COMPETITION LAW'S SUSTAINABILITY GAP? TOOLS FOR AN EXAMINATION AND A BRIEF OVERVIEW

JULIAN NOWAG*

The aim of this paper is two-fold. First, the paper aims to provide tools for a structured examination of competition law's perceived inability to address sustainability. The EU framework is chosen as a case study since EU competition law is embedded in the EU's constitutional framework. As a result, EU competition law is subject to the requirement of Article 11 TFEU and 39 of the Charter of Fundamental Rights. Article 11 mandates that '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.' The paper provides tools for a closer examination of this required integration. The second aim of this paper is modest. It aims to provide the reader with a brief overview of the perceived gap. While some gaps remain, the paper shows that EU competition law has developed tools that can be used to foster sustainability in a competition law context. As these tools are often not EU specific they could equally inspire other jurisdictions.

1 INTRODUCTION

This paper was originally written for the 2019 'Competition Law and Sustainability' conference at Sciences Po Law School in Paris and the 2019 Brussels conference 'Sustainability and Competition Policy: Bridging Two Worlds to Enable a Fairer Economy.' These conferences marked the start of a time of growing interest in the interaction between competition law and sustainability. These days, the European Commission is revising its horizontal guidelines and a number of initiatives in the field can be observed such as those by the Dutch[1] and Greek competition authorities,[2] the ICN,[3] and the OECD.[4]

Often the debates focus on the perceived inability of competition law to address problems of sustainability. This issue might be even more pressing in other jurisdictions. For example, in the US -under the Trump administration- an antitrust investigation had been

* Assoc Prof at the Faculty of Law, Lund University. I would like to thank Luc Peeperkorn, Alexandra Teorell and Ayse Gizem Yasar for comments on earlier versions of this paper. Errors remain mine.

[1] The second version of their draft Guidelines 'Sustainability agreements: Opportunities within competition law' was published in 26 Jan 2021, available at <https://www.acm.nl/sites/default/files/documents/second-draft-version-guidelines-on-sustainability-agreements-oppurtunities-within-competition-law.pdf> (accessed 7 Dec 2021).

[2] See Staff Discussion Paper On Sustainability Issues And Competition Law (2020) available at <https://www.epant.gr/files/2020/Staff_Discussion_paper.pdf> (accessed 7 Dec 2021).

[3] Hungarian Competition Authority, Special project for the 2021 ICN Annual Conference: Sustainable development and competition law (Sep 2021) available at <https://www.gvh.hu/en/gvh/Conference/icn-2021-annual-conference/special-project-for-the-2021-icn-annual-conference-sustainable-development-and-competition-law> (accessed 7 Dec 2021).

[4] See Julian Nowag, OECD (2020), Sustainability and Competition, OECD Competition Committee Discussion
Paper, available at http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf (accessed 7 Dec 2021).

launched against car makers because of their commitment to higher emission standards than those required by federal law.[5] What may fundamentally distinguish EU competition law from other jurisdictions is its embeddedness in the EU's constitutional framework. As a result, EU competition law is subject to the sustainability requirement of Article 11 TFEU.[6] This provision mandates that '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.' As such, this requirement also applies to the field of competition law as one of the EU's policies.[7]

To investigate whether and how such integration can take place and whether the perceived sustainability gap in competition law exists, tools are required. This paper aims at providing such tools to offer a framework for a closer examination of the perceived gap. Moreover, it provides a cursory examination of the perceived gap. It shows that EU competition law has developed some means that can be used to foster sustainability in a competition law context. Moreover, these tools are often not so EU specific so that these could not equally inspire other jurisdictions. However, some areas might still be open to debate and might well be classified as gaps.

2 FRAMEWORK FOR EXAMINATION

When examining the perceived sustainability gap in competition law it is helpful to map out instances where and how sustainability could feature within the competition analysis. In this regard the following framework developed elsewhere[8] may provide a first point of entry for a structured examination and deliberation.

As the EU's function in competition law is one of supervision (of compliance with the competition provisions of the Treaties), the EU is not actively designing the measures which impact sustainability. This reduces the flexibility because the EU's main option is to interpret and apply the relevant legal provisions to either allow or prohibit a measure.[9] Slightly more flexibility and influence on the relevant measures seems to be possible in commitment decisions.[10] Yet, even within this procedure the Commission is bound by the legal framework of the competition provisions but has a broad margin of discretion.[11] Thus, the main limits for considering sustainability are the wording and relevant interpretations of the competition provisions.

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[5] On this debate see e.g. Julian Nowag and Alexandra Teorell, 'The Antitrust Car Emissions Investigation In The U.S. – Some Thoughts From The Other Side Of The Pond' 1 (2) CPI Antitrust Chronicle (2020) 56-61. This investigation was later dropped.

[6] Also found in Art 39 of the EU Charter.

[7] See e.g. Case T-210/02 *British Aggregates v Commission* EU:T:2006:253, para 117; Case C-513/99 *Concordia Bus v Helsingin Kaupunki* EU:C:2002:495, para 57; and recently Case C-594/18 P *Austria v Commission* EU:C:2020:742 para 39-46. On the scope of Article 11 TFEU, the Member States' debates, and their intention to makes this requirement binding in *all* areas of EU law, see Julian Nowag, 'The Sky is the Limit: on the drafting of Article 11 TFEU's integration obligation and its intended reach' in Beate Sjåfjell and Anja Wiesbrock, The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously, (2014 Routledge) 15-30.

[8] See Julian Nowag, Environmental Integration in Competition and Free-Movement Laws (OUP 2017) 1-12.

[9] Another option is a change of the competition law provisions in the Treaty, however as such a change is considered unlikely in the near future it is not covered in this paper.

[10] The most flexibility is offered by (non-binding) informal advice.

