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## SUSTAINABILITY AND MARKET FAILURE: REGULATION V. COMPETITION

*ABSTRACT. The paper deals with the trade-off between competition enforcement and regulation when it comes to sustainability policies. It starts from public policy analysis in its traditional, three steps, economic approach: identifying the economic problem and market failures; outlining the options in solutions; balancing the pros and cons of regulation versus competition enforcement, in the light of the initiatives on sustainable competition already taken by National Competition Authorities. The article concludes on a focal role for antitrust law and policy in the ecological transition envisaged by the Green Deal, as far as dynamic competition promotes green innovations.*

*CONTENT. 1. Introduction: sustainability and public policies analysis. – 2. First step: identifying the economic problem. The market failure issue. – 3. Second step: identifying the options. – 4. Third step: pros and cons of competition and regulation over sustainability. – 5. Conclusions: competition policies and the promotion of green innovations.*

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## 1. *Introduction: sustainability and public policy analysis*

As stated by UN Secretary-General Guterres, climate change is the defining challenge of our time.<sup>1</sup>

There is a general consensus that sector-specific responses to this will fail. Action must involve “*all sectors of the society and the economy, including industry.*”<sup>2</sup>

This has led to calls for a rethink of the relationship between economic and environmental policies at the highest political level.

In analysing the market failure of sustainability and the debate about opting for regulation or competition enforcement as solutions, I will outline a scheme that starts from the traditional structure of public policy analysis, that is, on the one hand, still entitled in the institutional community and is, on the other hand, intertwined with the antitrust enforcement issue.<sup>3</sup>

In fact, there is a traditional three-step economic approach to public policy: for many years the OECD has advocated for Regulatory Impact Analysis, which starts with these three basic questions.<sup>4</sup>

1) The first step is to identify the economic problem to be solved or the grounds for intervention in the form of a “market failure” that could justify intervention

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<sup>1</sup> European Commission, ‘Mergers: Commission prohibits Siemens’ proposed acquisition of Alstom’, press release IP/19/881 of 6 February 2019.

<sup>2</sup> European Parliament, ‘Resolution declaring a climate and environmental emergency’, 2019/2930 (RSP) of 28 November 2019.

<sup>3</sup> Other approaches to environmental regulation emerged, that are worth mentioning: the market-based approach, see among others Ted Gayer and John K Horowitz, *Market-based Approaches to Environmental Regulation, Foundations and Trends* (now publishers 2006) 1-129; the adaptative governance approach, see, for instance, Marijn Janssen and Haiko van der Voort, ‘Adaptive governance: Towards a stable, accountable and responsive government’ (2016) 33(1) *Gov Inf Q* 1; the transformative change approach (for an overview, see Giacomo Fedele and others, ‘Transformative adaptation to climate change for sustainable social-ecological systems’ (2019) 101 *Environ Sci Policy* 116; the community-led approach (see Katy Simon, Gradon Diprose and Amanda G Thomas, ‘Community-led initiatives for climate adaptation and mitigation’ (2019) 15(1) *Kōtuitui: New Zealand Journal of Social Sciences Online* 93), and the transnational cooperation approach (see Clément Bultheel, Romain Morel and Emilie Alberola, ‘Climate governance & the Paris Agreement: the bold gamble of transnational cooperation’, (2016) *Climate brief n. 40* (I4CE - Institute for Climate Economics) 1-12; on its modest results, see also Pedro Mariani, ‘Climate Change and International Cooperation’, 2 February 2024, [www.sir.advancedleadership.harvard.edu](http://www.sir.advancedleadership.harvard.edu)). However all the alternative methods seem to give less room to the competitive discourse than the traditional analysis.

<sup>4</sup> See OECD, ‘Introductory Handbook for Undertaking Regulatory Impact Analysis’ (2008).

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by Governments. This market failure must be linked to a reduction in economic welfare.

2) The second step is to establish the options for addressing this economic problem and

3) The third step is to assess the costs and benefits of these options, including that of doing nothing.

