

POLICY COMMENTARY

Policy constraints in the greening of EU competition policy

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Abstract

The 2023 revision of the EU Horizontal Guidelines introduced a dedicated framework for sustainability-oriented cooperation agreements, marking the first systematic attempt to integrate environmental objectives into EU competition law. Yet, almost two years after they entered into force, DG COMP has not received a single request for informal guidance under the new provisions. This policy commentary explains this apparent policy failure by reconstructing the process through which sustainability concerns entered EU competition policy after the 2019 European elections and the European Green Deal. Drawing on historical-institutionalist process tracing, we show that the resulting adjustments were shaped by political urgency rather than gradual policy learning, and that the 2023 Guidelines reflected cautious compromise rather than transformative change. We then analyse why uptake has remained negligible: multinational firms face steep cross-border enforcement risks, particularly from jurisdictions such as the United States, where sustainability agreements can trigger antitrust liability. We conclude by assessing the EU's strategic options (retreat, international convergence, or domestic regime stabilisation) and argue that the last of these offers the most realistic path.

Keywords: competition policy; environmental sustainability; policy coordination; European union

Introduction

On 8 May 2025, Directorate-General Competition (DG COMP) launched a public consultation on merger control in the European Union (EU). While the supporting document addresses several dimensions of enforcement, Topic D on 'Sustainability and Clean Technologies' stands out (European Commission 2025; Lexology 2025a). Its inclusion, and Commissioner Ribera's emphasis on it, signal more than a technical adjustment: it reflects a broader attempt to recalibrate the relationship between competition policy and environmental objectives, i.e. two domains that have long evolved in parallel but largely apart. This effort unfolds against a changing political backdrop. The Draghi report has recently called for the prioritisation of 'sustainable competitiveness' (2024: 7, 64) and for a new strategic direction in EU competition policy (2024: 298–306). At the same time, the prospects for a genuinely green competition regime remain fragile and contested.

Building on an historical-institutionalist process-tracing project, we reconstruct how sustainability concerns were translated into competition policy following the European Green Deal. This reconstruction shows that while DG COMP engaged in extensive consultation and reflection,

the resulting adjustments were shaped by political urgency and by the EU's position as an international first mover, rather than by gradual, cumulative policy learning.

Earlier work has shown how technical and organisational complexity (Tirole 2023), including entrenched assumptions, institutional legacies, and diverging stakeholder interests, constrains transformative change in competition policy (see also Malinauskaite and Erdem 2023; Karagiannis 2025, 2026). This commentary explains how these constraints emerged and evaluates their implications. As citizens, we share the view that climate imperatives require institutional adaptation across all domains of EU governance. As researchers, however, we focus on assessing the durability and practical effects of recent changes.

Two policies turning their backs to each other

Although both competition policy and environmental policy seek to correct market failures, their underlying logics have long been difficult to reconcile. From the outset of European integration, competition rules occupied a central position. Treaty provisions adopted in 1951 and 1957, reinforced by Regulation 17/62 and early Court of Justice rulings, endowed the Commission (DG COMP) with far-reaching enforcement powers. By the early 1970s, DG COMP was actively policing cartels, vertical restraints, and abuses of dominance. A 1973 judgement laid the groundwork for merger control, and the adoption of the Merger Regulation in 1989 completed the core architecture. Frequently accused of overreach, DG COMP nonetheless consolidated its authority by presenting itself as the guardian of the internal market. This dual mandate of protecting market integration and consumer welfare placed competition policy at the heart of the EU's 'economic constitution', understood as the durable ordering principles governing market coordination and state intervention (Gerber 1994; Gerbrandy 2019).

Environmental policy followed a markedly different trajectory. It emerged later, more cautiously, and with weaker legal foundations (Lenschow 2020). The first Environmental Action Programme in 1973 lacked binding force, and early initiatives were often resisted by member states concerned about competitiveness. Only with the Single European Act of 1986 did environmental policy acquire a firmer treaty basis. Institutionalisation accelerated during the 1990s, culminating in the creation of DG CLIMA in 2010. By the early 2000s, instruments such as the Emissions Trading System (2005) and directives on renewable energy (2009) and energy efficiency (2012) had established the EU as an increasingly ambitious environmental regulator.

Despite their parallel expansion, the two regimes remained largely disconnected (Kingston 2019). Even after the Paris Agreement in 2015, DG COMP resisted integrating climate objectives into antitrust enforcement, and coordination efforts during the Juncker Commission produced limited results. In the 2019 European elections, competition policy barely featured in debates on climate governance (IEEP 2019). Illustrative of this disconnect is the Dutch *Energieakkoord*. In 2013, more than 40 stakeholders, including government bodies, unions, employers, and NGOs, agreed on a plan to phase out coal-fired power plants. The Dutch competition authority (ACM), however, blocked the agreement, citing EU and national competition law and warning of reduced supply and higher prices. The decision triggered a political backlash: members of parliament criticised what they called 'economic dogma', while Greenpeace denounced the authority's 'tunnel vision' (GCR 2016).

