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The European Green Deal: Shaping environmentally friendly policies under Article 101 TFEU*

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ABSTRACT: In the light of the renewed general interest for environmental issues resulting from the launch of the European Green Deal by President Von der Leyen, the article explores how the EU Commission could promote environmental considerations in the implementation of competition policy. More in detail, starting from the role currently played by environmental factors in the assessment of anticompetitive agreements, the article will consider whether Article 101 TFEU, as formulated – read in the light of the Commission's decisional practice and of the ECJ's case law – would support a broader interpretation according to which the importance of environment-related considerations would be increased, in line with the expectations of President Von der Leyen.

For this purpose, the present analysis will be focused on the first and third paragraphs of Article 101 TFEU, both already used in the past by the Commission – although on the basis of a different legal reasoning – in order to support the relevance of policy considerations (including those environment-related) within competition assessment. The results of such analysis will show that there is enough room for a change in the approach of the Commission that could (and should) be followed at national level. If such approach is effectively adopted, the role played by environmental considerations in the implementation of competition policy could be immediately enhanced with no need to wait for the adoption of a specific legislative act (or, even worse, for a Treaty amendment).

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Introduction

On December 11, 2019 the European Commission officially launched the "European Green Deal", the ambitious programme strongly promoted by President Van der Leyen to "transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use"[1].

Given the relevance of the objective, it has been requested that "all EU actions and policies […] contribute to the European Green Deal"[2]. An exhortation to which competition law could not have escaped: therefore, it is not surprising that immediately after the Commission's Communication, the issue of how competition law should contribute to the Green Deal has been (and it still is) widely debated at political level[3].

This article aims to contribute to such debate, exploring the instruments that – under the current legal framework – are already at the Commission's disposal for strengthening the role played by environmental considerations in the implementation of competition policy[4], and in particular in

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[1] Communication from the Commission, *The European Green Deal*, COM (2019) 640 final, p. 2.

[2] Ibid.

[3] As reported by MLex, the Commissioner for Industrial Policy has expressed its favour for a change of the current legislation in order to adapt it to the future challenges, highlighting that "European Commission President Ursula von der Leyen and EU lawmakers share the 'wish to make competition rules evolve in light of what was pledged with the Green Deal, the digital transition and with the new geopolitical balance of power'": see Arezki Yaïche, "Adapting EU antitrust rules to climate change, global threats is shared objective, Breton says", *Mlex*, 28 January 2020; others, such as the new DG of DG Comp has expressed his preference for maintaining the current legal framework, provided that "each time the EU has an assertive policy – either on industry, environment or finance – the policies conducted by the European Commission, including competition law, have supported the EU within the limits of the law", see Arezki Yaïche, "Competition law overhaul did not need to support EU industrial strategy, Guersent says", *Mlex*, 21 January 2020.

[4] The issue is quite sensitive since, as reported by Rinaldo Brau and Carlo Carraro, "a conflict between environmental policies and competition policy may occur. Indeed, the two policies may have conflicting objectives if the adoption of [voluntary agreements] and the consequent environmental benefits are associated with reduced competition within the industry. In other words, if a [voluntary agreement] is the optimal environmental policy tool to deal with a given environmental problem, an environmental regulator may prefer a concentrated industry structure in which the [voluntary agreement] can more easily be implemented and is likely to be more effective. But a competition authority may not accept to trade-off the environmental benefits of the [voluntary

the assessment – according to Article 101 TFEU – of anticompetitive agreements capable of bringing benefits to the environment[5]. Examining the current room for manoeuvre of the Commission in the interpretation of Article 101 TFEU appears essential in order to understand the responsiveness of the Commission in the implementation of the Green Deal. Indeed, if a change in Article 101 TFEU turns out to be necessary, the pursuit of the environmental objectives would necessarily require more time, due to the complex procedures to be followed for amending the Treaty[6].

The article will be structured as follows: after a brief description of the evolution of the role attributed to environmental policies in the Treaties, the focus will be on how this kind of agreements has been assessed under Article 101(1) and (3) TFEU, in order to understand whether these provisions – in the light of their wording, the Commission's decisional practice and the ECJ's case law – can support the transition to a "greener" approach to competition law.

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agreement] with the economic costs possibly induced by a concentrated industry": see Rinaldo Brau and Carlo Carraro, "Are voluntary agreements a threat to competition?", in *Environmental Voluntary Approaches: Research Insights for Policy-Makers*, eds. Charles J. Highley and François Lévêque (Milan: Fondazione Eni Enrico Mattei, 2001), 46-47.

[5] The reference is particularly to environmental agreements, i.e. "those by which stakeholders undertake to achieve pollution abatement, as defined by environmental law, or environmental objectives set out in Article [191 TFEU]": see Communication from the Commission, Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM(2002) 412, p. 4. As highlighted by OFT, "Agreements between firms may be particularly appealing to policy makers as they may help achieve policy goals without the requirement of government legislation or explicit regulation. Such agreements have the potential of allowing firms to pursue actions that secure beneficial environmental outcomes in as efficient a way as possible": see OECD, *Contribution to the OECD Policy Roundtable on Horizontal Agreements in the Environmental Context 2010* (24 November 2011), http://www.oecd.org/competition/cartels/49139867.pdf (accessed on May 1, 2020). Se also Simon Holmes, "Climate change, sustainability, and competition law", *Journal of Antitrust Enforcement* 8, no. 2 (2020): 367, who observed that "Agreement amongst competitors is a way of 'levelling the playing field' on the basis of costs that reflect the true costs of production [i.e. including environmental costs]. To the extent that this encourages others to compete on this basis (ie. on a fully cost or true cost basis) it can be seen as pro-competitive, rather than restrictive of competition".

[6] See Art. 48 TEU.

1. Environmental protection in the Treaties

Unlike competition provisions – which have always been present in the Treaties – EU's environmental policy has a more recent history[7]. The first provisions dedicated to the protection of the environment were in fact only introduced by the Single European Act in 1987[8]. Such provisions on the one hand recognised that "environmental protection requirements shall be a component of the Union's other policies" (Article 130 r), while on the other hand, and for the first time, they offered a specific legal basis for the adoption of environmental legislation (Article 130 s). Subsequently, EU's environmental policy was further strengthened under the Maastricht Treaty, which inserted among the aims of the Community (art. 2 EC) a reference to environmental protection[9] and – with the aim of ensuring that the environment would have been taken into "genuine account […] in the definition and implementation of other policies"[10] – amended Article 130 r by substituting the expression "shall be a component of" with "must be integrated"[11]. The Amsterdam Treaty, then, highlighted the importance of environmental considerations even more, regarding the promotion of a "high level of protection and improvement of the quality of the environment" as a Community objective (article 2 EC), while moving the

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[7] As explained by Francis Jacobs, "The role of the European Court of Justice in the protection of the environment", *Journal of Environmental Law* 18, no. 2 (2006): 185-186, "that lacuna may be explained by the fact that, first, the original Treaties were mainly concerned with the realisation of a common market, that is, market integration through the free circulation of factors of production and, second, at the time of their signature, environmental concerns did not constitute a priority in the political agenda".

[8] Before 1987, the only (indirect) reference to the environment was contained in Article 36 of the Treaty of Rome (now Article 36 TFEU), which considers "the protection of health and life of humans, animals or plants" as an express derogation to the principle of free movement of goods. However, this does not mean that before 1987 environmental issues were totally ignored: from a legislative point of view, EC Institutions adopted acts in this field on the basis of the flexibility clause (now Article 352 TFEU), and this choice was upheld by the Court: see judgment of 7 February 1985, *Procureur de la Republique v. ADBHU*, C-240/83, EU:C:1985:59, paragraph 13, where the adoption of a waste-oil disposal directive on the basis of Article 352 TFEU was considered justified since "environmental protection […] is one of the community's essential objectives".

[9] The insertion made in Article 2 EC reads as follows: "The promotion, throughout the Community, of a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment".

[10] European Commission, Submission to the IGC Conf-UP 1761/91, April 10, 1991, p. 3.

[11] According to the Commission, the original wording made unclear "the practical implications" of the provision, which gave the idea to "record a fact rather than imposing an obligation" (*Id*., p. 5).

integration obligation from the title dedicated to the environment to the "Principles" section (article 3c EC).

