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Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities

JURGITA MALINAUSKAITE[1,2] and FATIH BUĞRA ERDEM[3]
[1]Brunel University London, London [2]Vytautas Magnus University, Kaunas [3]Social Sciences University of Ankara, Ankara

Abstract

Debates have surged in the European Union (EU) on how EU competition policy can best support the European Green Deal. In the theoretical and practical aspects, non-economic factors in competition law analysis are problematic due to the difficulty in measuring the concrete benefits of trade-offs. The National Competition Authorities (NCAs) rather than the European Commission (EC) are leading the 'sustainability in competition law' debates, which is the focus of this article. Therefore, this study reviews the current *status quo* of all NCAs' positions concerning sustainability-related matters by classifying them into four typologies in terms of their willingness to incorporate sustainability in their assessments. It further identifies four emerging NCAs models, which seem to divert from the EC's view. This can be problematic in ensuring the uniform application of competition law.

Keywords: competition law; European Green Deal; National Competition Authorities; sustainability

Introduction

Sustainability is at the heart of the European Union (EU) with its pressing challenges to decouple economic development from environmental degradation. In light of the European Green Deal (EGD), which is a long-term plan to make Europe the first climate-neutral continent by 2050, *inter alia*, Commissioner Vestager (2020) noted that 'the time has come to launch a European debate on how EU competition policy can best support the Green Deal'. Indeed, the European Commission (EC) signals its intention towards more sustainability-friendly competition practices (European Commission 2022a) by committing to providing concrete examples of how sustainability objectives can be pursued by different types of co-operation agreements (i.e., joint production/purchasing agreements and standard setting) without restricting competition. The EC in its long-awaited Draft Horizontal Cooperation Agreements Guidelines (Draft Guidelines) incorporated a new chapter on how to self-assess sustainability agreements (European Commission 2022b). Apart from these a draft guidelines and draft of the revised R&D and Specialisation Block Exemption Regulations (known as 'HBERs') (European Commission 2022c), the EC is not leading this debate, most likely due to limited cases in this field. Instead, the National Competition Authorities (NCAs) have taken a lead for some time now, which is the focus of this article.

Building on the existing literature (Claassen and Gerbrandy 2016; Gerbrandy 2017, 2019; Holmes 2020; Holmes et al. 2021; Iacovides and Vrettos 2021; Kingston 2011; Lianos 2018; Monti 2020; Nowag 2016; Wouters 2021), this article has three main strands.

Firstly, all types of laws and policies as well as public and private actors should contribute to the climate change emergency, the so-called 'all hands-on deck' approach (Ellison 2020); there is no reason why competition law should be sheltered from this. Such a comprehensive approach requires the adoption of a maximalist rather than a minimalist perspective (Kingston 2011; Lianos 2018, pp. 161:213; Nowag 2016). Whilst the article admits that competition law is not a direct tool to tackle the climate emergency, this area of law, nevertheless, has a role to play. Indeed, a shift in environmental regulation from command/control to market-based instruments, such as environmental taxes, green subsidies, emissions trading and other voluntary initiatives, has already raised competition concerns (Coria et al. 2019). Competitive markets encourage businesses to produce at the lowest cost, use scarce resources efficiently, innovate and adopt more energy-efficient technologies. Undoubtedly, competition law has the capacity to contribute to environmental and climate policies. However, it should not act as a barrier to industry initiatives to deliver sustainability objectives. A transition to a low-carbon economy may entail 'first mover disadvantages' with high investment costs. Therefore, co-operation on sustainability initiatives is essential, yet businesses may feel 'uncomfortable' entering into sustainability agreements for fear of being exposed to anti-competitive practices investigations. Traditionally, 'sustainability' has a broad connotation, embracing all 17 sustainable development goals (SDGs). The Brundtland Report defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (UN 1987), outlining 'sustainability' by the three-pillar conception – embracing social, economic and environmental aspects. Given that 'sustainability' is an evolving 'organism' with myriad interpretations and context-specific understandings, the article leaves this concept open – referring to both a broader meaning (i.e., embracing all 17 SDGs) or a narrower one (i.e., focusing on climate-change-related issues). The Draft Guidelines embrace a broader scope of the notion of 'sustainability' including not only environmental initiatives but also social objectives (e.g., labour and human rights, and animal welfare); yet, climate-related issues are singled-out in policy documents (European Commission 2021b). At an international level, the climate emergency is the number one priority and bringing wider concerns, such as worker's rights into the 'sustainability' net, is regarded as more controversial, risking delaying the fight against climate change (ICC 2020). Therefore, the article argues that a hierarchical order should be adopted (i.e., prioritising environmental aspects over social aspects, such as workers' conditions aligned with the spirit of the 'constitutional provisions' defined in Article 37 Charter and Article 11 TFEU and beyond), also considering the limited resources of some NCAs.

Secondly, competition law by its nature is clearly adaptable and capable of reacting to various crises (i.e., the COVID-19 pandemic). It has to adjust to ever-changing market conditions and business models (i.e., multi-sided business models; circular business models). For instance, the NCAs will face new challenges due to businesses embracing sustainable business models (also enforced by other instruments, such as the Corporate Sustainability Reporting Directive with an expanded scope of reporting) (European Commission 2021a). Therefore, the open nature of competition law should be taken as being conducive to non-economic issues. EU competition law pursues multifaceted objectives, not confined to safeguarding economic efficiency. In the pragmatic understanding of law, it is argued that independent from legal positivism, it is necessary to start from

experience, not logic (Posner 1993, p. 8). Endeavours of generating sustainable scenarios through applying competition law seemingly stem from the mainstream of legal pragmatism. This requires an outcome-oriented, eclectic and anti-foundational approach in the pragmatic interpretation of law (Luban 1996, pp. 43–49). Posner, accordingly, defined the elements of legal pragmatism as (a) the adoption of the stance of pragmatic philosophy against concepts such as truth and reality, (b) the use of propositions whose results are testable and (c) the existence of legal designs based on human needs regardless of a strict notion of objectivity (Posner 1990, p. 1661). This means that the interpretation of law may require the adaptation of experimentalism: the necessity of implementing experimentalist governance in EU competition law applications to eliminate economic and non-economic uncertainties (Svetiev 2020). For instance, the Greek Competition Authority has recently embarked on experimentalism through its proposed sandbox. Therefore, competition law should re-legitimise its role by embedding progressive economic and legal thinking.