[11] See Case T-76/14 *Morningstar v Commission* EU:T:2016:481

First, the competition provisions are interpreted so that a measure that is harmful from a sustainability point of view is prevented/prohibited. Second, the provisions are interpreted so that measures that support sustainability are allowed. These situations can be termed[12] preventative and supportive integration. This important distinction has also been taken up by Simon Holmes, who uses the metaphor sword and shield.[13] In the first case, competition law is used as a sword to *prevent* for example a degradation of the environment. In the second case, sustainability provides a shield for measures that support sustainability against 'attacks' by competition law.

For analytical accuracy this basic distinction between preventative and supportive integration can be further clarified. Integration can take two forms: cases where no conflict exists and those where conflict exists and thus balancing takes place. In other words, the first form of integration is characterised by the possibility of bringing sustainability in line with the competition provisions. In other words, sustainability and the protection of competition can be pursued simultaneously without creating a conflict. In such a case the measure pursuing sustainability could for example be outside of the scope of the competition provisions. Of importance in this context is the outcome. Sustainability is achieved without the need to balance sustainability against competition. The second form of integration is only needed where the just described first form is not possible. This (second) form of integration is characterised by 'balancing' sustainability and competition. Yet, it is important to note that such a balancing is not a 'wild balancing' exercise which occurs in an abstract fashion. Instead, the balancing has to take place within the boundaries set by the relevant competition provisions.[14]

This distinction is a functional one. It scrutinises whether a balancing between sustainability and competition is needed/takes place or whether explicit balancing is avoided. And while this distinction typically overlaps with the scope of the competition provisions, on the one hand, and justifications of restrictions of competition, on the other, it does not have to. For example, the *Wouters*[15] case - which involved balancing - can be read as finding that a restriction of competition did not exist in the first place because the measure was outside the scope of the prohibition of Article 101 TFEU. Similarly, the *Metro I*[16] test for selective distribution which involves a balancing test might be seen as setting out the scope of Article 101 TFEU.[17] Yet, given that necessity is examined as part of that test it might be better to consider it as part of the second form of integration, ie balancing. This distinction leads us to the following options for integrating sustainability.

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[12] This terminology is developed in Nowag (n 8) 1-12.

[13] See Simon Holmes, 'Climate change, sustainability and competition law' (2020) 8 Journal of Antitrust Enforcement 355. This metaphor is elegant and focuses on how sustainability is used. This is the minor difference to the preventative/supportive distinction which focuses more on the outcome, ie whether an unstainable situation is prevented or a sustainable one supported by the relevant application of competition law.

[14] The structure of the provisions, in particular, with regard to justifications of restrictions might suggest a certain hierarchy because sustainability can only justify an exception to the general rule. Yet, this hierarchy follows merely from the structure of the provision and cannot change the general constitutional balance between the different aims of the EU. On the constitutional balance between competition and environmental protection and their equivalence in terms of constitutional weight, see in Nowag (n 8) 27-31.

[15] Case C- 309/99 *Wouters and others* EU:C:2002:98.

[16] Case 26/76 *Metro v Commission* (*Metro I*) EU:C:1977:167.

[17] See Nowag (n 8) 1.

In terms of *supportive* integration (*shield*): a) a close examination of a sustainability measure shows that it does not restrict competition (first form of integration). This form or integration should be the preferred option for integration as it means that competition authorities would not engage with the measure and the often more difficult balancing exercise can be avoided. b) Where a sustainability measure is subject to the competition provisions it might still be 'justified' where the benefits outweigh the restrictions on competition. However, as the brief analysis below shows, such a balancing takes places within the framework of competition law, so that sustainability benefits may need to be 'translated into the language of competition law'.

In terms of preventative integration (*sword*), the picture looks partly different: In cases where a measure leads to, for example, environmental degradation, the questions is to what extent can the competition law provisions be used to prevent such degradation. Here the question would be: to what extent can the scope of the competition provisions be interpreted, possibly more extensively, to subject such measures to the competition assessment (first form of integration). The second form of integration would then ask: can the competition provisions be interpreted in a way that the balancing leads to the outcome that the measure resulting in e.g. environmental degradation is prevented? Thus, the benefits of the agreement on the one hand would be weighed against the restriction of competition *plus* the negative effect for the environment.[18]

Overall, an examination of the possible sustainability gap of competition law can be structured according to following matrix:

Supportive Integration (*shield*)	**Preventative Integration (*sword*)**
(Interpretation of the competition provisions in order to allow sustainability measures)	(Interpretation of the competition provisions in order to prevent measures harming sustainability)
First Form of Integration: Questions of Scope Is the sustainability measure not subject to the competition law prohibitions?	*First Form of Integration: Questions of Scope* Is the measure detrimental to sustainability subject to the competition law prohibitions?
Second Form Integration: Balancing Does the (sustainability) benefit outweigh the restriction of competition?	*Second Form Integration: Balancing* Does the harm to competition and sustainability outweigh the benefits of the measure?

3 A BRIEF OVERVIEW OF POSSIBILITIES FOR INTEGRATION

Analysing competition law through this lens for integration, the main debates currently concern supportive integration of sustainability (shield). In other words, the questions of 1) whether sustainability measures are designed in a way that either does not trigger the

[18] For more details see *ibid* Chapters 2, 6, 13, and 14.

application of the competition provisions (first -and preferable- form of integration) or 2) whether the balancing exercises contained in the competition analysis leads to the conclusion that the measure's negative impact on competition is 'justified' by its positive effects in terms of sustainability. Cases of preventative integration are fewer and present more challenges for several reasons as this brief analysis show.

3.1 SUPPORTIVE INTEGRATION (SHIELD)[19]

Supportive integration of sustainability (the shield) in EU competition law can take the form of the first and second form of integration.