The Lisbon Treaty has taken all the mentioned legislative evolutions into account. On the one hand it includes among the objectives of the Community "the sustainable development of Europe, based on […] a high level of protection and improvement of the quality of the environment" (art. 3 TEU), on the other it maintains a policy-linking clause in the section dedicated to "provisions having general application", stating as follows: "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" (art. 11 TFEU)[12]. Moreover, the Lisbon Treaty introduced a "super-integration clause"[13], requiring the Union to "ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers" (art. 7 TFEU), and made the Charter of Fundamental Rights[14], which has its own integration clause (art. 37 TFEU)[15], which recalls the wording of Article 11 TFEU[16], binding for both EU Institutions and Member States.

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[12] Other policy-linking clauses related to the environment are those of Articles 13 TFEU (animal welfare) and 194(2) TFEU (environmental integration principle for the Union's energy policy).

[13] The expression is used by Hans Vedder, "The Treaty of Lisbon and European environmental law and policy", *Journal of Environmental Law* 22, no. 2 (July 2010): 289.

[14] According to Article 6 TEU, "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

[15] Charter of Fundamental Rights, OJ 2007 C 303/1. According to Article 37, "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". As noted by Ludwig Kramer, "Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies" in *European perspectives on environmental law and governance*, ed. Suzanne Kingston (Abingdon: Routledge, 2012), 91 "There is no obligation comparable to Article 37 placed on the EU institutions in the transport, agriculture, fisheries or competition areas. Rather, the environmental sector stands out with regard to all other sectors of EU policy: indeed, it is, together with the sectors of social and consumer policy, the only ones which are mentioned in the Charter. And with regard to these two other sectors, it is the only one where the Charter states that its objectives shall be pursued in order to reach sustainable development".

[16] Other references to the protection of the environment can be found in Articles 2 and 8 of the European Convention of Human Rights, which – according to Article 6 TEU – represent general principles of the Union's law.

The set of environmental provisions introduced by the Lisbon Treaty[17] represents an important tool to ensure that environmental issues are taken into account in the policy-making stage. However, it has been (and still is) strongly debated whether such provisions would bind EU Institutions and Member States in the implementation of single policies (such as competition policy). Indeed, some scholars have excluded the application of the integration principle in the implementation of competition policies (both at EU and national level), considering that neither article 3 TEU nor the various policy-linking clauses would have direct effect[18], and therefore it would be "inappropriate to use another provision [such as Article 101 TFEU] to indirectly create those same rights and obligations"[19]; others, instead, have reached the opposite conclusion, on the basis of the argument that, even considering Article 11 TFEU deprived of direct effect[20], its importance in the interpretation of a directly effective provision, such as Article 101 TFEU, cannot be ignored[21].

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[17] Other provisions concerning the environment are contained in Title XX of the TFEU (articles 191-193), in Article 21 (according to which external action has to "foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; [and] help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development"), and in Article 4 TFEU, which lists the environment among the areas on which Member States and the Union have a shared competence.

[18] See, in particular, Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford: Oxford University Press, 2006), chapter VII, and Okeoghene Odudu, "The wider concerns of competition law", *Oxford Journal of Legal Studies* 30, no. 3 (2010): 599-613. In this regard, the Author mentions judgment of 29 September 1987, *Zaera v. Instituto Nacional de la Seguridad Social*, C-126/86, EU:C:1987:395, paragraph 11 (where the Court seems to exclude the possibility for Article 2 EC to create rights or obligations for individuals) and judgment of 4 March 2010, *Commission v. France*, C-197/08, EU:C:2010:111, paragraphs 53-54 (where the Court held that policy linking clauses had to be considered "when the Union legislates, rather than when Union legislation is enforced").

[19] See Odudu, *The Boundaries*, 167.

[20] However, AG Cosmas has considered that the integration clause "appears to impose on the Community institutions a specific and clear obligation which could be deemed to produce direct effect in the Community legal order": see Opinion of AG Cosmas of 23 September 1997, *Greenpeace International v. Commission*, C-321/95P, EU:C:1997:421, paragraph 62.

[21] See, in this regard, Julian Nowag, *Environmental Integration in Competition and Free Movement Laws* (Oxford: Oxford University Press, 2016), 36 according to which "an exemption in cases of environmental benefits is not based on Article 11 TFEU but on Article 101(3) TFEU, so that Article 11 TFEU would not be directly effective. Instead, Article 101(3) TFEU is interpreted in the light of Article 11 TFEU, which does not bestow direct effect on Article 11 TFEU but is a form of internal indirect effect": and "in cases of indirect effect, the provision is not required to fulfil the conditions for direct effect as established [by the ECJ]".

In such doctrinal debate, the case law seems to support this latter opinion, thus attributing a role to the integration principle (and in particular to Article 11 TFEU) even in the implementation of competition policies. The first attempt in this direction was made by AG Jacobs in *Preussen Elektra*, stating that "as its wording shows, Article [11 TFEU] is not merely programmatic; it imposes legal obligations"[22]. The scope of such legal obligation was then clarified in two subsequent ECJ decisions: in *British Aggregates* (concerning State aid), the Court confirmed that Article 11 TFEU requires "environmental protection [to be] integrated into Community policies […] includ[ing] competition policy"[23], thus confirming that competition law is not immune from environmental issues; in *Stim*, the General Court further specified that the integration required by the policy-linking clauses (in that case, the cultural integration clause, but the same reasoning would also apply if other policy-linking clauses were considered[24]) is not limited to the policy-making stage, but extends to the implementing decisions adopted by the competent Institutions[25]. Similarly, even competition decisions adopted by NCAs are subject to the integration principle. This conclusion is confirmed by the case law, since in the *Concordia Bus* case the ECJ already considered Article 11 TFEU applicable in relation to a Member State measure implementing EU law[26]. In addition, the circumstance that

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[22] See Opinion of AG Jacobs of 26 October 2000, *PreussenElektra AG v. Schhleswag AG*, C-379/98, EU:C:2000, paragraph 231.

[23] See judgment of 22 December 2008, *British Aggregates v. Commission*, C-487/06P, EU:C:2008:757, paragraph 73. See, in similar terms, Jean-Francois Pons (former Deputy-Director General of DG Competition), *European Competition policy for the recycling markets*, 20 September 2001: "Community law provides that environmental considerations must be integrated into all other Community policies. This includes European competition".

[24] It should be pointed out that Article 11 is the only policy linking clause that is construed with a "must be" (instead of a "shall be"): see, in this regard, Kramer, "Giving a voice", 84, according to whom "the wording of Article 11 TFEU establishes a requirement ('must be'). It does not invite the addressees to deploy best efforts ('shall aim to') to reach integration, or to consider ('shall be taken into account'; 'shall take care') the integration of environmental requirements. Rather, the instruction given by the Treaty is absolute and clear".

[25] See judgment of 12 April 2013, *Stim v. Commission*, T-451/08, EU:T:2013:189, paragraph 103: "The [cultural integration clause] implies only that it is necessary to bear in mind the requirements relating to the respect for and promotion of cultural diversity when considering the four conditions for the application of Article 81(3) EC, in particular as regards the condition relating to the indispensable nature of the restriction".

[26] See judgment of 17 September 2002, *Concordia Bus v. Helsingin kaupunki*, C-513/99, EU:C:2002:495, paragraph 57, where the ECJ concluded that "in the light of […] the wording of […] Article 6 EC [now Article 11 TFEU], which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities,

the integration principle is nowadays also enshrined in Article 37 of the Charter – which is binding upon Member States in the implementation of EU policies[27] – represents a further element confirming the relevance of such principle even at a national level.

Finally, in terms of general policy – as observed by C. Townley – even admitting that environmental objectives could be achieved more efficiently using other policy instruments (for instance, environmental laws/regulation), "there might be practical reasons (at least in the short term) why the best way of achieving certain ends at a given moment in time is by distorting competition"[28].

In conclusion, the integration clause and the other policy-linking clauses oblige the enforcer (at the very least) to take into consideration environmental issues in the context of the adoption of competition decisions[29].

Based on such assumption[30], the next paragraphs will be dedicated to the illustration of the role played (and that could be reasonably and arguably be played in the future) by environmental issues in the assessment of anticompetitive agreements under article 101 TFEU.

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it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender".

[27] According to Article 51 of the Charter, the provisions of the latter are addressed also "to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers".

[28] See Christopher Townley, *Article 81 EC and public policy* (Oxford: Hart publishing, 2009), 40.