In short, EU competition and environmental policies developed side by side but with limited interaction. Both became more ambitious and more consequential for market outcomes, yet they remained legally, institutionally, and conceptually distinct – setting the stage for the tensions that would later surface when sustainability objectives began to enter the realm of competition policy. By contrast, EU state aid policy has proved more adaptable in integrating decarbonisation and industrial policy objectives, illustrating that competition-related instruments can, under certain institutional conditions, accommodate environmental goals more smoothly (Rangoni and Thatcher 2025).

The 2019 elections and the greening of competition policy

The 2019 European Parliament elections triggered a sequence of events that altered the balance between competition and environmental policy within the Commission. Following strong electoral gains by Green parties – most notably in Germany – and the weakening of the traditional grand coalition of Christian democrats, socialists, and liberals, environmental priorities gained new political leverage. A key demand advanced during negotiations over the appointment of Ursula von der Leyen as Commission President was that economic policy objectives explicitly incorporate environmental targets (The Guardian 2019; EurActiv 2019b). The resulting European Green Deal, announced as a flagship initiative, and the appointment of Frans Timmermans as First Vice President in charge of its implementation, gave sustainability concerns unprecedented institutional prominence. For the first time, calls to integrate environmental objectives into competition enforcement acquired real traction at the EU level.

This political shift coincided with mounting pressure from national competition authorities (NCAs), businesses, and civil society actors to clarify whether – and under what conditions – EU competition law could accommodate sustainability-oriented cooperation. Several NCAs, notably in the Netherlands, Greece, Austria, and France, began to explore more expansive interpretations of the prohibition of anticompetitive agreements. Dutch competition authority officials, including Martijn Snoep, argued that the interpretation of the ‘fair share’ test in the 2004 Horizontal Guidelines – requiring that consumers in the relevant market fully benefit from efficiency gains – was ill-suited to agreements aimed at reducing negative externalities such as greenhouse gas emissions. The Dutch proposal urged the Commission to consider broader societal benefits, and the authority commissioned studies seeking to quantify avoided environmental harm and to develop cost-benefit methodologies extending beyond market-specific consumer welfare (GCR 2020).

Other authorities adopted a more cautious stance. Germany’s Bundeskartellamt, in particular, warned against broadening exemptions for anticompetitive conduct under the banner of sustainability. Its president, Andreas Mundt, argued that such an approach risked politicising enforcement, enabling greenwashing, and exceeding competition authorities’ expertise and mandate. From this perspective, exemptions under Article 101(3) TFEU should remain strictly conditional on demonstrable, indispensable efficiency gains that are at least partly passed on to consumers in the affected market (Concurrences 2021; GCR 2021, 2023).

DG COMP itself initially shared this caution. In May 2019, Commissioner Margrethe Vestager opposed revising the existing framework (EurActiv 2019a), and she repeatedly emphasised that competition policy could not substitute for environmental regulation. In September 2020, she stated explicitly that ‘the paradigm of competition law is not to protect the environment’ (Concurrences 2020). Nevertheless, under the political impetus of the Green Deal, DG COMP launched a process of incremental reform. It organised consultations, workshops, and conferences, and in 2022 proposed revised Horizontal Guidelines clarifying that certain sustainability agreements could fall outside Article 101(1) TFEU or qualify for exemption under Article 101(3), provided they genuinely pursued environmental objectives and ensured that consumers in the relevant market received a ‘fair share’ of the resulting benefits. Notably, the consumer-focused interpretation of the ‘fair share’ criterion was retained, to the disappointment of those advocating a broader societal standard.

Businesses also pressed for reform, though with different priorities. In-house counsel from firms such as British Airways, Shell, and Unilever warned that legal uncertainty created a chilling effect on cooperation, particularly for projects requiring horizontal coordination, such as shared carbon-capture infrastructure or the phase-out of polluting packaging. Industry associations, including the International Chamber of Commerce, called for clearer guidance, pre-clearance mechanisms, and safe harbours to reduce legal risk (ICC 2020, 2023).

In parallel, several member states moved ahead with national initiatives. Austria introduced a statutory exemption in 2021 for sustainability agreements generating ecological benefits, even when these accrued outside the relevant market, and its 2022 draft guidelines outlined how to balance environmental gains against competitive restrictions. The Dutch authority approved agreements involving multinational firms, including Shell and TotalEnergies' CO₂ storage project and Coca-Cola's plastics initiative with Dutch supermarkets. While these cases created precedents, they also underscored the emergence of a fragmented legal landscape.

This process culminated in June 2023 with the adoption of a new sustainability chapter in the revised Horizontal Guidelines (European Commission 2023). For the first time, EU competition law articulated a dedicated framework for assessing horizontal agreements pursuing sustainability objectives. The Guidelines specified qualifying objectives, clarified which agreements fall outside Article 101(1) TFEU, introduced a 'soft safe harbour' for standardisation agreements, and reaffirmed that exemptions under Article 101(3) require that consumers in the relevant market are not made worse off. Despite expectations of a more far-reaching shift, the final text remained cautious: out-of-market benefits could not offset competitive harm, and exemption criteria were narrowly framed. The Guidelines thus reflected a process of intensive but politically compressed learning – one that delivered legal clarification under significant time pressure, while leaving unresolved the broader structural constraints that would later limit their practical uptake.

