570);
- What about benefits to society as a whole?

Assessment under Article 101(3) TFEU

Condition 3: Pass-on of benefits to consumers

- Normative issue: to protect the consumer focus of competition law under Article 101 TFEU, the EC has rejected a total welfare test and favoured a consumer welfare test: a restriction of competition will only be exempted where consumers in the relevant market are compensated by the alleged benefits so that the net impact is neutral for them;

- This means that if the benefit is 1000 and producers receive 800, consumers receive 200 (sustainability benefits) but have a cost (in higher prices) of 250, society as a whole is better off: 1000 - 250 = 750, however, consumers are worse-off: 200 - 250 = -50, so the agreement could not be exempted.

Assessment under Article 101(3) TFEU

Condition 3: Pass-on of benefits to consumers

- New framework: three kinds of benefits count:
  - Individual use value benefits;
  - Individual non-use value benefits;
  - Collective benefits

Funded by
the European Union

Assessment under Article 101(3) TFEU

Condition 3: Pass-on of benefits to consumers

- **Individual use value benefits**: utility derived from consumption increases due to improved consumer experience (e.g., better tasting or healthier foods, more durable goods);
- Qualitative efficiencies: direct benefits simply by consuming the products created or improved by an agreement to use more expensive sustainable inputs or reducing choice be eliminating a non-sustainable input;
- Quantitative efficiencies: agreements leading to price reductions are more obvious examples (cost reductions that lead to lower prices such as supplying detergent in concentrated form that reduces distribution costs, sharing infrastructure or distribution services.

Funded by
the European Union

Assessment under Article 101(3) TFEU

Condition 3: Pass-on of benefits to consumers

- **Individual non-use value benefits**: indirect benefits deriving from consumers' attributing value to the impact of their sustainable consumption on others;
- Considers benefits that do not derive from an improvement of the consumer's experience of the product but rather result from their valuation of the effect on others, including those outside the relevant market: perception of higher quality because of positive effects on others;
- Measurement issues: what is the WTP and how can we measure it (e.g. consumer surveys);
- Difference between declared preferences and actual preferences evidenced by consumer behaviour: parties to the agreement must demonstrate actual preferences (careful surveys need to provide context and take into account consumer knowledge and expectations);

Assessment under Article 101(3) TFEU

Condition 3: Pass-on of benefits to consumers

- Collective benefits: benefits that occur regardless of consumers' individual evaluation of the product and that accrue to a wider part of society, not just consumers in the relevant market;

- e.g., an existing technology has negative externalities (e.g., pollution) and an agreement is necessary to phase out that technology as consumers are unwilling to pay a higher price for the product produced with a green, more expensive technology;

- In this scenario, consumers in the relevant market do not fully internalise the costs of their consumption choices (negative externality) or do not receive a sufficient share of the benefits (e.g., of reduced emissions) from sustainable consumption (positive externalities).

Assessment under Article 101(3) TFEU

Condition 3: Pass-on of benefits to consumers

- EC new position: normally the weighing of positive and negative impacts is done within the same relevant market affected by the agreement, but "where two markets are related, efficiencies generated in separate markets can be taken into account, provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same." (§ 581)
- "582. By analogy, where consumers in the relevant market substantially overlap with, or form part of the group of beneficiaries outside the relevant market, the collective benefits to the consumers in the relevant market that occur outside that market can be taken into account if they are significant enough to compensate the consumers in the relevant market for the harm that they suffer."

Funded by the European Union

Assessment under Article 101(3) TFEU

Condition 3: Pass-on of benefits to consumers

- EC new position examples:
  - Agreement to promote less pollutant fuel: drivers are also citizens who benefit from cleaner air - substantial overlap as presumably all drivers are also citizens, so clean air benefits can be taken into account “provided that the compensate the consumers in the relevant market for the harm suffered” (§ 585);
  - Agreement to promote clothing made of sustainable cotton that reduces the use of fertilisers and water: collective benefits may be taken into account, however, the EC deems it unlikely that there is a substantial overlap between consumers of clothing and those enjoying environmental benefits as these occur where cotton is grown (i.e., not in the EU): only WTP for individual non-use benefits can be considered.