3.1[a] First Form of Integration (Questions of Scope)

The first form, in other words questions of scope (without a balancing exercise[20]) primarily[21] can take place a) within the definition of undertaking, b) certain social matters along the *Albany*[22] case law c) within the context of the state action defence, and d) in the assessment of effect on competition in Article 101 (1) TFEU e) platform models. Within the context of Article 102 TFEU such integration has not yet been observed in the case law. But it is conceivable that the same patterns observed under Article 101 (1) TFEU would apply to Article 102 TFEU cases where an *effect* on competition needs to be shown.[23]

a) The defining factor of an undertaking within the meaning EU competition law is an economic activity.[24] This concept, in turn, is defined as offering goods and services on the market, bearing a financial risk, and in turn having the opportunity to make a profit.[25] There are a number of activities that are considered to be non-economic such as state authority. Such a non-economic task could for example be the supervision of compliance or in other words the policing of environmental protection rules, like in *Diego Calì*.[26] Moreover, the General Court in *Germany v Commission* highlighted that certain core environmental protection tasks are non-economic and of a social nature.[27] This case involved the transfer of national environment heritage sites to environmental NGOs. However, it made also clear that the assessment examines the tasks very closely and scrutinises whether they are core environmental protection tasks or at least directly linked to these within the meaning of the *SELEX*[28] criteria. Similar points can be made about sustainability. In particular, with regard to the social aspects of sustainability, the cases regarding workers and social care might be

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[19] As depicted in on the left side of the matrix above.
[20] For a detailed analysis see Nowag (n 8) chapter 2.
[21] For a detailed examination see also Julian Nowag and Alexandra Teorell, 'Beyond Balancing: Sustainability and Competition Law' (2020) Concurrences N° 4-2020 On-Topic Sustainability and competition law, 34-39.
[22] See Case C-67/96 *Albany* EU:C:1999:430.
[23] For more details see Nowag (n 8) chapter 2.
[24] Case C- 41/ 90 *Höfner and Elser v Macrotron* EU:C:1991:161 para 21 more recently Case C- 280/06 *ETI and Others* EU:C:2007:775 para 38; Case C-350/07 *Kattner Stahlbau* EU:C:2009:127 para 34.
[25] Okeoghene Odudu, 'The Meaning of Undertaking Within 81 EC' (2004–05) 7 CYELS, 214; Okeoghene Odudu, The Boundaries of EC Competition Law: The Scope of Article 81 (OUP 2006), 26.
[26] Case C- 343/ 95 *Diego Calì & Figli v Servizi Ecologici Porto di Genova* EU:C:1997:160.
[27] Case T- 347/ 09 *Germany v Commission* (12 September 2013), EU:T:2013:418 para 31-32.
[28] Case C- 113/ 07P *Selex Sistemi Integrati v Commission* EU:C:2009:191. For more details see Julian Nowag, 'Case C- 113/ 07P *Selex Sistemi Integrati SpA. v Commission* [2009] ECR I- 2207: Redefining the Boundaries between Undertaking and the Exercise of Public Authority' (2010) 31(12) ECLR 483.

equally important. In *Becu*[29] the ECJ found that workers are subject to competition law as they are incorporated into undertakings rather than being themselves undertakings. And with regard to e.g. health care systems, the Court held that these are non-economic activities when they are run based on principles of solidarity.[30] Thus even traditional companies active in such systems based on principles of solidarity are not subject to competition law.

b) Closely related to the questions of the definition of undertaking and the scope of competition law are situations where social aspects of sustainability is achieved by means of collective bargaining; more precisely collective bargaining between employers and employees. In *Albany*[31] the Court held that competition law does noy apply to such situations of collective bargaining. This approach was confirmed in *FNV Kunsten*[32] where the Court clarified that this reasoning also applied to workers who are 'false self-employed', that is to say are workers but classified (eg by their employers) as self-employed. This approach has been criticised for its vagueness and not providing sufficient security to platform workers.[33] It is in this social context where possible sustainability gaps can exist, as long as the second form of integration[34] cannot close those gaps. It will also be relevant to see if, and how, the Commission will treat such situations under its upcoming guidance.

c) Supportive integration by means of the State action defence[35] is also possible. In such a case a State requires a certain sustainability enhancing behaviour from undertakings. These are thereby forced to take those actions. Yet, mere encouragement is not enough. In this regard it is important to note that the decisive factor is whether the undertakings are in fact *forced* to take that specific measure. The state action defence is, thus, not available where the undertakings have room to manoeuvre and are therefore able to adopt, for example, a different measure: A measure that would not restrict competition but that would still be compliant with the requirements imposed by the State.

d) Where these tools for the first form of integration are not available possibly the most important tool is the assessment of effects on competition.[36] The draft of the new guidelines[37] highlights the importance of the effects analysis and first explains the assessment with regard to object and effect classification. A classification that affects the burden of proof. The draft, in this regard, explains that in cases where a sustainability objective exists, this objective is considered as part of the legal and economic context. Thus, where parties can show a genuine sustainability objective doubt is raises as to the classification as object

[29] Case C- 22/98 *Becu and others* EU:C:1999:419, para 26.
[30] Joined Cases C-159/91 and C- 160/91 *Poucet and Pistre v AGF and Cancava* EU:C:1993:63, para 12.
[31] Albany (n 23).
[32] Case C-413/13 *FNV Kunsten Informatie en Media* EU:C:2014:2411.
[33] See Ioannis Lianos, Nicola Countouris, and Valerio De Stefano, 'Re-Thinking the Competition Law/Labour Law Interaction Promoting a Fairer Labour Market' (8 October 2019) available at SSRN: https://ssrn.com/abstract=3465996 (accessed 5 December 2021).
[34] See below under II. a) 2).
[35] Developed in Joined Cases C- 359/ 95P and C- 379/ 95P *Commission and France v Ladbroke Racing* EU:C:1997:531.
[36] Such an assessment only takes place where the restriction is not considered to be a restriction by object, see eg Case C-68/12 *Slovenská sporiteľňa* EU:C:2013:71 para 17 and the cases cited therein.
[37] 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 DRAFT.