Thirdly, the peculiarity of EU competition law is that the majority of antitrust cases (Articles 101 and 102 TFEU) are predominantly enforced at national rather than supranational level (European Commission 2022d) with the NCAs playing a tremendous role. The functioning of the EU internal market depends on 'fair trading rules', meaning that competition is maintained effectively by providing equal opportunities to consumers and undertakings. Therefore, there should be a 'uniform' application of the competition law provisions (Articles 101 and/or 102 TFEU) across the Member States (MS). In contrast to previous studies, this article embarks on a large-scale comparison embracing all 27 MS as well as a research scope that is broader and expands beyond the Article 101(3) TFEU debates. Sustainability considerations are not, however, equally shared amongst the MS. Apart from legal uncertainty to businesses, this could also raise a 'threat' to the uniform application of EU competition law across the MS. This is equally problematic if MS adopt divergent approaches in relation to their national competition laws. For instance, similar sustainability initiatives can generate divergent responses by different NCAs. One must also note that some NCAs can be rather 'creative' in finding ways to avoid EU competition law; therefore, anti-competitive practices that may affect trade between the MS may be judged under national law (Botta et al. 2015). Therefore, this article argues that it is essential to capture the initial 'sustainability' related stand of all the NCAs to prevent any future 'threat' to the uniform application of antitrust law. This will also facilitate future comparative studies necessary for the EU harmonised approach, which is much needed.

Specifically, the article focuses on the current *status quo* exploring the NCAs' perspectives on the sustainability debates, by addressing two main questions:

i What are the NCAs' past and current approaches to sustainability considerations? Are there any NCA models emerging?
ii What would be the practical implications for NCAs to address sustainability?

The article also provides initial comparative analysis between the MS.

In terms of the methodology, several steps were followed to obtain the necessary data to determine the NCAs' positions. Firstly, the article largely relies on the contributions from the 11 NCAs (Bulgaria, Czechia, Finland, France, Greece, Ireland, the

Netherlands, Poland, Romania and Spain – Catalonia added a separate response) to the EC's call regarding competition policy to support the EGD (European Commission 2020). Secondly, the official websites of all NCAs were scrutinised during various periods (i.e., December 2020; June 2021; November 2021; and May 2022) to identify recent developments. Finally, several OECD, UN and ICC reports were also consulted. To facilitate this comparative study, the NCAs' approaches were classified into four 'fluid' typologies, with key common denominators (*tertium comparationis*) being (i) a definition of sustainability (if any); (ii) the scope (i.e., Articles 101/102 TFEU and merger control); and (iii) any tools embedded (or plans to embed them). In terms of limitations, this article excludes the role of states and other institutions. Clearly, there is a possibility for governmental intervention, leaving sustainability considerations for ministers (such as, for instance, in Germany in terms of merger control in the public interest). There are also concerns raised how the courts (both European and national) would interpret sustainability considerations. For instance, Vedder (2021) criticised the CJEU's conservative arguments about sustainability by adhering to the established case law as seen in the APVE case (2017). Whilst equally important, these issues fall outside the scope of this article.

I. Setting the Scene for Competition Law in Sustainability Debates

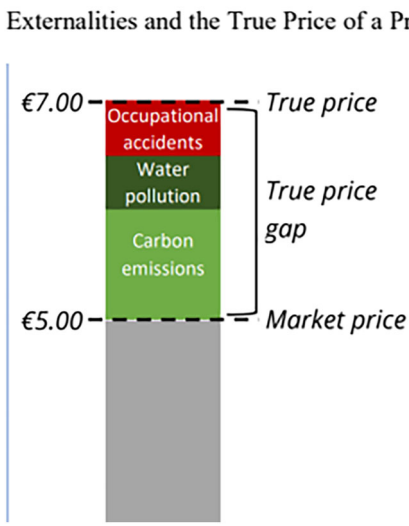
Competition is assumed to be useful for economic growth as a means of incentivising entrepreneurship and providing an efficient allocation of sources. It is accepted that sustainability and competition have a positive correlation because competition triggers the introduction of more efficient products (improved, cheaper and better) (ACM 2021, para 2). Moreover, competition law increases the effectiveness of green policies through the effective use of limited resources and the internalisation of environmental cost (European Commission 2020). However, an emphasis on fierce competition does not consider limited environmental sources due to corporate strategies including overproduction and planned obsolescence (Malinauskaite and Erdem 2021); overall, it has 'generally allowed and contributed to the creation of markets based on cheap products, disregarding their environmental and social sustainability' (Fair Trade Advocacy Office 2019). EU competition law places the focus on consumer welfare and efficient allocation of resources, meaning that more/cheaper/better/innovative products are expected from producers regardless of productions' impact on sustainability. Assessing other public interests in competition law raises concerns regarding legal uncertainties (Dorsey et al. 2018). The desire for economic growth imposed by the current economic system deepens the ecological collapse by constantly increasing production and consumption (Raworth 2018).

For a sustainable future, thinking about green growth is more than an obligation. In this regard, capitalism, in a general sense, should metamorphose into moral/conscious/citizen/stakeholder capitalism through ever-changing societal needs because the careless actions of businesses in perfectly competitive markets could be toxic in the absence of intervention by competition agencies (Meagher 2020; Stucke and Ezrachi 2020). On that note, Lianos (2020) and Schinkel (2022) argue that competition policies should also cover a comprehensive approach to competition that prioritises fairness, aimed at salving distributive injustices.

