

## Sustainable development and EU competition law: The complex pursuit of equilibrium between economic objectives and environmental and social imperatives

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1. *Introduction* – The EU today faces an epochal challenge: reconciling the promotion of a competitive and dynamic internal market with the categorical imperative of transitioning towards sustainable development. The United Nations’ 2030 Agenda<sup>1</sup> at the international level and the European Green Deal<sup>2</sup> at the European level have placed sustainability – in its environmental, social, and economic dimensions – at the centre of the political agenda, demanding a profound transformation of the economy and society. In this context, competition law, traditionally focused on market efficiency and the protection of consumers through the prevention of restrictions and distortions of competition, is called upon to address new demands and potential tensions.

This contribution aims to analyse the complex relationship between European competition rules and sustainable development objectives. Firstly, it seeks to define the concept of sustainable development, considering the global and European context. The central focus of the analysis will concern the intersection between these two areas: the interpretative challenges posed by agreements between companies aimed at pursuing sustainability objectives, the role of merger control and, above all, the evolution of State aid discipline as an instrument to support the ecological and social transition. Account will be taken of the most recent orientations of the European Commission and the relevant case law, highlighting emerging and salient critical issues, such as greenwashing, and the future prospects for a harmonious integration of competition and sustainability.

2. *Sustainable Development in the European and International context* – Although complex and multifaceted, sustainable development has acquired an indisputable centrality in the global and European political agenda. The most frequently cited definition dates back to the 1987 Brundtland Report: «development that meets the needs of the present without compromising the ability of future generations to meet their own needs»<sup>3</sup>. It goes beyond mere environmental protection, integrating interconnected dimensions: environmental (preservation of resources and ecosystems), social (equity, inclusion, human rights, participation) and economic (balanced growth, resource efficiency, employment). The 1992 Rio Conference reaffirmed and confirmed the need for an integrated approach.

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<sup>1</sup> UN General Assembly Resolution A/RES/70/1, *Transforming our world: the 2030 Agenda for Sustainable Development*, 2015.

<sup>2</sup> European Commission Communication, *The European Green Deal*, COM(2019) 640 final.

<sup>3</sup> World Commission on Environment and Development, *Our Common Future* (Brundtland Report), 1987.

At the global level, the 2030 Agenda for Sustainable Development, with its 17 Goals (SDGs)<sup>4</sup> and 169 targets, represents a significant and ambitious programme of action for the 193 UN Member States that have committed to achieving them. Together with the Paris Agreement on climate change<sup>5</sup>, they constitute the pillars of international cooperation.

EU has positioned itself as a leader in the implementation of these agendas by pursuing various programmes; in particular, through the European Green Deal<sup>6</sup>, a strategic package aimed at achieving climate neutrality by 2050 and transforming the EU into a modern, resource-efficient and competitive economy. The SDGs have also guided the response to the post-pandemic crisis, represented by NextGenerationEU<sup>7</sup>. This temporary fund has the primary objective of repairing the economic and social damage caused by the pandemic, while making Europe greener, more digital, resilient and ready for future challenges.

The growing relevance of sustainability, in its multiple dimensions, has led to the affirmation of ESG (Environmental, Social, Governance) criteria, used to evaluate the commitment and performance of companies in these three areas. The term's origin is often traced back to the 2004 UN Global Compact publication<sup>8</sup>.

*3. The intersection between Competition Law and Sustainable Development: challenges and prospects* – Integrating sustainability objectives into the EU's economic and legal framework raises significant questions for applying competition law. While competition can stimulate “green” innovation and efficiency in the use of resources, traditional antitrust rules can be perceived as an obstacle to the cooperation between businesses necessary to achieve ambitious sustainability goals.

One of the most debated critical issues concerns the application of Article 101 TFEU to agreements between competing companies to achieve sustainability objectives (environmental or social). Companies may indeed hesitate to undertake potentially beneficial collaborative initiatives for fear of incurring infringements, such as the prohibition of restrictive agreements, given the uncertainty about how such agreements would be assessed by competition authorities<sup>9</sup>. Although Article 101(3) TFEU provides an exemption for agreements that generate efficiencies<sup>10</sup>, the traditional interpretation has focused on direct economic benefits for consumers within the relevant market. The key

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<sup>4</sup> Adopted by the United Nations General Assembly in September 2015.

<sup>5</sup> Paris Agreement, adopted at COP21 in December 2015, entered into force in November 2016.

<sup>6</sup> European Commission Communication, *The European Green Deal*, cit.

<sup>7</sup> NextGenerationEU, through the Recovery and Resilience Facility, supports priorities aligned with the Sustainable Development Goals (SDGs); [https://next-generation-eu.europa.eu/index\\_it](https://next-generation-eu.europa.eu/index_it).

<sup>8</sup> UN Global Compact, *Who Cares Wins – Connecting Financial Markets to a Changing World*, 2004.