restriction. In turn, even issues such as price fixing, market or customer allocation, limitation of output or innovation will be assessed under the effects standard.[38]

This assessment under the effect analysis is important and should not be overlooked in the debate about sustainability and competition.[39] For example it allows for the application of the De Minimis Notice[40] to agreements that do not cover more than 10% of the affected markets.[41]

In the older[42] Guidelines[43] the Commission provided a futher, helpful distinction. It distinguished between agreements that 'almost always', that 'may', and that are 'not likely to' have the effect of restricting competition. The draft of the new Guidelines partly takes up this distinction in Section 9.2 and sets out an 'illustrative and not exhaustive'[44] list of examples of sustainability agreements that are unlikely to raise any competition concerns. These agreements are said to neither restrict competition by object, nor have any appreciable effect[45] on competition and thus fall outside the scope of Article 101(1) TFEU. The examples contained in that list are: 1) agreements that related to the internal corporate conduct, such as reducing the use of single use plastic, or limit the printed material per day; 2) agreements to create databases about suppliers and their sustainability performance[46] 3) industry wide awareness campaigns about e.g. the environmental footprint.[47] Furthermore the Commission explain that a broad set[48] of standards can be seen as typically not having an effect on competition (*soft safe habour)*, if they comply with a number of conditions.

It also explains that sustainability standards differ from the standards (mainly ITC) that are covered in chapter 7 of the guidelines.[49] First, sustainability standards often combine certain requirements and conditions with the ability to carry a label/logo that certifies compliance. Second, compliance with these requirements can be costly and thus lead to higher prices. Third, interoperability and compatibility questions that are important in technical standards are usually irrelevant. Fourth, sustainability standards do not prescribe specific technologies or production methods but are rather performance or process based, thereby leaving it open to the adopters who to achieve the outcome. For these reasons, the

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38 Ibid para 559-560. The Commission for example explains with regard to a joint purchasing agreement where competitors agree to purchase from supplies with a more limited environmental impact that such an agreement would not be an object restriction in form of a collective boycott, see para 333, 334.
39 For more details on this option, see Nowag and Teorell (21) 37-39.
40 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), [2014] OJ C 291/13.
41 See Draft Guidelines (n 37) fn 326.
42 Although this distinction has disappeared in the current Horizontal Guidelines, the classification offers a good first reference point and is based in decisional practice. The main reason for the disappearance seems to be that the broader examination of environmental agreements has altogether been abandoned in the current Guidelines.
43 Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements (2001 Horizontal Guidelines) [2001] OJ C3/02*,* para 184.
44 Draft guidelines (n 37) para 551.
45 The draft also contains a small list of object restriction, including agreements on how to pass on increased costs, or agreements to 'pressure on third parties to refrain from marketing products' that are not compliant with the standard, see ibid para 571.
46 Where these are only created but each company is free to decide how to use that database in making decision about from whom to buy/to whom to sell.
47 As long as they do not amount to joint adverting.
48 ibid para 561 and 562.
49 ibid 563.

Commission highlights that sustainability standards are often pro-competitive leading to qualitative and distribution improvements or the development of new products and markets, for example by informing consumers and thereby helping in developing markets for sustainable products.[50]

For sustainability standards to benefit from the soft safe harbour seven conditions must be fulfilled.[51] These conditions are aimed at ensuring non-discriminatory access to the standard, preventing foreclosure of alternative standards, and at reducing the risk that the exchange of information as part of the standards will lead to the formation of a cartel.[52] The first condition requires transparent and open procedures in setting the standard, ensuring that all competitors can take part if they wish to. Second, the obligation to comply should not be imposed on companies that do not wish to participate in the standard, in other words the standard should be voluntary. Third, participants should be able to adopt more stringent requirement than required by the standard, thereby ensuring that they can 'over-comply' with the aim of the standard. Forth, commercially sensitive information can only be exchanged where it is necessary for the development, adoption, or modification of the standard. The fifth condition requires non-discriminatory and effective access to the standard so that competitor which did not take part in the development of the standard can also participate. Sixth, there should be an effective monitoring system in place that ensure compliance with the standard. The seventh and final condition for the safe harbour to apply is that the standard does not significantly increase price or significantly reduce choice.

The draft adopts a very broad definition of sustainability standards and it seem not so easy to imagine cases that would not fit this definition. Yet, some standards developed by the industry might struggle with the seven conditions imposed. In contrast, many standards that are developed with the help of NGOs and are aimed at inclusion of a broad range of stakeholders would readily fufill the conditions. In this regard, it is also noteworthy that the Commission highlights that while sustainability standards might lead to price increases, standards covering significant parts of the market might lead to significant economies of scale. These economies of scale might in turn allow the undertakings to increase the price only insignificantly or even keep them stable.

Where the standard dose not fulfil the conditions the effect on competition needs to be assessed in more detail. In that context, the restraining effect of potential competition needs to be taken into account. This effect might be sufficient even where the market coverage of the standard is significant, but the standard only establishes a label and undertakings are able to operate without the label. In such a situation consumers have a choice between compliant products and non-compliant products, and it is therefore not likely that competition is restricted.[53] Only where this is not the case and an effect on competition can be established, the question of balancing comes into play for such sustainability standards.

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[50] See para 568 which also highlights the fact that they can level the playing field between producers subject to different regulatory requirements.
[51] ibid para 572.
[52] ibid 573. For example, the washing powder cartel, as well as the emissions cartel result from legitimate cooperation in the context of standards.
[53] Draft Guidelines (n 37) para 575.

e) As discussed elsewhere[54] a final, not yet tested, area that might exclude the application of competition law in particular Article 101(1) TFEU are sustainability platforms. Platforms can determine a number of conditions regarding the sale of between the seller and the buyer. They might even set the relevant price thereby preventing price competition between sellers.[55] While this is a largely underexplored area, no competition agency has taken action against such platform practices. Thus, as long as there are no cases where larger platforms such as Uber, Lift, Gojack, Didi and others have been prohibited from setting prices and other selling conditions, it seems that such a model can also be employed to provide sustainability improvements.