[29] However, this does not mean that environmental considerations should always prevail over other policies: see in this regard the Opinion of AG Geelhoed of 26 January 2006, *Austria v. Parliament and Council*, C-161/04, EU:C:2006:66, paragraph 59 and the Opinion of AG Bot *of* 8 May 2013, *Essent Belgium v. Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*, C-204/12, EU:C:2014:2192, paragraph 97, both highlighting that Article 11 TFEU (as well as Article 37 of the Charter) has to be regarded as an obligation on the part of EU institutions to take due account of ecological interests in policy areas outside that of environmental protection *stricto sensu*, that should therefore be balanced against the other EU policies. Against these conclusions see Suzanne Kingston, *Greening EU competition law and policy* (New York: Cambridge University Press, 2012), 113-114 who suggests that "environmental protection requirements should be applied at all times in priority to all other potentially conflicting objectives".

[30] An assumption that has been criticised by Giuliano Amato in *Antitrust and the Bounds of Power* (Oxford: Hart Publishing, 1997), 117 – who argued that antitrust had to be "liberalised" from objectives extraneous to it (such as industrial policies and regional policies), and Odudu, *The* Boundaries, 159 according to whom the attainment of non-efficiency goals was a "constitutional question external to competition law that ultimately requires resolution at the constitutional level".

2. Excluding the agreement from the scope of application of Article 101(1)

A first way to integrate environmental issues in competition assessments is by making a balance in the context of Article 101(1) TFEU and – provided that some conditions are fulfilled – excluding the agreement under assessment from the scope of application of competition law. The Commission has already made use of this possibility in the past, which has however been subjected to strict requirements. Thus, in order to understand how the balancing works, it appears appropriate to briefly recall ECJ rulings in *Albany* and *Wouters*.

In *Albany*, the ECJ examined the phenomenon of collective bargaining, reaching the conclusion that agreements between organisations representing employers and workers aiming at improving employment and working conditions do not fall within Article 101 TFEU "by virtue of their nature and purpose"[31]. More in detail, the Court found a conflict between one of the objectives of the Treaty – i.e. the social policy, mentioned in Article 137 EC – and competition provisions, since "the social policy objectives pursued by [collective] agreements would be seriously undermined if management and labour were subject to Article 85(1) [now Article 101 (1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment": in this scenario, "an interpretation of the provisions of the Treaty as a whole which is both effective and consistent" required to consider such agreements "as falling outside the scope of Article 85(1) [now Article 101 (1)] of the Treaty"[32].

If in *Albany* the Court adopted a more radical approach – excluding the agreement from the scope of Article 101 TFEU in the light of the need to pursue another EU objective[33] – in *Wouters* the ECJ made a slightly differ-

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[31] See judgment of 21 September 1999, *Albany International BV. v. Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430. Similar conclusions were reached in other cases implying social policy considerations: see, *inter alia*, judgment of 21 September 1999, *Brentjens' Handelsonderneming BV. v. Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen*, C-115-117/97, EU:C:1999:434; judgment of 12 September 2000, *Pavlov. and Others*, C-180 and 184/98, EU:C:2000:428. More recently, the ECJ has further expanded the scope of Albany, recognising the non-application of competition law also to those arrangements concluded by "false self-employed" workers: see in this regard judgment of 4 December 2014, *FNV. Kunsten Informatie en Media v. Staat der Nederlanden*, C-413/13, EU:C:2014:2411.

[32] See judgment of 21 September 1999, *Albany International BV. v. Stichting Bedrijfspensioenfonds Textielindustrie*, C-67/96, EU:C:1999:430, paragraphs 59 and 60.

[33] The solution of the ECJ has been criticised by Stefano Boni and Pietro Manzini, "National social legislation and EC antitrust law", *World Competition* 24, no. 2 (2001): 242, according to whom the Court – disregarding the application of competition policy – showed to make no "efforts to reach

ent reasoning. The Court – called to assess whether a Regulation adopted by the Bar of Netherlands that prohibited any multi-disciplinary partnerships between members of the Bar and accountants breached article 101 TFEU – concluded that "not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101](1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, […] [assessing] whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives"[34].

It is not clear whether in *Wouters* the Court affirmed the application – at least in principle – of Article 101 TFEU to the agreement (before concluding for its non-application in the light of the specific circumstances)[35]; however, both cases[36] show that the ECJ considers possible the exemption

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a balance between them. Manifestly, this hermeneutic attitude runs counter to the interpretative principle of effet utile, according to which a meaning must be recognised to the provisions of a treaty".

[34] See judgment of 19 February 2002, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV. v. Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap*, C-309/99, EU:C:2002:98: in that case, the public policy goal that the Netherland Bar Regulation intended to reach was a Member State goal (i.e. the administration of justice); however, the same reasoning was followed by the Court when a Community goal had to be pursued: for instance, in judgment of 18 July 2006, *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, C-519/04, EU:C:2006:492, the measure was justified by the need to combat doping in order for competitive sport to be conducted fairly (§ 43).

[35] This is for example the opinion of Nowag, *Environmental integration*, 220 ff. who made a distinction between Wouters – where the application of competition law was excluded on the basis of a proportionality test – and Albany, where the Court excluded at all the application of competition law; similarly, Edith Loozen, "Professional ethics and restraints of competition", *European Law Review* 31, no. 1 (2006): footnote 29 observed that in Albany the Court determined that collective agreements fall outside article 101(1), while in Wouters the Court "does not determine that the 1993 Regulation falls outside the scope of Art. 81 EC as such. In principle, Art. 81(1) EC applies".

[36] Some commentators have distinguished between the two cases: for instance, Giorgio Monti, "Article 81 EC and public policy", *Common Market Law Review* 39, no. 5 (2002) differentiates between the ancillary restraint (Albany) and the application of the "Cassis de Dijon formula" (Wouters); J.W. van de Gronden and K.J.M. Mortelmans, "Wouters: is het beroep van advocaat een aparte tak van sport?", *Ars Aequi* 51 (2002): 459 distinguish instead between inherent restrictions – i.e. restrictions which are considered necessary (inherent) and appropriate for the functioning of

from the application of competition law for agreements that: i) pursue one of the objectives of the Treaties (such as the improvement of working conditions) or, at least, a public interest objective (such as the administration of justice); and ii) generate a restriction of competition that is "inherent" to the agreement, such as collective bargaining[37].

The reasoning followed by the Court in such cases appears therefore to be the same of that developed in the field of free movement (starting from *Cassis de Dijon* case[38])[39]. This means that when it is faced with an obstacle to the free movement (of goods) indistinctly applicable to national and non-national products[40], the ECJ has to investigate whether the restriction is necessary to satisfy a mandatory requirement and appears to be proportionate[41].

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a certain organisation, system or sector – and mixed inherent restrictions, i.e. restrictions which are necessary for the general interest.

[37] Interestingly enough, Monti, "Article 81", 1090 believes that applying Wouters case law means only that "the measure in question cannot be challenged as a matter of Community law, but this cannot immunize the measure from the competition law of the Member State where the measure is implemented".

[38] See judgment of 20 February 1979, *Rewe v. Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42.

[39] In this context, it is relevant that in Wouters the Court expressly relied on Reisburo Broede (judgment of 12 December 1996, *Reisebüro Broede v. Gerd Sandker*, C-3/95, EU:C:1996:487) concerning the regulation of the legal profession in the context of Article 56 TFEU (freedom to provide services). However, it should be observed that in other circumstances the Tribunal has considered the case law on freedom of establishment and on freedom to provide services irrelevant in the context of Article 101(1) TFEU: see judgment of 28 March 2001, *Institut des mandataires agréés v. Commission*, T-144/99, EU:T:2001:105, paragraph 66.

[40] It should also be recalled that the ECJ, in *PreussenElektra* (judgment of 13 March 2001, *PreussenElektra AG v. Schhleswag AG*, C-379/98, EU:C:2001:160) and Walloon Waste (judgment of 9 July 1992, *Commission of the European Communities v. Kingdom of Belgium*, C-2/90, EU:C:1992:310), has justified (although not explicitly) the application of distinctly applicable measures on the basis of environmental considerations, even though such kind of measures could be only justified on the basis of express derogations of Article 36 TFEU.

