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# A competitive environment?

Articles 101 and 102 TFEU and the European Green Deal

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# Abstract

Europe is facing a climate and environmental crisis. To respond to this, the European Commission has launched several programmes, which aim to increase sustainability and environmental protection. This aim has been condensed into the policy document that is the European Green Deal. The European Green Deal sets out the aim of making the Union's economy climate neutral, while improving environmental protection and protecting biodiversity. To this end, several different sectors of the economy need to be overhauled.

In EU Law, a key policy area is to protect free competition. Article 101 TFEU sets out that agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition are prohibited. Similarly, Article 102 TFEU prohibits abuse by an undertaking of a dominant position.

This thesis explores what happens when competition law thus intersects with the environmental policy of the Union. The thesis identifies two main situations of interaction. Undertakings can invoke environmental protection to justify a restriction of competition. The Union may also rely on its antitrust provisions to enforce sustainability by holding unsustainable practices as restrictive agreements or abuses of dominant behaviour, respectively, and thus prohibited by the antitrust provisions.

Generally, the thesis concludes that there is not enough information on how the Commission and the CJEU will approach arguments relating to sustainability in its antitrust assessment. The Commission's consumer welfare standard appears to limit environmental integration to points where a certain factor results affects the environment or sustainability on the one hand, and consumer welfare on the other. The lack of information, moreover, is in itself an issue as undertakings may abstain from environmental action if they believe they will come under scrutiny due to violations of the antitrust provisions. Therefore, a key conclusion in the thesis is that the Commission and the CJEU should set out clear guidelines for environmental action by undertakings, in relation to the antitrust provisions. Similarly, the Commission appears to be cautious to use antitrust as a tool against unsustainable practices. The Commission has, however, recently decided to open an investigation into agreements which limit sustainability, which shows that the picture may be changing.

# Preface

This thesis concludes my time as a law student. It has been a fantastic time, although of course not without its challenges. I would like to take this opportunity to thank those who have made this time as fantastic as it was, and helped me endure the challenges that studying law entails. I am happy to say that there are too many of you to name here - “Ingen nämnd, ingen glömd”, as the saying goes.

I also wish to thank my supervisor, Associate Professor Vladimir Bastidas. In spite of my lack of planning for more than a week in advance, he has given me much support as well as important feedback, and inspired me to do my best.

Uppsala, 4th of June 2021
Lars Lundgren

# Abbreviations

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| EU | European Union |
| TEU | Consolidated Version of the Treaty on the European Union, OJ (2016) C 202/13 |
| TFEU | Consolidated Version of the Treaty on the Functioning of the European Union, OJ (2016) C 202/47 |
| CFR | Charter of Fundamental Rights of the European Union, OJ (2016) C 202/389 |
| ECJ | European Court of Justice |
| GC | General Court |
| CJEU | European Court of Justice and General Court |
| Treaties | TEU, TFEU and the CFR |
| Priorities Guidance | Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C (2009) 45/02 |
| Horizontal Guidelines | 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 |
| GHG | Greenhouse Gas(-es) |

# 1 Introduction

On the 22nd of September 2020, the European Commissioner for Competition, Margrethe Vestager, held a speech regarding the European Union's Green Deal and competition policy. In the speech, the Commissioner not only emphasised the problems caused by climate change, but also the need for a competition policy in line with the Union's aims as regards sustainability. Although Vestager stated that competition policy plays a "supporting role" as regards combating climate change, the Commissioner nevertheless found competition policy an important tool as part of the Union's climate action programme.[1]

One of the core objectives of the European Union is to ensure sustainability and the protection of the environment.[2] Article 11 TFEU emphasises that "[e]nvironmental protection must be integrated into the definition and implementation of the Union's policies and activities". Environmental protection and the prevention of climate change must therefore also be weighed in when the Commission, as well as the Member States, make assessments under the EU rules on competition. The EU and the European Commission have further launched programmes such as the European Green Deal, to combat climate change, increase sustainability and ensure environmental protection.[3]

The EU rules on competition have a function seemingly alien in comparison to environmental protection: To ensure that competition within the Union is unrestricted. This is assured in a number of ways. Under Article 101 TFEU, agreements restricting on competitions are prohibited. Article 102 TFEU, on the other hand, prohibits unilateral conduct that is liable to damage competition. However, precisely what protecting competition entails and what interests are ultimately protected is unclear, and a contentious question. The situation therefore begs the question whether sustainability issues can be considered as part of this assessment, and how.

That intersection, between climate and environmental policy on the one hand, and competition law on the other, is what this thesis aims to explore. These questions are not

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[1] 'Speech | 22 September 2020: The Green Deal and competition policy', https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en, last read the 4th June 2021.

[2] Preamble to, and Article 3 of, the Consolidated Version of the Treaty of the European Union, OJ (2016) C 202/1.

[3] Commission, 'The European Green Deal', COM (2019) 640 final

only important from a practical point of view, i.e., answering such questions as when an undertaking or the Commission can invoke environmental protection grounds. It is also important from a policy perspective, as it can clarify whether or not the antitrust rules effectively enable the Union's sustainability goals to be reached, or if it in fact is an obstacle to those aims.

## 1.1 Purpose and delimitations

The Treaties clearly state the importance of both unimpeded competition on the internal market and a high level of sustainability and environmental protection. The purpose of this thesis is to analyse what happens when these ambitions meet. Do the interests conflict, meaning that one interest is prioritised above the other, or are they compatible with one another? The central issue is thus if competition law allows for sufficient considerations of environmental and climate related grounds, or if it sooner impedes efforts to enhance sustainability. In particular, the Union's competition law will be reviewed in the light of the European Green Deal, to see if the Union's competition law allows the goals set out in the Green Deal to be reached.

### *1.1.1 Research questions*

To achieve the purpose, the following questions will be examined.

1) In what parts of the assessment may sustainability and environmental aims become relevant when applying the Union's antitrust rules?
2) In the situations identified in question one,
    a. How decisive are factors relating to sustainability and environmental protection?
    b. Is sustainability and environmental protection considered to a sufficient degree to achieve the Union's aims as set out in the Green Deal?
3) What other ways to consider sustainability and environmental protection are possible *de lege ferenda*?

### *1.1.2 Delimitations*

In order to achieve the purpose, it is also necessary to impose certain delimitations. The thesis, though it may consider national law, will only do so where that is a result of EU law or of relevance from a *de lege ferenda* perspective. Moreover, only the environmental

and climate aspects of sustainability will be considered. The definition of the relevant market, although it is an important part of EU antitrust in general, is not included in the thesis. It will therefore only be explained as part of the general background to the thesis. In particular as regards Article 102, the discussion in the thesis as such presupposes that the relevant undertakings are found to be dominant. Certain applications of the antitrust rules, such as considering lack of sustainability as an aggravating factor when applying Article 101(3), are either too theoretical or not sufficiently explored in neither case-law nor legal writing to be considered within the scope of this thesis, either, and have therefore been excluded.

## 1.2 Methodology and materials

The thesis primarily relies on two legal methods: The EU legal method and the dogmatic legal method. Additionally, economic analysis of law is used to analyse and understand the theories of Union competition law, as well as to critically review the application of it. These three are outlined below. Although nominally two separate legal methods, the first two of these have much in common. *Inter alia*, the two both follow the same basic structure. This structure consists of four steps: Firstly, a legal issue is identified. Secondly, the applicable rules in the situation are identified. The rules are then applied to the situation. In a final step, a conclusion to the issue posed initially is given.

### *1.2.1 EU Legal Method*

As the thesis concerns EU norms and policies, the EU legal method is of unparalleled importance. The EU legal method is characterised by the importance of the Treaties – the TEU, TFEU and the CFR and their annexes – as well as the interpretations made by the CJEU. Consequently, the interpretational methods used by the CJEU are also necessary to weigh in.[4] The interpretations used by CJEU is crucial to this area, as the General Court and the European Court of Justice are the only bodies capable of reviewing decisions made by the Commission, including decisions under Article 101 and 102 TFEU.[5] Another source of law is secondary law, i.e., directives, regulations, decisions, etcetera.

[4] Streinz, p. 154
[5] Article 263 TFEU

When interpreting the Treaties, the CJEU typically applies one of the following interpretative methods. These have no explicit hierarchal relationship. In *Stauder*, for example, the ECJ based its choice of interpretative method depending on what would be the least burdensome for the individual.[6] *Grammatical interpretation*, in the context of EU law, means giving an autonomous meaning to the term in question. Given that the Treaties have the same legal value irrespective of language,[7] this may include a comparison between the wordings of different language versions. A second interpretative method is the *systematic interpretation*. This is characterised by finding the function of a particular rule within the system to which it belongs and works on the premise that the Treaties form an "orderly and meaningful system".[8] In particular, this method is used when establishing the competences of the Union.[9]

A somewhat controversial[10] interpretative method is the *teleological interpretation*, whose main aim is to ensure the effectiveness of the Treaty provision being interpreted, so as to achieve the provision's aims. In its seminal *Costa v ENEL* judgment, the ECJ relied on the terms and spirit of the Treaty to establish the primacy of EU law over national law.[11] Of particular importance in this context is Article 1 TEU, which states that the Treaty "marks a new stage in the process of creating an ever closer union." However, Streinz claims that this method must be seen in the light of that the Communities (as the Union was then known) were still in an early phase. In later case-law, Streinz holds, the CJEU has taken a different role, as a guardian of the division of powers made in the Treaties.[12]

An assessment of EU law in this thesis would not be complete without also bringing non-binding documents into account, such as the *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (the Priorities Guidance).[13] These are important for the thesis' aims in so far as they clarify how the Commission will act in regard to an issue and can thus serve as a support when analysing decisions or potential conflicts with the

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[6] Case 29/69 *Stauder v Ulm*, EU:C:1969:57, para 4
[7] Article 55 TEU
[8] Streinz, p 161
[9] Case 22/70 *Commission v Council (ERTA)*, EU:C:1971:32, paras 12-15
[10] Streinz, p 162
[11] Case 6/64 *Costa v ENEL*, EU:C:1964:66, pp 593 and 594
[12] Streinz, p 163 and references made
[13] OJ (2009) C 45/7

sustainability aims of the Union. Being the sole EU body with the competence to initiate proceedings under Articles 101 and 102, the Commission's decisions are also of importance. Many antitrust decisions are never appealed, and thus do not reach the CJEU. The Commission's decision-making practice thus gives the reader a more complete understanding of how the law will be applied in practice. It can also be expected that many companies who risk facing scrutiny under the Union's antitrust rules will rely on the Commission's interpretation when adopting their own policies. Similarly, the Commission's guidelines relating to competition can serve to give an indication of when a certain conduct will be intervened against, which is highly important from a practical perspective. It should be borne in mind, though, that the Commission's guidelines are not a source of law and that the CJEU is not bound by the Commission's economic assessments. However, the Commission is allowed a certain amount of discretion when making such economic assessments in competition law cases.[14]

In this thesis, applications of the Union antitrust rules from the Member States' authorities and courts are also relied on, particularly as regards research question three about alternative ways to ensure sufficient observation of sustainability and environmental aims. Member State applications of the Union antitrust rules are not a source of law under EU legal method, meaning that the thesis applies a slightly modified version of that method. However, they can present legal argumentation valuable from both a *de lege ferenda* perspective and a purely practical one, as they show how Union law will be or have been applied.

### *1.2.2 The Legal-Dogmatic Method*

The legal-dogmatic method is used when assessing the law as it stands today. Its primary use is to assess a specific legal issue by identifying which rules apply in the particular case and what result the application of those norms cause. Correctly identifying the question to be answered is therefore critical.[15] The method itself relies on the use of multiple sources of law, such as legislative acts, case-law and preparatory works. Legal writing may also be used, although their primary value lies in the arguments presented in the text, and not the text itself.[16] Different means of interpretation can also be used. These

[14] Case T-432/05 *EMC Development v Commission*, EU:T:2010:189, para 60; see also references made
[15] Kleineman, pp 21 and 23
[16] Ibid, p 28

means include the *argumentum e contrario*, teleological interpretation and textualism.[17] Of particular importance is, therefore, both the selection of sources used and the importance in turn given to each source.[18] In areas affected by EU law, for example, judgments of the CJEU are of particular importance. Conversely, the lack of exhaustive preparatory works means that such sources are of lesser importance.

In the thesis, the legal-dogmatic method is used to identify the applicable norms in the situations assessed and their result. It is also used when relying on legal writing, so as to include various authors' interpretations of Treaty provisions and case-law.

### *1.2.3 Economic analysis of law*

Whenever assessing competition law provisions, and especially when assessing if a certain interest can be considered as part of the competition law analysis, it is important to consider economic analysis of law. Although this thesis primarily concerns an analysis of the possibilities to integrate environmental aims into the competition law analysis, it is important to understand economic analysis of law to fully comprehend the various policies, decisions and judgments in this area of law – all three of which are often heavily influenced by economic analysis. This section provides an overview of what economic analysis of law is used for as well as some fundamental concepts key to it.

Economic analysis of law is in essence a means to assess the economic effects of a certain legal rule or system, so as to evaluate that rule or system. Under economic analysis of law, rules *should* be economically effective, and rules that are not economically effective are thus undesirable. It is thus often applied from a *de lege ferenda* perspective, to scrutinise existing rules.[19] Typically, economic analysis of law is based on the core presumption that persons will rationally maximise *utility*. That is, they will try to reap the greatest possible benefit at the lowest possible cost – subject to the knowledge they can reasonably be expected to gather.[20]

Moreover, economic analysis of law is based on four principles, from which it operates. The first of these is the law of demand, and states that the higher the price, the lower the demand – and the other way around. If a rational individual is charged more for

[17] Ibid, p 21
[18] Kleineman, p 22
[19] Calabresi, p 2
[20] Posner, 'Economic Analysis of Law', p 3 et seq

the same product, they will assess whether there are substitutes to such products to switch to, or perhaps purchase less of that product, thus leading to a decrease in the total amount of product demanded. This applies equally to other changes affecting the maximisation of utility, such as decreases in quality of a product.[21]

Secondly, just as consumers will seek to maximise utility, producers will – by maximising profits, or the difference between costs incurred and prices charged. Economic analysis of law posits that a self-interested seller would never charge a *lower* price than what the seller could have achieved by using the same resources for something else. Conversely, the cost of not taking the most profitable alternative is known as *opportunity cost*.[22] When producing a product, the opportunity cost is equal to the marginal cost – that is, the costs incurred for producing an additional unit. Prices will tend to gravitate toward the marginal costs: Where prices rise above marginal cost, the process of utility maximisation will lead to lowered demand, thus leading to lower prices. Conversely, prices below marginal costs will lead to decreases in supply, thus creating higher prices.[23]

This, as a third point, is an *equilibrium*. An equilibrium is a stable point between supply and demand, resulting in that there is no incentive on anyone to leave or enter the market. Equilibria are fragile, however, and can easily be upset by various factors – for example price regulation, which may artificially lower the price as set by the market. Much economic analysis of law is tasked with identifying the factors which prevent equilibrium from being achieved, and how to remove them. Such factors are nearly always present, however.[24]

This leads to the last principle, namely that of *allocative efficiency*. If all exchanges on a market are voluntary, individuals – who strive for maximisation of utility – will pay more for a resource if they believe they can make a greater profit. This will over time lead to every resource being transferred to the person who makes the greatest use of it. Thus, where every resource is employed in the most useful way possible, resources are being allocated *efficiently*.[25] These concepts are of course only approximations, and theoretical at that, but nonetheless provide for a useful staging ground for economic analysis.

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[21] Posner, p 5
[22] Ibid, p 6 et seq
[23] Ibid, p 9
[24] Ibid, p 11
[25] Ibid, p 12

The method has been criticised, primarily for making undue assumptions about the legal reality. Calabresi argues in particular that when engaging in economic analysis of law, scholars tend to take a too narrow view of the relevant facts by for example only considering judgments from appellate courts, even though such judgments may not give a sufficiently complete understanding of the situation.[26]

In the thesis, economic analysis of law is used to explain and analyse the various judgments and decisions relied on below. It is also used to present arguments concerning the integration of environmental aims into Union competition law from an economic perspective. The central rules are returned to below to further explain the Commission's approach to competition policy.

## 1.3 Outline

The thesis initially provides a background as regards the European Green Deal, EU environmental law and policy as well as the various rules of EU competition law that will be considered. In chapter three, Article 101 TFEU is considered, establishing in which situations environmental aims may become relevant and what relevance those aims have, in those situations. Next, the same is done as regards Article 102 TFEU, in chapter four. Lastly, the results from the second and third step are analysed critically in chapter five from the perspective of environmental integration and the Union's environmental aims.

[26] Calabresi, p 2

# 2 Background

In this chapter, a background regarding the central instruments is provided, insofar as they are relevant for the purpose of the thesis. In the first section, Articles 101 and 102 TFEU are introduced together with key concepts when applying the articles. Secondly, the thesis explores what aims the Union antitrust rules pursue by discussing key documents and case-law. Thirdly, the Treaty provisions on environmental protection and sustainability are outlined, with a particular focus on Article 11 TFEU. Fourthly, the European Green Deal and the goals it sets out are introduced. In the final section, an overview of arguments for and against public policy considerations as part of competition policy is given, which serves as an introduction to the views brought up in legal writing in chapters 3 and 4.