<sup>9</sup> The legal and economic literature on the subject is vast. On the point, P. Giosa, *Bidding Consortia: Critical Assessment of the Revised Horizontal Guidelines*, in *European Procurement & Public Private Partnership Law Review*, no. 3, pp. 185-194, and R. Inderst, S. Thomas, *Sustainability Agreements in the European Commission's Draft Horizontal Guidelines*, in *Journal of European Competition Law & Practice*, 2022, pp. 571-577.

<sup>10</sup> Art. 101(3) TFEU.

question concerns whether and how to consider sustainability benefits, which may be broader, long-term and for the benefit of society as a whole, within this assessment.

Recognising this uncertainty, the European Commission specifically addressed the issue in the revision of the Guidelines on Horizontal Cooperation Agreements, adopted in June 2023<sup>11</sup>. The document clarifies that agreements that genuinely pursue sustainability objectives are not anti-competitive by nature and provide a framework for assessing such agreements under Article 101 TFEU, specifying the conditions for exemption under para. 3. In particular, it is acknowledged that consumer benefits may include not only individual benefits (e.g., more durable, healthier products) but also collective benefits (e.g., pollution reduction, improved biodiversity), provided that consumers in the relevant market appreciate their value and receive a “fair share”<sup>12</sup>. A “safe harbour” is also introduced for sustainability standardisation agreements that meet certain conditions. This represents an important step towards providing greater legal certainty for companies.

Prohibiting State aid (Art. 107 TFEU) represents another crucial juncture. While it aims to prevent distortions of competition due to selective state interventions<sup>13</sup>, the derogations provided for in the TFEU allow Member States to financially support the transition towards a more sustainable economy<sup>14</sup>. The Commission has progressively adapted its State aid rules to facilitate green investments. For instance, the Guidelines on State Aid for Climate, Environmental Protection and Energy (CEEAG 2022)<sup>15</sup> allow Member States to support projects for environmental protection, as well as measures to ensure the adequacy of energy production, under certain conditions. Similar to the aforementioned guidelines, the General Block Exemption Regulation (GBER)<sup>16</sup> also provides specific rules to support renewable energy, energy efficiency, clean mobility, the circular economy and the decarbonisation of industry. Furthermore, the Temporary Crisis and Transition Framework (TCTF)<sup>17</sup>, adopted in response to the energy crisis and then partially extended for measures supporting the green transition (with an expected expiry date of the end of 2025 for some sections)<sup>18</sup>, has further expanded the possibilities

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<sup>11</sup> European Commission, *Communication from the Commission: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements* (2023/C 259/01), OJ C 259, 21.7.2023, pp. 1-100, Chapter 9.

<sup>12</sup> Ivi, paras. 590-597.

<sup>13</sup> Art. 107(1) TFEU.

<sup>14</sup> Arts. 107(2) and 107(3) TFEU.

<sup>15</sup> European Commission, *Communication from the Commission: Guidelines on State aid for climate, environmental protection and energy 2022* (2022/C 80/01), OJ C 80, 18.2.2022, pp. 1-89.

<sup>16</sup> Commission Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (General Block Exemption Regulation – GBER), OJ L 187, 26.6.2014, pp. 1-78 (as last amended by Regulation (EU) 2023/1315).

<sup>17</sup> European Commission, *Communication from the Commission: Temporary Crisis and Transition Framework for State aid measures to support the economy following the aggression against Ukraine by Russia* (2023/C 101/03), OJ C 101, 17.3.2023, pp. 3-48 (as amended).

<sup>18</sup> The expiry dates of the various sections of the TCTF vary. It is always necessary to verify the current status on the website of the Commission’s Directorate-General for Competition.

for States to support key sectors for the objectives of the Green Deal and REPowerEU<sup>19</sup>. This regulatory framework aims to balance the urgency to support the transition with the need to preserve a level playing field in the internal market and avoid excessive or distortive subsidies.

Concerning cooperation agreements for sustainability, the agreement between several European car manufacturers to develop a shared network of charging stations for electric vehicles can be considered an example of cooperation promoting sustainability. Although this agreement may limit competition regarding charging infrastructure, the environmental benefits (reduction of greenhouse gas emissions) and consumer benefits (greater diffusion of electric vehicles) may outweigh the disadvantages. Another example could be the cooperation between agricultural companies to reduce the use of pesticides or to promote organic farming practices, which may require common standards and forms of coordination.

In the context of merger control, on the other hand, the merger between two large steel companies could be assessed not only in terms of market shares and prices, but also considering the environmental impact of steel production. Competition authorities could impose conditions on the merger, such as adopting cleaner technologies or reducing polluting emissions. In this regard, for instance, the European Commission's 2018 approval of ArcelorMittal's<sup>20</sup> acquisition of ILVA was conditional upon the divestiture of certain assets to preserve effective competition in the European steel market. However, the Commission did not impose specific environmental conditions as part of this merger decision.

