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**The New Article 102 Guidelines and Sustainability**

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***Summary: The European Commission's Guidelines on the application of Article 102 Treaty on the Functioning of the European Union (TFEU) to abusive exclusionary conduct, adopted on 3 September 2026, do not create a freestanding "sustainability defence" to abuse of dominance. What they do, for the first time, is expressly identify sustainability benefits as capable of constituting qualitative efficiencies within the existing Article 102 efficiency defence (paras 213, 217–218), subject to the same demanding four-condition test that applies to any other efficiency claim (para 220) and to a document-intensive evidential burden (paras 223–229). The more significant development is narrower and more technical than the headline suggests: paras 237–238 recognise expressly, in the Commission's Article 102 Guidelines, that collective efficiencies extending beyond the relevant market including sustainability benefits accruing to society at large can support the defence, subject to a further set of conditions. This article sets out what the Guidelines say, in their own words, and distinguishes that from the wider and more developed sustainability framework already operating under Article 101.***

## Introduction

On 3 September 2026, the European Commission adopted its 2026 Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings (the "**Guidelines**"). The Guidelines were published in the Official Journal of the European Union on 9 September 2026, as OJ C/2026/4675. Article 101 TFEU and Chapter I of the Competition Act 1998 prohibit anticompetitive agreements between two or more undertakings; Article 102 TFEU and Chapter II prohibit abuse of a dominant position by a single undertaking acting unilaterally. Neither provision was drafted with sustainability in mind, and until 3 September 2026 the two prohibitions had reached materially different points in accommodating it.

The Commission's Horizontal Guidelines, published in 2023, introduced the concept of a "genuine sustainability agreement" one pursuing real environmental or social objectives and going no further than necessary  and provided a more developed framework for assessing sustainability agreements under Article 101(3), including recognition of "out-of-market benefits": environmental gains accruing to society at large, not only to consumers in the affected market. The Guidelines also created a safe harbour for certain sustainability standardisation agreements, provided they are transparent, open to participation, and free of unnecessary restrictions such as price coordination.

The Competition and Markets Authority (CMA)'s Green Agreements Guidance, published in October 2023, takes a broadly similar approach to environmental sustainability agreements under Chapter I of the Competition Act 1998. It contains a specific, more permissive approach to "climate change agreements", under which benefits to all UK consumers may be taken into account. The CMA has, however, maintained a firmer line than the Commission on anything shading into price coordination or market division, whatever the environmental justification offered.

Article 102 had no equivalent express treatment of sustainability. A dominant undertaking seeking to justify exclusionary conduct, such as a refusal to deal, tying, exclusive dealing on sustainability grounds had only the general, long-standing ‘efficiency defence’ available to it: conduct otherwise distorting competition may be objectively justified where it produces efficiencies that counterbalance or outweigh the negative effects of the conduct on competition and consumers. That defence had always been capable, in principle, of covering environmental benefits. However, there was no express recognition of this in the Commission’s 2009 Guidance on Article 102 enforcement priorities.

**What the Guidelines Say**

The Guidelines confirm, at para 213, that the efficiencies a dominant undertaking may invoke include cost efficiencies and efficiencies of a qualitative nature. Para 217 states expressly that sustainability benefits can take the form of qualitative efficiencies, giving as examples reduced use of raw materials, less polluting production or distribution technologies, increased product recyclability, reliance on more resilient infrastructure, reduced risk of supply-chain disruption, the development of new, more sustainable products, and reduced time-to-market for such products. Para 218 adds that these benefits may translate into consumer benefits in their own right, including through lower costs for more sustainable products.

That confirmation removes any ambiguity in the Commission's guidance that an environmental justification is a legitimate category of efficiency under Article 102, stated in terms rather than left to inference from Article 101. It does not, however, change the underlying test. Para 220 sets out four cumulative conditions applicable to any efficiency claim, sustainability-based or otherwise: the conduct must actually achieve the claimed efficiencies; the efficiencies must counteract the conduct's negative effects on competition and consumers in the relevant market(s); the conduct must be necessary to achieve them; and the conduct must not eliminate effective competition. All four conditions must be satisfied cumulatively.

The evidential requirements are set out at paras 223 to 229. Claimed efficiencies must be specified in terms of their nature, existence and extent and supported by convincing, verifiable evidence, and the Commission identifies contemporaneous internal documents, financial and accounting material, historical examples, external expert evidence, and applicable economic models as relevant evidence. Efficiencies must be quantified where reasonably possible; where a qualitative or longer-term efficiency is difficult to quantify, the undertaking must still provide a sufficiently concrete and verifiable account of the claimed consumer benefit. Generic or unsubstantiated assertions of environmental benefit will not satisfy this standard. The Guidelines also emphasise that future benefits must be assessed over time, including by discounting future gains where appropriate.