## 2.1 Antitrust provisions in the TFEU

### *2.1.1 Article 101 TFEU*

Union antitrust consists of two separate Treaty provisions: Articles 101 and 102 TFEU. Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices (collectively called agreements in the thesis) which have as their object or effect to prevent, restrict or distort competition within the internal market. There must also be an effect on trade between Member States for the Union's antitrust provisions to become applicable, in relation to national law.[27] This effect can be assessed by considering the nature and quantity of the products covered by the agreement, the market position of the parties and any other agreements affecting the situation.[28] There are two categories of restrictive agreements under Article 101(1): Restrictions by object and by effect.

Restrictions by object are such agreements that, by their very content, reveal a sufficient degree of harm. To establish such a restriction, the provisions, objectives and economic and legal context of the agreement is considered.[29] Such a restriction can, for

[27] Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission*, EU:C:1974:18, para 30
[28] Case C-22/71 *Béguelin Import v G.L. Import Export*, EU:C:1971:113, paras 16–18
[29] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission*, EU:C:2009:610, paras 55-58

example, be a price-fixing cartel or a distribution agreement granting absolute territorial protection.[30] It is not possible to strictly categorise a certain restriction as restrictive by object. The various economic and legal factors characterising the particular sector and undertakings must be considered.[31]

Should an agreement be found not to contain a restriction by object, it may still fall within the ambit of Article 101 TFEU if it restricts competition by effect. This requires a more robust analysis of the specific effects of the agreement. In *STM*, the Court applied a counterfactual test to assess this. What would competition look like without the agreement in question? If the answer would be a situation where one of the parties could not penetrate a new market or area, it is likely that the agreement is not restrictive of competition.[32]

An assessment of the effects of the agreement involves defining the relevant market, i.e., assessing what products and areas are affected by it. The relevant market consists of a product dimension, and a geographical dimension. In *Delimitis*, for example, the Court considered that the product market for a beer supply agreement was "distribution of beer in premises for the sale and consumption of drinks", as set apart from sale of beer in retail stores. This distinction was made by virtue of differences in price, but also that sales of beer in public houses were coupled with the use of certain specialised equipment and that the sale of the goods – the beer – was coupled with a service. The geographical dimension was defined by reference to the area covered by the supply agreement, which was national.[33]

Having defined the market, an assessment of the effects of the agreement on that market can be made.[34] If market entry would be difficult for a competitor, the next step of the analysis is to assess if the agreement under scrutiny appreciably adds to this difficulty. This is done by considering the market positions of the parties involved. If the parties are only insignificant actors on their respective markets, the effect is not sufficient. This can be considered by assessing market shares, the nature of the agreement and if a

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[30] Joined Cases T-374, T-375, T-384 and T-388/94 *ENS and others v Commission*, EU:T:1998:198, para 136 and references made

[31] Case C-209/07 *Beef Industry Development Society and Barry Brothers*, EU:C:2008:467, paras 31 and 32

[32] Case 56/65 *STM*, EU:C:1966:38, p 249

[33] Case C-234/89 *Delimitis v Henninger Bräu*, EU:C:1991:91, paras 15–17

[34] Ibid., para 21; this test is explained in greater detail in chapter 3

supplier (in a vertical agreement) is involved in other similar agreements.[35] If the agreement restricts competition appreciably, it falls within the scope of the prohibition.

Agreements within the scope of Article 101(1) may be exempted from the prohibition if they fulfil the criteria of Article 101(3). Applying the exemption requires that four conditions be fulfilled. Firstly, the agreement must contribute to the improvement of production or distribution of goods or promote technical or economic progress. The advantages achieved must be of such a magnitude to compensate for the disadvantages caused by the agreements for competition.[36] The Commission considers that the parties must show what efficiencies will be achieved, causality between the agreement and the purported efficiencies, likelihood and magnitude of the efficiencies as well as how and when the efficiencies would be achieved.[37] Secondly, consumers must have a fair share of the benefit. There are also two negative criteria: The agreement may not impose restrictions unnecessary to the attainment of the benefit, nor may it afford the undertakings the possibility to eliminate competition in respect of a substantial part of the products in question.

### *2.1.2 Article 102 TFEU*

A second element of EU antitrust is Article 102 TFEU, which concerns abuses of dominant positions. As such, a difference is that Article 102 TFEU, unlike Article 101, applies to unilateral conduct (and, rarely, multilateral conduct). The analysis under Article 102 TFEU is split into two major parts. First, establishing if the undertaking is dominant and secondly, establishing if it has abused this position.

In *United Brands*, the ECJ defined dominance as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition […] by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[38] This is, however, a rather vague formula. It was further developed in *Hoffman-La Roche*, where the Court held that a dominant position does not necessarily preclude competition but enables the undertaking to influence the conditions under which competition develops. The Court also emphasised

[35] Case C-234/89 *Delimitis v Henninger Bräu*, paras 24–26
[36] Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission*, EU:C:1966:41, p 348
[37] Horizontal Guidelines, para 51
[38] Case 27/76 *United Brands v Commission*, EU:C:1978:22, para 65

that – while not always decisive – market shares were an important factor to weigh in when assessing if an undertaking is indeed dominant. The greater an undertaking's market share, the more likely is it that the undertaking is dominant. 'Very large' market shares are typical of dominant undertakings.[39] Building upon this, the Court stated in *AKZO* that market shares of 50 % or more were sufficient to presume dominance.[40] In conjunction with other factors, undertakings with lower market share can still be found dominant. Such other factors can include the strength and market share of competitors.[41] Notably, there is no 'safe harbour' for market shares under Article 102. No undertaking has, however, been found dominant with a market share lower than 39,7 %. In that case, the undertaking in question was also several times larger than its closest competitor.[42] Just as under Article 101, calculating market share presupposes identification of what constitutes the relevant market. There are no substantial differences in market definition between Articles 101 and 102.[43]

The concept of abuse, then, has at least two subcategories. Exclusionary abuses and exploitative abuses. Both of these presuppose damage to consumer interests. Exclusionary abuse is such conduct that weaken the competitive structure, or, in the words of the ECJ, "methods different from those which condition normal competition in products or service on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market".[44] Exclusionary abuses thus prevent the unfettered competitive process, in turn leading to less incentive to innovate and to maintain competitive pricing.[45] Exploitative abuses, by comparison, concern practices with more direct damage to consumers, such as charging unfair prices that would not be possible in a well-functioning market.[46] Exploitative abuses are often given a supporting role, however. The Commission typically prefers to intervene against conducts which prevent market entry or effective competition. Where market entry is viable, unfair practices should namely themselves lead to increased

[39] Case 85/76 *Hoffman-La Roche v Commission*, EU:C:1979:36, paras 39-41
[40] Case C-62/86 *AKZO v Commission*, EU:C:1991:286, para 60
[41] Case 27/76 *United Brands*, paras 109-112
[42] *Virgin/British Airways* (Case IV/D-2/34.780), Decision 2000/74/EC, OJ (2000) L 30/1, recital 88
[43] Notice on the definition of relevant market for the purposes of Community competition law, OJ (1997) C 372/03, para 1
[44] Case 85/76 *Hoffman-La Roche v Commission*, para 91
[45] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172, para 24
[46] Article 102(a) TFEU

competitive pressure as other undertakings can attract the dominant undertaking's customers.[47] Exploitative abuses should not be understated as an actual part of the Union antitrust rules, though. Some of the examples of abusive behaviour given explicitly in Article 102 TFEU are indeed exploitative in nature.

### *2.1.3 Regulation 1/2003*

Although not part of the Treaties, Regulation 1/2003[48] is an important part of the Union antitrust rules acquis. This section therefore provides a brief overview of the relevant rules of the regulation for the purposes of this thesis and of the Regulation's impact on Union competition policy.

The Regulation entails rules for the implementation of Articles 101 and 102 TFEU, which primarily affect the national competition authorities (NCAs) and the courts of the Member States. The intention behind the adoption of the regulation was essentially to provide for a more decentralised – and thus more effective – application of Articles 101 and 102 TFEU. NCAs and national courts were granted the power to apply not only the prohibition rules in Article 101(1) and Article 102 TFEU respectively, but also to apply the exemption in Article 101(3).[49] This is only partly true, as NCAs may not find that Article 101 or 102 has not been breached, only that there is no reason to intervene.[50]

Thus, Article 1 of the Regulation firstly sets out that the prohibitions in Articles 101(1) and 102, as well as the exemption in Article 101(3) TFEU, apply without any prior decision being required. Article 3 essentially sets out that where national competition law is applicable and either Article 101 or Article 102 is also applicable to the situation, the application of the national competition law may not deviate from what would have been the result according to the TFEU Articles. Thus, national competition law may not prohibit conduct that is compatible with EU law or, conversely, allow conduct which is prohibited under EU law.

The regulation also contains rules on the burden and standard of proof, procedural requirements and rules on the cooperation between NCAs and the Commission. These rules are, however, not relevant for the purpose of the thesis. Of greater importance, then,

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[47] Jones, Sufrin and Dunne, p 365
[48] Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ (2003) L 1/1
[49] Ibid, recital 4
[50] Case C-375/09 *Tele2 Polska*, EU:C:2011:270, para 30; Whish and Bailey, p 260

are the policy changes that the adoption of Regulation 1/2003 entailed. Generally, the regime prior to Regulation 1/2003 focused on the Commission. The Commission could for example rely on that it had exclusive power to enforce Article 101 TFEU to, informally, contact parties to agreements and allow them to amend their agreements so as to render them compliant with Article 101 TFEU.[51] Under Regulation 1/2003, the focus has shifted away from this application to instead be centred on the most severe infringements of the Union antitrust rules.[52] There have been very few applications of, for example, Article 101(3) TFEU leading to the agreement being found compatible with the Article, and most of these have been made by NCAs or national courts.[53]

## 2.2 Aims and theory of EU competition law

In order to discern how the EU's policies on climate change action and sustainability interact with the Union's provisions on competition, it is as a second step in this background necessary to outline what aims those provisions aim to further, and why that is the case. The Union's competition policy has never had a single explicit goal or aim. Instead, the Courts and the Commission have themselves developed on the theory of EU competition law. So as to provide a framework for the assessment of how and where environmental aims can be considered, this section will therefore provide a background on what aims have been and are being considered in the Union's competition law.

As to the Articles themselves, Articles 101 and 102 TFEU explicitly allow for the consideration of consumer interests as part of the analysis. Article 101(3) TFEU, for example, can exempt conduct from Article 101(1) where, *inter alia*, a fair share of benefit is provided to the consumers. There is thus no doubt that the aim of the Union's rules on competition to some extent serves to protect the consumers. The damage to consumers can be direct or indirect, i.e., the standard of harm also includes damages to the structure of competition which in turn might be contrary to the interest consumers have in unfettered competition.[54] This, however, only gives a preliminary view of what the Union's antitrust rules aims to protect.

[51] Bailey, p 115
[52] Ibid, p 118
[53] Ibid, p 130
[54] Case 6/72 *Continental Can*, EU:C:1973:22, para 25 et seq

In the seminal case of *Continental Can*, the ECJ held that Articles 101 and 102 TFEU strive to ensure effective competition. Both articles thus have the same aim.[55] In *GlaxoSmithKline*, the GC expanded on this and stated that effective competition was "the degree of competition necessary to ensure the attainment of the objectives of the Treaty". That degree, the GC further stated, may vary depending on the nature of the market concerned.[56] The objectives of the Treaties are of course manifold, including establishing an internal market, but also the sustainable development of Europe and a high level of environmental protection.[57] This is a liberal interpretation of the Union's competition policy, although it is not obvious that the GC intended for its statements to be interpreted as such. Akman, for example, considers that under such an approach, the harmful conduct is that which limits the economic freedom of competitors, so that they cannot freely enter markets and sell their products or services.[58] The Commission opted for a different interpretation of effective competition, considering that it was preserving economic freedom.[59]

However, it is the Commission which has been the driving force behind the Union's competition policy, by developing central documents such as the Horizontal Guidelines. Particularly since 2000, the Commission has taken a more active stance in expressing competition policy. Prior to 2000, the Commission did not express any particular understanding of competition policy. It would – as regards Article 101(3), for example – identify benefits of both an economic and public policy nature and bring the benefits into consideration.[60] By 2005 the situation had changed, as the then-Commissioner for Competition Neelie Kroos stated that *consumer welfare* is the standard applied by the Commission when assessing infringements of the Treaty competition rules.[61] This position was further reinforced by the Commission in various documents, such as the Priorities Guidance.

Before continuing, these central concepts ought to be explained. Certain key parts of economic analysis of law have already been explained in section 1.2.3. *Welfare* as such

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[55] Case 6/72 *Continental Can*, para 25
[56] Case T-168/01 *GlaxoSmithKline Services v Commission*, EU:T:2006:265, para 109
[57] Article 3 TEU
[58] Akman, p 52
[59] Commission, 'Fifteenth Annual Report on Competition Policy', p 11 et seq
[60] Witt, p 446 et seq
[61] 'European Competition Policy - Delivering Better Markets and Better Choices', https://ec.europa.eu/competition/speeches/index_2005.html, last retrieved 2nd February 2021

relates to the performance of a market and is based on the model of perfect competition. Perfect competition exists where there, *inter alia*, is a large amount of both buyers and sellers, there are no barriers to market entry, all market participants have perfect information and there are no uncompensated costs being imposed on others (so-called *externalities*). In other words, sellers can only compete by lowering costs and thus prices or by producing better products. This constitutes maximised welfare, as prices will be set only by how much it costs to produce an additional product. Thus, the less restricted competition is, the better the market will perform – and the greater the welfare.[62] Akman describes welfare as a comparison between two situations: If one makes a change to situation 1, and anyone's economic situation improves, there is an increase in welfare in situation 2. Depending on which measurement is used, maximum welfare is either reached where no one's welfare can be increased without reducing someone else's, or when it is no longer possible to increase the welfare of anyone without leading to a net decrease in welfare.[63]

*Consumer* welfare, then, is where this efficiency, materialised in consumer surplus – the difference between the highest price the consumers are prepared to pay and the market price – is maximised.[64] Where competition is perfect, consumer surplus is maximised, as economic resources are allocated in the best possible way and goods and services are offered at the lowest possible prices.[65] Lianos, in a critical remark, considers that competition policy essentially views individuals as acting solely on grounds of economic self-interest, and that this permeates into the standard of harm relied on in competition law assessments.[66] It should be emphasised, however, that the concepts of perfect competition and (maximised) consumer welfare are models rather than actual, achievable goals. There will most likely always be some factors preventing perfect competition.[67]

The name *consumer welfare* may thus be slightly misleading, as consumer welfare does not always have to do with what consumers consider important, but is rather a competition policy which focuses on ensuring that consumers are benefited from the

[62] Jones, Sufrin and Dunne, p 7 et seq
[63] Akman, p 14
[64] Jones, Sufrin and Dunne, p 11
[65] Whish and Bailey, p 6 et seq
[66] Lianos, p 11 et seq
[67] Jones, Sufrin and Dunne, p 11

competitive process in terms of product quality and price. Under the consumer welfare standard, transfers of wealth from consumers to producers is generally seen as negative, although they may be neutral from the perspective of total welfare – society as a whole would not be better or worse off materially. A strict application of a consumer welfare standard means that where a restriction on competition leads to transfers of wealth away from consumers, it can only be justified by other increases in consumer welfare.[68] Maximising consumer welfare is not pursued *in absurdum* by neither the Courts nor the Commission, however. The need for undertakings to safeguard their investments and thus maintain profitability is also recognised. Therefore, in *IMS Health*, for example, the ECJ required *inter alia* that a product or service was both objectively required and economically unviable to recreate before a dominant undertaking could be mandated to share that product or service with its competitors.[69] In the short term, consumer welfare might increase if undertakings are always required to share its innovations with its competitors, as it would lead to increased competition. However, such an application of competition law would in the long term lead to reduced will to innovate and invest in their business.[70]

The consumer welfare approach to competition law has not been clearly endorsed by the Courts. Although the Court of Justice *has* referred to consumer welfare when assessing efficiencies,[71] there is little indicating that this is considered when establishing whether a conduct as such can damage competition. Instead, the Courts have emphasised the protection of the competitive process as such, in particular as regards Article 101 TFEU.[72] Similarly, in *Deutsche Telekom*, the Court held that now-Article 102 TFEU can also prohibit practices that are "detrimental to [consumers] *through their impact on competition*" (emphasis added), whether or not there was a harmful effect on the consumers.[73] A more expansive interpretation of the aims of the EU antitrust provisions was given in *TeliaSonera*, where the ECJ stated that the aim was to prevent distortions of competition, "to the detriment of the public interest, individual undertakings and the

[68] Akman, p 31
[69] Case C-418/01 *IMS Health*, EU:C:2004:257, para 28
[70] Akman, p 34
[71] Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, para 49
[72] Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporitel'ňa as*, EU:C:2013:71, para 18
[73] Case C-280/08 *Deutsche Telekom v Commission*, EU:C:2010:603, para 176

consumers".[74] Of course, the lack of clear references to consumer welfare may have to do with the CJEU's function – the judiciary rarely engages in pure questions of policy overall. Moreover, there is certainly room for interpreting the CJEU's statements above as fitting into the consumer welfare-approach, if one believes that protecting competition as a means of enhancing consumer welfare is the primary goal of competition law. Akman considers that the ECJ has rejected consumer welfare as the sole standard and instead relies on a wider set of protected interests.[75] Under such an interpretation, the above statement from *TeliaSonera* may rather be considered as an expression of several, separate interests.