The mere identification of a problem is not sufficient to justify the need for intervention. The policy analyst must pay explicit attention to the practical difficulties of implementing various forms of it, including incentives, information, and the governance of the enforcement institution (sometimes known as “government failure”).<sup>5</sup>

## **2. *First step: identifying the economic problem. The market failure issue***

At one level, this three-step process could be seen as common sense. After all, an important first step in any quality decision-making process is to clearly define the problem to be solved. It is acknowledged<sup>6</sup> that economic activities can have a negative impact on sustainability.

This relationship between the economy and sustainability is most notably captured by the discussion surrounding market failure and sustainability.<sup>7</sup>

Markets are failing to ensure sustainable economic and social outcomes, slowing progress towards the Sustainable Development Goals, experts said at the United Nations Conference on Trade and Development UNCTAD’s Ad Hoc Expert Meeting on Competition, Consumer Protection and Sustainability on 28 September 2022.<sup>8</sup>

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<sup>5</sup> Darryl Biggar, ‘Public policy for regulators: Is “market failure” passé?’ (2022) 85 Network 1.

<sup>6</sup> See, Michael Common and Sigrid Stagl, ‘Ecological economics: an introduction’ (CUP 2005). Return to ref 1 in article EEA. State of nature in the EU: Results from reporting under the nature directives 2013-2018. European Environmental Agency; 2020. Contract No: 10. EEA. Is Europe living within the limits of our planet? An assessment of Europe’s environmental footprints in relation to planetary boundaries. European Environment Agency, Swiss Federal Office for the Environment; 2020.

<sup>7</sup> Katharina Biely and Steven van Passel, ‘Market power and sustainability: a new research agenda’ (2022), 3 Discov Sustain 5. <<https://doi.org/10.1007/s43621-022-00073-y>>.

<sup>8</sup> UNCTAD, ‘Ad Hoc Expert Meeting on Competition, Consumer Protection and Sustainability’ 20 September 2022.

Perfectly operating markets exist only in theory. It is well known that market failures not only inhibit the proper functioning of the market, but also affect sustainability and thus a sustainability transition. In this regard, much attention has been paid to externalities or missing markets, which are conceivable as reductions in economic welfare, even though these are not the only market failures.

Conceptually, *sustainability* requires a restructured market economy that prohibits externalities – forbidding production or consumption that results in environmental harms being inflicted on others. Pollution should no longer be accepted as a necessary by-product of industrial production and justified on a benefit-cost basis. Nor should the private use of public resources – water, timber, minerals, or other natural resources – be condoned at less than the full-price paid by society for the privilege.<sup>9</sup>

According to economic theory, a market should not create inefficiencies such as environmental destruction or human exploitation. Such negative impacts are understood to be partly the result of market failures that hamper efficient market allocation.<sup>10</sup>

The market failures blamed are usually externalities, missing markets, public goods, and inadequately assigned property rights.

It is assumed that by solving the problems of market failures, inefficiencies and thus sustainability problems would disappear. Therefore, the key to facilitating a sustainable transition is at least to reduce market failures.<sup>11</sup>

### **3. *Second step: identifying the options***

To turn the tide of businesses maximizing profits to the detriment of the planet, Countries should address market failures through public policies, including those on regulation, competition and consumer protection.<sup>12</sup> The objective of regulatory policy is to ensure that regulations are in the public interest.

It addresses the ongoing need to ensure that regulations and regulatory frame-

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<sup>9</sup> Dan Esty, 'Mastering the Labyrinth of Sustainability: Toward a New Foundation for the Market Economy' (2022) 4 *Rethinking Capitalism* 1.

<sup>10</sup> Richard Lipsey and Alec Chrystal, *Economics* (11th edn, OUP 2007).

<sup>11</sup> Biely Passel (n 7).

<sup>12</sup> UNCTAD (n 8).

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works are justified, of good quality and “fit for purpose.” An effective regulatory policy supports economic development and the rule of law by helping policymakers reach informed decisions about what, whom, and how to regulate.<sup>13</sup>

The goal of regulatory reform is to improve national economies and enhance their ability to adapt to change. Better regulation and structural reforms are necessary complements to sound fiscal and macroeconomic policies.<sup>14</sup>

Within the EU’s sustainability regulation, this aim is reflected in the European Green Deal, which is founded on an all-economy approach to environmental protection and calls for “*deeply transformative policies*” underpinned by an economic model that properly values environmental and natural resources.<sup>15</sup>

In addition, we are seeing groundbreaking framework climate legislation that places obligations upon Member States to achieve economy-wide binding targets in line with the Paris Agreement.<sup>16</sup>

The 2021 European Climate Law imposes a legal obligation to achieve climate neutrality by 2050 and a 55% reduction in greenhouse gas emissions by 2030 compared to 1990 levels.<sup>17</sup>

Further, the Commission has a legal obligation to take the “*necessary measures*” to ensure that the legally binding objective of climate neutrality in the Union is attained by 2050 and to eliminate inconsistent Union measures.