The Draft Guidelines offer a willingness-to-pay formula as an alternative solution where environmental benefits can be considered as individual non-value benefits in the interest of consumers if they are willing to pay more for sustainability (European Commission 2022b). However, in practice, consumers do not seem willing to bear any cost/price increase in products because of the sustainable production process: 'Consumers say they want to buy ecologically friendly products and reduce their impact on the environment. But when they get to the cash register, their Earth-minded sentiments die on the vine' (Bonini and Oppenheim 2008, pp. 56–61). Recently, there are some elements of behaviour change in consumers (Growth from Knowledge 2021). Therefore, Volpin (2020, pp. 9–18) argues that sustainability should be accepted as a quality element because consumers would probably choose a more sustainable product if it is offered at the same price as other identical products. The problem is that externalities (i.e., labour exploitation and environmental pollution) are not internalised in the economic process (Vedder 2021). Already in 2007, economist Lord Stern explained that 'Climate change is a result of the greatest market failure the world has seen' (Economist's View 2007), as the price of a product does not reflect its true costs. The market price does not include the climate and environmental costs ('negative externalities'), which are imposed on society as a result of pollution (True Price 2019). The difference between the true price and market price, which is also known as true price gap (Dolmans 2020, pp. 1–5), leads to a stalemate for the EGD. Neither businesses nor consumers compensate for the true price, which is currently borne by society as a whole (Figure 1).

Therefore, economists suggest ways of internalising external costs (Folkens et al. 2020, p. 6681; Long et al. 2012, pp. 460–466). For the recovery of real product

Figure 1: Price Externalities and True Price. [Colour figure can be viewed at wileyonlinelibrary.com]



Source: True Price (2019)

cost, the true price gap should be identified on a case-by-case basis because deferring this cost could lead to downstream issues for the following generations. In the competition law context, Cerpeckis (2021) proposes different methods to quantify sustainability benefits either based on the generation of new data (i.e., by asking consumers their willingness to pay for sustainability improvements; or elicit individuals' willingness to pay for sustainability improvements from their behaviour) or relying on existing data (i.e., benefit transfer from other studies; or valuation derived from stated policy estimations, for instance, using a CO_2 price). The price should be determined by considering all kinds of externalities of the product during its lifetime, including use, disposal, storage and environmental costs. Undertakings should be prevented from competing on exploiting externalities that harm the environment. Instead, they should be competing on how to reduce and internalise externalities (Dolmans 2020).

Competition law does not exist in a vacuum and has been discussed in various contexts in the past (i.e., industrial policy and most recently, the EGD). Indeed, Article 11 TFEU notes that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities'. The former Horizontal Cooperation Guidelines covered different types of co-operation explicitly. They potentially generate efficiency gains, *inter alia*, environmental agreements (Horizontal Cooperation Agreements 2001, para 10), although this chapter was removed from the 2010 Guidelines (Horizontal Cooperation Agreements 2011). In terms of cases, in *Exxon/Shell* (1994), the EC held that a reduction in pollution would lead to a technological improvement under Article 101(3) TFEU. Similarly, in *CECED* (1999), whilst the agreement was restrictive by object as it restricted either producing or importation less energy-efficient washing machines, it was, nevertheless, upheld under Article 101(3) TFEU; new machines would reduce energy consumption, meaning lower electricity and water bills for consumers. Yet, case law indicates that an agreement may be found to be restrictive 'by object'. The quote from the case states: An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives (General Motors 2006). Businesses can exploit 'sustainability' to cover their anti-competitive agreements. Accordingly, in the Consumer Detergents case (2011), the implementation of an environmental initiative concerning laundry detergents led to a cartel that co-ordinated price increases. Whilst the AISE's recommendation concerning good environmental practice for household laundry detergents was voluntary, helping consumers to reduce the usage of detergent and use washing machines more efficiently, three major industry players decided to enter into a parallel agreement designed to achieve 'market stabilisation', *inter alia*, ensuring that price reductions (through reduced packaging) would not be passed on to consumers.

Apart from voluntary initiatives, collusions can also take place when environmental standards are introduced by legislation, as in the *Trucks* decision (2017). Most recently, in the *Car Emissions* case (2021), the EC found an infringement of Article 101(1)(b) TFEU due to the collusion on technical development in nitrogen oxide cleaning. The EGD has given a new impetus to businesses to pursue sustainability initiatives. The EC had to bring back a 'sustainability' chapter (yet, broader in scope) to its Draft Guidelines. Despite the EGD, surprisingly, the NCAs rather than the EC are leading sustainability debates.

II. The NCAs' Past and Current Approaches to Sustainability Considerations

As noted above, the NCAs play a significant role in the enforcement of EU competition law. It seems that the NCAs are also leading the sustainability debates. Therefore, this section will be devoted to the NCAs' approaches in dealing with 'sustainability' aspects.

Role of NCAs in Sustainability Debates

The article embraces the 'all hands-on deck' approach insisting that nobody should be excluded from addressing the climate change emergency. Regarding the normative question of why it is legitimate for a competition agency to intervene, this study falls in line with Dworkin (1986), who argues that legal actors such as judges and independent administrative authorities are a part of regulation in 'hard cases'. Consequently, this article positions itself between natural law and legal positivism by arguing that NCAs should have an exhorting and guiding role so long as they remain loyal to general principles of law by considering abstract ethical values. There is a need to move from a technocratic to a more populist approach, questioning whether it is legitimate for competition law to focus exclusively on economic efficiency (Lianos 2020). Non-economic factors serving the public interest are now considered frequently due to the existential characteristics of sustainability-related matters. The NCAs have to adapt to a new reality and should not stand aloof from pressing EU policies. Monti (2020, p. 132) notes that integrating considerations of environmental sustainability in the NCAs' (as well as the EC) decision-making process is part of the enforcer's task.

One must note that intervention is not without costs. NCAs (especially from the newer MS) have to justify to the public and policy-makers their existence, by measuring the effects of competition enforcement. NCAs are also constrained by scarce financial and human resources, preventing them from effectively enforcing every infringement. Setting clear enforcement priorities is a crucial precondition for preserving society's resources, via a cost-benefits analysis tackling the most harmful infringements. On one hand, competition is a main driver for innovation and it helps to produce more sustainable products/service, as demonstrated by the Car Emissions case. On the other hand, it is equally important that competition law does not present barriers to the achievements of sustainability goals. For instance, the Dutch Authority for Consumers and Markets (ACM) in 2022 allowed competitors Shell and TotalEnergies to collaborate in the storage of CO_2 in empty natural-gas fields in the North Sea. Whilst there was restriction of competition, the ACM noted that this initiative would help realise climate objectives (ACM 2022).