Moreover, competition policy and rules are considered necessary for the establishment of a functioning internal market.[76] This means that conduct which prevents the economic integration of the Member States can be caught by the rules on competition, such as in *GlaxoSmithKline*, where a limitation of parallel imports was found as contrary to Article 101(1) TFEU in the light of the Treaties' objective of market integration.[77] This can be seen either as a separate, additional, aim of Union competition law or as part of the consumer welfare standard. For example, if consumer welfare is to be maximised *on the internal market*, it is not possible to do so while different parts of that market do not exercise competitive pressure on one another.

There can thus not be said to be a single, clear and well-defined goal of the Union's antitrust rules. The Commission's assessment clearly focuses on a consumer welfare approach, but the supreme interpreters of EU law – the CJEU – have not clearly embraced this, and the goals of the Union's antitrust rules seem to constantly change. It is clear from the above, however, that consumer welfare is an important part of the rationale behind the Union's antitrust rules, even if there may be other rationales as well. Given that the Commission is the sole authority on EU level with competence to apply Articles 101 and 102 TFEU, its consumer welfare approach is nevertheless of tremendous importance.

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[74] Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para 22
[75] Akman, p 109
[76] 'Speech | 13 October 2015: The Values of Competition Policy', https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/values-competition-policy_en; Available as archived version via www.wayback.archive.org, last retrieved 4th June 2021
[77] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline*, para 61 and references made

## 2.3 Environmental protection and sustainability in the Treaties

There are a number of provisions in the Treaties' that aim to ensure environmental protection. In the TEU, Article 3(3) establishes that the objectives of the Union are *inter alia* to work for the sustainable development of Europe and a high level of protection and improvement of the quality of the environment. In the TFEU, there are three main provisions with connection to environmental sustainability, namely Articles 7, 9 and 11. Moreover, Article 37 CFR stipulates that a high level of environmental protection must be integrated into the policies of the Union.

Under Article 7 TFEU, the Union must ensure the consistency of all its policies and activities while taking all its objectives (cf. Article 3(3) TEU) into account. Article 9 TFEU, lastly, requires that the Union takes a high level of protection of human health into account when defining and implementing its policies and activities. The most important Treaty Article when it comes to questions of competition law and sustainability is, however, Article 11 TFEU. Article 11 TFEU states that the Union *shall* integrate requirements of environmental protection into the definition and implementation of the Union's activities. As with many other Treaty Articles, however, the Article itself does not give much guidance as to the actual implementation of it.

Some guidance as to the importance of Article 11 TFEU may be found in *Austria v Commission*, which concerned a State aid measure. Austria claimed that a British measure granting State aid to nuclear power production was incompatible with Article 107 TFEU, read in the light of Articles 11 and 194(1) TFEU. In particular, Austria claimed that the State aid was contrary to the principles of protection of the environment, "polluter pays", the precautionary principle and the principle of sustainability. The Court agreed that Article 11 TFEU meant that Article 194 TFEU would have to be considered, but also stated that Article 194(2) TFEU meant that it was up to the Member States to decide what energy sources they relied on.[78] This application of Article 11 TFEU indicates that there needs to be a clear rule – a principle, for example – in EU law that can be relied on for Article 11 TFEU to become relevant at all. It would therefore not be sufficient to, for example, make a general reference to environmental aims.

[78] Case C-594/18 P *Austria v Commission*, EU:C:2020:742, paras 43, 48 and 49

Nowag states that the Union tends to overlook Article 11 TFEU when applying economic areas of law, such as competition law. He argues that, with the *travaux préparatoires* to the Maastricht Treaty in mind, it is logical to grant this Article an expansive interpretation. Although preparatory works have been granted limited room in early case-law, a more nuanced approach to those works can be seen in later cases – such as *Inuit* and *Pringle*.[79] As such, there may be a coming trend towards more extensive integration of environmental aims.

## 2.4 The European Green Deal

The centrepiece of the EU's climate change action and sustainability programme is the European Green Deal. In the thesis, the European Green Deal serves as the benchmark against which the Union antitrust rules are compared, to assess if the current regime sufficiently takes into account the need to reach the Green Deal's goals. Therefore, the central points of the Green Deal are introduced in the following as well as related documents, to give the reader an understanding of what requirements the Green Deal places on Union law.

Published by the Commission in 2019, the European Green Deal provides a summary of the issues faced by the Union as regards sustainability and how the Commission intends to face these issues. The communication provides for both what changes will be necessary within the EU as well as in regard to foreign relations in this context.[80] For the purposes of this thesis, however, it is only necessary to consider the parts of the communication concerning internal action.

The European Green Deal sets out two overarching aims. The first of these is to eliminate net emissions of GHGs by 2050. The second is to ensure a high level of environmental protection. The former, the communication states, must be an expansion of current efforts.[81] The latter includes not only to "conserve and enhance the EU's natural capital", but also the decoupling of use of natural resources from economic growth and to protect EU citizens from environment-related risks to health and well-being.[82]

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[79] Nowag (2015), p 3 et seq
[80] See titles 2 and 3 of the European Green Deal, respectively
[81] Ibid, p 5
[82] Ibid, p 2

As concerns the internal policies of the EU, this will be achieved firstly by large-scale public investments. However, it is stated, that alone will not suffice. Redirecting private capital towards climate and environmental action is also a necessary step. Moreover, all available policy levers will be used. Regulatory measures, standardisation, investments etc. must all be relied on together.[83] In the following, certain key parts of the European Green Deal will be presented, to give the reader an overview of what it entails and to provide a framework for the discussion on what requirements are placed on competition law in the light of the Green Deal.

### *2.4.1 Energy*

The European Green Deal sets out the decarbonisation of the energy system as crucial to achieving its goals. The communication states that production and use of energy in the EU accounts for more than 75 % of the GHG emitted there. To achieve net zero emissions, the Green Deal states that the power sector must become based on renewable sources, and that sources such as coal and natural gas must be rapidly phased out. In particular, the Green Deal sets out offshore wind power as a key energy source when transitioning to renewable sources.[84]

In tandem with this, the need for renewable energy also creates a need for energy infrastructure in the Union. Under Article 170 TFEU, the EU "shall contribute to the establishment and development of trans-European networks", *inter alia* as concerns energy infrastructure. A proposal for a revised trans-European energy networks regulation was put forward by the Commission in December 2020, as envisioned in the Green Deal.[85] The proposal states that a 25-fold increase in offshore wind energy and ocean energy will be necessary to achieve climate neutrality. Additionally, the proposal states that usage of hydrogen must increase when shifting away from carbon-based fuels.[86]

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[83] The European Green Deal, p. 5
[84] Ibid, p. 6
[85] Commission, 'Proposal for a regulation on guidelines for trans-European energy infrastructure and repealing Regulation (EU) No 347/2013', COM (2020) 824 final
[86] Ibid, p 1 et seq.

### *2.4.2 Industry*

A second key area affected by the Green Deal is industry in general. The communication states that about half of all GHG emissions stem from resource extraction and processing of materials, fuels and food. It is also a major source of environmental damage. Moreover, the Green Deal sets out two key issues that must be resolved. GHG emissions in the Union's industry must be lowered, and it must become independent of the throughput of new materials. At the same time, the communication finds that energy-intensive industries such as steel and chemicals are crucial to the EU's economy. There thus exists a need, especially as concerns these industries, to create sustainable ways of manufacturing the goods in question. Resource-intensive sectors, such as textiles, must be prioritised when finding ways to decrease resource use.[87]

Reducing material use also means changes to the business-to-consumer relation. The Commission states that businesses must be encouraged to offer reusable, durable and repairable products.[88] However, the communication states that there is also a need for market regulation. The market for secondary raw materials with mandatory recycled content must be supported, and the production of batteries (*inter alia* for use in electric vehicles) must be made safe and sustainable.[89]

### *2.4.3 Transport*

At the outset, the Green Deal states that a 90 % reduction in GHG emissions in the transport sector will be necessary to achieve climate neutrality. In particular, the communication states that a large portion of the freight carried via road must be shifted onto rail and inland waterways. This requires higher capacity and improved management of the two latter categories of transport.[90]

Moreover, the Green Deal states that it will be necessary to end subsidies for fossil fuels, as well as expanding the EU emissions trading system to the maritime sector and reducing the allowances allocated to airlines. The deployment of public recharging and

[87] The European Green Deal, p 7
[88] Ibid p 8
[89] Ibid, p 8 et seq
[90] Ibid, p 10

refuelling points will also be supported, the communication states, especially where necessary for long-distance travel and in rural areas.[91]

### *2.4.4 Food and the Farm to Fork strategy*

In the area of food production, the green deal finds that innovation will be necessary here, too, to face issues of pollution, contributions to biodiversity decline and climate change.[92] In order to achieve sustainability in food production, the Commission presented a "Farm to Fork Strategy" in May 2020.[93] The strategy sets out a sustainable food system as critical to achieving the EU's climate and environmental objectives, while also increasing the Union's competitiveness globally.[94] To accelerate the transition to sustainable food production practices, the Farm to Fork Strategy envisages increased EU spending on research and innovation in the food production sector. Other measures to stimulate innovation will also be considered. Secondly, the strategy states that knowledge and advice as regards sustainability will be key to enable producers to reach the Union's aims.[95]

Moreover, the Commission will apply a strict standard as regards deforestation and forest degradation, illegal, unreported and unregulated fishing and imports of pesticides and products of animal origin, so as to prevent environmental damage. This applies both in regards of legislative proposals as well as compliance with current rules.[96]

### *2.4.5 Other areas*

A further aim of the European Green Deal is to preserve the Union's ecosystems, so as to protect Europe from pests, natural disasters and climate change. For the purposes of this thesis, it is primarily of importance to note that the Green Deal requires that all EU policies should contribute to this aim.[97]

The Green Deal sets out a toxic-free environment as another ambition. Both air, water and soil are covered, so as to prevent harmful pollution and protect biodiversity as

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[91] The European Green Deal, p 11
[92] Ibid
[93] Commission, 'A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system', COM (2020) 381 final
[94] COM (2020) 381 final, p 4
[95] Ibid, p 15 et seq
[96] Ibid, p. 17 et seq.
[97] The European Green Deal, p 13

well as mitigating the effects of natural disasters. A chemicals strategy will also be presented, to encourage innovation for the development of sustainable chemicals.[98]

*2.4.6 Sustainable investments*

A crucial part of the strategy laid out in the European Green Deal is private investments. The communication therefore sets out the need for long-term signals to direct capital to green investments. Sustainability also needs to be incorporated into corporate governance, the communication states, to ensure a shift towards long-term growth and sustainability while increasing disclosure from companies and financial institutions as regards sustainability.[99]

*2.4.7 Summary: The European Green Deal*

The Green Deal sets out ambitious goals for an overhaul of the entire economy. A central part of that overhaul is innovation. New, more sustainable, technologies must be introduced to generate the power and produce the products and services relied on today. However, it also means that private actors must shift away from unsustainable practices, such as fossil-fuel based modes of transport. It is also clear that the Green Deal is not to be achieved solely by means of public action and sector regulation, but that private action must be encouraged, as well.

## 2.5 Public policy considerations in antitrust: Why or why not?

As outlined in section 2.2, there is no single, clear goal of the Union antitrust rules. Consumer welfare and protection of the competitive process are often mentioned as the goals of the antitrust provisions in key documents and case-law. The position of public policy considerations, such as sustainability and environmental protection, in both antitrust policies and in competition law in general is hotly debated. Scholars of competition law, the CJEU as well as the Commission have all taken different stances throughout the years, and changes remain common. In this section, an overview of the core arguments as to why or why not public policy should be considered in antitrust assessments is given.

[98] The European Green Deal, p. 14 et seq
[99] Ibid, p. 16 et seq

The choice to apply consumer welfare as the decisive model – as the Commission has – is often explained by that it is easier to apply than other models. It is rather straightforward (although far from easy) to establish whether a certain conduct leads to higher prices or lowered quality of products or services.[100] A central argument raised against public policy considerations in antitrust assessments is also that considering only welfare-enhancing goals as part of the antitrust analysis is more predictable and more effective at reaching its aims than an antitrust system based on public policy aims.[101] The role of competition law is, it has been said, sooner to make the cake bigger – increasing the total value of the economy – rather than to cut it in a particular manner.[102] If the reason for choosing a consumer welfare approach is indeed to make easier the application of competition law, it may therefore be logical to adopt a strictly economical interpretation of consumer welfare. In the same vein, it has been stated that organisations do not consider public policy goals as part of their antitrust analysis. According to this line of argumentation, there are better tools to achieve public policy aims, such as taxation, than to rely on the antitrust rules. It has also been questioned whether it is suitable for a competition authority to make the assessments necessary for public policy considerations to be weighed in.[103] Kingston considers that the central argument is that antitrust can only function properly when guided by consumer welfare as its single goal. Introducing other goals would render the antitrust rules ineffective or an obtuse tool.[104]

There have of course also been many arguments to the contrary. Holmes argues that under a constitutional approach to competition law, one must take as a starting point Article 3 TEU and Articles 7, 9 and 11 TFEU. As noted above, those Articles require that environmental aims are considered throughout the Union's activities. Holmes states that, in light of that, there is a requirement to consider sustainability issues at all times, even when applying provisions of competition law. This applies *a fortiori* now, Holmes states, in light of the climate crisis.[105] Moreover, Holmes continues, there is no need to construe consumer welfare as narrowly as has been done in EU competition law. Welfare, as a term, does not only include economic factors, but also access to clean air to breathe and

[100] Nazzini (2011), p 44 et seq
[101] Blair and Sokol, p 2505 et seq
[102] Townley, p 16
[103] OECD (2020), '*Sustainability and Competition, OECD Competition Committee Discussion Paper*', http://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf, p 17
[104] Kingston, p 781 et seq
[105] Holmes, pp 358 and 361

producing goods using fewer resources. Continuing, Holmes states that there is thus no requirement to only consider consumer surplus and that doing so anyway is therefore a morally flawed stance. A wider view of the relevant factors when applying competition law would in Holmes' mind be a sounder economic approach.[106]

Similarly, Kingston finds that, with the placing of Article 11 in the TFEU in mind, the Union's environmental policy must be considered at every step of sectoral policymaking, especially competition law.[107] A systematic interpretation of Article 11 TFEU, Kingston means, gives the result that environmental protection must be considered throughout the process – both when competition policy is formulated and when decisions are made. Moreover, Kingston argues that this is required to face the threat of climate change as well as the potentially tremendous economic damages that would be the long-term effects of unsustainable resource use. The latter would mean that even under a strictly economic approach, sustainability must be a crucial interest to all policy areas. Thus, Kingston concludes that as long as there is room for interpretation in a provision and environmental aims are at all relevant, Article 11 TFEU means that all restrictions on environmental policy must be justifiable.[108]

To conclude this section, it is evident that there is a strong case to be made for considering environmental aspects in antitrust assessments. Whether one takes the position that this is compatible with the consumer welfare approach to the antitrust rules or not is an open question, and one that the thesis will return to below.

[106] Holmes, pp 362-364
[107] Kingston, p 788
[108] Ibid, p 789 et seq

# 3 The environment and Article 101 TFEU

The first point of examination in this thesis is Article 101 TFEU. At the outset, it is evident that there are two different situations in which Article 101 may be used to advance the Union's sustainability goals. Given that it is of greatest importance from a practical perspective, the possibility to exclude or exempt agreements due to its positive effects on the environment or sustainability is assessed first. Such an application is often called applying the Article 'as a shield'. Although both exclusion and exemption lead to that the agreement under scrutiny is found not to infringe Article 101 TFEU, they are presented separately here so as to provide a clear structure for the reader. Secondly, there is also the possibility to use Article 101 'as a sword', that is, by applying it to agreements that limit environmental action or higher levels of sustainability in between the parties.

## 3.1 Exclusion of environmental agreements

As was noted in chapter 2, a great deal of the sustainability efforts of the Union require innovation to succeed. Undertakings will need to develop technologies that allow them to produce the same products and services they do today while decreasing their GHG emissions and their overall negative impact on the environment. A way to achieve this may be through collaboration. Undertakings could collaborate to remove unsustainable products from the market, or to introduce better alternatives. This section explores if and how undertakings can enter into agreements to further sustainability and environmental protection. Jointly, such agreements are called *environmental agreements* in the following.

Not all agreements that *prima facie* fall within the ambit of Article 101 TFEU will actually end up being prohibited by it. There are at least two possibilities set out in case-law for an agreement to be excluded from the scope of Article 101. It may be deemed (1) as not falling within the criteria of Article 101 TFEU or (2) as only having 'ancillary restrictions' which are permissible in the light of the circumstances of the case. Additionally, the Commission has in its Horizontal Guidelines set out guidelines on how undertakings may agree on standardisation without infringing Article 101(1) TFEU.