These obligations, by their very nature, impose legally binding requirements on the EU to achieve targets that, it is argued, are inherently dependent not only on State action, but also on the actions of the private sector.

The role of private businesses and consumers in investment, innovation and purchasing decisions is seen as essential to meeting these obligations. Businesses around

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<sup>13</sup> OECD, ‘Regulatory Policy and the Road to Sustainable Growth’, Draft.

<sup>14</sup> *Ibid.*

<sup>15</sup> European Commission, ‘The European Green Deal’, COM (2019) 640 final, Communication of 11 December 2019, section 2.1.

<sup>16</sup> See Thomas L Muinzer (ed.), *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation*, (Hart Publishing 2020).

<sup>17</sup> European Parliament and Council, Regulation (EU) 2021/1119 of the of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 (‘European Climate Law’), OJ L 243, 9.7.2021, 1.

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the world are increasingly taking responsibility for promoting sustainability by setting higher standards than required by applicable laws. They often act individually, but sometimes coordinated action with their competitors may be needed.

Competition law, in principle, prohibits cooperation agreements and could stand in the way of pursuing sustainability objectives. However, against this framework, National Competition Authorities (NCAs) are increasingly providing guidance on the types of sustainability agreements that may or may not restrict competition.

On a more general level, this has led to a rethinking of competition policies. In the debate on Sustainable Competition and the Consumer Welfare Standard (CWS), originated on the other side of the Atlantic and now raging also in Europe, two different doctrines contend with each other: one in favor of a more flexible antitrust, and one against it.

Indeed, on the one hand some scholars argue that sustainability is covered by specific constitutional rules, such as in the EU, art. 11 of the TFEU<sup>18</sup> and accordingly, the EU competition law could legitimately pursue sustainable development goals and balance the potentially conflicting goals of the Union.<sup>19</sup>

On the other hand, it has been opposed that a more flexible antitrust would bring a lack of predictability for markets players together with the risk of a progressive politicization of competition law and of a lessening of independence of NCAs.<sup>20</sup> If NCAs should be asked to strike a balance between competition and non-economics interest, at the end of the day it could be predicted they will make a political choice.

More in particular, and in practice, the Netherlands' Authority for Consumers and Markets (ACM) has been a frontrunner, being the first NCA to publish guidelines<sup>21</sup> and call on the European Commission (EC) to take an EU-wide initiative. The EC re-

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<sup>18</sup> Pursuant to article 11 of the Treaty of the Functioning of the European Union “*Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.*”

<sup>19</sup> Julian Nowag, *The Environmental Integration Obligation of Article 11 TFEU, Environmental Integration in Competition and Free-Movement Laws* (OUP 2016) 15-50. For additional constitutional references, see Suzanne Kingston, ‘Competition and Sustainability in EU Law: Nearer Resolution of the Old Debate?’ (2023) (1) *Concurrences* 6.

<sup>20</sup> Jurgita Malinauskaitė, Fatih Buğra Erdem, ‘Competition Law and Sustainability in the EU: Modelling the Perspectives of National Competition Authorities’ (2023) 61 *JCMS* 1211.

<sup>21</sup> ACM, Second draft version: ‘Guidelines on Sustainability Agreements – Opportunities within competition law’, 26 January 2021, <<https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-opportunities-within-competition-law.pdf>>.

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sponded to that request and introduced a new chapter on sustainability agreements in its revised draft Horizontal Guidelines.<sup>22</sup>

Other NCAs have followed suit: on 27 January, the Competition and Markets Authority (CMA) published an information sheet to help businesses and trade associations better understand how competition law applies to sustainability agreements, and where issues may arise.<sup>23</sup>

And on 12 October 2023, the CMA published guidance on green agreements – providing welcome clarity for businesses, trade associations and NGOs on how to collaborate on environmental sustainability objectives without infringing competition law.