Thus, the first form of integration allows quite a number of activities to escape the application of competition. This view is also backed up by anecdotal evidence from the Dutch competition authority: The majority of cases that were brought to the attention of the agency were found not the restrict competition.

Only where this first form of integration is not possible, it is necessary to examine the second form, balancing. In other words, it is ***only*** where it has been established that a measure by one or more undertakings is adopted voluntarily and restricts competition by object or effect, that it needs to be asked whether the benefits outweigh the harm.

3.1[b] Second Form of Integration (Balancing)

This second form of integration is the exception. Yet, it is what competition lawyers and economists like to debate, and it is the areas where questions about sustainability gaps can be raised.

Without going into too much detail[56] as this area has been and is[57] extensively debated the following might be stated. The European Rule of Reason (along the *Wouters* case law) under Article 101 (1) TFEU, Article 101 (3) TFEU and their equivalents of objective justification and efficiency defence under Article 102 TFEU provide some, but limited, rooms for such integration. Similarly, Article 106 (2) TFEU can provide such balancing in some cases.

a) The balancing under Article 101 (1) seems to be broad enough to encompass sustainability concerns. Yet, the Article 101 (1) European Rule of Reason/objective justification route is not available in all cases. A certain link to the State is needed.[58] Only

[54] See Nowag & Teorell (n 21).
[55] For a detailed and critical analysis see Julian Nowag, 'When Sharing Platforms Fix Prices for Sellers' (2018) 6:3 Journal of Antitrust Enforcement 382–408.
[56] For an overview see Nowag (n 8) Chapter 13.
[57] See the e.g. contribution to this issue and eg Holmes (n 13).; Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) 40 World Competition 539; Giorgio Monti and Jotte Mulder, 'Escaping the clutches of EU competition law: pathways to assess private sustainability initiatives' (2017) 42 European law review 635; Klaudia Majcher and Viktoria H.S.E. Robertson, 'Doctrinal Challenges for a Privacy-Friendly and Green EU Competition Law (2021) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778107> (accessed 14 February 2022); Cristina Volpin, 'Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)' (July 2020). available at https://ssrn.com/abstract=3917881 (accessed 5 Dec 2021); Simon Holmes, Dirk Middelschulte and Martijn Snoep, *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021) Marios Iacovides and Christos Vrettos, 'Falling through the cracks no more? Article 102 TFEU and Sustainability: the Relation between Dominance, Environmental Degradation, and Social Injustice' (2022) 10 JAE 32-62.
[58] See Nowag (n 8) Chapter 13.

where such a link exists sustainability matters can be balanced against restrictions of competition. Such balancing is an abstract balancing,[59] that is to say that a proportionality assessment applies and the sustainability benefits must be proportionate to the restriction of competition.

b) In contrast, the Article 101 (3) TFEU/efficiency defence is available for all measures, yet it imposes more stringent criteria. It is in this context that the sustainability gap is most often talked about. The gap concerns the questions of whether sustainability as such and without benefits that compensate the individual consumer (of the product in question) fully is enough to satisfy Article 101 (3) TFEU, or whether the way that compensation is measured is the appropriate one. In other words, how broad the interpretation of 'benefits for the consumers' should be and whether 'consumer' should be read more like 'citizen' so that benefits that are not only enjoyed by the 'consumer of the product' can be taken into account. However, as suggested, elsewhere,[60] such a question is only relevant when:

1) all the options for the integration of sustainability described above are not sufficient *and*
2) the benefits *cannot even* be understood as qualitative improvements that benefit the consumers of the product in question (which most of the sustainability benefits can).[61] Or where such qualitative improvements in terms of sustainability are not valued enough, for reasons of informational deficiencies or behavioural biases.

In this smaller subset of the overall discussion of the gap in terms of sustainability can be perceived. This perception has to do with the way that competition authorities -as opposed to courts-[62] apply Article 101 (3) TFEU, the economic measurement preformed and the related question of what counts as benefits to consumer/user within the meaning of Article 101 (3) TFEU. The Dutch and Greek competition authorities have taken the lead and started substantive steps to address any gap in this area by means of guidelines and their joint Technical Report on Sustainability and Competition.[63] This approach sets out ways to quantify externalities and bring them into the competition assessment. The Commission has partly taken up this work in its draft guidelines on horizontal co-operation and also relied on a study it commissioned.[64] Primarily, the Commission highlights that Article 101(3) TFEU allows for a broad range of sustainability benefits to be taken into account as efficiencies which encompass not only reductions in production and distribution costs but equally

[59] See Nowag (n 2) 23.
[60] See Nowag (n 8), page 1-12 and chapter 13.
[61] There is then the further (and rather difficult) question of how to assess quality improvements in the competition context. The assessment of such does not seems to be every sophisticated yet. For one of the best accounts see OECD Round Table Discussion on The Role and Measurement of Quality in Competition Analysis DAF/COMP(2013)17.
[62] Whether the EU courts would use the same econometric tools where they have to assess benefits under Article 101 (3) TFEU, remains questionable, see Holmes (n 13).
[63] Roman Inderst, Eftichios Sartzetakis, Anastasios Xepapadeas, 'Technical Report on Sustainability and Competition' (Jan 2021) <https://www.acm.nl/sites/default/files/documents/technical-report-sustainability-and-competition_0.pdf> (accessed 5 Dec 2021).
[64] Roman Iderst, *Incorporating Sustainability into an Effects-Analysis of Horizontal Agreements - Expert advice on the assessment of sustainability benefits in the context of the review of the Commission Guidelines on horizontal cooperation agreements* (Luxembourg: Publications Office of the European Union, 2022).

improvements with regard to quality, variety of products, innovation or improvement in processes of production and distribution.[65]