### *3.1.1 Exclusion of Agreements I: The Court's judgment in Albany*

A notable example of exclusion from the scope of Article 101 TFEU is *Albany*. The case concerned an obligation on all Dutch employers to make contributions to a fund for employee pensions. This obligation was a result of a collective agreement between the sector's employers and worker unions. When assessing whether the agreement could restrict competition within the meaning of Article 101 TFEU, the ECJ firstly referred to the objectives of social protection, promotion of collective bargaining and development of management-labour dialogue, as laid out in the Treaty. In particular, the Court noted that the Union was to promote management-labour dialogue. That dialogue may, stated the Court, result in the parties entering into an agreement, should they so choose.[109]

Next, the Court stated that some measure of competition restriction is inherent in collective agreements but that "the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [101 TFEU] when seeking jointly to adopt measures to improve conditions of work and employment." The Court thus found that an effective and consistent interpretation of the Treaty would be that collective agreements should be excluded from the scope of Article 101(1) TFEU, in light of their nature and purpose.[110] The Court then moved to assess whether such an approach would be justified as regarded the agreement at issue, and found that it indeed did take the form of a collective agreement and, furthermore, was aimed at improving the working conditions for all workers in the sector. These factors sufficed to exclude the agreement from the scope of Article 101(1) TFEU.[111]

The judgment in *Albany* has been confirmed in subsequent case-law, such as *FNV Kunsten*, wherein the Court excluded a collective agreement entered into by service providers in a situation comparable to that of employees and the service employers from the scope of Article 101(1) TFEU. [112]

### *3.1.2 Applying Albany to Environmental Agreements*

The natural next step is thus if a similar approach as in *Albany* could be applied to environmental agreements. At the outset, it is important to note two things. Firstly, the

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[109] Case C-67/96 *Albany v Stichting Bedrijfspensioenfonds Textielindustrie*, EU:C:1999:430, paras 54-58
[110] Ibid, paras 59 and 60
[111] Ibid, paras 62-64
[112] Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411

judgment in *Albany* does not have any explicit support in the Treaties. There is no exemption from Article 101(1) TFEU on basis of the objective pursued by the agreement in question. A strictly objective interpretation would therefore lead to the agreement falling within the ambit of Article 101(1) TFEU. Secondly, environmental protection and sustainability enjoys similar status as social policy objectives, such as improving working conditions. In particular, as noted above, Article 37 CFR sets out environmental protection and sustainability as a key goal of Union policy, and a similar objective is set out in Article 191(2) TFEU. In that sense, there is therefore nothing indicating that the same considerations should not apply to a case regarding environmental agreements.

Holmes considers that *Albany* is primarily the Court taking heed of the politically sensitive nature of passing judgment on collective bargaining.[113] Whether a similar approach would be taken with reference to environmental agreements is, of course, uncertain. On the one hand, it is evident from the above and the Green Deal that environmental policy is a key part of Union policy. As the case-law stands today, there is therefore ample reason to believe that a similar decision would be reached if the Court was faced with a request to strike down an environmental agreement under Article 101(1) TFEU. On the other hand, the fact remains that the *Albany*-exclusion has only been applied to collective bargaining agreements. Collective bargaining agreements, by regulating such issues as pay, work hours, etc, could often be considered to restrict competition by object and thus be found incompatible with Article 101 TFEU *if* the agreements were considered to fall within the ambit of the Article. As mentioned above, some measure of restrictions of competition are thus inherent in collective bargaining agreements. Environmental agreements can take many shapes, on the other hand, and do not *per se* restrict competition. The CJEU or the Commission may thus find that the situations are incomparable. It is therefore not certain that the approach taken in *Albany* would also be taken with regard to an environmental agreement.

### *3.1.3 Exclusion of Agreements II: Wouters and beyond*

The standing of public policy considerations under Article 101 has also been assessed to some extent in *Wouters*.[114] Although there has been some conflation of the Court's judgments in *Albany* and *Wouters*, they are here considered as two separate grounds; as

[113] Holmes, p 370
[114] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, EU:C:2002:98

the reader no doubt will become aware, there are certain crucial differences in the Court's approaches.

The case concerned a reference for a preliminary ruling regarding a measure adopted by the Dutch bar. Under authorisation by national legislation, the Dutch bar had prohibited members of the bar from entering into professional partnerships with accountants.[115] When assessing the effects of the measure, the Court initially found that a partnership between lawyers and accountants may be beneficial to competition, as it could generate, *inter alia*, economies of scale. A ban on lawyer-accountant partnerships was therefore found liable to limit production and technical development, as prohibited by now-Article 101(1)(b) TFEU.[116] The Court noted that a conclusion on a measure's compatibility with Article 101 TFEU must take into account (1) the overall context in which the measure under scrutiny was taken, (2) the legal framework applicable in the Member State where the undertakings were established and, in particular, (3) the measure's objectives.[117] The Court then found that the objective of the measure was to ensure due observance of rules of professional conduct, and that the measure was *necessary* to ensure the proper practice of the legal profession. This, the Court stated, meant that the prohibition of professional partnerships was not an infringement of Article 101(1) TFEU.[118]

On the one hand, although the ECJ in *Wouters* seemingly weighed the restriction on competition against the non-economic effects of the measure, this approach has not always been followed. In the case of *Piau v Commission*, for example, the GC stated that a licence requirement for football agents "constitutes a barrier to access to that economic activity and therefore necessarily affects competition. It can therefore be accepted *only in so far* as the conditions set out in [Article 101(3) TFEU] are satisfied" (italics added).[119] It can be stated, however, that the GC indeed did take into consideration that the occupation of football player agent was largely unregulated throughout the Union, which, in and of itself, is not part of the assessment under Article 101(3).[120] That line of

[115] Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, para 77
[116] Ibid, paras 87–90
[117] Ibid, para 97
[118] Ibid, paras 107–110
[119] Case T-193/02 *Laurent Piau v Commission*, EU:T:2005:22, para 101. Cf. Jones, Sufrin and Dunne, p. 255
[120] Ibid, para 103 et seq

argumentation is also highly similar to the Court's statements in *Wouters* that the measure's objectives must be taken into account.

On the other hand, the Court confirmed *Wouters* in *inter alia* the case of *OTOC*, which concerned a measure adopted by the Portuguese Order of Chartered Accountants (OTOC).[121] The Order, which was tasked with enforcing disciplinary rules relating to accountants, required that all chartered accountants take part in a certain amount of training each year. The OTOC held training itself, but other bodies fulfilling certain requirements were allowed to hold training if they paid an administrative fee. All accountants were, however, required to partake in some training held by the OTOC annually.[122] As regards the application of Article 101(1), the Court firstly found Article 101(1) *prima facie* applicable. Next, it reiterated the *Wouters*-formula. The Court stated that the OTOC's measure put in place a system of compulsory training, thus *effectively contributing* to the sound administration of undertakings' accounting and taxation matters. The Court subsequently held that the restrictive effects must be *necessary*. After establishing that the measure was liable to eliminate competition on a significant part of the relevant market, the Court found that "[e]limination of competition as regards training sessions […] cannot in any event be regarded as necessary to guarantee the quality of the services".[123] The measure could thus not escape the ambit of Article 101(1) TFEU.

These cases must be understood in light of cases such as *Slovak Banks*. The undertakings under scrutiny were three Slovak banks who, in order to remove a Czech foreign exchange transactions undertaking from the market, had agreed to terminate all contracts with that undertaking.[124] In the national proceedings, the question arose whether the contested legality of the Czech undertaking's activities was relevant for the assessment of whether attempting to eliminate that undertaking was contrary to Article 101 TFEU.[125] The ECJ stated that "it is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements".[126] Although the facts at hand thus were somewhat different in *Slovak Banks* as compared to the *Wouters* and *OTOC*, the ECJ's statement has general application. There is thus a fine

[121] Case C-1/12 *Ordem dos Técnicos Oficias de Contas*, EU:C:2013:127
[122] Ibid, paras 11, 13 and 17
[123] Ibid, paras 95–98
[124] Case C-68/12 *Protimonopolný úrad Slovneskej republiky v Slovenská sporiteľňa*, para 4
[125] Ibid, para 8
[126] Ibid, para 20

line between exemption from Article 101(1) and *prima facie* prohibition. The central question as regards the test is therefore its scope, or more precisely what types of rules can be exempted from Article 101(1) TFEU. Other applications of this rule in case-law indicate that only measure with a 'public law character' can be exempted – but even that characterisation is abstract at best.

### *3.1.4 A Wouters-approach in environmental agreements?*

To specify the question from the previous section, the thesis will next explore if the test from *Wouters* could be applied to agreements between undertakings whose main purpose is environmental protection or prevention of climate change.

Whish and Bailey suggest that the reason for the Court's judgment in *Wouters* is primarily that the referring court could not, at the time, apply Article 101(3) itself, as the Commission had the sole competence to do so. Neither could Article 106(2) TFEU have exempted the measure from Article 101 TFEU, as there was no act entrusting a service of general economic interest to the Dutch Bar.[127] With such an interpretation, *Wouters* has very limited applicability to other situations and would most likely not include environmental agreements.

A further issue is that the ancillary restrictions-test has only been applied to measures laying out rules setting standards for professions. Some differences can be found between such measures and environmental agreements. Rules setting out standards for professions are many times an extension of the state, as the rules had been laid out after authorisation from the state in both *Wouters* and *OTOC*. Environmental agreements, on the other hand, are generally entered into without any such authorisation – and in an area of law where both Member States and the Union have enacted other provisions. For example, the Court mentioned in *Wouters* that "in the absence of specific [Union] rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory".[128] The same can hardly be said of the area of environment and climate protection, in light of the Commission redoubling its efforts as regards that very area.

Naturally, there have been disparate opinions about the case in the literature. Nowag considers that the judgment should be given a wide interpretation. He states that *Wouters*

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[127] Whish and Bailey, p 141
[128] Case C-309/99 *Wouters*, para 99

forms part of a wider rule of reason, that can be relied on to exclude agreements from the scope of Article 101(1) TFEU. This "European rule of reason", as Nowag calls it, corresponds to the mandatory requirements-test from market-freedoms law.[129] Thus, any undertaking could justify a restriction of competition by showing that it pursues a public policy ground, is suitable for, and the least restrictive measure capable of, achieving that aim. Kingston appears to agree with this approach, albeit from a *de lege ferenda* perspective. She considers that, from a systematic perspective, the four freedoms of EU law and competition policy should be seen as part of a greater whole. This greater whole, then, is the Union's overarching economic policy.[130] As such, similar rules ought to apply in both fields of law. Nowag identifies several similarities between the *Wouters*-test and the mandatory requirements-test, in particular that a proportionality test was applied. He also notes that environmental protection is recognised as a legitimate interest under the aforementioned mandatory requirements-test. Therefore, Nowag states that the *Wouters*-test should indeed be considered applicable to areas such as environmental protection. However, there does not appear to be any support for this in case-law. Nowag *inter alia* refers to the Advocate General's opinion in *Deliége*. which also concerned regulation of a professional activity.[131] It is thus difficult to make any kind of conclusions regarding the scope of the exemption itself.

In this context, it may be of interest to return to Article 11 TFEU, which, as mentioned above mandates that environmental protection must be integrated into the implementation of the Union's policies and activities. With the European Green Deal in mind, one may for example consider agreements between competing manufacturers to abstain from the production of cars with particularly high GHG emissions – as required to reach the Green Deal's aims. They could, for example, decide only to produce engines with an emissions performance above the Euro 6 level,[132] or to only produce electric engines after a certain date. Such an agreement could have negative effects on competition. It may remove certain high-power engines from the market, and thus in turn have a negative effect on consumer welfare by both reducing consumer choice and the

[129] Nowag (2016), p 217
[130] Kingston, p 791 et seq
[131] Nowag (2016), p 221; Opinion of AG Cosmas in Joined Cases C-51/96 and C-191/97 *Deliége*, EU:C:1999:147
[132] 'Euro 6' refers to the emission standards laid out in Annex I of Regulation 595/2009 on type approval of motor vehicles and on access to vehicle repair and maintenance information, OJ (2009) L 188/1

performance of the products available on the market. It could also grant the parties involved more insight into each other's business, reducing the incentives on them to compete as aggressively. There is, after all, little economic incentive to innovate if you know that no one else will be able to offer a better product than you already are.

To apply the *Wouters* test to this hypothetical agreement, it should first be set out that the objective of the agreement genuinely is prevention of climate change via emissions reductions. As long as that is the case, and there is no ulterior motive, this criterion should however not prove too troublesome. Secondly, the greater legal context would have to be considered. Contrary to what the case was in *Wouters*, however, the truck manufacturers would not have a particular role assigned to them by national legislation. More importantly, the agreement would neither be regulating an area void of other regulation – as there is, as noted, already EU legislation in place placing emission standards on trucks. These factors then emanate in an overarching assessment of necessity, i.e., if the agreement is necessary to prevent climate change, or if less restrictive measures could be considered. Here, another difference is to be found. Unlike the legal profession, it is difficult to claim that a certain level of environmental action is sufficient, as lower emissions are always better. However, it is likely that the assessment would anyway result in a finding that emission standards are already being regulated by the Union, as the lack of national legislation was a key factor in the Court's conclusion in *Wouters*. Emission standards are already regulated in the Union, for example through the aforementioned Euro 6 standards. The truck manufacturers could therefore not expect to escape the ambit of Article 101(1) through the ancillary restrictions-test.

A more novel approach would be to defend the necessity of the agreement via Article 11 TFEU. As noted above, the applicability of the Article is contingent on showing that there is a specific rule or principle of EU environmental policy that the contested measure is – in this case – contrary to. With that in mind, it is a possibility that Article 37 CFR could be relied on, or even the Green Deal itself, which explicitly states that transport should become less polluting.[133] However, it should be emphasised that there is no case-law concerning Article 11 TFEU being applied in a case concerning Article 101 TFEU; any and all reasoning around this question is therefore largely speculative. Even if there is a possibility to exempt environmental agreements under the

[133] The European Green Deal, p 11

ancillary restrictions-test with the help of Article 11 TFEU, the lack of case-law on the topic is likely to deter undertakings from entering into such agreements – at least while relying on that any restrictions of competition are ancillary.

### *3.1.5 Standardisation agreements as environmental agreements*

Although not explicitly a way to exempt agreements from Article 101 TFEU, framing environmental agreements as standardisation agreements can also be an escape from the ambit of the Article. Thus, the issue for consideration in this section is whether an environmental agreement can viably be compliant with Article 101 TFEU when construed as a standardisation agreement. A standardisation agreement is, under the Commission's Horizontal Guidelines, an agreement with its primary objective "the definition of technical or quality requirements with which current or future products, production processes, service or methods may comply", but may also include agreements setting out environmental performance standards.[134] It can be noted that previous versions of the Horizontal Guidelines have contained a separate section on environmental agreements, but this has seemingly been incorporated into the section on standardisation agreements. As such, standardisation agreements can cover many different topics, and it is likely that many environmental agreements would qualify as such. In this thesis – as in the Horizontal Guidelines themselves[135] – only environmental standards established by competitors through an agreement will be covered.

According to the Commission, standardisation can cause anticompetitive effects of primarily three categories: Reduction in price competition, prevention of further technical development and discrimination against undertakings not taking part in the standards.[136] Where a large part of an industry adopts a standard, this can also lead to reductions in the free choice of customers, as it may be difficult to acquire a product that deviates from the standard. Another point emphasised in the guidance is that where standards become essential for market entry, lack of transparency and easy access to such standards may constitute a barrier to market entry, thus being anticompetitive.

The Commission further considers that where standardisation agreements aim to exclude competitors or directly affect prices, such agreements will be considered to

[134] Horizontal Guidelines, para 257
[135] Ibid, para 258
[136] Ibid, para 263 et seq

restrict competition by object[137] - and thus incompatible with Article 101(1) TFEU, meaning that no such requirements can be placed in any environmental agreements.

A 'safe haven' is also set out in the Horizontal Guidelines. The Commission states that, firstly, unless the parties have market power, anticompetitive effects are unlikely as far as standardisation is concerned. Secondly, where standardisation agreements *risk creating* market power, the standards will still be exempt if they fulfil four criteria: (1) unrestricted participation, (2) transparency of the standard, (3) no obligation to comply and (4) fair, reasonable and non-discriminatory access to the standard.[138] Commissioner Vestager set out four similar criteria in a 2019 speech: (1) Sustainability agreements are not cover-ups for cartels, (2) the agreements do not decide how any additional costs should be passed on, (3) companies cannot decide that only their products are sustainable and keep competitors out and (4) open and non-discriminatory access to the standard.[139] There is certainly overlap between the two quartets. They both convey the over-arching picture of a standard that any undertaking active in the sector can take part of, should it so desire, and which does not involve any price-fixing.