It is also worth noting the case law underlying the general efficiency defence, since the Guidelines are consolidating existing doctrine rather than creating a wholly new defence. The four-condition test reflects the existing EU law on objective justification and efficiencies, with the Guidelines citing a range of authorities. *European Superleague Company* (C-333/21) and the General Court's 2024 judgment in *Qualcomm (Predation)* (T-671/19) are relevant to the broader Article 102 framework, but neither judgment concerned a sustainability-specific efficiency claim. *Qualcomm* is in any event now subject to an appeal (C-819/24 P).

I would therefore avoid suggesting that those two cases, taken together, are the direct judicial source of the four-condition sustainability test. The safer formulation is that the Guidelines place the sustainability examples within the existing efficiency-defence framework and ground that framework in established Article 102 principles. The Guidelines represent the Commission's considered application of those principles to sustainability; they are not themselves a judicial pronouncement on the legality of any particular sustainability-linked restriction.

**Out-of-Market and Collective Efficiencies**

Paras 237 and 238 are, in substance, the most significant sustainability-related development in the Guidelines. The orthodox position in EU competition law has been that the assessment of benefits is, in principle, confined to the relevant market(s), and benefits in an unrelated market cannot normally compensate for harm elsewhere. Para 237 qualifies that position in two respects.

First, where two markets are genuinely related, for example, where conduct enables investment with spill-over effects across a value chain efficiencies achieved in one market may be taken into account in the assessment of conduct in another, provided the consumers affected by the conduct and the beneficiaries of the efficiency substantially overlap. Second, the Guidelines recognise that efficiencies can generate collective benefits extending beyond the relevant market altogether, through the internalisation of externalities, giving as an explicit example sustainability benefits from cleaner technologies or more sustainable products that benefit a wider section of society independently of any individual consumer's appreciation of the product.

Para 238 then imposes a further set of cumulative requirements on any such claim: the dominant undertaking must describe the claimed benefit clearly and provide evidence that it has occurred or is likely to occur; define the beneficiaries clearly; demonstrate that the consumers negatively affected by the conduct in the relevant market substantially overlap with those beneficiaries; and demonstrate that the share of the out-of-market benefit accruing to the affected consumers, combined if relevant with other in-market efficiencies, counterbalances or outweighs the harm those consumers suffered. The final requirement is particularly important: the Guidelines do not permit a simple balancing of harm to consumers against an unallocated societal benefit.

This is a demanding, additional layer on top of the general conditions in para 220, not a lower standard. It is, nonetheless, a significant express development in the Commission's Article 102 guidance because it identifies collective sustainability benefits accruing beyond the relevant market as potentially relevant to an efficiency defence.

**The Greenwashing Intersection**

The evidential rigour the Guidelines require at paras 223 to 229 sits alongside a separate and increasingly active enforcement regime for misleading environmental claims. The CMA's Green Claims Code, launched in 2021, has produced a growing body of enforcement action, including undertakings secured in 2024 from three major fashion retailers over claims about recycled materials, under the strengthened consumer protection powers in the Digital Markets, Competition and Consumers Act 2024.

A sustainability claim advanced in support of an Article 102 efficiency defence should, as a matter of practical preparation, be capable of withstanding the same scrutiny a green-claims regulator would apply to it. The two regimes should not, however, be conflated: the CMA's consumer-protection rules concern the accuracy and presentation of environmental claims, whereas the Article 102 analysis asks whether the claimed efficiencies are sufficiently substantiated, are passed on to consumers, are indispensable, and satisfy the remaining conditions of the efficiency defence. Whether a false sustainability claim supporting a premium price could itself constitute an abuse of dominance, where the company holds significant market power, is not addressed by the Guidelines and has not, to date, been tested.

**Conclusion**

The Guidelines' treatment of sustainability is best understood in precise terms: an express, named recognition that sustainability benefits are a form of qualitative efficiency, assessed under an existing and demanding test that the Guidelines have not relaxed. The genuine development lies in paras 237 and 238, which make express provision for certain out-of-market and collective benefits to be taken into account in an Article 102 efficiency assessment, a provision that is, by the same token, not yet tested in a judicial decision applying these final Guidelines to a sustainability claim. For any dominant undertaking considering reliance on this framework, the practical implication is straightforward: the evidential record required by paras 223 to 229 is generally built or lost long before any enforcement action begins, in the ordinary commercial documents created at the time a sustainability-linked decision is made.

*This article is the third of three companion pieces on the new Guidelines; two related pieces consider the Guidelines' implications for UK collective actions before the CAT and what changed between the 2024 draft and the final text, both under Article 102 and Chapter II.*

*This article is for general information purposes only and does not constitute legal advice. If your organisation needs a considered view on how the new Guidelines affect a live or prospective matter, please get in touch with the Competition team.*