Overview of NCAs Sustainability Approaches

The literature identifies different suggestions on how to approach sustainability in the context of competition law, for instance, by expanding the protection of 'consumer welfare' beyond pure economic considerations; by employing the so-called 'Albany' route of finding the provisions of Article 101 TFEU inapplicable to (some) sustainability agreements (Albany International BV 1999); and by taking due account of externalities of products/services that cannot be measured in direct prices, which was reinstated in *Kunsten Informatie en Media* (2014, para 23), where the court noted that 'the framework

of collective bargaining between employers and employees and intended to improve employment and working conditions must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 101(1) TFEU'. Article 101(3) exemptions to increase the scope of efficiency considerations (society at large not only affected users), block exemptions and ancillary restraints are also possible (Holmes 2020).

This article does not attempt to fully delve into a discussion of how sustainability should be addressed. Instead, it aims to capture the NCAs' initial reactions, which are not uniform across the EU.

The article has identified four typologies of NCAs' approaches to address sustainability: (i) positive action – where some active steps were taken in an attempt to explicitly acknowledge sustainability in competition law; (ii) cautious approach – where support for sustainability has been expressed with some further reservations (and/or where a call for further clarification was noted); (iii) reserved approach – suggesting that other authorities are better placed to deal with sustainability issues or no changes to the current framework is needed; and (iv) undecided approach – no indication on this issue yet (illustrated in Table 1).

First Category: Positive Action Approach – Leading an Example Towards Sustainability

The first category embraces the approach taken by the NCAs (or the legislature like in the Austrian scenario), where explicit steps have been taken to address 'sustainability' in the competition law context.

The Dutch and Greek Experiences

The **Dutch** ACM was the first authority to engage in the debates on sustainability. In 2014, it proposed a radical change in relation to price-centric competition law assessment by indicating that lower prices do not always bring consumer welfare (Toma 2016). However, the past ACM's experience followed a price-orientated approach. For instance, the proposal to close five old coal-fired power plants to reduce the environmental damage was rejected because this co-ordinated practice would have led to a decrease in the total energy supply and consequently an increase in electricity prices. The ACM accepted that

Table 1: National Competition Authorities' Approaches to Sustainability

Positive action approach	Cautious approach	Reserved approach	Undecided approach
Austria	Belgium	Czechia	Croatia
France	Bulgaria	Germany	Cyprus
Greece	Finland		Denmark
Hungary	Ireland		Estonia
Spain	Poland		Italy
The Netherlands	Portugal		Latvia
	Romania		Lithuania
	Sweden		Luxembourg
			Malta
			Slovakia
			Slovenia

environmental benefits could be considered but that these were limited as the expected increase in prices outweighed them (ACM 2013). A similar request was made in 2015 by chicken producers, leading to the infamous leading to the infamous "Chicken of Tomorrow (*Kip van Morgen*) case, involving 95% of Dutch supermarkets. The chicken producers and supermarkets made a joint decision to only sell chickens that complied with these set conditions, which in turn increased the costs. An exemption was not granted, as consumers were not willing to pay for the increased cost (ACM 2020). The ACM (2014) focused on consumer preferences, and their sensitivity to a price, as well as reduction of choice. A similar approach is currently employed in the EC's Draft Guidelines.

These cases have surged alongside further discussions concerning whether competition law causes a barrier to sustainability goals. In response, the ACM issued the Sustainability Guidelines Draft in 2020 with a further revision in 2021, which were limited in scope with regard to sustainability agreements (see NCA Models section for more detail). The ACM introduced new tools, such as a willingness-to-pay test and environmental cost calculation to assess sustainability agreements (Costa-Cabral 2020). In the guidelines, sustainability is defined as one of the most important priorities of the ACM (2021, para 7) with sustainability agreements serving the purposes of 'the identification, prevention, restriction, or mitigation of the negative impact of economic activities on people (including their working conditions), animals, the environment, or nature'. It has also expressed its willingness to enter into dialogue with the sustainability initiative parties and provide informal advice. The ACM has recently applied the second draft version of its Guidelines in the Shell and TotalEnergies case.

Similar to the ACM, the **Hellenic** Competition Commission (HCC) has also taken an active role in the sustainability debates. It issued a Staff Discussion Paper, which analysed convergence areas and conflicts between sustainable development and competition law (HCC 2020a). The Discussion Paper also encourages all NCAs to review their aims and objectives with a broader perspective, embraced externalities and intergenerational effects, in addition to monetary assessments. The theory of harm, accordingly, should embrace long-term sustainability considerations through the development of a competition law sandbox (OECD 2020b). In contrast to the ACM, the HCC (2020a, paras 42–43) also noted that sustainability considerations should have a broader scope (beyond Article 101(3) TFEU) including Article 102 TFEU and merger control. Sustainability considerations could justify otherwise illegal foreclosure on the basis of efficiencies or objective necessity, or more broadly based on the Article 11 TFEU requirement that environmental protection is integrated into all EU policies. All in all, the HCC suggests that Article 102 TFEU could be used as a sword, indicating that restrictions of competition that also impact regulatory objectives may amount to an abuse of dominance.

In the past, the HCC experience, in terms of sustainability, has been far from consistent. For instance, in 2009, the HCC granted an exemption to the Public Company of Electricity for an exclusive supply agreement for 15 years with a lignite mine for the generation of electricity, *inter alia*, on the grounds that security of energy supply would benefit direct consumers (Decision 457/V/ 2009; Decision 627/V/ 2016). However, a more restrictive approach in terms of exemption was taken in the Technical Chamber of Greece case (Decision 512/VI/ 2010), where quality-related efficiency gains were rejected (HCC 2020a).

The Spanish, French, Hungarian, and Austrian Experiences

Whilst the ACM and HCC are the two leading NCAs in terms of sustainability debates, there are also positive developments in the other MS.