It should be emphasised in this context that where an agreement does not fulfil the criteria of the safe haven, it can still be compatible with Article 101(1) in the eyes of the Commission. The Commission will, however, conduct an exhaustive assessment in such cases. The Commission states that it will pay particular heed to whether members of a standard may develop or partake in *other standards*, if there is *inter-standard competition* – in particular where there is no open access to the standard under scrutiny – if the restrictions on open access are *necessary*, and if sufficient *information* is freely available about the standards.[140]

A standardisation agreement was considered by the Courts in the case of *EMC Development*,[141] which concerned a standard for cement adopted by the European Committee for Standardisation, CEN. Although CEN is a standardisation body with mandate under EU law, certain questions answered in the case is relevant for all

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[137] Horizontal Guidelines, para 274
[138] Ibid, para 279 et seq
[139] Speech | 24 October 2019: Competition and sustainability, https://wayback.archive-it.org/12090/20191129200524/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-sustainability_en, last read the 23rd of April 2021
[140] Horizontal Guidelines (2010), paras 293-295
[141] Case T-432/05 *EMC Development v Commission*; Upheld in Case C-367/10 P *EMC Development v Commission*, EU:C:2011:203

standardisation agreements. The applicant – EMC – was a producer of a novel type of cement, who sought a finding to that the standard adopted by CEN was incompatible with now-Article 101 TFEU.[142] Relating to a complaint that the standard was *discriminatory*, the GC held that the applicant merely indicating that an association of traditional cement producers had attempted to influence the standard in question was insufficient to prove manifest error.[143] Also claiming that there was a lack of transparency, EMC stated that it had been unable to access relevant documents about the adoption procedure. The GC, however, did not consider that a failure to share such documents would even prove a sufficient lack of transparency.[144] A further complaint was that the standard was *de facto* binding, as the standard dominated the market – national authorities had for example adopted regulations reflecting the standard. The GC rejected this complaint, too, stating that it would be necessary to produce evidence showing that the market had changed as a result of the adoption of the standard; there were also other ways to acquire the CE marking necessary for marketing the cement.[145]

Although *EMC Development* must be understood in light of the material scope of the GC's assessment – only manifest errors would lead to the complaints being upheld – the judgment does shed some light on the question of standardisation agreements. It is, foremost, not sufficient to make general claims about the standard restricting competition, such as that certain documents were not granted access to. Any claims about a standard having anticompetitive effects must be thoroughly substantiated by evidence showing that the standard in question actually *did* lead to the exclusion of a certain product or producer. This burden on the party claiming an infringement provides some further leeway to the parties to a standardisation agreement, in turn making it more viable to enter into environmental standardisation agreements. Moreover, although the Commission's guidelines as regards standardisation was not explicitly considered, they must still be considered to have been somewhat reaffirmed through this case, given that the GC did not strike down on the Commission's application. Schellingerhout reaches a similar conclusion in a 2011 comment on the then-new Guidelines, stating that "[i]f standard bodies have designed effective internal rules, the European Commission is unlikely to

[142] Case T-432/05 *EMC Development v Commission*, para 44
[143] Ibid, para 86 et seq
[144] Ibid, para 97
[145] Ibid, paras 117 and 126

intervene in individual cases."[146] *EMC Development* thus grants some additional clarity to the issue of environmental standardisation agreements, and necessary legal certainty for undertakings seeking to enter into such agreements.

An example may serve to make these rather abstract sources somewhat more concrete. To turn again to the hypothetical truck manufacturers' agreement on emissions, there are two main issues. Could this constitute a standardisation agreement and, in that capacity, be compliant with the Commission's Guidelines? As a first point, then, an agreement setting out certain emission limits could clearly fall within the Commission's definition of a standard, as it can both be considered a quality requirement and an environmental performance standard. As to whether such an agreement would fulfil the criteria of the safe haven, an agreement which genuinely strives to ensure heightened levels of environmental protection should have little issues with fulfilling the criteria of unrestricted access to the standard. The more manufacturers taking part in the agreement, the greater the environmental benefit. As noted by both Teorell and Schellingerhout, the transparency requirement means that – unlike a traditional agreement – there would have to be sufficient procedures in place to inform about standardisation work.[147] That does not in any way prevent the manufacturers from entering into the agreement as such, however. The requirement that undertakings be free to enter into other standards should not cause any greater issue, either. An agreement on *minimum* environmental performance standards would of course not prevent undertakings from ensuring a higher standard, as it would otherwise contravene its own purpose.

A greater issue might be the requirement that there be no binding effect of the agreement. An agreement being binding on the parties is naturally a central part in its usefulness, and undertakings leaving the agreement may therefore be deleterious to the purpose of it. For example, a manufacturer may invest significant resources into complying with the agreement, only to find out that the most important parties to the agreement do not intend to produce products in compliance with the standard. It would thus have to face a so-called first mover disadvantage, as it invests in research that does not necessarily lead to (sufficiently) increased profits. Other undertakings may however still be able to profit from the undertaking's research. That would mean that the

[146] Schellingerhout, p 7
[147] Teorell, p 205 and Schellingerhout, p 6

manufacturer has spent those resources on a moot project, in turn placing it at a competitive disadvantage. Should the manufacturers therefore decide to make the standard binding, the Guidelines mean that the standardisation agreement must be found compliant with Article 101(1) TFEU after the more exhaustive assessment.

The Commission considers that enforcing the standard by not allowing parties to produce non-compliant products is highly likely to cause restrictions on competition, and mentions its decision *Philips/VCR*.[148] In that case, producers of video cassette players had agreed to only produce players with a certain standard, which limited the players' use to only VCR cassettes. Other cassettes would thus be incompatible with the players, meaning that technical progress was being limited.[149] For example, an improved cassette which perhaps could be store longer videos would see its market share severely limited if producers had agreed to only produce cassette players capable of playing the VCR standard. A crucial difference from that case compared to environmental agreements is that an environmental agreement setting out minimum standards would not prevent further technical development. This means that the binding nature may not be an issue as such. It could still limit consumer choice and thus result in it being considered incompatible with Article 101(1) TFEU, though.

It is therefore unlikely that the safe haven could be an 'escape route' for environmental agreements, where mandatory participation is decided on. Should it be viable for the parties to make participation voluntary, however, the agreement will likely be outside the scope of Article 101(1) TFEU when framed as a standardisation agreement – although this will require extensive efforts from the parties on how they communicate around the agreement.

## 3.2 Article 101(3) TFEU: The Efficiency Defence I

The most obvious way to exempt agreements from the prohibition in Article 101(1) is, naturally, Article 101(3) TFEU. As noted above, Article 101(3) allows for the exemption of agreements which

1. Contribute to improving the production or distribution of goods or to promoting technical or economic progress,

[148] Horizontal Guidelines, para 293
[149] *Philips/VCR*, (Case IV/29.151) Commission Decision 78/156/EEC, OJ (1978) L 47/42, para 23

2. Allow consumers a fair share of the resulting benefits
3. Do not
    a. Impose other restrictions on the parties than those indispensable to the attainment of the objectives (of point 1)
    b. Afford the undertakings the possibility to eliminate competition in respect of a substantial part of the products in question.

In this section, the possibility to apply these points to environmental agreements will be analysed in turn, with a view to establish whether or not such agreements would be able to fulfil these criteria, both from a *de lege lata* and a *de lege ferenda* perspective.

First of all, a few general observations. Article 101(3) can only ever become relevant if the agreement is found to be within the scope of Article 101(1). Thus, an agreement must first be found to produce actual or potential anticompetitive effects. The Commission considers that the relevant assessment is then if the pro-competitive effects *outweigh* the restrictions on competition.[150] Given the requirements, it has been argued that the exemption in Article 101(3) serves to allow for agreements that enhance consumer welfare to escape the ambit of Article 101(1).[151]

### *3.2.1 The first condition: Defining an efficiency*

The first issue is whether environmental agreements can *contribute to the improvement of production or distribution of goods or to promoting technical or economic progress*. This criterion only encompasses advantages that are objective in character and can be proven by reference to empirical data. Advantages the parties achieve by being granted market power, or which can only be inferred from – for example – economic theory, are not sufficient.[152] It can be assumed in this context that an environmental agreement would be capable of benefiting both environmental protection and general sustainability concerns, such as more sustainable use of materials and reduced GHG emissions. Whether this could fulfil the first criterion of Article 101(3) will depend on how one interprets the criterion itself.

The Commission does not take an explicit stance in its Guidelines on the Article, stating that "[g]oals pursued by other Treaty provisions can be taken into account to the

[150] Guidelines on the application of Article 81(3) of the Treaty, para 11
[151] Østerud, p 25
[152] Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission*, p 348

extent that they can be subsumed under the four conditions of Article [101(3)]".[153] A strict interpretation of this thus means that only the contents of Article 101(3) TFEU matters, and that other goals are secondary. A more extensive interpretation would be that this allows for application of, in particular, Article 11 TFEU so as to consider sustainability aims throughout the assessment unless it means applying Article 101(3) *contra legem*. Subsequently, the Commission states that the efficiencies created must relate to the relevant market and that the EU competition rules aim to protect competition on the market.[154] This indicates a narrow view of the efficiencies that can be considered, in line with the Commission's view that competition rules aim to maximise consumer welfare. This reading of the Commission's guidelines would therefore exclude efficiencies that are general in nature, i.e., environmental protection. Such efficiencies do not relate to a particular market and cannot 'fix' restrictions of competition on that market. Only where two markets are related – the Commission mentions upstream and downstream markets in particular – can efficiencies for one group of consumers be weighed against restrictions on another group of consumers.[155] The Commission furthermore identifies two different categories of efficiencies that can be considered: Cost efficiencies and qualitative efficiencies. The latter category includes technological advances.[156] An environmental agreement could in particular generate this type of efficiency, as they may involve the use of more environmentally neutral technologies or products. The hypothetical agreement between the truck manufacturers mentioned above might, for example, induce advancements as regards electric engines in heavy vehicles. General efficiencies relating to decreased material use or GHG emissions do not seem to be covered by the Commission's Guidelines, however.

The Guidelines form a stark contrast to the decision-making practice of the Commission and the case-law of the CJEU prior to the shift to the consumer welfare-based approach. One may, for example, consider the GC's judgment in *Métropole Télévision*, where the GC stated that public policy grounds *can* be considered by the Commission when making the assessment under Article 101(3).[157] There is thus nothing

[153] Guidelines on the application of Article 81(3) of the Treaty, para 42
[154] Guidelines on the application of Article 81(3) of the Treaty, para 43
[155] Ibid
[156] Ibid, paras 64 and 69
[157] Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision v Commission*, EU:T:1996:99, para 118

as such preventing the Commission from taking a wider view as to what constitutes an efficiency. In numerous decisions, most famously *CECED*,[158] the Commission has also itself found that environmental protection can constitute an efficiency. These decisions were however all taken before the Commission adopted its consumer welfare standard. The decision in *CECED* concerned an agreement between producers of washing machines, with the aim to improve the environmental performance of those washing machines. This was done by ceasing to produce and to import washing machines with relatively low energy efficiency, and agreeing to reach a set level of average energy efficiency by a certain date for all products produced. It also included the setting up of a system to monitor the agreement's implementation, and certain other obligations.[159] Having found that the agreement could restrict competition, the Commission found that lower electricity usage and the decrease in GHG emissions both constituted objective technical efficiencies within the scope of Article 101(3). Additionally, the Commission found that the agreement may increase competition on price between the parties.[160] That the same would apply under the 2004 Guidelines on Article 101(3) is somewhat unlikely, given the wording of the Guidelines as noted above. Decreases in electricity usage do indeed directly benefit the consumers who buy the washing machines. However, decreases in GHG emissions are general in nature, and do not directly benefit the consumers. The probable increases in price competition are not proven, and would thus not fulfil the criteria set out in the Guidelines. In a similar vein, Akman interprets the Commission's Guidelines as a view that only efficiency gains are possible as a defence, meaning that non-economic gains would be excluded.[161]

NCAs have taken somewhat more liberal approaches as to what may constitute an efficiency under Article 101(3). Brook *inter alia* mentions a decision by the Dutch NCA finding no reason to intervene as regards an arrangement by the Dutch fishing association setting out fishing quotas, as the arrangement was necessary to prevent overfishing.[162] A frequently discussed document is the Dutch NCA's (the Authority for Consumers and

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[158] *CECED*, (Case COMP/36.718) OJ L (2000) 187/47
[159] *CECED*, (Case COMP/36.718) OJ L (2000) 187/47, recitals 20-22
[160] Ibid, recitals 48, 53 and 56
[161] Akman, p 115
[162] Brook, p 143; cf. "NMa is positive towards Dutch shrimp-fishing industry's plans to make shrimp-fishing sustainable", https://www.acm.nl/en/publications/publication/6535/NMa-is-positive-towards-Dutch-shrimp-fishing-industrys-plans-to-make-shrimp-fishing-sustainable, last read the 30th of April 2021

Markets, 'ACM') decision in the case of *Chicken of Tomorrow*. The decision concerned an agreement between producers and retailers of chicken meat, which aimed to improve animal welfare in the Dutch chicken industry. In particular, it entailed switching to a slower-growing albeit healthier breed of chicken, increases in living space, reduced use of antibiotics and other general quality of life improvements. The ACM found that the agreement both reduced consumer choice and could increase the costs for consumers, and thus constituted a *prima facie* infringement [163] What has garnered the most interest, however, is probably the manner in which the ACM applied the exemption criteria.[164] The ACM identified that the effects of the agreement concerning animal welfare, the environment and public health may be an efficiency in line with Article 101(3) if consumers attached value to them. As such, it conducted a study revealing that consumers were willing to pay an additional 68 cents per kilo chicken filet for improved animal welfare. It also quantified the environmental benefits to 14 cents per kilo chicken filet. The ACM then weighed this against the increased costs imposed on the consumers as a result of the agreement, and found that the increased costs were greater than the resulting benefits. As such, the agreement could not be justified. The ACM did emphasise, however, that consumers indeed were prepared to pay more for improved animal welfare.[165]

Notably, a 2015 draft policy rule adopted by the Dutch Ministry of Economic Affairs stated that benefits for society as a whole should be considered when applying Article 101(3) – but this was met with criticism from the Commission, resulting in the withdrawal of the draft.[166] This further reinforces the above conclusion that the decision in *CECED* carries little weight as to the situation *de lege lata*. It also indicates a narrow view of what constitutes gains to consumer welfare, so that only gains in terms of quality and lower prices can be included. Such a standpoint would likely exclude environmental performance improvements that are not in the consumers' economic self-interest.

Brook explains the narrow approach adopted by the Commission as relating to the application of Article 101(3) becoming more decentralised. As noted above,[167]

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[163] *Chicken of Tomorrow*, p 4
[164] As the ACM found that the agreement had an effect on trade in the Union, Dutch law had to be applied consistently with Article 101(3), under Article 3(2) of Regulation 1/2003.
[165] *Chicken of Tomorrow*, p 5 et seq
[166] Brook, p 144 et seq
[167] Cf Section 2.1.3

Regulation 1/2003 gave NCAs the ability to apply Article 101(3) themselves – although the Commission retained sole competence to grant positive clearance. However, Brook expands, this decentralisation meant that there in the eyes of the Commission was a risk that the NCAs would consider national interests when applying the Article. In order to prevent this, the Commission therefore sought to frame Article 101(3) as only allowing for strictly economic considerations.[168]

The Commission's rather restrictive view as to what may constitute an efficiency has been met with scepticism among scholars. Holmes *inter alia* remarks that there is no reference to consumer welfare in Article 101(3), and that economic progress is but one of the four separate ways which agreements can meet the criterion. Even where one considers only the sub-criterion of contributing to economic progress, Holmes considers that producing a product with higher environmental performance would still amount to economic progress. Holmes also notes that the Commission's reference to the pro-competitive effects outweighing the anti-competitive effects does not have support in Article 101(3).[169] This holds true as there is no reference to a general weighing operation at all in Article 101(3). The only 'hard limit' is that the undertakings must not be allowed to eliminate competition in respect of a substantial part of the relevant products. Instead, the Article provides a rather large amount of discretion for the Commission and the Courts to themselves assess the weightiness of the interests being pursued through the agreement vis-à-vis the interest of protecting the competitive process. There is neither, as Holmes mentions, an explicit reference to pro-competitive effects. The Article instead focuses on allowing the protection of the same broader interests as competition law, namely striving for a high level of development – both technical and economical.

### *3.2.2 The second condition: Fair share of the benefits to consumers*

A second issue is whether an environmental agreement can provide a fair share of the benefits to consumers. From a theoretical standpoint, the second criterion is often considered as an indication of that consumer welfare is the prevailing standard under Article 101 TFEU, as only efficiencies that benefit the consumers are taken into account.[170] Nominally, this may seem straightforward. Increased levels of sustainability

[168] Brook, pp 137-139
[169] Holmes, p 372 et seq
[170] Akman, p 113

are of benefit to all, and should therefore be of benefit to the consumers, too. As long as the sustainability benefits outweigh the competition restrictions, there should therefore be no issue.

That rather straightforward interpretation of the second condition was embraced by the Commission in *CECED*. The Commission firstly quantified the benefits granted by the agreement in question, finding the environmental benefits to be much greater than any additional costs faced by the consumers. With that in mind, the Commission found that such environmental benefits would give consumers and adequate share of the benefits even without no individual benefit.[171]

It should be reiterated, however, that *CECED* does most likely not accurately reflect the present position of the Commission. In its Guidance, the Commission considers that the consumers referred to in Article 101(3) are the customers of the parties to the arrangement – and thus not consumers in general. The Commission also reiterates the idea that the benefits granted to the parties' customers must be so great as to compensate for the restrictions of competition. Interestingly, however, the Commission also notes that *society as a whole* benefits from benefits such as decreased resource use or improved product quality, and thus also the relevant consumers for the purposes of Article 101(3).[172] This indicates that the Commission, even under the consumer welfare model, may to some extent take a wider view of the second criterion. Where society as a whole is benefited by the agreement in question, so is the relevant group of consumers. Furthermore, the Commission states that the "availability of new and improved products constitutes an important source of consumer welfare."[173] It is of course difficult to assess what the Commission considers to be an improved product, although it may be a further indication that a wide view of how benefits can be passed to consumers.

However, while decreased resource use or improved product quality are possible efficiencies emanating from an environmental agreement, it is not evident that *all* environmental agreement would have such results. A relevant question in this context is if, for example, consumers are benefitted by decreased GHG emissions relating to a product's use or production where all other factors remain constant. Holmes considers that it is *implicit* in the guidelines that such general benefits to society can constitute

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[171] *CECED*, (Case COMP/36.718) Commission Decision 2000/475/EC, OJ (2000) L 187/47, recital 56
[172] Guidelines on the application of Article 81(3), paras 84 and 85
[173] Ibid, para 104

passing a fair share to society,[174] a view which is also shared by Teorell.[175] A somewhat more cautious approach is taken by Townley – with regard to the decision in *CECED* – who finds that the Commission's rather framed the agreement in *CECED* as being of economic benefit to the consumers than actually weighing environmental benefits against restrictions on competition or economic harm.[176] It would thus be unclear if environmental benefits that are not quantifiable in terms of monetary gain can result in a fair share being granted to consumers under the current regime, although most scholars seem to be optimistic that so is the case.