The main development of the new draft can be observed with regard to the assessment of whether a fair share of these benefits is passed on to consumers. While the Commission sticks to its main principle of that the affected consumers in the relevant market must be compensated to the extent that the overall effect is at least neutral,[66] it offers more flexibility in terms of measurement. It also notes that a detailed assessment of this condition might not always be needed because either the sustainability benefits are clearly unrelated to the affected consumers or, in the opposite case, because the competitive harm is insignificant when compared to the potential benefits.[67]

In terms of measurement, the draft distinguishes between 'individual use value benefits', 'individual non-use value benefits' and 'collective benefits' and then explains how each might contribute to the assessment of whether consumers are not worse off and that 'any of the different benefits or any combination of them can be presented to satisfy the fair share condition'.[68] The individual use value is the most commonly found benefit. It is the value of the individual consumers' experience in form of improved quality of the product, greater variety, or reduced price.[69] As an example of individual non-use value, the Commission mentions consumers that opt to buy a certain cleaning product not because it cleans better but because it is better for the environment.[70] The 'individual non-use value' benefits is the value that the consumers in the relevant market place on the impact of their choices, on others. In other words, effects that their choice of a more sustainable product has on other.[71] In can, thus, be said the value these consumers place on the benefit for society or future generation.[72]

The trickiest and potentially most controversial benefits are collective benefits. The Commission defines these as benefits that go beyond the 'voluntary (altruistic) choices of individual consumer'[73] and 'occur irrespective of the consumers' individual appreciation of the product. These benefits can objectively accrue to the consumers in the relevant market,'[74] for example cleaner air and water, or CO2 reductions. These benefits can only be taken into account if a number of conditions[75] are fulfilled that ensure that consumers of the relevant market benefit and are in the end not worse off. The Commission explains that such benefits and the beneficiaries need to be clearly described and evidence[76] of benefit's occurrence or

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[65] Draft Guidelines (n 37) para 577. As examples of efficiencies the Commission lists in para 578 'the use of cleaner production or distribution technologies, less pollution, improved conditions of production and distribution, more resilient infrastructure or supply chains, better quality products, etc. [Sustainability agreements] can also avoid supply chain disruptions, reduce the time it takes to bring sustainable products to the market and can help to improve consumer choice by facilitating the comparison of products.'

[66] ibid para 588.

[67] ibid para 589.

[68] ibid para 609.

[69] ibid para 590.

[70] ibid para 595.

[71] ibid para 594.

[72] ibid para 596.

[73] ibid para 601.

[74] ibid.

[75] See ibid para 606.

[76] In this regard, public authorities' reports and academia are particularly valuable, see para 607. And where no quantitative data can be provided, a more than marginal benefits that is clearly foreseeable must be shown, see para 608.

likely occurrence needs to be provided. It also needs to be shown that the beneficiaries and consumers in the relevant market substantially overlap and that any benefit occurring outside the relevant market still accrue to the consumers in the relevant market. In an example, the Commission explains that while drivers as affected consumers may benefit as part of the society from reduced emissions, buyers of clothing produced abroad in a way that is less polluting to the local water ways would not substantially overlap with the beneficiaries. Hence the consumers in the relevant market would not accrue the collective benefit of reduced water pollution.[77]

After having set out what benefits can be taken into account to show that consumers in the relevant market are not worse off, the Commission also explains that sustainability agreement need to pass the indispensability and non-elimination of competition test. Such agreements are indispensable of they are needed to reach the sustainability goal - whether set by regulation or by the agreement - in a more cost-efficient way by providing, for example, economies of scale.[78] Moreover, companies may be able to show that the agreement is needed to align incentives for implementation of the sustainability agreement[79] or because consumers have difficulties with information and knowledge relating to the product or future benefits.[80] In terms of the non-elimination of competition principle, the Commission highlights that it is competition in the relevant market that is important.[81] Thus, not all competition needs to be maintained it is sufficient if at least one element of vigorous competition is maintained[82] and that this condition can even be fulfilled where certain products disappear.[83] Equally, elimination of competition over a limited time period does not mean that the agreement would fail the test.[84]

Overall, this approach in the draft guidelines certainly has the potential to narrow any gap substantially. While a certain gap is obvious with regard to collective benefits that occure outside the affected market and don't accrue to the consumers in that market,[85] the gap has certainly been narrowed. To what extent the gap can be considered reduced by this approach depends however on a number of factors. For example, one might question whether the same principles are equally applicable to questions of social sustainability. While the report suggests that 'its concepts and tools are also more broadly applicable to other aspects of sustainability,'[86] the Dutch draft guidelines seem to limit the more generous approach to environmental matters.[87] While it remains to be seen how the final horizontal guidelines by the Commission but also by the Dutch competition authority will look like and how they

[77] ibid para 604, yet the Commission also highlight that these benefits might still be part of the individual non-use value.
[78] ibid para 583, 585.
[79] ibid para 585.
[80] ibid para 586.
[81] ibid para 612.
[82] ibid para 611.
[83] ibid para 612
[84] ibid para 614.
[85] Think of the example of water pollution abroad, similar things could possibly be said about improvements of labour conditions or the human rights situation abroad..
[86] ibid 53.
[87] Draft Guidelines (n 1).

deal with this issue of social sustainability, the current draft seems certainly a substantive improvement that narrows perceived gaps.[88]

c) Finally, even where Article 101(3) TFEU or the equivalent under Article 102 does lead to the conclusion that a measure is justified, the option of balancing under Article 106 (2) TFEU may be available. Article 106 (2) TFEU sets out that the competition rules do not apply to undertakings entrusted with services of general economic interest where the application might hinder the performance of these tasks. The balancing under Article 106 (2) is a broad proportionality. It might well apply where the service is one that fosters sustainability and thereby one of general interest. . Yet, it only applies where the undertaking(s) has been specifically 'entrusted' with that task by the State.[89]