Assessment under Article 101(3) TFEU

Condition 3: Pass-on of benefits to consumers

- Paradox: market coverage will have to be significant for collective benefits to materialise (increasing risk of agreement being found to have negative impact on competition);
- Providing evidence on claimed benefits and likelihood that they will occur, who the beneficiaries are, demonstrating substantial overlap of consumers in relevant market with beneficiaries and demonstrate that the share of benefits accruing to them (together with individual use and non-use benefits) outweighs harm suffered by those consumers;
- Evidence in public authorities or independent academic reports is more relevant;
- Further guidance on measurement is expected in the future.

Funded by
the European Union

Assessment under Article 101(3) TFEU

Condition 4: No elimination of competition

- Final condition: the agreement leaves sufficient competition in the relevant market;
- Analysis of impacted parameters of competition: e.g., agreement limits quality or variety competition but does not affect price competition;
- Degree of product differentiation may be relevant: elimination of competition in less substantial models may maintain competition in more sustainable product ranges;
- Duration: temporary limits on competition do not prevent fulfilling this condition.

3. Sustainability as a sword: Harm to the environment as an abuse of dominance

Foundations of Article 102 TFEU

- Article 102 TFEU deals with unilateral behaviour of dominant undertakings: for it to apply there is a structural requirement (dominance) and a conduct requirement (abuse);
- Recent case-law and EC practice has extended the possibility of justifying prima-facie abusive conduct through an objective justification to include efficiency gains (although this is not yet settled, an argument can be made that the analysis of sustainability benefits under Article 101(3) can be extended to the justification of conduct by a dominant firm under Article 102 TFEU).

Foundations of Article 102 TFEU

- More economic approach and effects-based approach in the past two decades has turned the requirements to demonstrate abuse much higher than in previous decades;
- The EC is attempting to correct this with a more structured workable approach;
- However, the focus is likely to remain on consumer harm and on harm to the competitive structure.

Funded by
the European Union

Foundations of Article 102 TFEU

Judgment of 17 February 2011, *TeliaSonera*, Case C-52/09, EU:C:2011:83:

- "20. [...] it must be observed at the outset that article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon [...], is to include a system ensuring that competition is not distorted.
- 21. Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market.
- 22. The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, therefore ensuring the well-being of the European Union [...]."

Foundations of Article 102 TFEU

Judgment of 21 February 1973, *Continental Can*, Case 6/72, EU:C:1973:22

- Paragraph 26: Article 102 TFEU "is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure [...]."

Dominance

- Standard definition: “The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers.” (United Brands, 1978, paragraph 65).

- Special responsibility: “A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market) (Michelin, 1983, paragraph 57).

Abuse

General concept

- Judgment of 13 February 1979, *Hoffmann-La Roche v. Commission*, Case 85/76, EU:C:1979:36, paragraph 91:
- “The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.”

Abuse

General concept

- **Exploitative abuses**: conduct whereby the dominant undertaking obtains advantages through the exploitation of its partners (clients, suppliers) or consumers, that it could not have obtained, had it been exposed to effective competition;

- **Exclusionary abuses**: conduct of the dominant undertaking aimed at excluding competition through methods other than those of competition on the merits.

.

Abuse

Exclusionary abuses

- Judgment of 9 November 1983, *Michelin v. Commission*, Case 322/81, EU:C:1983:313, paragraph 70: “[…] in prohibiting any abuse of a dominant position on the market in so far as it may affect trade between Member States Article [102] covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders’ performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market.” (Emphasis added).
  - Conduct that is not competition on the merits leading to further deterioration of competitive conditions in the affected market;
  - Capable of having exclusionary effects;

Sustainability and abuse

- Issue: can unsustainable conduct by dominant firms constitute an abuse under Article 102 TFEU?
- In favour: Iacovides & Vrettos (2022);
- Opposing: Inderst & Thomas (2024).
- As we have seen, sustainability as a shield is a well-developed field, yet that is not the case with Article 102 TFEU as there is no actual EC practice and there are no clear accepted theories of harm that equate environmental damage with abuse.

Funded by
the European Union

Sustainability and abuse

The case for competition law as a sword - Iacovides & Vrettos (2022)

- Iacovides & Vrettos (2022): argument from a constitutional standpoint - given the EU treaties requirement for integrating environmental protection and policy consistency, Article 102 TFEU must be interpreted accordingly and pursue sustainability goals;

- Parallel between state aid law and Article 102 TFEU: CJEU Austria v. Commission (C-594/16 P): State aid for conduct violating EU environmental law cannot be declared compatible with the internal market. The authors extend this logic: conduct violating EU environmental law should not be declared compatible with Art. 102 TFEU either;

- Empirical study: case law in sectors that overlap with the Environmental Justice Atlas in 6 sectors involve breaches of sustainable development goals.