### *3.2.3 The third condition: Indispensability*

Thirdly, then, the agreements may only contain such restrictions that are indispensable to achieve the efficiencies in question. The Commission considers that the test has two limbs, namely if the agreement itself is reasonably necessary, and if the individual restrictions themselves are necessary. The relevant assessment is, according to the Commission's Guidance, whether *more efficiencies* are produced than without the agreement or the restriction being scrutinised. There should be no other viable and less restrictive alternatives to achieve the same benefits, although the Commission also stresses that it will not attempt a detailed review of undertakings' choices in this regard.[177] The ECJ considered the criterion in *Slovak Banks*, and confirmed the Commission's position that it is not only the situation without the agreement that can be considered, but also alternative measures. In that case, the undertakings were required to turn to Member State authorities instead of taking concerted action against an undertaking whose actions they found to be incompatible with national law.[178]

As concerns environmental agreements, the undertakings would thus – given that the agreement fulfils the other criteria – have to show that concerted action is necessary to achieve the heightened levels of environmental protection or sustainability. There is, of course, any number of ways to do this. In particular, however, it may be possible for the undertakings to argue that without sufficient cooperation between them, one of the undertakings would have to carry the first mover disadvantage inherent in environmental

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[174] Holmes, p 377
[175] Teorell, p 28
[176] Townley, p 152
[177] Guidelines on the application of Article 81(3), paras 73-75
[178] Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporitel'ňa as*, para 35

protection. Those disadvantages may prohibit undertakings from taking unilateral action, meaning that cooperation is the only way forward. In this context, it serves to recall that the sky is the limit as regards what levels of protection are achieved, meaning that it is unproblematic if *some* environmental protection – but not the same levels as under the agreement – could be achieved via unilateral action.

Holmes considers the indispensability criterion to be an important check on agreements actually having the genuine goal of striving for environmental protection or sustainability, but also notes that it often constitutes an insurmountable obstacle for many environmental agreements.[179] However it is not, as Baarsma and Rosenboom note, strictly a question about the role of environmental protection in the Union's antitrust rules[180] – if an environmental agreement is found to create efficiencies, environmental protection has been weighed in as a factor.

#### *3.2.4 The fourth condition: No elimination of competition*

Fourthly, there is a hard limit in Article 101(3) stating that the paragraph cannot be relied on to disapply Article 101(1) in respect of agreements giving the undertakings the possibility to eliminate competition in respect of a substantial part of the products in question. Given that this thesis only covers measures which genuinely strive to ensure high levels of sustainability and environmental protection, this condition does not pose an issue. There is no reason for an environmental agreement to entail dividing the market between the parties or complete price-fixing, for example.

## 3.3 Intermediary conclusions – Article 101 TFEU as a shield

There are several different paths possible when assessing an agreement's compatibility with Article 101 TFEU. As has been shown above, however, none of these paths clearly entail the concept of environmental action, as of today. The Court's judgments in cases such as *Albany* and *Wouters* seem open for analogies to other types of agreements; but without further information there is certainly no room to consider that these judgments lend themselves to application as regards environmental agreements. There are, primarily, differences in nature and legal setting between the agreements considered in those cases

[179] Holmes, p 381
[180] Baarsma and Rosenboom, p 406

and the nature and legal setting surrounding the typical environmental agreement. It is possible for undertakings wishing to engage in environmental cooperation to set up environmental performance standards, and thus escape the ambit of Article 101(1) TFEU. However, such standards may – in particular – not be binding, which limits the usefulness of the standards. Lastly, environmental agreements can also create benefits, meaning that Article 101(3) TFEU can be relied on to disapply Article 101(1). Here there are two primary issues. The Commission is firstly not clear on what it considers as a benefit, and secondly seems to exclude general environmental protection from that concept.

## 3.4 Article 101(1) TFEU as a sword

In order to assess the full environmental impact of Article 101 TFEU, it is not enough to merely consider how the Article treats environmental action. The reverse situation must also be assessed, i.e., can Article 101 TFEU be used against agreements which prevent environmental action, or perhaps even cause environmental harm? Such an application of antitrust rules is often called using it 'as a sword' against, in this case, unsustainable practices.[181] This section will therefore explore whether Article 101(1) TFEU prevents environmental degradation and unsustainable practices.

At the outset, it is important to note a few basics. Firstly, Article 101(1)(b) mentions agreements that limit technical development as an agreement that in particular is prohibited by the Article. Many agreements falling within the ambit of the discussion here will therefore no doubt be within the scope of Article 101(1). Secondly, and as noted above, Article 11 TFEU is not limited in reach to only using Article 101(3) as a defence. The Article instead mandates that the Union's environmental policy should be considered whenever possible, and it must thus also be weighed in this situation.

When considering public policy and the standard of harm under Article 101(1) TFEU, it is of course necessary to keep in mind that the assessment is based on the concept of restricting competition. Without a restriction of competition, there can be no violations of the Article. Unlike Article 102 TFEU, there is no additional safeguard for the undertakings involved such as the prerequisite of the undertaking(s) holding a dominant position, which may justify a broader approach to what conduct may be a violation. There is also the crucial difference insofar as there is no prohibition on exploitative conduct

[181] Cf. Nowag (2019), p 4

under Article 101, unlike Article 102 TFEU. If undertakings were charged under Article 101(1) based solely on an agreement being unsustainable, it would not only erase much of the foreseeability of the Article's application; it would also lead to an unwanted expansion of the general ambit of EU competition law. Thus, there must still be a restriction of competition before environmental integration can come into play.

As soon as there is a restriction of competition, however, there is room for environmental integration, with Article 11 TFEU in mind. Such integration can take multiple guises. It can mean *prioritising* agreements with harmful effects on the environment or sustainability, similarly to how the Commission already has issued a Guidance on its enforcement priorities in applying Article 102 to exclusionary conduct. If one considers the 2019 report on competition policy, it does appear that the Commission considers sustainability an important factor to be considered – though this seems to be mostly aimed at State aid law.[182]

A second possibility is integrating the Union's environmental aims by considering environmental harm as an aggravating factor, by having negative effects on the consumers and society as a whole. As mentioned above, the (current) aim of the Union antitrust rules is in the eyes of the Commission to maximise consumer welfare. With a more nuanced definition of consumer welfare, it is possible to bring environmental protection into consideration. Lianos mentions that consumers often do not act solely on economic grounds, but are also motivated by emotional and social identity, including such factors as profession and culture.[183] There are therefore ample reasons to consider environmental aspects as part of the standard of harm in Article 101(1) TFEU assessments. On the other hand, Lianos also notes that many proponents of the consumer welfare model envision a strict 'division of labour' between competition law and environmental law - the environmental impact of competition law should be dealt with by applying environmental law in the resulting situation. He finds the argument unconvincing, however, as there normally does not exist any possibilities to face non-competition policy consequences of a competition law decision in the EU.[184] There is, for example, no centralised application of Union environmental law.

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[182] Commission, 'Report on Competition Policy 2019', pp 19-21
[183] Lianos, p 11 et seq
[184] Ibid, p 16

With the fundamentals of environmental integration and Article 101(1) TFEU laid down, the thesis will now continue with the material assessment under Article 101(1). The assessment under Article 101(1) typically has two parts: Whether an agreement restricts competition by *object*, or if it does so by *effect*.

### *3.2.1 Environmental damages as restrictions by object*

When considering if an agreement constitutes an infringement of Article 101(1) TFEU, the first question is if the agreement constitutes a restriction by object. An application of this can be found in the Commission's 2019 Report on Competition Policy, where the Commission states that "it is illegal for companies to agree to stifle competition on quality and innovation", and mentions the case of *Car Emissions*.[185] The case – which, as of this thesis being written, is still open – concerns an agreement entered into by three car producers in the EU to not develop or to delay certain types of emission cleaning technologies used in personal cars. As the Commission relied on the word *cartel* to describe the agreement, it is likely that the agreement is being considered as a restriction by object.[186] Thus, agreements between undertakings which outright strive to prevent the development of technology which enhances the environmental performance of a product will be considered as restrictions by object. It is not always clear whether or not the Commission indeed considers agreements that do not restrict the performance of a product from the end user's perspective. As such, even the decision to make a statement of objections regarding car emissions indicates that the Commission may be widening its view of what aspects of a product affect consumer welfare.

[185] Commission, 'Report on Competition Policy 2019', p 21
[186] Case 40178 *Car Emissions*; see also 'Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology', https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2008, last retrieved 17th May 2021

A second question is whether environmental effects can affect whether a restriction is considered to be by object or by effect. A hypothetical example may be of assistance:

> **Example:** *Widgets* and *Blodgets* are two different products with similar areas of application, production cost and overall value. Blodgets, however, are more environmentally friendly than Widgets, as their production and use cause less GHG emissions than Widgets. The association of Blodget and Widget producers takes a decision that no member is to sell Blodgets to retailers without also selling an equal amount of Widgets to the same retailer.

An agreement such as the one in the example would be liable to restrict competition within the meaning of Article 101(1) TFEU. By requiring that all retailers carry both types of products, the agreement limits the free choice of retailers. The question is thus if the fact that the agreement makes a more sustainable product more expensive than its less sustainable alternative can be taken into account when considering if the restriction is *by object* or *by effect*.

When assessing if an agreement constitutes a restriction by object, the ECJ has stated that it will normally consider – in particular – three factors. Firstly, the content of the provisions, secondly, the objectives the agreement pursues, and lastly, the legal and economic context of which the agreement forms part.[187]

The content may of course in itself be obligations that reduce sustainability while also restricting competition. Typically, the content has to considered particularly severe and thus consist in, for example, fixing prices in various ways, reducing capacity of production or boycotting a competitor.[188] Interestingly, there appears to be little reference to outright decreases in product quality or innovation in the case-law of the Courts. The Commission, however, considers that effect on product quality and innovation is one of the key factors identifying restrictive *effects* on competition.[189] Applied to the concept of restrictions by object, it would thus mean that sufficiently severe restrictions on quality or innovation, that are evident in the wording of the agreement and its implementation, ought to be caught by the concept of restrictions by object. In the example above,

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[187] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission*, paras 55-58; Cf section 2.1.1
[188] Jones, Sufrin and Dunne, p 220 and references made
[189] Horizontal Guidelines, para 27

restricting the sale of the more sustainable Blodgets by requiring both products to be bought will likely lead to artificially decreased sales of Blodgets in favour of Widgets. It will also restrict competition by reducing the retailers' free choice when buying products, in turn preventing retailers from adapting to changes in consumer demand.

Once again, however, it is difficult to assess what constitutes product quality in the view of the Commission. Is environmental performance caught or not? Given the strict approach taken by the Commission in other documents after its shift to a consumer welfare-based assessment, it is unlikely that environmental issues alone would cause a restriction to be viewed as by object by the Commission. From a *de lege ferenda* perspective, there appears to be support for that environmental performance indeed should be considered as part of the restriction by object-assessment. For example, one may consider *Chicken of Tomorrow*, where the Dutch ACM indeed found that consumers were prepared to pay more for higher levels of animal welfare. Similarly, a 2018 article found that consumers in eight European countries were willing to pay, on average, an additional 14 % for fish produced according to sustainable standards.[190] Where such empirical proof is available, it is therefore logical to consider sustainability as part of the assessment of whether there is a restriction, even from a consumer welfare perspective. If consumers are prepared to pay more for a more sustainable product, it is after all likely that their welfare increases where they own that product in comparison to where they own the less sustainable alternative. With Article 11 TFEU in mind, there is thus ample reason to consider the environmental impact of an agreement when considering if it restricts competition by object – insofar that impact is clear from the content of the agreement.

The *objective* can also be considered contrary to sustainability and competition. In this context, it should be recalled that the objective of an agreement is assessed rather by what the circumstances of the agreement reveal, not by considering if there was intent to restrict competition on behalf of the parties.[191] Agreements that limit sustainability can be expected to have controlling or limiting competition as their object in this sense, as they will likely consist in either limiting innovation by preventing more sustainable products from entering the market, or by artificially maintaining a less sustainable product's presence on the market, as in the example above. In this part of the assessment,

[190] Zander and Feucht, p 263; Notably, the willingness to pay was slightly greater (14.8 %) where the fish was produced according to an organic standard.
[191] Case C-209/07 *Beef Industry Development Society and Barry Brothers*, EU:C:2008:467, para 21

then, there appears to be greater compatibility with the Union's aims of environmental protection.

To what degree the context is relevant for assessing if an agreement restricts competition by object is debatable. As the ECJ held in *Toshiba* that the contextual analysis is limited to establishing such core facts as whether the agreement is entered into between competitors, or if the agreement forms a part of a larger network of agreements with different effects from the one under scrutiny.[192] For the purposes of this thesis, it is therefore unlikely that the context assessment is decisive.

The above means that although agreements limiting sustainability may be caught by the concept of object restrictions, there is little indicating that the fact that those agreements limit sustainability actually factors into it as such. However, when seen from an economic perspective, there may be reason to weigh in sustainability restrictions in this assessment, in particular where it drives consumer choice or affects their willingness to pay. There is thus to some extent a gap between the economic reality and the application of Article 101 TFEU by the Commission and the Courts. It should be stressed, however, that by striving for maximised innovation, competition law can also ensure improved sustainability.

### *3.2.2 Effect of restricting sustainability, effect of restricting competition?*

If the agreement under scrutiny is not found to restrict competition *by object*, it can still be caught by the prohibition in Article 101(1) TFEU where the agreement restricts competition *by effect*. In comparison to the assessment of restrictions by object, this assessment requires detailed and thorough consideration of the economic situation.

Although the assessment under Article 101(1) TFEU is extensive, this section is chiefly concerned with where environmental issues may be considered, if that *is* done and, if so, how. A hallmark case as regards the effects-assessment is *Delimitis*. The case concerned an agreement between a brewer and Delimitis, under which the latter leased a pub from the brewer. In return, Delimitis undertook to only purchase beer and soft drinks from the brewer and its subsidiaries; he also had to purchase a minimum amount of beer each year. Delimitis could, however, purchase beers from other breweries in other Member States[193] As regards restricting competition by effect, the ECJ firstly stated that

[192] Case C-373/14 P *Toshiba v Commission*, EU:C:2016:26, para 29
[193] Case C-234/89 *Delimitis v Henninger Bräu*, paras 3–5

one must consider "the effects of the beer supply agreement, taken together with other contracts of the same type, on the opportunities on national competitors or those from other Member States, to gain access to the market […] or to increase their market share and, accordingly, the range of the products offered to the consumers".[194] The Court *inter alia* held that one must consider (1) whether there are other similar contracts adding to the effects of the agreement under scrutiny[195] (2) where there is such a network of contracts, if there are real, concrete possibilities to enter the market, with the economic and legal context in mind (3) "the conditions under which competitive forces operate on the relevant market", e.g., the number and size of producers present, market saturation, and other factors such as brand loyalty, [196] and (4) if these three show that market entry is difficult, whether the agreement under scrutiny appreciably adds to these effects.[197]

The question that must be answered in this part is, then, how environmental issues can enter into this. Concerning *Delimitis*, the Court mainly considered the possibilities of market entry, and not whether the current market conditions restricted consumer choice. *Prima facie*, it may therefore seem as though the test devised in *Delimitis* is not relevant from the perspective of environmental integration. One must however consider what the Court's statements actually take aim at, which is ensuring that markets remain open for competition, so that new products and producers can establish themselves. Thus, more sustainable alternatives will be ensured a (reasonably) fair chance to enter the market. From that perspective, Union competition law already fulfils an important role in ensuring increased sustainability – as Commission Vestager noted in 2019. Nowag reaches a similar conclusion, while noting that environmental integration must be considered with great care so as to not end up expanding the scope of competition law and thus the competences of the Commission itself. If not, Nowag states that it is likely that the Commission will begin to encroach on the powers of the legislator as regards environmental protection.[198] Here, there is thus also a constitutional aspect that must be considered and that limits the potential for environmental integration.

Regarding horizontal agreements, the Commission places the focus on identifying adverse effects on price, output, product quality and variety, and innovation. The

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[194] Case C-234/89 *Delimitis v Henninger Bräu*, para 15
[195] Ibid, para 19
[196] Ibid, para 21 et seq
[197] Ibid, para 24
[198] Nowag (2019), p 9

Commission considers that these effects will depend on two overarching sets of characteristics: (1) the market conditions, and (2) the type of information exchanged.[199] Concerning the first category, the Commission identifies market transparency as a key factor that can contribute to an agreement's restrictive nature. The more undertakings know about their competitors' prices, costs, output and demand, the easier it is to restrict competition. On the other hand, the Commission also mentions that the *less* transparent a market is, the greater the risk that an information exchange results in a 'collusive outcome', i.e., restrictions on competition.[200] Under the second category, the Commission instead identifies the following criteria as decisive:

(1) the market coverage of the agreement, i.e., the market shares of the parties put in the context of the market at large,
(2) the degree of individualisation of the information exchanged, such as whether the data can be pinned to a certain producer or is merely generalised sales data,
(3) the age of the data, with newer data obviously being more liable to restrict competition,
(4) the frequency of the information exchange, and
(5) the public nature of the information and of the exchange.[201]

Unlike the criteria established by the ECJ in *Delimitis*, it is difficult to envision precisely where the Union's environmental aims may interact here. Although the Commission states initially that it will try to identify adverse effects on product quality and variety – where sustainability definitely could be benefited – the criteria set out relate rather to the performance of the market than to the products themselves. This can likely be explained by reference to two separate factors. The Commission, firstly, appears to consider the category of restriction by effect as rather narrow in comparison to the category of restriction by object, and secondly, it is likely that many markets were sustainability-related innovation is low are markets that the Commission's criteria will indicate as problematic. For example, an undertaking active on a stable market with high levels of transparency does not have to continuously innovate to stay competitive, as it will become

[199] Horizontal Guidelines, para 75
[200] Ibid, paras 78-82; Why the Commission has opted for other terms than those found in the Treaties is a mystery to the author.
[201] Horizontal Guidelines, paras 86–92

aware of any changes to its competitors' products beforehand. Notably, however, the Commission does not mention other factors that may be interesting from an environmental integration point-of-view, such as a prominent presence of externalities on the market.