3.2 PREVENTIVE INTEGRATION (SWORD)[90]

As mentioned above, the more common form of environmental integration is to ensure that competition law supports rather than obstructs sustainability measures (shield). Preventative integration (sword), that is to say integration by means of interpreting competition law in a way that leads to the prevention of, for example, a deterioration of the environment, is less frequently encountered. While this author has previously argued that the room for such integration is limited,[91] the area seems to be developing, albeit slowly.[92]

3.2[a] First Form of Integration (Questions of Scope)

It is in particular the first form of integration (the scope of competition law) where the debate and developments take place. In terms of enforcement activity, competition authorities have been active where sustainability, in particular environmental sustainability, has been parameter of competition. For example, the French competition authority has pursued a cartel between companies that agreed not to compete on the environmental performance of their product by not mentioning this performance to the customers.[93] Similar enforcement action can be seen in the context of innovation improving the environmental sustainability of products. For example, in *BMW, Daimler and VW*[94] the Commission fined the investigated undertakings for a cartel to reduce innovation competition while in *Bayer/Monsanto*[95] it looked at potential innovation harms resulting from the merger. These enforcement actions focused on innovation harms which then, in turn, led to environmental harm. Such an approach,

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[88] Given that national competition authorities (and courts) are only bound by the EU Courts' case law and limited only to the extent that they cannot adopt decisions 'which would run counter to the decision adopted by the Commission' (Art 16 Reg 1/2003), interesting questions might arise. Questions concerning the different standards and tools at different levels of the EU.

[89] For details see Nowag (n 8) Chapter 3 and 12.

[90] As depicted in on the right side of the matrix above.

[91] See Nowag (n 8) Chapter 6 and chapter 14

[92] See Marios Iacovides and Christos Vrettos, 'Radical For Whom? Unsustainable Business Practices as Abuses' in Simon Holmes, Dirk Middelschulte and Martijn Snoep, *Competition Law, Climate Change & Environmental Sustainability* (Concurrences 2021) 91-103.

[93] Autorite de la Concurrence, Décision 17-D-20 relative à des pratiques mises en œuvre dans le secteur des revêtements de sols résilients (18 October 2017), available at <https://www.autoritedelaconcurrence.fr/fr/decision/relative-des-pratiques-mises-en-oeuvre-dans-le-secteur-des-revetements-de-sols-resilients>. (accessed 5 Dec 2021).

[94] See Case AT.40178 – *Car Emissions*.

[95] Case M.8084 - *Bayer/Monsanto* C/2018/1709 [2018] OJ C 459/10.

based on the existence[96] of innovation harms, seems to be a viable route by which sustainability can be achieved *indirectly*.[97]

Some go further to address the perceived gap. They argue that e.g. Article 102 TFEU could be used to address for example unfair prices paid to farmers;[98] or even that unsustainable business practices can in themselves be abusive under Article 102 TFEU.[99] However, so far we have not seen such actions in practice.

3.2[b] Second Form on Integration (Balancing)

When exploring the second form of integration, that is to say, balancing in the context of preventative integration (the sword), the gap becomes more obvious. It is not only a (potentially justified[100]) gap in achieving sustainability but also a gap of academic engagement and discussion. The questions that one would ask is the following: if a situation is covered by the competition prohibitions -in other words within the scope of competition law- how can the relevant balancing be applied so as to prevent unsustainable outcomes? Normally the assessment explores whether benefits outweigh the restriction of competition e.g. in the context of Article 101 (1) or 101 (3) TFEU.[101] In the context of preventative integration, the questions would go a step further and ask whether the benefits are sufficient given that this action causes a restriction of competition and is damaging from a sustainability perspective. In other words, the benefits would need to outweigh not only the harms to competition but also the sustainability harms. Such a balancing has not yet been observed in the traditional areas of competition law. Yet, one might point to e.g. the rules on superior bargaining power of supermarkets,[102] or the EU unfair trading terms directive.[103] In that context, it might not be far-fetched to argue that the harm to competition between supermarkets was not particularly great and there were price benefits for the consumer. However, these benefits, while outweighing the harm to competition between supermarkets, were not enough to ensure that supermarkets could continue to exercise their bargaining power in that way. In other words, from a purely competition law perspective there was nothing illegal happening and the consumers obtained a price benefit. Yet, the UK Competition Commission and the European legislature still felt that they needed to step in in order to protect the often small-scale producers.

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96 And the ability to prove such harm.
97 See also Nowag (n 4).
98 Holms (n 13) 384-387.
99 Iacovides and Vrettos (n 57).
100 See below under III. b) 4).
101 See above under II. a) 2).
102 See e.g. the UK Competition Commission, The Groceries (Supply Chain Practices) Market Investigation Order 2009, available at https://webarchive.nationalarchives.gov.uk/ukgwa/20111108202701/http://competition-commission.org.uk/inquiries/ref2006/grocery/pdf/revised_gscop_order.pdf (access 22.11.2021).
103 Directive 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in in business-to-business relationships in the agricultural and food supply chain [2019] OJ L 111/25.

3.2[c] The Gap in the Area of Preventive Integration or What the Sword Can't Reach

A gap in terms of sustainability can most likely be identified in the area of preventative integration. And while some developments can be observed with regard to the first form or integration, that is to say the scope of competition law, the gap is bigger for the second form. Preventive integration of sustainability concerns in the balancing of benefits against the restriction and the sustainability harm seems indeed absent from practice and even academia. However, this specific gap, but similarly also the general caution in the areas of preventative integration, may not be surprising. Any action in this area needs to be taken with utmost care. Where the Commission expands the scope of competition law capturing unsustainable practices, it may similarly expand its own competence beyond its remit.[104] The risk in such cases is one of breaching the separation of powers. The Commission needs to be mindful not to be seen as (in effect) setting a new environmental standard by means of competition law. Such environmental standards are set by the relevant legislature. Thus, in particular, where the relevant legislature has set a lower-level environmental standard or even purposefully not adopted a standard, dangers regarding overstepping the competence exist. It needs to be ensured that any expansion in the scope of competition law can be related back to protecting competition and its outcomes. The danger of overstepping that line might be even higher where the second form of integration, namely balancing, is concerned. This is so as preventative integration when balancing is involved would mean that activities that result in benefits that would usually outweigh the harm to competition would not be allowed (only) due to their impact on sustainability.