[41] As noted by Julio Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the European Community* (Oxford: Hart Publishing, 2002), 1 competition and free movement rules are the "oldest layer of the Community constitution" and should "not be seen as isolated and independent groups of norms, but rather as inextricably linked in a functional sense". The existence of a (partial) convergence between competition law and free movement rules has been highlighted also by Kamiel Mortelmans, "Towards convergence in the application of the rules on free movement and on competition?", *Common Market Law Review* 38, no. 3 (2001): 613-649.

If it is undoubted that in similar cases – and also in many others[42] – the ECJ has recognised the possibility of assessing restrictive agreements even in the light of non-economic factors[43], the question is whether protection of the environment could be included among these non-economic factors. Many scholars[44] – and even the Commission[45] – have tried to narrowly interpret the described line of case law, excluding the possibility of applying the same reasoning to justifications other than the ones already taken into consideration by the Court, and highlighting that the application of competition law would have been otherwise "transformed into the exercise of political discretion and choice"[46].

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[42] In this regard, it is interesting to note that the ECJ has adopted the Wouters doctrine even in cases concerning restrictions by object: see judgment of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas v. Autoridade da Concorrência*, C-1/12, EU:C:2013:127, and judgment of 18 July 2013, *Consiglio nazionale dei geologi contra Autorità garante della concorrenza e del mercato e Autorità garante della concorrenza e del mercato contra Consiglio nazionale dei geologi*, C-136/12, EU:C:2013:489.

[43] This possibility has been clearly stated in judgment of 9 July 2009, *3F v. Commission*, C-319/07 P, EU:C:2009:435, paragraph 58, where the ECJ held that "the Community has not only an economic but also a social purpose, [and therefore] the rights under the provisions of the Treaty on State Aid and competition must be balanced, where appropriate, against the objectives pursued by social policy". The approach of the ECJ seems therefore to recognise the existence of a "rule of reason" in the EU: however, despite the US-style rule of reason – which consists in balancing all pro-competitive and anticompetitive effects of an agreement (and whose existence has been expressly excluded by the Tribunal – see judgment of 2 May 2006, *O2 (Germany) GmbH & Co. OHG v. Commission of the European Communities*, T-328/03, EU:T:2006:116) – the EU-style rule of reason only recognises the possibility, in certain circumstances, of assessing restrictive agreements in the light of non-economic factors. It is however undoubted – as noted by Christopher Townley – that "by balancing in Article 81(1), the ECJ ignored the letter of the Treaty", which allows the balancing in the context of Article 1010(3) TFEU. However, this could probably be seen as a solution adopted "in extremis" by the ECJ to ensure "that the referring court could achieve the 'right' result (or at least consider all relevant values) when it decided the case at hand": see Townley, *Article 81*, 138.

[44] See, *inter alia*, Loozen, "Professional ethics", 28 and Odudu, *The Boundaries*, chapter VII.

[45] See European Commission, *XXII Report on Competition Policy* (Luxembourg: Office for official publications of the EC, 1992), paragraph 77: "Agreements which restrict competition continue to be prohibited by Article (1) even if the parties invoke environmental protection in order to justify them". See also Opinion of AG Fennelly of 11 May 2000, *Hendrik van der Woude v. Stichting Beatrixoord*, C-222/98, EU:C:2000:226, paragraph 28, "the scope of the Albany exception must be narrowly construed".

[46] See Heike Schweitzer, "Competition law and public policy: Reconsidering an uneasy relationship", *EUI Working Paper Law* 30, (2007): 5 and Odudu, *The Boundaries*, 170-173. Also, the World Bank and OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (Washington-Paris, 1999), 1 consider that "there is no room for socio-political criteria such as fairness and equity in the administration of competition policy. Such criteria are viewed as ill-defined

However, as other commentators[47] have (probably, more correctly) pointed out, there are in principle no valid reasons to exclude the possibility of extending the balancing approach used in *Albany* and *Wouters* to cases where other non-economic justifications come under attention[48]. Indeed, the circumstance that the line of case law has (still) not been applied in relation to environmental issues (as well as to many other non-economic policies) does not mean that the Court wanted to exclude such possibility. This is because the ECJ only rules on the cases that are subject to its attention. Interestingly, in its rulings, there is no general statement concerning the need of limiting the balancing approach to the areas of collective bargaining and self-regulation by professional associations.

Still, this does not mean that competition assessment should always take into consideration all the non-economic justifications provided by the parties, nor that, in the balancing exercise, competition should always be regressive. If this were the case, competition policies would become (*de facto*) almost always inapplicable and, in any case, Article 101 (3) TFEU would lose any significance.

As ancient Romans used to say, *in medio stat virtus*. Therefore, in absence of arguments that preclude a balance between competition law and other non-economic justifications (i.e. different from the ones already examined by the ECJ in *Albany* and *Wouters*), it is the opinion of the author that agreements, concerted practices or decisions of associations of undertakings with an environmental aim and that determine an inherent restriction of competition could in principle be exempted from the application of competition law[49]. In this regard, it is interesting to highlight that the mentioned case law could be invoked to exempt not only agreements aiming at

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and loaded with subjective value judgments, and therefore not able to be applied in a consistent manner".

[47] See Kingston, *Greening EU*, 236-237. See also Christopher Townley, "Is anything more important than consumer welfare (in Article 81 EC)? Reflections of a Community lawyer", *Cambridge Yearbook of European Legal Studies* 10 (2008):361, who relaunched the balancing approach highlighting that "the Treaty requires public policy to be considered (at least those in the policy-linking clauses) using the Article 81 EC instrument".

[48] As pointed out by the same Commission, "it would, however, be wrong to look at the Community's competition policy in isolation from other policies": see European Commission, *XXI Report on Competition Policy* (Luxembourg: Office for official publications of the EC, 1991), paragraph 42.

[49] According to Maurits Dolmans, "Sustainable competition policy", *Competition Law and Policy Debate* 5, no. 4 and 6, no. 1 (2020), 10-11 "there are solid legal grounds to take account of climate change mitigation goals" when applying competition law that have been specifically listed by the Author.

protecting the environment (and thus achieving one of the objectives listed in Article 3 of the Treaty), but also – in the light of the *Wouters* case – those decisions adopted by private bodies that pursue environmental protection goals (such as regulatory systems set up for environmental protection)[50], provided that – in both cases – the restriction is "inherent" to the agreement (i.e. in absence of the restriction, the environmental agreement/decision would not be concluded/adopted).

Conclusion: a first alternative for integrating environmental issues in competition law

The analysis of the *Wouters* and *Albany* rulings shows that the European Commission has room for action in re-thinking its restrictive approach concerning the possibility of excluding an agreement from the scope of application of competition law. Indeed, the application by analogy of such case law to environmental agreements and to decisions of environmental bodies appears not only a reasonable solution, but also an appropriate approach in order to ensure the consideration of environmental issues in the enforcement of competition law[51]. Therefore, there is no doubt that the balance under article 101(1) TFEU could represent a first instrument at the Commission's disposal to pursue the Green Deal.

3. Exempting anticompetitive environmental agreements under Article 101 (3)

Another way to integrate environmental issues in competition policies is to consider them within Article 101(3) TFEU. The third paragraph of Article 101 TFEU exempts from the application of competition law those agreements that restrict competition and fulfil four cumulative conditions: they (i) improve the production or distribution of goods or promote technical or economic progress; (ii) pass on consumers a fair share of the resulting benefit; (iii) do not impose on the undertakings concerned restrictions

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[50] See Kingston, *Greening EU*, 238.

[51] See however Hans Vedder, *Competition Law and Environmental Protection in Europe; Towards Sustainability?* (The Netherlands: Europa Law Publishing, 2003), 321, according to whom environmental considerations could be integrated only in Article 101(3) TFEU, while "with regard to the competitive appraisal on the basis of Article 81(1), environmental considerations can play an interactive role at best. Article 81(1) is about establishing whether or not there is an appreciable restriction of competition and this, of course, does not allow for weighing of environmental with competitive concerns in the first place".

which are not indispensable to the attainment of these objectives; (iv) do not substantially eliminate competition in the relevant market.

The abovementioned conditions (and in particular the first two, which have a "substantial" nature) seem broad enough to allow the exemption of an agreement on the basis of non-economic considerations (such as environmental ones)[52], and in effect – as it will be described below – the Commission has done so in the past, adopting various exemption decisions on environmental grounds[53], which have also been upheld by the ECJ[54]. However, it is also undoubted that with the decentralisation of the application of competition law introduced by Regulation 1/03[55], the Commission has changed its approach. The guidelines on the application of Article 81(3)

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[52] As noted by Nowag, *Environmental Integration*, 35, "'improvement of production' and 'consumer benefit' […] are [terms] sufficiently broad to allow an interpretation that encompasses environmental benefits".