It also opens the door to an ongoing, constructive discussion between industry participants and the CMA on how the benefits of sustainability agreements to UK consumers should be properly assessed and quantified.<sup>24</sup>

Greece's Hellenic Competition Commission (HCC) created a so-called sandbox where companies can submit initiatives for examination.<sup>25</sup> In its assessment, the HCC will refer to its Technical Report for Sustainable Development, which it commissioned jointly with the ACM.<sup>26</sup>

Austria's Federal Competition Authority (AFCA) published final guidelines on sustainability agreements in September 2022<sup>27</sup>, providing guidance on the so-called sustainability exemption introduced in September 2021 in the Austrian Cartel Act<sup>28</sup> for corporate agreements that restrict competition but contribute significantly to an ecologically sustainable or carbon-neutral economy.

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<sup>22</sup> Draft revised 'Horizontal Guidelines', available at <[https://competition-policy.ec.europa.eu/public-consultations/2022-hbers\\_en](https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en)>.

<sup>23</sup> CMA, Guidance, 'Environmental sustainability agreements and competition law', 27 January 2021, <<https://www.gov.uk/government/publications/environmental-sustainability->>.

<sup>24</sup> CMA, 'CMA launches Green Agreements Guidance to help businesses co-operate on environmental goals', Press release of 12 October 2023.

<sup>25</sup> For further information on the Sustainability Sandbox, see <<https://www.epant.gr/en/enimerosi/sandbox.html>>.

<sup>26</sup> ACM and HCC, 'Technical Report on Sustainability and Competition', January 2021, <[https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition\\_0.pdf](https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf)>.

<sup>27</sup> AFCA, 'Leitlinien zur Anwendung von § 2 Abs 1 KartG auf Nachhaltigkeitskooperationen (Nachhaltigkeits-LL)' (2022).

<sup>28</sup> Federal Act against Cartels and other Restrictions of Competition (Cartel Act 2005 – KartG 2005), as amended.

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France's *Autorité de la Concurrence* did not issue guidelines but has recently appointed a new head of its sustainability development network.<sup>29</sup> In its press release, the Authority stated that this appointment is part of its commitment to the sustainable development objectives set at national, European and international level.

Further, the EU introduced a specific sustainability exemption for certain agricultural agreements: Article 210a of the EU CMO Regulation<sup>30</sup> exempts agricultural agreements from the application of Article 101 TFEU if these agreements (i) contribute to environmental objectives, sustainable production (reduction of pesticides) or animal welfare; (ii) aim to apply higher sustainability standards than those mandated by EU or national law; and (iii) their restrictions are indispensable to attaining that standard.

The ACM issued new guidelines regarding collaborations between farmers, including a section on sustainability collaborations.<sup>31</sup>

#### ***4. Third step: pros and cons of competition and regulation over sustainability***

On one hand, evaluation of regulatory outcomes informs policymakers of successes, failures and the need for change or adjustment to regulation so that it continues to offer effective support for public policy goals.<sup>32</sup>

The nature of these sustainability challenges has blurred traditional conceptions of the role of the public and private sectors in environmental regulation.

The idea that legislation is, in itself, the entire solution to environmental degra-

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<sup>29</sup> Fr. NCA, 'Elise Provost is appointed adviser to the General Rapporteur and head of the sustainable development network of the *Autorité de la concurrence*', press release of 7 September 2022, <<https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/elise-provost-appointed-adviser-general-rapporteur-and-head-sustainable>>.

<sup>30</sup> Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No. 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No. 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No. 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No. 228/2013 laying down specific measures for agriculture in the outermost regions of the Union, OJ L 435, 6.12.2021, p. 262.

<sup>31</sup> ACM, 'Guidelines regarding collaborations between farmers' 7 September 2022, <<https://www.acm.nl/en/publications/many-arrangements-within-production-chains-regarding-sustainable-agriculture-are-allowed>>.

<sup>32</sup> OECD (n 8).