Sustainability and abuse

The case for competition law as a sword - Iacovides & Vrettos (2022)

- Iacovides & Vrettos (2022): concept of dominance as the ability to act independently of market pressures suggests that market power enables or facilitates unsustainable conduct as the dominant firm is insulated from competitive discipline and consumer switching;
- Normative argument: competition induces firms to increase CSR efforts;
- Policy argument: dominant firms as "keystone actors" (socio-ecological literature): affecting a handful of powerful corporations can have disproportionate systemic impact on entire sectors and biosphere functions.

Sustainability and abuse

The case against competition law as a sword - Inderst & Thomas (2024)

- What is harm to consumers?
- Exploitative abuses: obtaining an advantage from consumers or business partners that could not have been achieved without dominance - theoretically possible theory of harm where a dominant firm deprives consumers of a more sustainable product they would have obtained under competition;
- This has to be supported by evidence of WTP for legal compliance with environmental standards;
- However, Infringement of environmental law is neither necessary nor sufficient to establish consumer harm: a firm may harm consumers in terms of sustainability while complying with environmental law and a firm may breach environmental law without consumer harm (as consumers do not internalise the breach in purchasing decisions).

Sustainability and abuse

The case against competition law as a sword - Inderst & Thomas (2024)

- Authors reject presumptive causal links for an exploitative abuse theory:
  - A presumption that dominant firms are more likely to breach environmental law is problematic as a larger market share may *increase* incentives to invest in sustainability (larger base to recoup fixed costs);
  - Conflicting forces: cannibalization of existing product lines may reduce dominant firm's incentives to innovate sustainably — but this is case-specific, not a general presumption;
  - If the firm would have taken the same conduct absent dominance, there is no anticompetitive counterfactual.

PECUCS
Participation of European Citizens in the Union's Climate Strategy

Funded by the European Union

UNIVERSITÀ DEGLI STUDI DI BARI ALDO MORO
DIPARTIMENTO DI GIURISPRUDENZA

Corso di competenze trasversali
Sustainable development and climate Awareness: tRaining EU citizens and compAnies - S.A.R.A.
a.a. 2025/2026

Sustainability and abuse

The case against competition law as a sword - Inderst & Thomas (2024)

- Authors reject presumptive causal links for an exclusionary abuse theory:
  - If an environmental infringement provides a cost advantage, non-dominant rivals can equally commit the same infringement — no foreclosure specific to the dominant firm;
  - Unlike the AstraZeneca case (where behaviour abusing regulatory proceedings was found) there is no exclusive right to foreclose competitors in environmental law;
  - Proper tool is targeted environmental regulation, not antitrust law — otherwise Art. 102 becomes a general enforcement mechanism for all extra-legal conduct

Sustainability and abuse

Open questions

- Do constitutional goals justify a deviation from standard competition theory in Article 102 TFEU?
- Can harm to the environment be considered as a harm targeted by Article 102 TFEU?
- Can a presumption of causality be established dominance facilitates unsustainable conduct)?
- What theories of harm could link environmental degradation to exploitative or exclusionary abuses?
- Do competition authorities have the required knowledge to incorporate environmental concerns?

Tentative conclusion

- The current focus of discussion on Article 102 TFEU is to restore it to an effective tool;
- Extensive interpretation of Article 102 TFEU to include environmental harms does not seem a priority, even if a case could be made as to its necessity to address an enforcement gap (the existence of which is not clear to me…);
- Competition on the merits: a case can be made that behaviour that is unsustainable is not competition on the merits, but the likelihood of an exclusionary impact on competition needs to be demonstrated as well;
- This is not to say that in the appropriate factual and legal circumstances an abuse case cannot be made - this echoes the discussion on abuse by dominant firms reducing privacy protections in the Bundeskartellamt Facebook case (CJEU Meta Platforms v. Bundeskartellamt, Case C252/21);

Funded by
the European Union

4. Sustainability as a wild card: Resilience, investment, sustainability and innovation in the context of merger control

Funded by
the European Union

Corso di competenze trasversali
Sustainable development and climate Awareness:
tRaining EU citizens and compAnies - S.A.R.A.
a.a. 2025/2026

How could sustainability be relevant in EU Merger Control?