[53] It is interesting in this regard the analysis made by Christopher Townley on the decisions adopted by the Commission between 1993 and 2004, which show how public policy goals (which include the environment) "were decisive […] in over 32 percent of formal Commission Article [101 (3) TFEU] decisions": see Townley, *Article 81*, 6. With specific reference to environmental agreements, a good review of the main reasons for granting the exemption could be found in the Commission's Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, OJ 2001 C 3/2 (the "2001 Horizontal guidelines"), which dedicated an entire chapter to agreements, distinguishing among agreements that: i) are not likely to restrict competition, given that they do not place precise individual obligation upon the parties, are only loosely committed to contributing to the attainment of a sector-wide environmental target, set the environmental performance without affecting product and production diversity or, finally, give rise to genuine market creation (§§ 184-187); ii) may restrict competition, when – due to the high market shares – they restrict the parties' ability to devise the characteristics of their products or the way in which they produce them (§§ 189-191); iii) almost always restrict competition, when the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel (§ 188).

[54] For instance in *Métropole Télévision*, the CFI held that "in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption" (see judgment of 11 July 1996, *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v. Commission of the European Communities*, T-528/93, EU:T:1996:99, paragraph 118). See also Odudu, *The Boundaries*, 160 who – despite his criticism about attributing relevance to non-economic considerations in the context of Article 101 TFEU – recognises that "non efficiency goals have been considered within Article [101 TFEU] in the past. This results […] from a teleological interpretation of Article [101 TFEU] […] through [which] the Court endorsed pursuit of a range of Article [3 TEU] goals, particularly through the use of the Article [101(3) TFEU] power to declare Article [101(1) TFEU] inapplicable".

[55] See Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

EC[56] specify that the sole objective of Article 101 TFEU is consumer welfare[57], thus ignoring the relevance of other goals[58], and provide that the exemption should only be granted if "pro-competitive effects outweigh the anti-competitive effects"[59], therefore only after an economic assessment of the conduct considered in breach of Article 101(1) TFEU[60]. This change of approach – which unjustifiably narrows the scope of the conditions of Article 101(3)[61] – was motivated by the (political) need to ensure the uniform application of Article 101(3) by all national competition authorities[62]. Therefore, it could be assumed that, in presence of a political will to ensure

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[56] See Commission Guidelines on the Application of Article 81(3) of the Treaty, OJ 2004 C 101/97 (the "*Article 101(3) Guidelines*"). As noted by the Committee on Economic and Monetary Affairs of the European Parliament, Annual Report on Competition Policy (2018), https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang.en&reference.2018/2102(INI), "the narrow interpretation of Article 101 of the TFEU by the Commission's horizontal guidelines has increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards".

[57] Id., § 13. However, as correctly noted by Simon Holmes, "there is no basis for the adoption of a narrow 'consumer welfare' test anywhere in the Treaties – and therefore in EU law (or the analogous national competition regimes in Europe)": see Holmes, "Climate change", 9.

[58] Such approach does not seem shared by the ECJ: see for instance judgment of 6 October 2009, *GlaxoSmithKline Services Unlimited v. Commission*, C-501/06 P, EU:C:2009:610, paragraphs 61-63.

[59] See Article 101(3) Guidelines, § 11.

[60] This conclusion was anticipated in the Commission's *White Paper on the Modernisation of the Rules Implementing Articles 81 and 82 of the Treaty*, OJ 1999 C132/1, where it was clarified that the purpose of Article 81(3) EC [now article 101(3)] was "to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations". According to Kingston, *Greening EU*, 263, "it is clear […] that the Commission, in these documents, adopts a narrow economic view of the function of Article 101(3) TFEU, allowing balancing of competitive restrictions against efficiency gains to the exclusion of non-economic factors", although recognising that such "interpretation is at odds with the EU courts' jurisprudence and certain of the Commission's own decisions, as well as with the cross-cutting provisions of the EU Treaty and more general principles of coherence in governance".

[61] As noted by Nowag, *Environmental integration*, 37, Regulation 1/03 – which, decentralising the application of competition law gave rise to the narrow interpretation – cannot change a primary law such as Article 101 TFEU. See also Holmes, "Climate change", 11, "consumer welfare, in the narrow sense of consumer surplus, appears nowhere in the treaties and at most should only be part of a much wider set of goals focusing on both the competitive process and the core goals of the treaty set out above, including for present purposes, sustainability".

[62] The issue concerns the justiciability of the choices made by the Courts: some authors consider that "NCA and national Courts […] unlike the Commission, seem ill-placed to balance a restriction of competition under Article 101(1) against a broad range of EU policies under Article 101(3)" (see in this regard Richard Whish, *Competition Law* (Oxford: Oxford University Press, 2015) 169); against such approach, see Nowag, *Environmental Integration*, 37-44.

a greater attention to environmental issues, the same conditions could be relaxed again.

Based on this assumption, the article examines the first two conditions of Article 101(3) in the light of the relevant Commission's (and ECJ) decisional practice. As for the third and the fourth conditions – which are an expression of the proportionality principle – these will not be object of the analysis, since such principle operates in environmental cases in the same way as all other cases[63].

First condition: the agreement must improve the production or distribution of goods or promote technical or economic progress

As anticipated, the interpretation given by the Commission to the first condition has changed over the time: in a first phase, "improving the environment [was] regarded as a factor which contribute[d] to improving production or distribution or to promoting economic or technical progress"[64]. This was, for instance, the approach held in CECED[65], where the Commission was faced with an agreement among almost all European producers and importers of washing machines (representing 95% of the market), aimed at stopping production and importation of less efficient washing machines and at jointly developing more environmentally friendly machines. The Commission considered the agreement capable of fostering economic and technical progress because "reduced electricity consumption [of new washing machines] indirectly leads to reduced pollution from electricity generation"[66]. Such conclusion was also emphasised

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[63] For an analysis of the application of the third and fourth condition to environmental cases see Kingston, *Greening EU*, 280-292.

[64] See European Commission, *XXV Report on Competition Policy* (Luxembourg: Office for official publications of the EC, 1995), paragraph 85. See also judgment of 15 July 1994, *Matra Hachette SA v. Commission of the European Communities*, T-17/93, EU:T:1994:89, paragraph 96, where the Commission recognised that "it is possible to take into account, as regards the contribution to economic and technical progress, [other] factors […] [such as] the maintenance of employment […] [or] regional policy". The Commission's statement refutes the argument put forward by some scholars according to whom, from the analysis of the Commission's decisional practice, it comes out that "environmental benefits [are] not part of the Commission's reasoning, but fulfi[l] the function of embellishment": see Halil Rahman Basaran, "How should Article 81 EC address agreements that yield environmental benefits", *European Competition Law Review* 27, no. 9 (2006): 479-484.

[65] European Commission, Decision of 24 January 1999, *CECED*, 2000/475/EC, OJ L 187/47.

[66] Id., § 48. More specifically, according to the Commission, the agreement was "designed to reduce the potential energy consumption of new washing machines by at least 15 to 20 % […] [and] 7,5 TWh would be saved in 2015" and "the pollution avoided [was estimated] at 3,5 million tons

by Competition Commissioner M. Monti as the proof that environmental concerns were "in no way contradictory with competition policy"[67].

A similar approach was adopted in DSD, where the Commission analysed the exclusivity clause included in the agreements concluded by the undertaking responsible for the collection and recovery of sales packaging in Germany (DSD) with the various local collecting companies, by virtue of which each of these companies was responsible for the waste collection in a designated area[68]. The Commission, considering the agreement "exemptible" under Article 101(3) TFEU, observed that it contributed to improving the production of goods and to promoting technical or economic progress, since it "provide[d] for practical steps to implement […] environmental objectives in the collection and sorting of used sales packaging collected from households and equivalent collection points. Such agreements [were] essential if DSD [were] to meet the targets and obligations it ha[d] assumed in connection with the operation of the system"[69].