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dation has been questioned.<sup>33</sup>

It has been argued that it is impossible for the State alone to address many of today's environmental problems rapidly or effectively enough.

Further, it has been argued that the environmental problems that threaten the existence of society as we know it – in particular climate change – do not respect the jurisdictional boundaries associated with traditional environmental regulation. These problems are in many cases caused by, and may most effectively be solved by, private transnational corporations.

Whereas traditional environmental regulation looked to the State to fashion and enforce environmental rules, there is now a consensus that private environmental initiatives form an important part of the policy mix.<sup>34,35</sup>

Furthermore, the impact of the European climate regulatory framework should not be completely overlooked even in a wider, global perspective. Alongside the promotion of regulatory cooperation<sup>36</sup> through formal trade agreements with third Countries, the so-called 'Brussels effect'<sup>37</sup> may also play a role outside the internal market's borders, where foreign corporations can be induced to voluntarily adhere to European standards.

Especially where the non-divisibility of production across global markets entails that greater benefits arise from adhering to a single global standard than from taking advantage of lenient ones, complying with higher standards proves convenient in the light of ensuring foreign businesses' competitiveness, notably if they are interested in trading within the European market and in gaining a reputational advantage, also in

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<sup>33</sup> See generally, Veerle Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles* (CUP 2018).

<sup>34</sup> This is reflected, for instance, in the UN Sustainable Development Goals, including UN SDG 12, addressing sustainable consumption and production patterns. See Michael P Vandenberg, 'Private Environmental Governance' (2013) 99 (1) Cornell LR 129.

<sup>35</sup> Marjolein De Backer and others, 'Sustainability and competition policy' (2023) (1) Concurrances.

<sup>36</sup> See footnote 3 and the mentioned international cooperation approach.

<sup>37</sup> This telling expression, coined by Anu Bradford in 2012, has become customary to refer to the fact that, despite its multiple weaknesses, the European Union influences the shaping of policy actions outside its borders acting as a globally hegemonic regulatory regime (see Anu Bradford, 'The European Union in a globalised world: the "Brussels effect"' (2021) (2) *Revue Européenne du Droit* 75).

terms of consumers' trust.<sup>38</sup>

This could also be seen as a side effect of the global dimension of the climate issue, in a panorama in which the European climate policy appears to be the most ambitious and is perceived as coming from an experienced policy-making agent, acting through a robust evaluation process and able to provide actors with solid legal certainty.

As for now, however, the Brussels effect in the climate policy area seems to be limited compared to other policy areas such as data privacy and product safety. Still, it can be substantially perceived when it comes to ESG reporting, given that many global companies are choosing to comply with the European regulatory obligations,<sup>39</sup> even if stricter, rather than juggle mixed international standards.<sup>40</sup> Moreover, a recent study examining whether the European Union is providing a model for other countries for product requirements interestingly shows that such influence is reinforced in the environmental arena.<sup>41</sup>

Overall, given that the implementation and achievement of the European Green Deal goals are still in process, it is possibly still too early to assess whether the EU is succeeding in its ambition to lead the global green transition.<sup>42</sup>

Nevertheless, the Brussels effect is expected to develop over time, perhaps also on the back of the leverage of European measures with cross-border implications like the CBAM regulation.<sup>43</sup> It has also been argued that a 'mega-Brussels effect' may stem

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<sup>38</sup> Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford Academic 2020), 26. See also Anu Bradford (n 37).

<sup>39</sup> As the ones outlined in Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

<sup>40</sup> Peter Walsh, 'The Brussels Effect: How CSRD and European Union ESG Regulations Affect U.S. Global Companies', 12 March 2024, <benchmarksuite.com>.

<sup>41</sup> Cristina Herghelegiu and Fernando Martin, 'Is the European Union providing a regulatory model for other countries?' (2023) 15 Single Market Economics Papers, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (European Commission), Chief Economist Team, Luxembourg, 2023, 1-39.

<sup>42</sup> Sandra Eckert, 'The European Green Deal and the EU's Regulatory Power in Times of Crisis' (2021) 59 (1) *Journal of Common Market Studies* 81.