Understanding an apparent policy failure

Despite the clarity of the 2023 Horizontal Guidelines, uptake by industry has so far been negligible. Almost two years after they entered into force, DG COMP has not received a single formal request for informal guidance concerning a sustainability-oriented cooperation agreement. In public remarks throughout 2024 and 2025, senior officials – including Commissioner Vestager, Director-General Olivier Guersent, and the head of DG COMP's international unit, María Luísa Tierno Centella – have openly acknowledged the failure of the initiative to generate concrete cases. While reiterating the Commission's willingness to grant exemptions, Guersent and Tierno Centella confirmed that several discussions involving large international alliances were abandoned because firms feared enforcement in jurisdictions where such exemptions do not exist, notably the United States (GCR 2024b, 2025). Vestager had already expressed similar frustration in 2024, remarking that the Commission had 'talked about the issue a gazillion times', yet 'businesses are not coming forward' (GCR 2024c). In short, the policy framework exists, but legal asymmetries across jurisdictions remain sufficiently steep to deter its use.

This outcome is best understood by examining firm-level incentives under conditions of international legal asymmetry. When considering participation in a horizontal sustainability agreement, firms assess expected benefits – such as operational efficiencies, reputational gains, or improved ESG ratings – against the expected costs of potential enforcement across all relevant jurisdictions. These costs include legal fees, fines, damages, reputational harm, and, in some systems, criminal liability for executives. Even where an agreement is clearly permissible under EU competition law, the prospect of enforcement elsewhere may outweigh its expected benefits. This effect is particularly pronounced for large multinational firms, which are best positioned to deliver meaningful environmental impact and are also the most exposed to cross-border enforcement risk. For such firms, the rational response may be not only to refrain from seeking exemptions, but to avoid requesting clarification from DG COMP altogether.

This interpretation helps explain why the limited uptake of the 2023 Guidelines cannot be attributed solely to transatlantic divergence. Several jurisdictions – such as Japan, South Korea, Singapore, and the United Kingdom – have issued guidance broadly aligned with the EU's approach, and similar initiatives are under discussion in Mexico. Yet these jurisdictions do not define the global enforcement baseline. Other major economies, including Brazil, Canada, India,

and Russia, have not adopted comparable frameworks, and in some cases remain openly sceptical of sustainability agreements. In the United States, former FTC Chair Lina Khan has argued that her agency lacks the authority to create sustainability safe harbours, noting that such measures would require congressional action (Lexology 2025b). Former DOJ Antitrust Division head Jonathan Kanter similarly warned against using antitrust as a pretext for avoiding environmental responsibility (GCR 2024a). At the same time, investigations launched by Republican State Attorneys General into climate-related alliances point not merely to legal uncertainty, but to heightened enforcement risk. Under the second Trump administration – where climate policy is deprioritised and the new FTC leadership has advocated investigations into sustainability-related coordination (GCR 2024c) – the expected costs of seeking green exemptions have increased further. Under these conditions, the global legal environment remains too uncertain, and in some respects too hostile, for even well-intentioned European initiatives to translate into sustained changes in business behaviour.

Going forward, but where?

The EU thus faces a strategic impasse. One option would be to treat the experiment as a failure and reverse course. DG COMP could issue revised guidelines eliminating references to sustainability exemptions, thereby restoring a higher degree of legal clarity. Such a move, however, would also signal a retreat from a policy trajectory that only recently appeared to command broad political support, and would sit uneasily with the Union's broader climate ambitions.

At the opposite end of the spectrum, the EU could seek to reshape the global environment more assertively. This would entail using international forums such as the International Competition Network, alongside bilateral engagement, to promote convergence around its approach to sustainability agreements. While such efforts may bear fruit among some competition authorities, particularly in developing economies, they are unlikely to succeed in jurisdictions that increasingly view the EU with suspicion – a category that now arguably includes both the United States and several BRICS (Brazil, China, South Africa, Egypt, Ethiopia, India, Indonesia, Iran, Russia, and the United Arab Emirates) countries.

Between retreat and expansion lies a more pragmatic strategy: stabilising the EU's own regime. First, the Commission could encourage closer alignment among EU national competition authorities, reducing internal divergence and reinforcing the credibility of the EU framework. Such internal cohesion is a necessary, if insufficient, condition for reducing external uncertainty. Second, DG COMP could explore ways to lower the exposure of firms seeking guidance under the sustainability framework. Measures such as stricter confidentiality guarantees for informal consultations – or extending protections to firms granted exemptions, analogous to those offered under leniency programmes in cartel enforcement – could reduce the deterrent effect associated with cross-border scrutiny.

This intermediate strategy is not without risks. Foreign authorities may view enhanced confidentiality as an obstacle to detecting anticompetitive conduct disguised as sustainability cooperation. Nevertheless, in the absence of global convergence, a strategy focused on regulatory resilience offers a more realistic path forward than either symbolic leadership without uptake or outright policy reversal. If the EU is to align its environmental ambitions with its capacity to shape market behaviour, stabilising the conditions under which firms can act may prove as important as refining the substantive rules themselves.

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