The approach of the Commission changed in 2001, with the adoption of the Horizontal Cooperation Guidelines, where it was recognised that environmental agreements may well pass the test if they "either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs"[70]. On the same line, Article 101(3) Guidelines specified that in order to fulfil the first condition,

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of carbon dioxide, 17000 tons of sulphur dioxide and 6000 tons of nitrous oxide per year in 2010" (CECED, §§ 57 and 51). As noticed by Monti, "Article 81", 1075 "the economic value of environmental assets is now just as relevant to consumer welfare as productive efficiency".

[67] European Commission, Press Release of 23 May 2000, "Commission approves an agreement to improve energy efficiency of washing machines", IP/00/148.

[68] European Commission, Decision of 17 September 2001, *DSD*, 2001/837/EC, OJ L 319/1. For an analysis of the case see Anatole Boute, "Environmental protection and EC anti-trust law: The Commission's approach for packaging waste management systems", *Review of European Community and International Environmental Law* 15, no. 2 (2006): 146-159.

[69] Id, § 144.

[70] See the 2001 Horizontal guidelines, paragraph 193. The Commission also described how to assess the benefits of the agreement: if consumers "individually have a positive rate of return from the agreement under reasonable payback periods" there is "no need for the aggregate environmental benefits to be objectively established"; otherwise, a "cost–benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions" (§ 194).

parties have to submit evidences of the fact that the agreement produces "economic efficiencies"; differently, for "non-cost based efficiencies, the undertakings claiming the benefit of Article 81(3) must describe and explain in detail what is the nature of the efficiencies and how and why they constitute an objective economic benefit"[71]. Moreover, such new (and restrictive) approach has further been stressed by the 2010 Horizontal Cooperation Guidelines, which confirm the "economic approach", but – differently from the 2001 Horizontal Guidelines – do not specifically deal with environmental agreements (except for a paragraph on environmental settings)[72].

This being said, the adoption of a more restrictive approach does not mean that the Commission has closed the door to the assessment of environmental issues in the context of competition law, provided that they can be translated into economic efficiencies that make them usable in determining consumer welfare[73]. In other words, environmental agreements can still fulfil the first condition, if they are examined through the lenses of environmental economics[74]. In most of cases, it is possible to calculate the "environmental" cost (or benefit) of the agreement on consumers: after all, elements that have a relevant impact on the environment – such as

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[71] See Article 101(3) Guidelines, cit., § 57. However, as noted by Holmes, "Climate change", 19, "Economic progress is only one of four separate ways in which an agreement may meet the criteria of this condition (note the disjunctive 'or'). There is therefore no need to translate all improvements and progress into 'economic' terms".

[72] See Commission's Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements OJ C 2011 11/01 (the "2010 Horizontal Cooperation Guidelines"). However, the Commission specified that the environmental chapter's removal "does not imply any downgrading for the assessment of environmental agreements" (see European Commission, Press Release of 14 December 2010, *Competition: Commission adopts revised competition rules on horizontal co-operation agreements*, MEMO/10/676): therefore, as noted by Kingston, *Greening EU*, 243, "the substantive principles set out in the 2001 Horizontal Cooperation Guidelines remain a useful framework of analysis in assessing environmental agreements".

[73] This is what Hans Vedder considers as the "economisation of environmental benefits": see Vedder, *Competition Law*, 321.

[74] However, as noted by Giorgio Monti, "Four options for a greener competition law", *Journal of European Competition Law & Practice* 11, no. 3 and 4 (2020), 128: "A criticism of this proposal is that there are significant costs which may need to be borne in carrying out an environmental impact assessment. However, it should be recalled that the evidentiary burden of showing that Article 101(3) TFEU is satisfied rests on the parties seeking to benefit from such exemption".

pollution and Co_2 emissions[75] – are quantifiable[76]. Therefore, even adopting the narrow approach of the Commission, there is no reason to continue to exclude such elements from the competition analysis: as advocated by S. Kingston, "reasonable quantifiable, environmental benefits should be taken into account in assessing the efficiencies flowing from a transaction"[77]. This could be done by "internalis[ing] environmental externalities in competition analysis, within the measure of post-transaction consumer surplus"[78], which, in turn, depends on "the level of remaining environmental resources and the ability of the environment to continue providing essential ecosystem services in the future"[79]. In other words, if an environmental agreement determines an increase of costs for consumers, but such costs are fully balanced with a reduction in CO_2 emissions (which, in monetary terms, is equal to the cost increase), then the first condition could (and should) be considered fulfilled[80].

Second condition: consumers must receive a fair share of the resulting benefit

In order to fulfil such condition, a "fair share" of the benefits stemming from the agreement – and whose existence was ascertained under the first condition – should be passed on to "consumers". But who are the "consumers"? Only the customers of the good and services covered by the agreement or the whole society? And what is the minimum percentage of the benefit that should be passed onto consumers? The Commission

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[75] For instance, see Nicholas Stern, *The Economics of Climate Change* (New York: Cambridge University Press, 2007), 304 who noted that "the current social cost of carbon with business as usual might be around $85/tCO2 (year 2000 prices)".

[76] This results in the so-called "true price", i.e. "the market price plus the unpaid external costs": see in this regard "A roadmap for true pricing" available at: https://trueprice.org/a-roadmap-for-true-pricing/.

[77] Kingston, *Greening EU*, 274.

[78] Suzanne Kingston, "Integrating environmental protection and EU competition law: Why competition isn't special", *European Law Journal* 16, no. 6 (2010): 801.

[79] Kingston, *Greening EU*, 189.

[80] As highlighted by Holmes, "Climate change", 19, "an agreement [that] leads to the production of an engine that costs € 1000 with half the emissions of its predecessor which also cost € 1000 should fulfil the condition": as highlighted also by the OECD, "cost savings, innovation, improved quality and efficiency as direct economic benefits which are typically recognised in competition law analysis", OFT Contribution to the OECD Policy Roundtable on Horizontal Agreements in the Environmental Context 2010 (24 November 2011), http://www.oecd.org/competition/cartels/49139867.pdf, p. 11.

has answered these questions, but the answers provided (once again) have changed over time.

In a first phase – characterised, as seen above, by a broad interpretation of Article 101(3) TFEU – the Commission expressly recognised that the "environmental results for society would adequately allow consumers a fair share of the benefits even if no benefit accrued to individual purchasers"[81]. Such conclusion, reached in CECED, was justified by the fact that "the benefits to society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines"[82].

While in CECED the Commission tried to make an economic analysis to support its conclusion, in DSD the fulfilment of such condition was based on a mere assumption. According to the Commission, the reduction in the volume of packaging – which was one of the objectives of the agreement – would have allowed "consumers […] [to] benefit […] [from] the improvement in environmental quality sought"[83]. In this case, the Commission did not offer a definition of "consumers", but this is probably because DSD was the only undertaking offering to German final customers a countrywide system for collection and recovery of sales packaging, so that "customers" were in effect the society as a whole.

The analysis of CECED and DSD not only offers some hints on how to interpret the notion of consumers, but also on how the Commission assessed the issue of the "fair share" of benefit that must pass onto consumers. Indeed, the circumstance that in both cases the issue is cursorily examined is probably because environmental benefits are – by their (open and diffusive) nature – always passed onto consumers in significant quantities.

The picture has however changed with the adoption by the Commission of the 2001 Horizontal Guidelines first[84] and then of the Article 101(3) Guidelines: the latter clearly holds that "consumers within the meaning of Article [101(3) TFEU] are the customers of the parties to the agreement

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[81] See European Commission, CECED, cit., § 56.

[82] Ibidem.

[83] See European Commission, DSD, cit., § 148.

[84] The 2001 Horizontal Guidelines (§ 194) distinguished between cases "where consumers individually have a positive rate of return from the agreement under reasonable payback periods", for which "there is no need for the aggregate environmental benefits to be objectively established", and cases where "net benefits for consumers in general" are likely, which require a cost-benefit analysis.

and subsequent purchasers"[85], thus making a clear U-turn with respect to the Commission's previous decisional practice. Such approach has also been confirmed by the ECJ, who stated that the benefits of the agreement should (at least, in part) arise in the same market where the restriction was found[86], and that they should be directed "inter alia, [to] consumers"[87] – thus confirming that consumers of the relevant market (and thus, customers) should be the final addresses of (at least) a part of the benefits stemming from the agreement[88].