### *3.2.3 Intermediary conclusions – Article 101(1) TFEU as a sword*

As the situation was when considering environmental agreements, there is a notable lack of clear information as regards environmental integration concerning agreements that limit sustainability under Article 101(1) TFEU. Generally, and from a theoretical perspective, it can however be noted that many of the core issues considered by the Courts and by the Commission are relevant for increased sustainability as well. A market where the competition is restricted is therefore also one where progress towards a more sustainable economy is restricted. By enforcing Article 101(1), the Commission can thus ensure that more sustainable products are developed and are given a fair chance to enter the market. Nevertheless, areas of conflict remain and there is room for improvement. The Commission provides little information on environmental considerations in its key documents, and it appears that a more nuanced economic analysis could bring further benefit to the sustainability efforts of the Union in this regard.

# 4 The environment and Article 102 TFEU

The second theme in the thesis concerns Article 102 TFEU. Just as with Article 101 TFEU, environmental integration can become relevant in two main situations. Firstly, if a dominant undertaking can rely on environmental action as a way to justify a *prima facie* abuse, and secondly, how Article 102 TFEU is applied where a dominant undertaking harms the environment or prevents environmental action. In the following, these situations are considered in turn. Just as with chapter 3, the application of Article 102 'as a shield' is considered first given its greater importance from a practical perspective.

## 4.1 Article 102 as a shield

### *4.1.1 Environmental justifications*

A contentious question in the Union antitrust rules is if and to what extent dominant undertakings can rely on public policy grounds, such as environmental protection, to justify a behaviour that has been found to be a *prima facie* abuse under Article 102 TFEU. This may become relevant in regard to several possible abuses. For instance, a dominant undertaking may increase prices to incorporate costs that would otherwise be externalities such as pollution, refuse to supply of a product or service on the grounds that it would be to the detriment of the environment, or tie a product with a service such as carbon offsetting.

No exhaustive definition of the concept of objective justifications has been given in case-law. Instead, the Court has relied on vague statements such as "an undertaking may demonstrate […] that its conduct is objectively necessary".[202] The Commission's Priorities Guidance does not clarify the concept, but states that health and safety concerns related to the product in question may constitute such justifications.[203] An undertaking must – according to most authors, at least – also show that the *prima facie* abuse is proportionate to the objective pursued.[204] Hence, while the concept of objective justifications is nothing new to the Union antitrust rules, the current case-law of the CJEU is not conclusive as to precisely what may constitute such a justification. Notably, there

[202] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, para 41
[203] Priorities Guidance, para 29
[204] Nowag (2016), p 83 and references made

is no explicit support for objective justifications in Article 102 TFEU. Instead, the Article is often interpreted so as to mean that only unjustified conduct actually constitutes an abuse.[205]

A hallmark case is *Hilti*.[206] Hilti sought the annulment of a Commission decision finding that Hilti had abused its dominance on the market for powder-actuated fastening nail guns as well as the nails and cartridge strips used in such guns. The abuse, as found by the Commission, consisted in various related practices. *Inter alia*, Hilti only sold cartridge strips *with* nails to distributors in the United Kingdom and refused to sell empty cartridge strips to other nail producers there. Hilti thus made it more difficult to use nails from other nail producers.[207] Before the GC, Hilti claimed that the competitors' products had defects which could cause flaws in the fastenings, if made with those products. These flaws would, Hilti claimed, potentially lead to Hilti being held legally responsible under product-liability law – in turn meaning that Hilti's conduct was justified. The Commission, on the other hand, took the stance that there were many different measures Hilti could have taken that would also have served to protect the safety of its products. Therefore, the Commission argued, there was no coherent user protection policy behind the measures, whose "primary concern was the protection of its commercial position".[208]

The GC rejected Hilti's invocation of public policy grounds relating to product safety as a justification under now-Article 102 TFEU, stating that "it is clearly not the task of an undertaking in a dominant position to take steps […] to eliminate products which, rightly or wrongly, it regards as dangerous". In this context, the facts central to the GC's conclusion are worth highlighting. The GC relied on four factors. Firstly, there were competent authorities for product safety. Secondly, Hilti had not made any attempts at reporting the competitors' products to those authorities. Thirdly, Hilti did not provide a satisfactory explanation as to why the undertaking did not rely on the competent authorities. Lastly, the GC stated that the effective implementation of EU competition law would be at risk if an undertaking could rely on the Member States' laws on product safety to trump the former.[209]

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[205] Opinion of AG Jacobs in Case C-53/03 *Syfait*, EU:C:2005:33, para 72
[206] Case T-30/89 *Hilti v Commission*, EU:T:1991:70
[207] Ibid, para 8
[208] Ibid, paras 104 et seq
[209] Ibid, paras 117-119

The conclusions reached by the GC in *Hilti* and similar cases[210] have often been considered to rule out that dominant undertakings can invoke public policy grounds as an objective justification.[211] When the GC's statements regarding why Hilti could not invoke product safety as a justification are examined closely, it appears that the Court's assessment either consists of cumulative criteria, or is an *in casu* analysis where all relevant factors may be considered. In the first case, it appears that it may be sufficient that an undertaking has a satisfactory explanation as to why it could not turn to competent authorities, as long as the effective implementation of competition law is not at risk. This latter caveat, however, limits the application of the formula to cases where the interests protected by the undertaking's conduct are weighty enough and the end result does not lead to serious restrictions of competition. If the GC's analysis is sooner to be seen as an *in casu* analysis, the situation is much more unforeseeable. The Courts may in that case present any argument when assessing an undertaking's claims of objective justifications. This lack of clarity may of course in itself be an indication that the GC's analysis should be viewed as cumulative criteria; after all, it is logical to construe the Courts' case-law as a coherent system. If the Courts' statements are to be understood as allowing for public policy justifications, it is likely that the Courts would have clearly established that the proportionality test, typical of EU law in general, applies.

Nowag remarks that the Commission had submitted before the GC in *Hilti* that Hilti's purported protection of product safety was not supported by the facts, as they had not attempted to contact authorities, the competitors or the consumers. Thus, Nowag's conclusion is that the GC lambasts the suitability and proportionality of Hilti's actions, and not the actions as such. Such tests, Nowag states should be seen as ensuring that the attempt at foreclosing competitors is not merely disguising itself as protecting a public policy goal.[212] Van der Vijver considers that *Hilti* leaves central issues unsolved, such as whether if there are national (or Union) rules safeguarding an aim would prevent a dominant undertaking from relying on the pursuit of the same aim as an objective justification.[213] A reply to van der Vijver's question is given by Brisimi, who notes that the CJEU has never considered an abusive conduct as justified due to it being in the public

[210] For example Case 333/94 P *Tetra Pak v Commission*, EU:C:1996:436
[211] Jones, Sufrin and Dunne, p 384
[212] Nowag (2016), p 244
[213] Van der Vijver, p 66

interest. Brisimi interprets the statements by the Courts in cases such as *Hilti* so as to mean that public policy considerations can never justify abusive conduct where other means are available. Such means could be contacting the responsible Member State authority. Whichever interpretation is made of *Hilti*, however, Brisimi considers that the standard of proof relied on by the Courts when dominant undertakings attempt public policy justifications indicates that this would be a Herculean task in practice.[214] Although Brisimi notes that a possible counter-argument would be that only cases of clear abuse lead to Commission decisions, and by extension an appeal before the CJEU, he considers the similar statements in the preliminary reference-case *Sotirios Lelos*[215] as evidence that the counter-argument does not hold.[216]

Nowag is, on the contrary, of the opinion that environmental justifications are possible under the Commission's practices. He considers the *S.A. Tanklux* decision adopted by the Luxembourger NCA, which concerned rules adopted by a dominant undertaking active on the market for transporting petroleum products by ship to Luxembourg. The rules themselves were intended to ensure personal and environmental safety during the loading and unloading of oil products. The NCA found no reason to intervene given that the concerns motivating the rules justified them.[217] Nowag considers that a similar approach is expectable at a Union level, as the concept of objective justifications nominally allows for such an approach. While recognising that there is a lack of decisions applying environmental justifications, Nowag considers that this is merely a result of that the Commission would not pursue practices it considers to be justified. In the *Football World Cup* decision, for example, the Commission recognised the legitimacy of ensuring effective security at football matches but considered that the measures adopted were disproportional.[218] In line with this, Nowag notes – contrary to Brisimi – that many of the times objective justifications have been at all successful are preliminary references.[219]

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[214] Brisimi, p 263–265
[215] Joined Cases C-468/06 to C-478/06 *Sot. Lélos Kai Sia and Others*, EU:C:2008:504
[216] Brisimi, p 265
[217] Nowag (2016), p 240; Conseil de la Concurrence, '*2009-FO-02 Affaire Rock Fernand Distribution s.à.r.l. contre Tanklux S.A.*', https://concurrence.public.lu/content/dam/concurrence/fr/decisions/rejets-de-plaintes/2009/decision-2009-fo-02/Decision-N_2009-FO-02-du-3-aout-2009.pdf, last retrieved 14 May 2021)
[218] Nowag (2016), p 241; *Football World Cup* (Case 36.888) Commission Decision 2000/12/EC OJ (2000) L 5/55, recitals 110-113
[219] Nowag (2016), p 242

Regardless of the academic debate, interpreting *Hilti* so as to allow for environmental action seems to be consistent with the Commission's decision-making approach, at least prior to the adoption of the Commission's more economic approach. Van der Vijver *inter alia* mentions the Commission's decision *Port of Genoa*, which concerned price discrimination for mandatory piloting services in the port of Genoa.[220] Exclusive rights to provide such services had been granted to the Corporation of Pilots of the Port of Genoa. The Commission refuted the Corporation's argument that the discrimination could be justified as an incentives scheme, but remarked *obiter dicta* that an objective ground such as protection of the seabed could be a possible justification for the conduct.[221] Similar statements can be found in the 2004 decision *GVG/FS*, which concerned a refusal by Ferrovie dello Stato (FS) to grant access to crucial railway infrastructure in Italy.[222] The Commission found that FS could have justified its conduct by reference to safety concerns, but that any such concerns were to be observed by the infrastructure manager. As such, it was not up to FS to refuse access to the infrastructure on such grounds.[223] The *GVG/FS* decision thus closely resembles the GC's judgment in *Hilti*, and it is likely that similar conclusions can be drawn from the two cases. Similarly, the Commission – as mentioned – considers in the Priorities Guidance that exclusionary conduct can be objectively necessary for health or safety reasons, indicating that it considers public policy as a possible objective justification.[224]

In the context of *GVG/FS*, it can be questioned why the Commission would have even brought safety concerns as a justification into its decision; it does not appear that FS explicitly argued that the services provided by the applicant would have been unsafe. This indicates that there is even under the Commission's consumer welfare approach still room for public policy considerations as objective justifications – and thus environmental justifications – under Article 102 TFEU. However, the fact that sustainability or environmental protection as objective justifications have either merely been brought up tangentially or been rejected as such a justification means that the situation is far from certain. Given that all attempts to justify behaviour on public policy grounds have failed, however, the bar must be considered to be set very high.

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[220] Van der Vijver, p 66; *Port of Genoa*, Decision 97/745/EC, OJ (1997) L 301/27
[221] *Port of Genoa*, Decision 97/745/EC, OJ (1997) L 301/27, recital 21
[222] *GVG/FS* (Case COMP/37.685) Commission Decision 2004/33/EC, OJ (2004) L 11/17
[223] Ibid, recital 136
[224] Priorities Guidance, para 29

Some further guidance was given in *Baltic Rail*. The decision concerned an undertaking (LG) on the market of goods transport by rail – who also controlled the Lithuanian railway infrastructure – which had removed a part of rail necessary for its primary competitor to effectively compete with LG. The Commission stated that LG, as the railway infrastructure manager, could justify its behaviour with regard to passenger safety. LG would have to provide a "clear and coherent explanation" for its conduct, however.[225] LG failed to do so, although it appears that this was a question of fact – LG's abuse was considered severe and the explanations were found contradictory to one another, and in any event lacking.[226] It may be difficult to draw any far-reaching conclusions from the decision, as the circumstances were highly unusual. LG was responsible for managing the infrastructure necessary, and the Commission could thus not claim that LG should have turned to the responsible authorities or relied on national legislation. Although the Commission thus recognised LG's interest in protecting passenger safety, the same might not apply to an undertaking that does not have an infrastructure monopoly.

The decision in *Baltic Rail* raises a further question of interest – can environmental protection justifications have a different position than other public policy justifications? Typically, there is no authority an undertaking could turn to if it finds that a customer's or competitor's activity causes unnecessary GHG emissions. Moreover, many of the judgments and decisions regarding public policy justifications focus on that it is not for undertakings to pursue such goals, particularly not by potentially excluding competitors. However, the Commission itself notes in the Green Deal that public action will not be enough to reach the goals set out there, but that improved sustainability in private investments and corporate governance is also necessary.[227] There may thus be a case for reviewing the stance taken by the Courts and the Commission. If one considers the judgment in *Hilti*, it may not always be possible to turn to a responsible authority to prevent additional GHG emissions. Thus, the situation becomes much more resemblant of the situation in *Baltic Rail*; the undertaking itself (and the rest of society) must take responsibility to reduce GHG emissions. With regard to other environmental issues, the situation is less obvious. The Commission's statements in the Green Deal can be

[225] *Baltic Rail* (Case AT.39813) OJ (2017) C 383/08, recital 326
[226] Ibid, recitals 348 and 357
[227] See above, sections 2.4.1 and 2.4.6

interpreted so as to allow undertakings to, to a greater extent, increase environmental protection even where it restricts competition. Without any further guidance as to the position of environmental action from the Commission's side, however, the discussion will remain theoretical and the situation uncertain.

### *4.1.2 The Efficiency Defence in Article 102 TFEU*

A second way for a dominant undertaking to justify a *prima facie* abusive behaviour is to prove that it results in efficiencies. Although materially similar to objective justifications, the Court typically separates between the two categories, with the efficiency defence typically relating to such factors that counterbalance any negative effects on customers.[228] The efficiency defence thus closely relates to the similar ground under Article 101(3) TFEU; Both Peeperkorn[229] and Akman[230] considers the Priorities Guidance's efficiencies test to be a near-verbatim copy of the requirements of Article 101(3). The dominant undertaking must consequently show that (1) the efficiency gains counteract any negative effects on consumer welfare *and* competition in the affected markets, (2) the efficiencies have been or are likely to result from the conduct, (3) the conduct is necessary to achieve the efficiencies and (4), the conduct does not eliminate effective competition. This mimics the Commission's statement in its Priorities Guidance.[231]

A preliminary observation is that upon comparison with the objective justification defence, the efficiency defence is clearer defined and may also be better suited for environmental considerations. *Inter alia*, the efficiency defence test allows for weighing the environmental interests against the restrictions of competition as well as recognising that a high level of environmental protection is beneficial to all, and not just a justification on part of the undertaking.

Generally, however, the efficiency defence appears to be very difficult to succeed with. Given the similarities between the efficiency test under Article 101(3) and Article 102 TFEU, the test raises the same questions for the purpose of this thesis. Can environmental protection and sustainability at all be considered, and if so, to what extent? As noted above, the requirement that efficiency gains affect the same relevant market as

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[228] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, para 41
[229] Peeperkorn, p 407
[230] Akman, p 117
[231] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, para 42 et seq; Priorities Guidance, para 30 et seq

the restrictions appears to limit the spectrum of efficiencies possible. On the one hand, improvements to the environmental performance of a product or service that also lead to decreased costs for the consumers are covered. On the other hand, it is not evident that practices whose sole benefit for the consumers are, e.g., decreased GHG emissions, or avoiding damages to the environment, would be covered by the concept of efficiencies.

Geradin considers that the practice under now-Article 102 TFEU deviates from the related economic theory, and states that there generally is a *per se* approach to many types of abuse, such as price discrimination. This, Geradin claims, in itself limits the room for efficiencies to be claimed. If anything, Geradin considers that – given the case-law on the topic – there is even less room for justifications based on efficiencies under Article 102 TFEU than under Article 101(3) TFEU. This difference is according to Geradin due to the lack of explicit support in the Article and that the Commission is typically suspicious of dominant undertakings' claims of efficiencies.[232]

### *4.1.3 Intermediary conclusions – Article 102 TFEU as a shield*

Just as with Article 101 TFEU, the status of environmental justifications is rather unclear under Article 102 TFEU. While there are certain cases and decisions indicating that environmental protection can be relied on, those cases are rather disparate as to methodology. Moreover – and more importantly – no undertaking has as of yet successfully invoked environmental protection or sustainability before the Commission or the CJEU in an Article 102 proceeding. Generally speaking, the Commission has afforded little room for dominant undertakings to justify their behaviour on grounds not directly relating to the performance of the market. The image is not quite bleak though. There are NCA decisions proving that environmental aims can be weighed in, thus establishing the necessary framework for such considerations. Furthermore, the case-law of the CJEU is open to interpretation in this respect, showing that it may be possible for undertakings to invoke environmental justifications. Clarification in this respect would no doubt be beneficial, so as to not dissuade dominant undertakings – who, after all, often have a very important role in their respective markets – from striving for high levels of sustainability and environmental protection.