The **Spanish** Competition Authority (CNMC) announced that incorporating sustainability objectives into competition law was more than a necessity (CNMC 2020, pp. 2–3). It stresses that necessity (i.e., any imperative reason for the society) and proportionality (i.e., the least harmful way to do it) tests are vital in the assessment of whether sustainability objectives are met and whether any restrictions in competition can be tolerated (CNMC 2020, p. 4). Specifically, in relation to sustainability agreements, it plans to review the concepts of 'consumer and equitable sharing of profits, as well as the design or adaptation of cost analyses […] to accommodate the assessment of qualitative criteria and the accounting of externalities' under Article 101(3) TFEU (CNMC 2020, p. 14). As per merger control, whilst raising concerns about 'killer' acquisitions (acquiring companies to prevent developing cleaner technologies), the CNMC (2020, pp. 20–21) also indicated that mergers could support sustainability objectives – and the latter should be considered when assessing mergers. The CNMC (2020, p. 19) also set a three-tier action plan concerning the development of an antitrust approach to sustainability: (i) to determine which concepts need to be redefined/reinterpreted; (ii) to re-adjust the enforcement tools (i.e., cost and efficiency analyses, which can bring benefits to society); and (iii) to recruit specialised personnel (i.e., environmental/development economists and environmental scientists). The trade-offs between different objectives depend on how the objectives are defined; therefore, the CNMC rightly questions the current framework. The CNMC is the first authority to explicitly note its intention to recruit more specialist staff. Whilst the NCAs of larger MS can afford it, this may not be possible for smaller and 'newer' NCAs owing to financial restraints, which will be further discussed in Section III.

Furthermore, the **French** Competition Authority (2020c) (*Autorité*) also noted that developing environment-specific tools of analysis would require modification of the *Autorité*'s legal framework. It further stressed environmental aspects in its published priorities in 2020 and 2021, by suggesting that the integration of sustainability concerns in its decision-making [i.e., declaring that environmentally beneficial concerted actions are considered under exemptions (if other criteria are met) in light of the EGD] (Autorité de la concurrence 2020a). In addition, in May 2020, the *Autorité* and seven other regulatory authorities also published a joint document to take a co-operative action against climate change. It was stated that the concept of consumer welfare is being contextualised more comprehensively by considering the environmental dimension of issues in merger control (Autorité de la concurrence 2020b). In terms of case law, the *Autorité*, in its hard-wearing floor coverings sector investigation, fined both related manufacturers and the trade association €302 million due to the 'reduced incentives to innovate and produce more sustainable products' (French Competition Authority 2017; OECD 2021a, p. 24). Most recently, in 2022, the *Autorité* also appointed the head of its sustainable development network to deal with an increase in complaints and queries about co-operation between rivals on sustainability initiatives.

The **Hungarian** Competition Authority (GVH) noted that sustainability considerations often emerge in practice as a 'defence' rather than prompting any sustainability-related anti-competitive concerns. However, the GVH (2021) concluded that NCAs should take an active role to achieve sustainability objectives, at least within certain limits by stating

that legislative action is not necessary but instrumental. Whilst this requires political will, the GVH has started its own initiative, for example, by recently issuing an amendment to its notice related to fines. The so-called the New Notice (Gönczöl et al. 2021) introduced a pro-active remedy, where an undertaking has to provide either partial or full compensation for the negative impact of its competition law violation for a reduced fine (or the remittal of the whole fine). Pro-active remedies on sustainability and environmental protection are also included.

Finally, **Austria** has a contrasting approach from this debate in the EU with the Federal Competition Authority (BWB) playing a reactive role. Initially, the BWB emphasised the necessity of a broad understanding of consumer welfare by taking more account of impacts on quality, variety and innovation. Short-term effects of low prices in the enforcement of competition law were of a lesser concern. Yet, the legislature has taken a lead and the Cartel and Competition Law Amendment Act 2021 (Republik Österreich Parlament 2021), implementing the ECN+ Directive, *inter alia*, incorporates sustainability-related matters.

Second Category: 'Cautious' Approach

This category refers to the NCAs, which have expressed support to sustainability with some caution, underlining sustainability-related challenges.

The **Polish** Office of Competition and Consumer Protection (OUKiK 2017) stated that competition law can support the EGD objectives by 'adjusting the application of the current competition law policies'. Yet, it noted that the current framework should only be adjusted rather than radically changed. The OUKiK has limited experience in dealing with non-economic issues under the Polish Competition Law. However, in the waste management decision, the Polish Supreme Court (2014) indicated that apart from competition protection, other values (environmental protection) could be considered, especially under the Polish counterpart of Article 101(3) TFEU (Bernatt and Mleczko 2017). The OUKiK calls for EU-level guidelines, yet, allowing some room to manoeuvre for the EC and NCAs to apply for the 'green exemption' in a flexible way. Herein, it recently issued two go-ahead decisions, namely, *Polska Grupa Energetyczna/Ørsted Wind Power* and *PKN Orlen/NP Baltic Wind* (2021). Both concerned the construction of wind farms in the Polish economic zone in the Baltic sea to generate electricity using clean and environmentally friendly technologies. In contrast, the **Irish** Competition and Consumer Protection Commission (CCPC, 2020) stated that sustainability agreements could be included in the Horizontal Guidelines 'with detailed guidance', calling for businesses' input to better understand the issues. For instance, in its previous reports, the CCPC raised concerns about sustainability, particularly in the farming sector in relation to (i) farm income levels; (ii) farmers' lack of power and their limited ability to negotiate the price they get for their products; and (iii) a lack of transparency in terms of who is profiting in the food chain (Goggin 2019).

Other sustainability "technocrats" also involve the **Finnish** Competition and Consumer Authority (FCCA), which expressed that consumer benefits (embracing both current and future consumers) should be redefined in a broader way and that the timeframe to assess efficiencies should also be re-examined. In the calculation of harm, the tools from environmental economics, such as shadow prices, should be presented. The

FCCA (2020) also singled-out the climate-related issues: '[climate change] is more urgent than other policies and therefore deserves a different kind of treatment'. Similarly, the **Swedish** Competition Authority (*Konkurrensverket*) in its contribution to the EC's consultation admitted that sustainability agreements and climate-related matters have not been highlighted in their enforcement activities, but that this was about to change. It further suggested that the EU-level guidance would be beneficial, as well as horizontal block exemption regulations and potentially, so-called comfort letters (akin to the HCC's approach). The Konkurrensverket (2020) noted several challenges, including complex calculations using analytical methods to calculate shadow prices, and, subsequently, these affiliated issues were discussed in its annual conference 2022 dedicated to sustainability (Konkurrensverket 2022).