<sup>43</sup> Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130, 16.5.2023. 52-104.. As stated in Recital 10, it is an essential element of the Union's toolbox for meeting the objective of a climate-neutral Union in line with the Paris Agreement by addressing the risk of carbon leakage that results from the Union's increased climate ambition. It is expected to also

from the latest development in the co-ordination between EU and US' climate actions in the light of creating a single economic superbloc.<sup>44</sup>

On the other hand, sustainability is increasingly a dimension of competition in the market.

In the consultation as part of the revision of the EU's Horizontal Cooperation Guidelines, the European Commission noted that respondents indicated as the "*most important development*" since the prior version in 2010 "*climate change and the corresponding challenging environmental and sustainability goals. Respondents believe that this results in increased demand from consumers and businesses for sustainable, ethical and environmentally friendly business practices.*"<sup>45</sup>

The starting point of the analysis is the importance of sustainable development as a "core principle" of EU law, as well as the Commission's commitment to the EU Green Deal.<sup>46</sup>

While space precludes full discussion of the draft, it observes that "[w]here market failures are addressed by appropriate regulation, for example, mandatory Union pollution standards, pricing mechanisms, such as the Union's Emissions Trading System ('ETS') and taxes, additional measures by undertakings, for example through cooperation agreements, may be unnecessary. However, cooperation agreements may become necessary if there are residual market failures that are not fully addressed by public policies and regulations."<sup>47</sup>

The draft goes on to set out instances where sustainability agreements would not be considered to fall under Article 101(1) TFEU,<sup>48</sup> and principles for the assessment of those sustainability agreements that do fall under this provision, including potential application of Article 101(3) TFEU.

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contribute to promoting decarbonisation in third countries.

<sup>44</sup> Peter Orszag, 'Do not underestimate the 'mega-Brussels effect' of EU-US co-ordination', Financial Times, 16 October 2023, [www.ft.com](http://www.ft.com).

<sup>45</sup> European Commission, Factual Summary of the Contributions Received during the Public Consultation on the Evaluation of the Two Block Exemption Regulations and the Guidelines on Horizontal Cooperation Agreements, at 16, p.HBERS\_consultation\_summary.pdf.

<sup>46</sup> Communication from the European Commission, 'Approval of the content of a draft for a Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' OJ C 164, 19.4.2022, par. 542.

<sup>47</sup> *Ibid.* par.546.

<sup>48</sup> *Ibid.* par.572.

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Here, it notes that sustainability agreements can produce efficiencies such as cleaner technologies and less pollution, thus contributing to a “*resilient internal market*,” which can be taken into account if objective, concrete and verifiable.<sup>49</sup>

As concerns indispensability, the draft notes that, although public policy and regulations “*often take care*” of negative environmental externalities, this is not always the case, and “[t]here may be other instances where, due to market failures, sustainability benefits cannot be achieved if left to the free interplay of market forces or can be achieved more cost efficiently if undertakings cooperate.”<sup>50</sup>

Furthermore, with regard to the pass-on of benefits to consumers, the draft contains an innovative new section setting out principles for the valuation not only of individual use-value and non-use value benefits, but also of collective benefits, opening the possibility of taking into account sustainability benefits to a larger group of society (so-called out-of-market benefits).<sup>51</sup>

Aside from qualitative considerations, advances in environmental economics make it possible to quantify and place a monetary value on environmental harms and benefits.<sup>52</sup>

Many Governments routinely use these techniques in undertaking cost-benefit analysis of regulatory innovations.

An excellent overview of the menu of potential quantitative valuation techniques available to competition regulators, drawing from the environmental economics literature, is provided in the 2021 Technical Report on Sustainability and Competition, jointly commissioned by the Dutch and Greek Authorities.<sup>53</sup>

Such work suggests that it is possible, within the consumer-welfare-based model of competition policy on its own terms, to take account of environmental considerations by using established environmental economics techniques such as revealed preference

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<sup>49</sup> *Ibid.* par.579.

<sup>50</sup> Communication from the European Commission (n 46), par. 584.

<sup>51</sup> *Ibid.* par.601.

<sup>52</sup> For an excellent overview, see Charles D Kolstad, *Environmental Economics* (2nd edn, OUP 2010); see also Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press 2004).

<sup>53</sup> See ACM and HCC, Technical Report on Sustainability and Competition, January 2021, <[https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition\\_0.pdf](https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf)> (accessed 23 December 2022).