4 CONCLUDING REMARKS: AVOIDING COMMON MISCONCEPTIONS

So far, this paper has investigated the integration of sustainability into competition law as demanded by Article 11 TFEU/Article 39 of the Charter of Fundamental Rights (CFR). However, it would be a misunderstanding to see the requirement of Article 11 TFEU/39 CFR as making sustainability or environmental protection the primary goal or even a goal of competition law, in the same way as the respect for rights of defence or other fundamental rights of undertakings does not mean that fundamental rights protection becomes an aim of competition law. It simply requires respect, or as possibly more frequently used in the context of international competition law, comity. In this sense, Article 11 TFEU/39 CFR prohibit in particular the (wilful) exclusion[105] of environmental or sustainability concerns in order to maintain the 'purity of competition law'.[106]

A second misconception relates to the conceived problems of legitimacy.[107] One common argument is that a competition agency or court does not possess sufficient legitimacy to make complex value judgments (also with regard to sustainability) and that these should be made by the legislature. In this regard, two things must be pointed out.

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[104] On this risk as a limit to preventative integration see also Nowag (n 8) Chapter 6 and 14.
[105] Yet, there will be a level of discretion, for further details see ibid 273ff.
[106] See in this regard also the rejection of such a purity argument in e.g. Case C-594/18 P *Austria v Commission* EU:C:2020:742. The ECJ contrary to the GC and its AG reject to argument that the competition provisions, in this case State aid, would be immune from the application of Article 11 TFEU as it was applied to an area exclusively covered by the EURATOM.
[107] For more details on this and related questions see Nowag (n 8) 31-48.

First, only the second form of integration requires balancing so that integration *as such* cannot be rejected based on such an argument.

Second, agencies and courts possess sufficient legitimacy to make such decisions where the constitutional framework requires them to do so. It seems inconceivable that someone would make the argument that an agency or a court does not possess the legitimacy to take account of the fundament rights of companies in competition proceedings. The constitutional framework requires agencies and courts to take account of fundamental rights implications and for sustainability it requires this by means of Article 11 TFEU/Article 39 CFR. Claiming that agencies or courts do not possess sufficient legitimacy implies a rejection of the binding force of constitutional provisions in the area of competition law. Such an argument would in same way also mean rejecting all fundamental rights of companies in competition proceedings and apply purely those protections already explicitly enshrined in the existing written text of competition laws, such as e.g. Reg 1/2003.

Third, where integration occurs -as above suggested- within the established framework of competition law, these value judgments are not complex but follow the usual competition law logic.

More importantly, if one is concerned about the 'purity of competition law',[108] one needs to be particularly mindful not to abuse competition law. Competition law (under most of the current standards) should not be (ab)used to protect the legislature. In other words, competition law is not a tool to protect the legislature against companies 'making judgments and decisions' that will improve sustainability, in particular decisions and judgments that the legislature has not (yet) decided on. This is so for two reasons.

The first reason relates to the relevant standard of a 'pure' competition law. Where a 'pure' competition law requires a focus on e.g. consumer welfare this should be the relevant benchmark for assessment. Whether it is the task of the legislature to make a certain decision in a given legal framework should have no bearing on whether the measure is legal or illegal under competition law. The focus needs to be on the effect on consumer welfare. Thus, it should only matter whether the integration of environmental protection/sustainability fits within that consumer welfare framework. The analysis above suggests that it does to a considerable extent.

The second reason relates to constitutional requirements: agencies or courts should not second-guess the (constitutional) legislature. Competition agencies and courts need to be mindful not to substitute the view of the legislature with their view about what is for the legislature to do and what is for the companies or (competition) agencies/courts to do. This is particularly true in jurisdictions where courts and agencies are required by the same legislature (or even the constitutional legislature) to take account of sustainability concerns, e.g. by means of Article 11 TFEU/39 CFR.

5 CONCLUSION

This mapping exercise has set out a framework for the integration of sustainability in EU competition law. This framework, in turn, can be used to examine the perceived sustainability gap in EU competition law. The paper highlighted the importance of preventing conflicts

[108] See for example Ariel Ezrachi, 'Sponge' (2017) 5 JAE 49-75.

between sustainability and competition in the first place. It has shown which tools EU competition provides to prevent such conflicts by means of excluding certain situations from the scope of competition law. Then, it briefly looked at the tools available for balancing competition and sustainability once such a conflict has been established. If one is looking for a gap, it is certainly in this area that the limitations are found. While these limitations might justify the use of the term sustainability gap in specific instances, the overall picture seems more nuanced and provides room for undertakings to foster sustainability. The question that remains is how large this gap is. In terms of the environmental aspects of sustainability it has certainly narrowed with the latest activities by competition authorities. But it remains possibly a bit wider where the social aspects of sustainability are concerned. Finally, the paper highlighted the possibly biggest gap: the area of promoting sustainability by using competition law to target behaviour of undertakings that is harmful from a sustainability perspective. It seems that sustainability concerns in this area can so far only be tackled by means of other harms,such as harms to innovation which in turn lead to sustainability concerns. While this is certainly the biggest gap in terms of sustainability, the gap seems mainly the result of the difference between competition law (aimed at competition harms) and e.g. environmental law (aimed at environmental harms) or other laws fostering sustainability. Overall, the requirement to integrate environmental and sustainability concerns might be something specifically European, based on the EU Treaties. Yet, there are no reasons why other jurisdiction could not pursue similar routes where the legal framework is structured in a comparable way.

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