Article 101(3) Guidelines also tried to give some guidance on how to assess the pass-on of a fair share of benefits, specifying that in order to pass the test "it suffices that sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement"[89]. In this regard, according to the Commission, environmental agreements could generate two kinds of benefits. First, they could result in quantitative efficiencies, when the agreement "lead[s] […] to fewer resources being used to produce the output consumed". Indeed, in this case, there is "a more efficient allocation of resources" and therefore "society, as a whole, benefits" from the agreement[90]. Second, they could produce qualitative efficiencies, where

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[85] See Article 101(3) Guidelines, cit., § 84. In this regard, the Commission also adds that "the concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession".

[86] See judgment of 11 September 2014, *MasterCard Inc. and Others v. European Commission*, C-382/12P, EU:C:2014:2201, paragraph 242. However, see judgment of 28 February 2002, *Compagnie générale maritime and Others v. Commission*, T-86/95, ECLI:EU:T:2002:50, paragraph 130 where the Court of first instance held to take into consideration "the advantages arising from the agreement in question, not only for the relevant market […] but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects".

[87] See judgment of 21 September 2006, *JCB Service v. Commission of the European Communities*, C-167/04P, EU:C:2006:594, paragraph 162.

[88] However, according to Dolmans, "Sustainable", 20, it is not necessary that consumers are "addressees" of a fair share of benefits stemming from the agreement: "Consumers who impose a cost on society – and thereby act unfairly themselves – cannot object on grounds of unfairness if they have to pay more to reduce or compensate for that cost, e.g., when the externality is internalized. […] An agreement that restores a more reasonable balance of costs and benefits and improves fairness overall in accordance with the polluter pays principle must therefore by definition be deemed to allow consumers a fair share of the resulting benefit".

[89] See Article 101(3) Guidelines, cit., § 86, where the Commission also adds that to fulfil the condition "it is not required that consumers receive a share of every efficiency gain identified under the first condition".

[90] Id., § 85.

environmental improvements allow to obtain "new and improved products, creating sufficient value for consumers to compensate for the anti-competitive effects of the agreement": in this case, the passing-on is generally presumed[91].

Finally, a last element of attention contained in the Article 101(3) Guidelines concerns the possibility of considering "delayed" benefits in the assessment. According to the Commission, "the fact that pass-on to the consumer occurs with a certain time lag does not in itself exclude the application of Article [101(3) TFEU]. However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on"[92]. This is particularly relevant for environmental agreements, whose positive effects – in terms of impact on the environment – are usually far from immediate, as they can only be appreciated by future generations.

Despite the narrow (and questionable) interpretation adopted for the notion of "consumer", the circumstance that the Commission also takes "delayed" benefits into account confirms that environmental agreements are not precluded from fulfilling the second condition[93]. Therefore, the key element will be undertakings' capability to demonstrate how some of the effects of the environmental agreements pass onto customers[94]. Indeed, the circumstance that these agreements – by their nature – are addressed

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[91] Id, §§ 102 and 104. According to the Commission, in fact, "the availability of new and improved products constitutes an important source of consumer welfare. As long as the increase in value stemming from such improvements exceeds any harm from a maintenance or an increase in price caused by the restrictive agreement, consumers are better off than without the agreement and the consumer pass-on requirement of Article [101(3) TFEU] is normally fulfilled".

[92] Id., § 87.

[93] Sander van Hees, *A sustainable competition policy for Europe* – LLM dissertation (Utrecht: Europa Instituut Utrecht, 2013), 46-47 proposes a reform of such condition in the light of the Australian model: the latter is based on a total welfare approach, which exempts from competition law agreements whose public benefits outweigh public detriments; a solution that would not require to prove "that efficiencies generated by agreements are necessarily passed on to consumers", and that could be implemented through a simple Commission Communication. Although the proposal appears very interesting, it cannot be ignored that the requirement of the "pass on" is enshrined in the Treaty, and therefore one can doubt of the possibility for a guidance paper of the Commission to make inapplicable one of the four conditions provided by Article 101(3) TFEU.

[94] Note that in case of agreements "promoting technical or economic progress" – differently from those aiming at the production or distribution of goods – it is hard even to identify the customers that are supposed to be the addresses of a fair share of the benefits stemming from the agreement.

to the whole society[95] is not incompatible with the existence of customer-specific benefits. It should be highlighted that to pass the test it is sufficient that customers are addressees of some of the benefits of the environmental agreement, but not necessarily of those of environmental nature: therefore, if, for instance, the environmental agreement aims at creating a new household appliance which pollutes less and at the same time allows its customers to save on the power bill, customers will be addressees of a benefit of economic nature; however, even limiting the analysis to environmental benefits, it is likely that in many cases a consistent share of them is enjoyed by customers, who are the first addressees of the agreement[96]: for instance, an agreement for banning intensive breeding not only has an impact on the environment, but offers customers tastier and healthier food[97].

Conclusion: an effective alternative for integrating environmental issues in competition law

The analysis of the "substantial" conditions of Article 101(3) TFEU has shown how the same provision of the Treaty – unchanged since 1957 – has been interpreted in different ways over the time. While contesting the new and "narrow" approach adopted by the Commission – which, being the result of a political choice, could and should change – the exam of the case

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[95] See, however, in this regard Vedder, *Competition* Law, 174: the Author – interpreting judgment of 27 February 2003, *Commission of the European Communities v. Federal Republic of Germany*, C-389/00, EU:C:2003:111 – considered that the "Court sees environmental protection as a diffuse benefit that inherently benefits an open group", and therefore a measure pursuing such objective "does not confer any specific or definite benefit" to its addressees.

[96] In this regard, Nowag, *Environmental integration*, 236 observed that "the lower the benefits for the individual consumer of the product, the greater the benefits must be to the society to satisfy Article 101 (3) TFEU".

[97] Monti, "Four options", 6 appears to be more sceptic about the possibility that an environmental agreement has good possibilities to pass the test: in this regard, the Author mentions the case of "an agreement by competitors to reduce the use of plastic in packaging fragile goods and replace plastic with a more expensive but sustainable material, then one must first inquire whether the buyers of the product gain anything by receiving goods that are packaged in a more sustainable manner. If no such benefit is evidenced, then the collective gain resulting from reduced use of plastic would not be relevant for an assessment under Article 101(3)". Similarly, see Donal Casey, "Disintegration: Environmental protection and Article 81 EC", *European Law Journal* 15, no. 3 (2009): 376, who notes that Article 101(3) Guidelines do "not prevent environmental gains being considered as such within Article 81(3) EC, [but] only allo[w] environmental benefits to be taken into account as by-products of dynamic efficiency gains. It therefore precludes general environmental improvements and pollution abatement simpliciter being taken into account".

law has confirmed that, even under such new approach, environmental agreements have good chances of fulfilling the conditions of Article 101(3) TFEU if the environmental effects of the agreement are considered in economic terms in the assessment of consumer welfare. Therefore, the third paragraph of article 101 TFEU could represent another instrument at the Commission's disposal to pursue the Green Deal.

Concluding remarks

In the light of the analysis made in the previous paragraphs, it is possible to conclude that the first and third paragraphs of Article 101 TFEU seem to offer the Commission enough room for a change of approach that enhances the role played by environmental considerations in the implementation of competition policy[98].

More in detail, the first paragraph of Article 101 TFEU allows the enforcer – in the light of the ECJ case law – to balance environmental issues in a manner similar to the one adopted in the context of the four freedoms: therefore, a restriction of competition that is inherent (and therefore, necessary and proportionate) to an environmental agreement appears to be admissible according to the case law (although this was never invoked in the specific field of environmental protection).

Moreover, another promising path that can be explored is represented by the third paragraph of Article 101 TFEU: in fact, the wording of the first two "substantial" conditions is generic enough to include considerations of environmental nature; after all, until the 2000s, the interpretation of these conditions was very broad, and effectively included environment-related considerations, as the CECED and DSD cases demonstrate. In this regard, the circumstance that the Commission's approach has changed due to political and contingent policy considerations (i.e. the decentralised application of competition law, provided by Regulation no. 1/03) confirms that it would be possible to, at least, "go back" to the previous approach, escaping the stricter interpretation adopted after the 2000s. This notwithstanding the fact that – as it has been shown – even under the stricter approach adopted by the Commission after the 2000s, the possibility of obtaining an exemption on the basis of environmental considerations is not precluded,

[98] As put by Holmes, "Climate change", 2, "It's not the law that needs to change but our approach to it".

because environmental impact could be "quantified" and "monetised" and, therefore, used in the calculation of the consumer's welfare.