- Article 11 TFEU also applies to the EUMR;
- Efficiency defence: article 2(1)(b) EUMR enables the EC to take efficiency gains into consideration - the methodology developed under Article 101 TFEU on horizontal cooperation and sustainability agreements can be adapted to the merger context (in the UK, the CMA explicitly includes sustainability as relevant consumer benefits);
- Theory of harm: like innovation, sustainability may be used as a parameter of competition (e.g., customers' preferences for recycled aluminium products), the elimination of which gives rise to a significant impediment to competition;
- Legitimate interests: article 21(4) EUMR allows member States to protect interests beyond competition - sustainability is not explicitly considered.

What path for a sustainability theory of harm

- Extending the Bayer/Monsanto and Dow DuPont theory on innovation (limitation: output-centered):
  - Pre-merger: parties compete in overlapping “innovation spaces” - rivalry creates an incentive to invest and conduct R&D (business stealing effect);
  - Post-merger: internalisation of the business stealing effect reduces incentives to innovate (cannibalisation outweighs gains from innovation);
  - This translates into a SIEC - harm to innovation competition:
    - First-order effect: Elimination of close rival innovation paths reduces merged entity's incentive to invest. Measured via 'innovation diversion ratio' analogous to UPP in price analysis;
    - Second-order effect: Reduced competitive pressure on non-merging parties also depresses their R&D. Strategic complementarity: rivals may also cut back innovation post-merger.

What path for a sustainability theory of harm

- Deutscher & Makris (2023): Innovation as a polycentric process with many autonomous, independent decision-making centres pursuing diverse paths through trial-and-error;´
- How to operationalise:
  - Quality-adjusted metrics: weigh innovation by environmental impact and diversity index;
  - Industry-wide structural effects: analyse how the merger reduces the number of independent R&D centres and the breadth of innovation paths;
  - Structural filter: Rebuttable presumption: if merger reduces independent technology paths below a critical threshold, raise concerns (precautionary logic);
  - Protect nascent competitors: Scrutinise acquisitions of small, distant innovators ('killer acquisitions'). Low turnover ≠ low competitive significance.

Tentative conclusion

- The Commission is currently reviewing its merger guidelines (horizontal and non-horizontal mergers);
- Public consultation envisages both sustainability as a shield and as a sword, with particular emphasis on mergers that may be harmful to the clean transition or hamper climate and sustainability objectives:
  - e.g., incumbent firm acquires a disrupting innovator offering a green product (green killer acquisitions) or where the merger reduces incentives to invest and innovate in green products or clean and decarbonised technologies.
  - This includes vertical mergers where they remove access to products or services that are less carbon or energy intensive, generate less waste, etc.

Thank you for your attention

PECUCS
Participation of European Citizens in the Union's Climate Strategy

Funded by the European Union

UNIVERSITÀ DEGLI STUDI DI BARI ALDO MORO
DIPARTIMENTO DI GIURISPRUDENZA

Corso di competenze trasversali
Sustainable development and climate Awareness: tRaining EU citizens and compAnies - S.A.R.A.
a.a. 2025/2026

References

- Deutscher, Elias & Makris, Stavros (2023), “Sustainability Concerns in EU Merger Control: From Output-Maximising to Polycentric Innovation Competition”, Journal of Antitrust Enforcement, 11: 3, 350-399.
- Ezrachi, Ariel (2017), “Sponge”, Journal of Antitrust Enforcement, 5: 1, 49-75;
- Iacovides, Marios C. & Vrettos, Christos (2022), “Falling through the cracks no more? Article 102 TFEU and sustainability: the relation between dominance, environmental degradation, and social injustice”, Journal of Antitrust Enforcement , 10:1, 32-62.
- Inderst, Roman & Thomas, Stefan (2024), “Abuse of dominance and sustainability”, Journal of European Competition Law & Practice, 15:1, 48-56.
- Lianos, Ioannis (2018), “Polycentric Competition Law”, Current Legal Problems, 71:1, 161-213.
- Monti, Giorgio (2020), “Four Opetions for a Greener Competition Law”, Journal of European Competition Law & Practice, 11:4, 124-132,

Funded by
the European Union