Furthermore, the **Portuguese** Competition Authority (AdC) did not contribute to the EGD call, yet its position was expressed in various talks. Rosa, the AdC President (Rosa 2021), demystified views that competition policy acts as an obstacle to sustainability, simultaneously noting that 'guidance to stakeholders may be key to avoid businesses shying away from sustainability initiatives'. There were some further reservations, where out of market efficiencies could be better addressed by regulation, rather than by competition policy. The **Belgian** Competition Authority (BCA) also did not submit its opinion to the EGD consultation. Yet, it noted that it takes 'into account total as well as consumer welfare (i.e., out-of-market benefits)', which is in line with the CJEU reasoning, as it 'never endorsed an exclusive focus on consumer welfare'. It further emphasised that their current legal framework allows for environmental aspects to be considered 'within the competitive assessment of infringement and merger control cases' (OECD 2021b).

Finally, the **Romanian** Competition Authority (RCC) expressed that sustainability agreements can lead to uncertainties, such as the calculation of efficiencies. Whilst the RCC admits that competition rules (including merger control) can contribute to the achievement of the EGD objectives, it currently does not have the authority to address 'major public interests' (RCC 2020). From the brief **Bulgarian** Competition Authority's (CPC) stand, it seems that it expects further instructions from the EC in terms of both general policy guidelines and case-by-case assessments. Yet, the CPC (2020) further notes that in the development of potential future EU guidelines, 'the specifics of individual regions and national characteristics' should be considered.

To conclude, the NCAs vary in their approaches addressing sustainability-related matters, which are listed in Table 2. The majority of the NCAs refrain from defining 'sustainability', yet the explicit priority is given to environmental matters. Whilst the ACM and HCC indicated a wider spectrum of sustainability matters (beyond environmental concerns), environmental protection is singled-out. There are also divergences across these NCAs in relation to the scope, yet a clear domination of Article 101(3) TFEU is visible (domestic equivalent), traditionally used to cover non-economic matters. Most NCAs (Belgium, Greece, France, Ireland, Poland, Romania, Spain and Sweden) also note other provisions (i.e., Article 102 TFEU and merger control). In terms of tools, most of the NCAs have suggested that guidelines should be provided to increase legal certainty, whereas the French *Autorité* prefers a case-by-case assessment (i.e., its new Head of the sustainable development network should facilitate it).

Table 2: Comparative Analysis (Compiled by the Authors)

		Scope			*Sustainability*			*Tools/next steps*			
		Art 101	*Art 102*	*Mergers*	*Broad*	*Narrow*	*Not defined*	*EU guidance*	*National guidance*	*Enforcement priority*	*Others*
Positive action approach	The Netherlands	v			v*				v		Guidelines
	Austria	v				v			v		Legislative route
	Greece	v	v	v	v*			v	v		Sandbox/legislation/ guidelines
	Hungary						v*		v		New Notice – pro-active remedies
	France	v		v			v*			v	Sustainability priorities/Head of sustainability
	Spain	v		v			v*				Action plan
Cautious approach	Belgium	v	v	v			v*				
	Bulgaria						v	v			
	Ireland	v		v			v*	v			
	Finland	v					v*	v			Hierarchical approach: priority to the climate-related aspects
	Romania	v	v	v			v	v			
	Poland	v		v			v*	v			
	Portugal						v	v			
	Sweden	v	v	v			v*	v			

*Environmental protection is singled-out.

Furthermore, there are substantial proposals by CCPC and OUKiK to employ a soft approach via re-educating the industry on sustainability agreements that are not likely to cause competition concerns and enabling customers to make more sustainable decisions. Finally, the HCC (2020a) noted the significance of collaborations between NCAs at a national level for realising the objectives of the EGD. This can be illustrated by the joint technical report commissioned by the ACM and the HCC (Inderst et al. 2021). The majority of the NCAs expects direction from the EU, calling for a harmonised approach across the EU.

Third Category: Reserved Approach

In contrast to the above positions, the **German** Competition Authority, the Bundeskartellamt (OECD 2020a), expressed that 'it is undisputed that there are other important economic and socio-political goals than ensuring competition. However, it is not the *Bundeskartellamt*'s responsibility to realise these'. For instance, in the glass collection and recycling case (Gesellschaft für Glasrecycling und Abfallvermeidung 2007), the purchasing cartel was found to be unnecessary in increasing the amount of glass waste recovery by the *Bundeskartellamt*. Yet, the 'Fairtrade Labelling Organizations International e.V.', which aimed to set fair terms around imported agricultural goods, and the 'Initiative Tierwohl' for safeguarding animal welfare were both found in line with German competition law (OECD 2020a, paras 71–72). Recently, in the assessment of the milk producers' initiative of 'Agrardialog Milch', the *Bundeskartellamt* concluded that the price-fixing agreement was anti-competitive. Yet, it noted that even price-fixing agreements pursuing sustainability aims are encouraged and supported as long as 'they are not aimed at a higher sustainability standard than stipulated by European or national law'. For example, the Bundeskartellamt (2022a, 2022b, 2022c) declared no competition concerns for 'the food retail sector's voluntary commitment to set common standards for wages in the banana sector' because there are not any attempts to share information of sensitive parameters and to introduce minimum prices or surcharges.

Previously, the *Bundeskartellamt* expressed that the groups of consumers affected by the restriction and benefitting from the gains must be substantially the same and future benefits must be discounted (OECD 2020a, para 57). Furthermore, sustainability benefits were seen as 'not fully reflected in the material form of the relevant product' and represented 'public interest objectives', which were 'externalities' (not qualifying as benefits at all) (OECD 2020a, paras 57–58). The dominant view was that the legislator rather than the *Bundeskartellamt* should take a decision if there is a conflict between competition law and sustainability objectives. This ambivalent situation is expected to be resolved by the 12th amendment of the German Competition Act. It was mentioned in the 2025 agenda of Federal Ministry for Economic Affairs and Climate Action of Germany as a way to establish more legal certainty for sustainability co-operation between companies as well as stronger consumer protection with the expanding authority of the *Bundeskartellamt* (Weidenbach et al. 2022).