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methods, contingent valuation, and discounting.<sup>54</sup>

From a more general perspective, we could argue that regulatory Authorities operate within an established legislative framework, with limited scope for discretion.

Even where there remains discretion, many Authorities develop guidelines and policies that make clear how they will exercise that discretion – thereby limiting the scope for decision-making.

It could be argued that the role of a Competition Authority is simply to enforce the law.

This perspective overlooks the fact that, even if the law is clear about what behaviours are permitted, NCAs retain considerable discretion in deciding whether and how to enforce the law.

We cannot know how to enforce the law (that is, how to allocate enforcement resources, how to choose which cases to take, or which remedies to accept) or which firms or behaviours should be captured by the law (i.e., the scope of the regulatory framework) without an understanding of the underlying economic harm to be addressed. In other words, we must understand the market failure that is driving the need for intervention and the link between correcting that market failure and economic welfare.

Policies, guidelines, or rules of thumb are useful tools for NCAs to expedite the enforcement process without the need to revisit first principles with every decision.

But those policies inevitably need to be updated from time to time.

In addition, many NCAs, among whom the Italian Competition Authority, have advocacy powers and an explicit public policy role – advising Governments and public entities on regulatory reforms in their domain of expertise.<sup>55</sup>

Almost certainly, an NCA will be consulted before major changes to their regulatory framework.<sup>56</sup>

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<sup>54</sup> De Backer (n 35).

<sup>55</sup> Art. 22, L. n. 287/1990.

<sup>56</sup> Biggar (n 5).

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## 5. *Conclusions: competition policies and the promotion of green innovations*

The need to integrate sustainability considerations into all modern competition policies is more important than ever in the light of three factors: the increasingly evident effects of climate change; the inadequate policy and regulatory responses; and the growing evidence that many businesses are looking to work together to fight climate change – but often fear that competition law limits what they can do.<sup>57</sup>

Despite the crucial role that regulation plays in supporting the reduction of greenhouse gas emissions, however, its interdependence with competition emerges as the former is subject to a number of conditions, including proportionality, timeliness, proper enforcement and administrative management, which do not ensure its timely effectiveness.

For this reason, complementary market-based alternatives to legislation (e.g. environmental agreements between companies) are a necessary part of the green transition. In this context, competition law is a more than effective solution for environmental protection.<sup>58</sup>

The growing importance of the role of competition law has also been evident in the increasing attention paid by NCAs as well as by the European Commission, which are trying to supplement the regulatory framework through new guidelines and explanatory guidance.

This awareness was already evident in 2020, when dedicated public consultations addressed the topic of how competition law and policies could contribute to the Green Deal.<sup>59</sup>

The overall result received from stakeholders aligns with the general perception of a focal role for competition law and policy in the ecological transition envisaged by the Green Deal.

The economic objectives of competition policy might suggest that it is at odds with environmental protection. Not infrequently, it aims pursue the intensification of

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<sup>57</sup> De Backer (n 35).

<sup>58</sup> ClientEarth, ‘Competition Policy supporting the Green Deal – Our call for a sustainable competition policy’ (2020) <[www.clientearth.org](http://www.clientearth.org)>, accessed 6.6.2022.

<sup>59</sup> European Commission, DG Competition, ‘Competition Policy supporting the Green Deal Call for contributions’, 13 October 2020, <[https://ec.europa.eu/competition/information/green\\_deal/call\\_for\\_contributions\\_en.pdf](https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf)>, accessed 7 June 2022.

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production and a reduction in prices, thereby favouring an excessive consumption of limited natural resources.

However, it must be considered that the aims of competition policies include improving the quality of products/services, broadening their choice and stimulating innovations.

These objectives therefore correspondingly imply sustainability (quality), greater ecological variety (widening of choice) and, finally, the promotion of green innovations.<sup>60</sup>

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<sup>60</sup> OECD, 'Environmental considerations in competition enforcement' DAF/COMP(2021)4, 18 November 2021, <[https://one.oecd.org/document/DAF/COMP\(2021\)4/en/pdf](https://one.oecd.org/document/DAF/COMP(2021)4/en/pdf)>, accessed 7 June 2022.

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