For both paragraphs 1 and 3, the proposed changes only have an impact at policy level, with the undoubtable benefit that a Commission Communication that "formalises" the change of approach would suffice, without the need to wait for the previous approval of a legislative act by the Institutions (or, worse, for a Treaty amendment), thus ensuring a quick pursuit of Green Deal objectives[99]. In this regard, a good occasion could be the review undertaken by the Commission of the two Horizontal Block Exemption Regulations and the 2010 Horizontal Cooperation Guidelines[100], especially considering that the public consultation preceding the review has shown that "climate change and the corresponding challenging environmental and sustainability goals" are the most important developments that affected the application of the 2010 Horizontal Cooperation Guidelines, and that environmental agreements deserved "a specific section outside the examples given in the standardisation chapter"[101].

The opportunities offered by paragraphs 1 and 3 of Article 101 TFEU have been recently explored at national level as well, as it is shown by the Draft Guidelines on sustainability agreements[102] published by Dutch NCA (ACM), which consider environmental agreements exemptible under certain conditions. It is of course desirable that other NCAs follow the new trend, giving more relevance to environmental issues in the application of competition law[103]; however, if this should not happen, the Commission should make use of Article 10 of Regulation 1/03 – a provision never used until now – which accords to the Commission the possibility to adopt inapplicability decisions "where the Community's public interest […] so requires", if "the conditions of Article 81(1) of the Treaty are not fulfilled,

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[99] This approach appears in line with Ms. Vestager's thoughts, according to whom "we don't need new competition rules to make [the Green Deal] possible": see Ms. Margrethe Vestager's speech of 24 October 2019, *Competition and sustainability*, cit.

[100] See https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html.

[101] See https://ec.europa.eu/competition/consultations/2019_hbers/HBERs_consultation_summary.pdf, 8 and 16.

[102] See https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

[103] In this regard, the new ECN+ Directive (Directive 1/19) provides that "National administrative competition authorities shall have the power to set their priorities for carrying out the tasks for the application of Article 101": this provision could therefore help NCAs to pay more attention to environmental issues when enforcing competition law.

or […] the conditions of Article 81(3) of the Treaty are satisfied"[104]. Indeed, the advantage of adopting decisions on such legal basis is that they are binding for national competition authorities and national Courts[105], which would ensure the uniform application of competition law, in a (hopefully) more environmentally friendly manner.

The exemption mechanisms provided under Articles 101(1) and 101(3) TFEU[106] – in case, coupled with the use of Article 10 Reg. 1/03 (which could enhance the effects of the Commissions' decision at national level) – could therefore be used in a complementary way to strengthen the role of environmental considerations in the implementation of competition law and, consequently, to give an effective contribution to the Green Deal.

Bibliography

Amato, Giuliano. *Antitrust and the Bounds of Power – The Dilemma of Liberal Democracy in the History of the Market*. Oxford: Hart Publishing, 1997.

Baquero Cruz, Julio. *Between Competition and Free Movement: The Economic Constitutional Law of the European Community*. Oxford: Hart Publishing, 2002.

Boni, Stefano and Pietro Manzini. "National social legislation and EC antitrust law". *World Competition* 24, vol. 2 (2001): 239-255;

[104] See Regulation 1/2003, cit., Art. 10. According to Recital 14, such kind of decisions could be adopted "in exceptional cases […] with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice". The Commission specifies that "the terms of application of Article 10 have been clearly defined so that its use is confined to 'exceptional cases', to clarify the law and ensure its consistent application throughout the Community, namely: (i) to 'correct' the approach of a national competition authority; or (ii) to send a signal to the ECN about how to approach a certain case"; however, "such an ex ante means of ensuring consistency has largely been overtaken by the extensive efforts of the ECN in promoting the coherent application of the EC antitrust rules" which made it useless – at least, until now – to proceed under Article 10: see European Commission, *Commission staff working paper, Report on the functioning of Regulation 1/2003, SEC(2009) 574 final*, 29 April 2009, 36.

[105] See articles 11(6) and 16(1), Regulation no. 1/2003, which prevent NCAs and national Courts from adopting decisions in contrast with those of the Commission.

[106] Although it is undoubted that – from a systematic point of view – the express derogation mechanism provided by Article 101(3) makes in principle the latter the most appropriate provision to be invoked for exempting agreements from the application of competition law, it is the opinion of the Author that the derogation mechanism under Article 101(3) should be used in a complementary way with the one provided by Article 101(1) TFEU in order to maximise the chances of strengthening the role of environmental considerations in the implementation of competition law.

Boute, Anatole. "Environmental protection and EC anti-trust law: The Commission's approach for packaging waste management systems". *Review of European Community and International Environmental Law* 15, no. 2 (2006): 146-159.

Brau, Rinaldo and Carlo Carraro. "Are voluntary agreements a threat to competition?". In *Environmental Voluntary Agreements: Research Insights for Policy-Makers*, edited by Charles J. Highley and François Lévêque, 33-50. Milan: Fondazione Eni Enrico Mattei, 2001.

Casey, Donal. "Disintegration: Environmental protection and article 81 EC". *European Law Journal* 15, no. 3 (2009): 362–381.

Dolmans, Maurits. "Sustainable competition policy". *Competition Law and Policy Debate* 5, no. 4, and 6, no. 1 (2020): 4-23.

Holmes, Simon. "Climate change, sustainability and competition law". *Journal of Antitrust Enforcement* 8, no.2 (2020): 354-405.

Jacobs, Francis. "The role of the European Court of Justice in the protection of the environment". *Journal of Environmental Law* 18, no. 2 (2006): 185-205.

Kingston, Suzanne. *Greening EU Competition Law and Policy*. New York: Cambridge University Press, 2012.

Kingston, Suzanne. "Integrating environmental protection and EU competition law: Why competition isn't special". *European Law Journal* 16, no. 6 (2010): 780-805.

Kramer, Ludwig. "Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies". In *European Perspectives on Environmental Law and Governance*, edited by Suzanne Kingston. Abingdon: Routledge, 2012.

Loozen, Edith. "Professional ethics and restraints of competition". *European Law Review* 31, no. 1 (2006): 28-47;

Monti, Giorgio. "Article 81 EC and public policy". *Common Market Law Review* 39, no. 5 (2002):1057-1099;

Monti, Giorgio. "Four options for a greener competition law". *Journal of European Competition Law & Practice* 11, nos. 3 and 4 (2020): 124-132.

Mortelmans, Kamiel. "Towards convergence in the application of the rules on free movement and on competition". *Common Market Law Review* 38 (2001): 613-649.

Nowag, Julian. *Environmental Integration in Competition and Free Movement Laws*. Oxford: Oxford University Press, 2016.

Odudu, Okeoghene. *The Boundaries of EC Competition Law: The Scope of Article 81*. Oxford: Oxford University Press, 2006.

Odudu, Okeoghene. "The wider concerns of competition law". *Oxford Journal of Legal Studies* 30, no. 3 (2010): 599-613.

Rahman Basaran, Halil. "How should Article 81 EC address agreements that yield environmental benefits?". *European Competition Law Review* 27, no. 9 (2006): 479-484.

Schweitzer, Heike. "Competition law and public policy: Reconsidering an uneasy relationship". *EUI Working Paper Law* 30 (2007).

Stern, Nicholas. *The Economics of Climate Change*. New York: Cambridge University Press, 2007.

Townley, Christopher. "Is anything more important than consumer welfare (in Article 81 EC)? Reflections of a Community lawyer", *Cambridge Yearbook of European Legal Studies* 10 (2008): 345-381.

Townley, Christopher. *Article 81 EC and Public Policy*. Oxford: Hart Publishing, 2009.

Van de Gronden, J.W. and K.J.M. Mortelmans. "Wouters: is het beroep van advocaat een aparte tak van sport?". *Ars Aequi* 51, (2002): 441-465.

van Hees, Sander. *A sustainable competition policy for Europe* – LLM dissertation. Utrecht: Europa Instituut Utrecht, 2013.

Vedder, Hans. *Competition Law and Environmental Protection in Europe: Towards Sustainability?* The Netherlands: Europa Law Publishing, 2003.

Vedder, Hans. "The Treaty of Lisbon and European environmental law and policy". *Journal of Environmental Law* 22, no. 2 (2010): 285-299.

Whish, Richard. *Competition Law*. Oxford: Oxford University Press, 2015.