A rather sceptical view was also expressed by the **Czech** Competition Authority (OUHS), noting that 'the possible relaxation or adjustment of competition rules applied only on particular market players achieving the green deal objectives may lead to a risk

of unequal approach and thus to unequal market conditions' (Office for the Protection of Competition of the Czech Republic 2020). It further raised concerns about whether competition law is truly an effective tool to promote the EGD.

Fourth Category: Undecided Approach

There is a large group of the NCAs (11/27) that neither contributed to the EGD call nor publicly indicated their views in relation to sustainability. This fourth category embraces the following countries: Croatia, Cyprus, Denmark, Estonia, Italy, Latvia, Luxembourg, Lithuania, Malta, Slovakia and Slovenia. For example, in its OECD contribution, Lithuania noted that '[t]he issue of sustainability in the context of competition policy is a broad and important topic which merits serious exploration' (OECD 2020c). Yet, similar to Germany, it left making the necessary changes to the legislature. One must note that all these countries (save Italy) are regarded as small countries and most of them (except Italy, Denmark and Luxembourg) are classified as 'new' MS (the 2004–onwards enlargement wave).

NCA Models

Building on the discussion above, the article has identified four different NCA models emerging in the EU. They are the Austrian, Dutch, Greek and Hungarian models (Table 3).

The **Dutch** ACM has been a leading authority in the sustainability debate in the EU. It was the first to launch its draft guidelines on sustainability agreements, which present three opportunities to businesses to meet the sustainability objectives.

Firstly, it provides examples, which initiatives can fall outside scope of 6(1)WE (domestic equivalent of 101(1) TFEU) (e.g., non-binding joint ambitions). Yet, its example of 'respecting legislation elsewhere' is open for wide interpretation and can be problematic (ACM 2021).

Secondly, the guidelines also modify the conditions under Section 6(3)WE. The first condition has an explicit reference to sustainability benefits under the 'efficiency gains' umbrella. Whilst efficiencies should be 'objective' (ACM 2021, para 35), both quantitative data (i.e., reduction of carbon footprint) and qualitative data (i.e., animal welfare) could be considered (ACM 2021, paras 41–42). The second condition of 'a fair share', the users of product/service are considered in a broad sense (i.e., including society at large) (ACM 2021, paras 43–45). This deviation from the traditional interpretation is only applicable to environmental-damage agreements and if 'the agreement helps, in an efficient manner, comply with an international or national standard, or it helps realise a concrete policy goal (to prevent such damage)' (ACM 2021, para 45). The final two conditions of indispensability (ACM 2021, paras 64–68) and preservation of competition (ACM 2021, para 69) are mainly built on the existing practice.

Thirdly, the ACM is also willing to provide individual advice to undertakings (e.g., the energy agreements in the past) (ACM 2021, paras 70–71). If sustainability initiatives are found to be incompatible with the Dutch Competition Act, undertakings could submit their initiatives to the legislature (ACM 2021, paras 73–74).

The **Hellenic** HCC is another leading authority in the sustainability-related issues. In 2022, it launched its Sandbox for Sustainable Development and Competition (following

a public consultation in 2021). This sandbox provides a safe space (free from regulatory penalties) for businesses acting towards a more sustainable industry (HCC 2020a, 2020b, 2022a). Via this platform, the HCC offers a 'supervised space for experimentation' to pro-actively promote innovative business initiatives. Specifically, it is aimed at industry and small and medium enterprises to experiment with new business models for the faster and more efficient realisation of the SDGs, in compatibility with competition law (HCC 2022b). A new step was taken in 2022 by incorporating sustainability goals in Article 37A of Law 3959/2011 on Free Competition, providing the possibility of adopting a no-action enforcement letter by the HCC President based on a Report by the Directorate-General for Competition, where after the evaluation, a co-ordinated conduct/practice contributes significantly to sustainable development and the public interest (HCC 2022a).

Whilst the HCC was the initiator of change in Greece, in **Austria**, the legislature rather than the BWB took assertive steps. As noted above, the Cartel Act 2021 acknowledges expressly 'sustainability' defined in a narrow sense. It is a potential justification for restrictive agreements (Robertson 2022). '[C]onsumers' are, for the purposes of the Act, 'granted a fair share of the benefit resulting from the improved production of goods, its distribution or the promotion of the technical and economic progress if the agreement *significantly contributes to an ecologically sustainable and climate neutral economy* [emphasis added]'. Furthermore, in June 2022, the BWB announced its draft guidelines on the application sustainability, which provides a 'sustainability exemption' under five cumulative conditions: (i) The co-operation should bring along efficiency gains (ii) in furtherance of an ecologically sustainable or climate-neutral economy (iii) in substantial and (iv) indispensable manners (v) without eliminating competition (BWB 2022). Similar to the ACM, but in contrast to the EC's Draft Guidelines, it expands the scope of 'consumer welfare', by embracing the welfare of society as a whole and, additionally, recognising benefits that can be materialised at a later stage of the co-operation, including benefits for future generations. Similar to the ACM and HCC, the BWB is also willing to offer informal guidance provided doubts remain after self-assessing using the guidelines.

Finally, a rather unique approach is also embraced by the **Hungarian** GVH. Pursuant to its New Notice, the GVH may also consider the positive impact of pro-active remedies on sustainability and environmental protection, even if businesses make commitments that are largely unrelated to the violation, provided such commitments serve sustainability and environmental objectives. There is an out-of-market scope employed here to support sustainability issues. Whilst this is a novel approach, there is no further information in terms of what meant by 'sustainability objectives' and how these commitments will be assessed or monitored in practice.

Table 3: The Emerging National Competition Authority Models

Dutch model	Greek model	Austrian model	Hungarian model
Guidelines	Sandbox	Legislative route	Remedies

III. The Role of the NCAs in Sustainability Debates and Practical Implications for the NCAs

The NCAs play a major role in the enforcement of antitrust provisions (Articles 101/102 TFEU) with 90% of these cases being decided at the national level, leaving the EC to deal with significant 'European interest' cases. Competition enforcement in Europe is a vital part of the internal market; if competition is distorted, the European market cannot deliver its full potential. The proper functioning of the internal market requires that the provisions ensure a level playing field, which engages with the principle of legal certainty. The 'modernisation' framework (i.e., Council Regulation 1/2003) called for 'uniform' application of these provisions across the MS. Yet, the EC (2014) noted that enforcement varies significantly across the MS. Presumably, these differences should now be rectified by the ECN+ Directive, with the aim of empowering the NCAs to be more effective enforcers by setting some minimum guarantees and standards to reach their full potential, including the requirement to ensure that the NCAs have the human, financial and technical resources necessary to perform their core tasks as per Article 5 of the ECN+ Directive (Directive (EU), 2019).