Finally, regarding state aid, the tax incentives granted by some Member States for the purchase of electric vehicles or the installation of photovoltaic systems represent forms of government assistance that promote sustainability. The European Commission assesses the compatibility of such aid with the internal market rules, ensuring that it does not create undue distortions of competition. Public funding for research and development projects in renewable technologies or for redeveloping disused industrial areas also falls into this category.

*4. Applicative and ideological criticalities: greenwashing and priorities* – Despite regulatory advancements, significant challenges persist. One such challenge concerns 'greenwashing,' a phenomenon wherein certain enterprises exploit sustainability as a mere facade for commercial practices that are, in effect, neither environmentally nor socially virtuous or may even conceal anti-competitive behaviours. Indeed, some companies advertise their products as 'ecological' or 'sustainable' without furnishing concrete evidence or relying on tenuous standards. This can mislead consumers and harm

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<sup>19</sup> REPowerEU is the European Union's plan to reduce dependence on Russian fossil fuels and accelerate the green energy transition. Launched in 2022 in response to the energy crisis, it promotes energy savings, diversification of energy supplies, and faster deployment of renewable energy: <https://www.consilium.europa.eu/it/policies/repowereu/>.

<sup>20</sup> Final Report of the Hearing Officer (Case M.8444 – ArcelorMittal/Ilva) (OJ C, C/351, 01.10.2018, p. 7, CELEX: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018M8444\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018M8444(01))).

businesses that genuinely adopt sustainable practices. For instance, a company might claim a product is ‘recyclable’ when, in reality, the infrastructure for its recycling is not widely available or may employ deceptive environmental labels.

To mitigate the proliferation of such improper conduct, competition authorities, in conjunction with consumer protection agencies, are tasked with monitoring these detrimental practices on two fronts: consumer interests, as the phenomenon erodes consumer confidence, and business interests, given the dangerous distortion of competition.

The ultimate difficulty lies in the inherent challenge of balancing potentially conflicting objectives. For example, increased market concentration resulting from a merger could yield production efficiencies, but might also diminish competitive impetus for sustainable innovation. The decision regarding which interests to prioritize – short-term economic efficiency versus long-term sustainability – remains intricate. Another potential conflict is exemplified by the promotion of intensive farming to augment food production and reduce prices. While this may offer short-term economic benefits, it could engender substantial environmental costs, such as water pollution and biodiversity loss. Similarly, infrastructure development (e.g., roads, ports), while stimulating economic growth, can adversely affect ecosystems and land. Compounding these issues is that despite Article 11 TFEU mandating the integration of environmental requirements into EU policies, its concrete prescriptive force in guiding the application of competition law remains contested.

The perception of environmental protection as primarily a cost for businesses, rather than a driver of innovation and competitiveness, can impede the adoption of genuinely sustainable business models. Consequently, it seems that combating greenwashing necessitates international cooperation, as companies increasingly operate globally and national regulations may prove insufficient.

*5. Conclusions* – The relationship between competition law and sustainable development within the European Union is in a dynamic evolution state characterized by inherent complexity. While primarily designed to ensure market efficiency and safeguard consumer welfare, competition rules are not intrinsically at odds with sustainability objectives. Indeed, they can contribute to their pursuit by fostering innovation and counteracting detrimental practices such as greenwashing. Nevertheless, tension and uncertainty persist, particularly concerning assessing collaborative agreements among enterprises under Article 101 TFEU. The European Commission’s recent guidance, notably the Horizontal Guidelines of 2023, represents a significant stride towards greater clarity, acknowledging the legitimacy of agreements that genuinely pursue sustainability and broadening the concept of consumer benefits. Similarly, the evolution of state aid rules reflects the intent to harness this instrument to steer and financially support the ecological transition, while maintaining essential safeguards to protect competition within the internal market.

The principal challenge for the future will be to apply these rules consistently and judiciously, ensuring that the promotion of sustainability does not become a pretext for unwarranted restrictions on competition and, conversely, that an overly rigid application of antitrust rules does not stifle collaborative initiatives necessary to address complex environmental and social challenges.

Overcoming the outlined challenges is further exacerbated by the current global landscape, marked by escalating trade tensions and conflicts involving some of the world's most influential powers (the United States, China, and Russia). These instabilities not only jeopardize the security of supply and market stability but also risk fragmenting international cooperation and diverting valuable resources from the long-term investments required for the sustainable transition, rendering the path towards the intended objectives even more arduous. Continuous dialogue among institutions, national authorities, businesses, and civil society will be paramount, as will meticulous monitoring of the effects of adopted policies, to ensure that competition law can constitute a significant contribution, rather than an impediment, to the European Union's trajectory towards a more sustainable future for all.

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