In terms of sustainability debates, sustainability considerations can further dilute 'uniform' enforcement of the competition law provisions, undermining the 'level playing field' concept, therefore, creating legal uncertainty for businesses. One may argue that the EC's economic pathway after decentralisation following Regulation 1/2003 was chosen due to fears that it may lead to situations where NCAs become tolerant of anti-competitive agreements justified by national public policies, effectuating national interests (Brook and Cseres 2019, p. 163). Given that legal rules operate in a very particular social and political setting (Rosett 1992, p. 687), it is important that there is a shared meaning and common set of values amongst the NCAs. Whilst these are early days, still, the NCAs are not on the same page in terms of sustainability considerations. The delay in the EU-based guidelines has led to divergent national models adopted by the NCAs. For instance, both Austria and the Netherlands have contrasting approaches to the EC's Draft relating to 'out-of-market' efficiencies, acknowledging that environmental benefits do not always need to accrue to the relevant market as long as there is a benefit for broader society.

Furthermore, the NCAs vary significantly in terms of their capabilities (size and budget), which are based on country-specific institutional traditions and legacies. Recently, many MS have created 'multi-function' agencies by merging the competition authority with the authorities responsible for other economic policy functions, such as consumer protection, sector regulation, technical regulation control or public procurement control. Whilst these authorities may have different experts 'in-house', it does not necessarily mean that they will have the capacity and expertise to address sustainability. Therefore, they may need to hire environmental economists to calculate externalities, as noted by CNMC. Yet, some NCAs of 'newer' and smaller MS will not be able to afford it, given their already limited resources (Malinauskaite 2019). There are also country-specific factors that influence an NCA's need for resources, such as the quality of the justice system and the relative pay of skilled staff (Meicklejohn 2014, pp. 110–132). To save resources, the NCAs can prioritised environmental aspects over wider SDGs. Furthermore, environmental concerns do not have jurisdictional borders and cross-border sustainability

initiatives are encouraged; therefore, co-operation between the NCAs, especially in neighbouring areas, is essential. By pooling their resources together, the NCAs can to some extent ease the burden on their limited national budgets. This is not limited solely to enforcement. For instance, the Dutch–Greek joint guidelines can serve as a perfect example of fruitful co-operation in sustainability debates, or previously, the 2010 report 'Competition Policy and Green Growth' jointly produced by the Nordic Competition Authorities (2010).

In addition to a responsive approach – considering sustainability issues under their competition law enforcement mechanism, the NCAs can play a pro-active role in promoting sustainability, like the HCC. First of all, the NCAs can send a clear positive message to industries that competition law will not stand in a way of sustainability initiatives. Secondly, the importance of sustainability should be included in their competition awareness and advocacy campaigns. Some lessons could be learnt from newer NCAs, which had to create and promote a competition culture in their jurisdictions, especially those that embarked on new market economies away from the communist era with capacity building and changes in values and thinking (Butorac-Malnar and Kaufman 2016). For instance, the NCAs of the Central and Eastern European countries regularly organise competition awareness events and training, publish guidelines to businesses and popularise competition law to society at large, including schools and universities (Malinauskaite 2019). Therefore, building on this experience, the NCAs could advocate a sustainability-inspired competition culture in both public and industries through activities other than enforcement.

Conclusions

In light of the EGD, this article has reviewed the current *status quo* of the NCAs in terms of their approaches to sustainability. The NCAs' stand is essential given their position as the main enforcers of EU competition law (Articles 101/102 TFEU) and the further burden of ensuring 'uniform' application of competition rules in the internal market.

The article broadly identified four typologies of the NCAs' positions and concluded that the NCAs are clearly not 'on the same page'. Some NCAs raised serious doubts whether competition law is truly an effective tool to promote the EGD (i.e., Germany and Czechia), whereas others confirmed that competition law has a role to play and have taken various assertive steps to implement it in practice: by publishing draft national guidelines (i.e., the Netherlands); launching an experimental sustainability sandbox (i.e., Greece); addressing sustainability/environmental protection through pro-active remedies (Hungary); drafting an action plan to incorporate sustainability-related issues (Spain); or appointing a new Head of sustainability networking (France). The majority of NCAs call for EU-wide guidelines to tackle sustainability, with a priority being placed on the climate-change-related issues (singled-out by the majority NCAs). The delay in the EU-based guidelines has led to the divergent national models, such as Dutch, Greek, Austrian and Hungarian. On one hand, this seems instrumental because the NCAs have a chance to 'make their stand' rather than following a top-down approach. On the other hand, this EU hands-off approach risks ensuring a consistent application of competition rules within the EU, simultaneously leading to legal uncertainty. In contrast to the EC's Draft Guidelines, the NCAs are more willing to accept 'out-of-market' efficiencies,

acknowledging that environmental benefits do not always need to accrue to the relevant market as long as there is a benefit for broader society. Yet, the EC seems to insist on a 'consumer' rather than 'citizen' perspective.

The article notes that more comparative studies are needed to explore the NCAs' perspectives, as harmonisation is not possible if the authorities do not share common values. This is essential to avoid any 'threats' to uniformity of competition enforcement amongst MS. Systematic post-application reviews of sustainability assessments in competition antitrust and merger cases (suggested by the HCC) could provide a useful platform for future re-adjustments. For instance, the ACM, in its recent analysis of the chicken meat market, found that more sustainable and higher chicken welfare standards are currently offered in supermarkets than the planned standards of 'Chicken of Tomorrow' (ACM 2021).

For a final remark, the article also appeals for NCAs to play a pro-active educational role in promoting sustainability.

Correspondence: Jurgita Malinauskaite, College of Business Arts and Social Sciences Ringgold Standard Institution, Brunel University London, Kingston Lane, London, Uxbridge UB8 3PH, UK.
email: jurgita.malinauskaite@brunel.ac.uk

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