[232] Geradin, p 343

## 4.2 Article 102 TFEU as a sword

In comparison to the situation under Article 101 TFEU, Article 102 TFEU is much more often considered as a possible tool against unsustainable business practices. As mentioned above, dominant undertakings are important players in their markets and their behaviour in regards of sustainability can thus have a large effect on the sector overall. The question to be assessed in this section is therefore if Article 102 TFEU can be applied on unilateral conduct which prevent increased sustainability or themselves are unsustainable as such. Answering the question entails an analysis of the concept of abuse of a dominant position itself, so that conclusions can be drawn about whether or not sustainability is – or could be – a protected interest.

When considering Article 102 from an environmental-integrative perspective, it appears that conduct of both exclusionary and exploitative character may have effects on the environment. If a dominant undertaking engages in exclusionary abuses, it can prevent more sustainable alternatives to the products or services it offers from entering the market. For example, it can set prices in such a way that makes it impossible for an as-effective competitor that acts sustainably to enter the market or expand. A dominant undertaking can also rely on its independence of the constraints of competition to avoid sustainability efforts or to maintain unsustainable conduct which harms the consumers. For instance, a dominant undertaking may decide to only provide products that cannot be repaired, thus harming the consumers and the environment by increasing material use – as recognised in the Green Deal.

Akman considers that there is no clear and unified standard of harm under Article 102 TFEU; instead, decisions and case-law allow for the identification of several possible goals.[233] Moreover, Akman analyses the subjects protected by the Article, and arrives at the conclusion that while the stated goal is consumer welfare, the analysis of anticompetitive effects in the application of Article 102 TFEU sooner focuses on the protection of the competitive process.[234] The statement in *TeliaSonera*[235] indicates a wide view, including public interest – and thus, by extension, such public policy issues as sustainability and environmental protection. However, the situation becomes less clear,

[233] Akman, p 129 et seq
[234] Ibid, p 134 et seq
[235] Cf n 74

Akman notes, when other cases are considered. In the procedure for interim measures in the case of *IMS Health*, the President of the ECJ instead focused on the protection of competing undertakings and effective competition.[236] Such a view would exclude the consideration of sustainability or environmental protection in the standard of harm. If one considers the Article 101 TFEU case *Car Emissions*, it appears that the Commission indeed considers that undertakings actively and deliberately agreeing to market products which are less environmentally sustainable may damage consumer welfare.[237] By extension, even unilateral versions of such conduct may therefore be abusive. There is no mention of limiting technical development in the Priorities Guidance, however, and as such there is some lack of clarity on the topic.

When Article 102 TFEU itself is considered, the image is less complex. A primary point of integration can be found in Article 102. Namely, a dominant undertaking's conduct may be classified as abuse under Article 102(b) TFEU if it limits technical development to the prejudice of consumers. In line with what was mentioned regarding Article 101(1) TFEU, this in and of itself may contribute to the sustainability and environmental aims of the Union. If dominant undertakings cannot limit technical development, it will be ensured that other undertakings can compete by introducing, for example, more fuel efficient alternatives than what the dominant undertaking offers.

When identifying the issue from a sustainability perspective, Iacovides and Vrettos consider that business practices that contribute to lower levels of environmental protection and failure to meet sustainability standards is a problem that must be tackled.[238] Given the obligation to integrate environmental aims under Article 11 TFEU, Iacovides and Vrettos argue that where a conduct constitutes abuse of a dominant position under Article 102 TFEU, such conduct cannot be declared compatible with the Union antitrust rules if it also contravenes Union environmental law.[239] Iacovides and Vrettos also state that by engaging in unsustainable behaviour, an undertaking can reduce costs. For example, the undertaking can create environmental externalities without compensating for them. Undertakings may thus improve their competitiveness by acting

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[236] Akman, p 136; Order of the President of the Court of Justice of 11 April 2002 in Case C-481/01 *NDC Health & Co KG and NDC Health Corporation v Commission and IMS Health Inc*, EU:C:2002:223, para 84

[237] Cf n 186

[238] Iacovides and Vrettos, p 7

[239] Ibid, p 9 et seq

unsustainably.[240] Iacovides and Vrettos recognise that applying Article 102 TFEU to environmental issues may raise issues regarding foreseeability, but they consider that only dominant undertakings can engage in deliberately unsustainable practices. Companies are increasingly subject to legal requirements to report on sustainability issues and investors increasingly require investees to be sustainable. Moreover, Iacovides and Vrettos notes, sustainability is also an increasingly important point of competition. Therefore, Iacovides and Vrettos conclude that only undertakings that operate independently of such factors – thus having market power – would be able to engage in unsustainable business practices.[241]

There may therefore be a link between the market structure, i.e., an undertaking being dominant, and the result of environmental degradation. As such, it may be justified to enforce Article 102 against behaviour that results in such environmental harm when carried out by a dominant undertaking, even from an economic perspective. Moreover, unsustainable business practices could also be seen as an indicator of dominance in and of itself, if it is accepted that sustainability is a factor that undertakings compete on apart from price and quality.

Holmes instead identifies the core issue as predatory pricing, albeit with a novel approach to what constitutes such pricing. In particular, Holmes considers that prices are *too low*, and thus unfair from a competition law perspective, where they do not cover the true costs of production.[242] Holmes mainly discusses this from a perspective of social sustainability, such as purchasing prices that are too low for producers to make a liveable wage. The true costs may however also be construed so as to include environmental externalities, i.e., as including any costs necessary to compensate for environmental damage that would result from producing a product or service. Of course, arguments can be raised against such an application as well. In particular, considering environmental externalities as part of the true costs may be considered to reduce legal certainty by introducing a too wide spectrum of factors that may be brought into the abuse assessment. However, as Holmes notes, unfair pricing is already considered as an abuse under Article 102(a) TFEU, and was considered an abuse in cases such as *Intel*. Contributing to fair trading is one of the key objectives of the Union as expressed in Article 3(5) TEU. Thus,

[240] Iacovides and Vrettos, p 19
[241] Ibid, p 14 et seq
[242] Holmes, p 384

Holmes claims, it would not be a far-flung conclusion to include pricing that is unfair from a sustainability perspective.[243]

While there thus may be policy reasons to integrate environmental externalities in the analysis of what constitutes abusive pricing, one must also bring the case-law and decision making practice on the area into account. With regard to *exclusionary* conduct, the Commission considers that price competition is generally beneficial for consumers. Therefore, the Commission states that it will *normally* only intervene where a dominant undertaking's prices lead to the exclusion of other as-efficient competitors.[244] This statement implies that not including environmental externalities in the pricing would not be abusive where other undertakings are also capable of doing so. The Commission does add a caveat, stating that the dominant undertaking's pricing may in itself render other undertakings less effective.[245] This does not change the conclusion that creating environmental externalities is generally not exclusionary in the eyes of the Commission. Notably, the CJEU has taken a similar approach to exclusionary pricing. In *AKZO,* for example, the ECJ held that pricing below average total costs[246] can render a hypothetical smaller, but as-efficient, competitor uncompetitive as it does not have the financial muscle to compete with those prices.[247]

Of course, one might argue that environmental externalities could be considered as part of the costs incurred by an undertaking, as Holmes mentions. Under such a standard, undertakings would thus generally be considered to set prices below average total costs where they create environmental externalities and do not compensate them. On the one hand, such an application of competition law may stimulate sustainability by protecting undertakings which choose to offset effects to the environment or include environmental externalities in the pricing. On the other hand, it may also lead to the Union's antitrust rules becoming too disconnected from the economic reality. If most undertakings on a market create environmental externalities, those undertakings will not be foreclosed if the dominant undertaking does not include such environmental costs in its pricing. As mentioned, conduct is only exclusionary where it prevents competitors from entering or

[243] Holmes, p 385; Case C-413/14 P *Intel v Commission*, EU:C:2017:632
[244] Priorities Guidance, para 23
[245] Ibid, para 24
[246] Average Total Costs are the costs incurred for producing a given amount of additional units of a product or service, including fixed costs and variable costs, divided by the number of units produced
[247] Case C-62/86 *AKZO v Commission*, para 72

staying on a certain market. Thus, unsustainable conduct would not be exclusionary under the definition given by the Court unless there are qualifying factors.[248] Such a factor could, e.g., be that other undertakings do not create environmental externalities. Including unsustainable conduct under the concept of exclusionary abuses may instead cause foreseeability issues if no actual exclusionary effects have been caused. This means that it should be possible to, as the law stands, consider not including environmental costs into the price of a product as abusive – given that as-efficient competitors do not create environmental externalities themselves. Moreover, any other conclusion would likely be flawed as it would encourage undertakings to create externalities in order to lower their costs and thus the price.

With regard to *exploitative* conduct, the approach taken by Iacovides and Vrettos as well as Holmes must be considered radical. This is chiefly a result from the fact that exploitative conduct as a concept has not been very developed in Union law. As was noted in the background to Article 102, exploitative conduct – in case-law generally high prices – are generally not considered to be a "sufficient case for intervention".[249] In particular, such practices should, if there are no exclusionary practices or high barriers to entry, attract new undertakings to enter the market and thus lead to the self-correction of the market.[250] If this is accepted as a truth not only with regard to price but also as regards other factors, such as sustainability and environmental performance of products, there is thus in most cases no need to intervene. Cases such as *Chicken of Tomorrow* indicate that undertakings may compete on sustainability factors, which in turn means that where possible, markets should self-correct also in that aspect.

A complicating factor is that pricing is always highly visible for the end consumer. The same can hardly be said for a products' sustainability - apart from environmental branding and labelling, transparency is generally low. There may thus be further economic reasons to take a wider approach to environmentally unsustainable practices as an exploitative abuse. Such an approach may also be in line with the decision-making practice of the Commission. In *P&I Clubs*, for example, the Commission found that an association of insurers abused now-Article 102 by limiting the level of insurance cover offered. The Commission stressed that intervention could, however, only become relevant

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[248] Case C-209/10 *Post Danmark A/S v Konkurrencerådet*, para 20
[249] Jones, Sufrin and Dunne, p 560
[250] Opinion of AG Wahl in Case C-177/17 *AKKA/LAA*, EU:C:2017:286, para 3

where there was a substantial share of the demand being deprived of a service it manifestly needs.[251] As such, a dominant undertaking not making use of available technology so as to render its products or services more sustainable may be contrary to Article 102 TFEU, even from a *de lege lata* perspective. Of course, one must keep in mind that the Commission's decision-making practice does not carry any weight as a source of law and that there is a distinct lack of case-law on the topic. The Commission's reasoning furthermore indicates that intervention is reserved to exceptional cases.

[251] *P&I Clubs*, (Case IV/D-1/30.373), Commission Decision 1999/329/EC, OJ (1999) L 125/12, recital 127

# 5 Are the Union antitrust rules Green Deal-compatible?

As noted in the background, the European Green Deal sets out ambitious goals regarding the Union's economy, aiming to overhaul it into a more sustainable version that remains competitive. This section provides a critical analysis of the results reached in the previous chapters with a view to reach a conclusion about whether the antitrust rules are in line with the Green Deal's ambitions.

## 5.1 The first issue: The lack of clear information

Perhaps the most important issue that needs addressing is the lack of information, which is of particular importance as to how it treats undertakings' taking environmental action which may limit competition or reduce consumer welfare. The Commission has in various decisions stated that certain interests may or may not be taken into account. Those decisions sadly provide very limited information on a general level as to how the Commission will assess sustainability and environmental protection. Similarly, the Commission's guidelines and similar documents – both as regards Article 101 and Article 102 TFEU – fail to provide information on *what* interests it will take into account when assessing an agreement or a dominant undertaking's conduct. In the following section, this issue will be developed on.

### *5.1.1 It is too unclear what interests are protected*

The lack of information is particularly glaring as regards efficiencies under Article 101(3) TFEU and objective justifications under Article 102 TFEU. For instance, although the Commission has issued guidelines specifically as concerns Article 101(3) TFEU, the document does not clarify what the Commission considers to constitute improvements to the production or distribution of goods, or what advancements constitutes technical or economic progress.[252] While this may seem to be a matter of semantics, one must bear in mind that the Commission has on its own accord adopted the consumer welfare approach.

[252] Cf n 161

It could therefore be expected that the Commission also adopts a clear position regarding what policy issues an undertaking can pursue – but that has not happened. A possible solution would be updating the relevant guidelines to clarify the situation. Such guidance could be sector-specific. In the European Green Deal, different goals are set out for different sectors – and they will likely be reached in different ways. In markets with a few, large undertakings, such as the steel industry, it may be more relevant to set out guidelines regarding unilateral environmental action. Where the market is characterised by a greater amount of undertakings with smaller market shares, it would instead be more reasonable to focus on how such undertakings may agree on environmental cooperation to allow them to pool resources together for a common goal.

With regard to Article 101 TFEU, clear guidelines are of particular importance given that most information exchanges between competitors can be considered as anticompetitive, dependent on the circumstances.[253] The Commission could reinstate the category of environmental agreements into its Horizontal Guidelines, and therein provide more detailed information on how undertakings can cooperate to enhance sustainability and environmental protection. Increased guidance in these matters would not only be beneficial to the undertakings involved by setting out the circumstances for when environmental cooperation can be permissible, but also from a compliance perspective. By setting out clear guidelines for environmental agreements, the Commission namely would not need to rely on decision-making in order to lay out its interpretation of the law. As such, improving and clarifying the relevant documents can help facilitate the efforts required to reach the goals of the European Green Deal by setting out clear rules for what action undertakings may and may not take. With regard to Article 101(3), in particular, the Commission ought to clarify whether benefits for society as a whole can constitute an efficiency, and if so, under what circumstances. This would clarify the issues identified with regards to *CECED* and the 2004 Guidelines on Article 101(3), which do not appear to allow environmental benefits that do not result in increased welfare or that cannot be clearly related to the same market as where there are restrictive effects to be considered.[254]

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[253] Cf n 199 et seq; the Commission considers that the more competitors know about each other, the easier is it for them to restrict competition

[254] See for example n 166; the Commission objected to a Dutch proposal to include benefits to society as a whole in the antitrust analysis

Similarly with regard to Article 102 TFEU, the Priorities Guidance may need expanding. The attentive reader might have noted that there is scarcely any mention of the Priorities Guidance on the above section relating to objective justifications. This is – simply put – because the Guidance offers very little actual guidance. Of course, the concept of objective justifications *is* rather unclear, even with regard to the CJEU's case-law. As noted above, the CJEU has mostly relied on merely stating that an undertaking *can* invoke objective justifications.[255] However, as the Commission itself brings up examples such as product safety as possible justifications in the Priorities Guidance, it stands to reason that the Commission would also develop on under what circumstances such justifications could succeed. Not doing so essentially means that a dominant undertaking cannot rely on its conduct being justified, as there is little telling how the Commission will assess claims of such justifications. The undertaking would thus have to run the risk to face scrutiny under Article 102 TFEU, which can have dire consequences.

Of course, one must bear in mind the CJEU's judgments here, as well, which grant additional information and which the Commission is likely to follow. Cases such as *Hilti* – where Hilti claimed to pursue consumer safety by not letting its distributors carry competitors' goods – indeed lay out a more detailed structure of analysis. Those cases do not, however, clarify under what circumstances an undertaking may invoke grounds of policy – it is unclear if they are to be interpreted as setting out a general formula or merely an *in casu* assessment. Here, the Commission has a largely unique possibility to set out guidelines without having to wait for a suitable case, which the CJEU cannot do. The CJEU does hold an important role, however. Given its role as the supreme interpreter of the Treaties and the Charter, its responsibility in furthering the sustainability aims of the Union cannot be understated. Thus, the CJEU has the ability to, should the opportunity arise, lay down a formula which allows undertakings to agree on environmental cooperation or to take unilateral environmental action.

Such an approach could mimic the mandatory requirements-test from market-freedoms law, as suggested by Nowag. The proportionality test included in the mandatory requirements-test should be sufficient to ensure protection of the public interest, individual undertakings and the consumers – which the ECJ identified as the goals of

[255] Cf n 202

Union competition law in *TeliaSonera* – while also allowing sufficient room for sustainability and environmental protection concerns.

That is not to say that there are no reasons to be suspicious of undertakings justifying restrictions on competition with reference to environmental protection or sustainability. Just as was the case in *Hilti* and *Baltic Rail*, such public policy aims may merely be a disguised attempt at excluding competitors from the market, especially as concerns possible abuses of dominance under Article 102 TFEU. Even where one considers that undertakings should be prevented from raising such justifications, and that this is how the CJEU's case-law should be interpreted,[256] the situation *de lege lata* is unclear – to the detriment both of competition law and to undertakings wishing to take environmental action. Whatever view it has of undertakings relying on environmental protection to justify a restriction of competition, a clearly stated rule is better than the lack of clarity in the present regime, as undertakings can only adapt to rules if they are aware of them.

In this context, it appears that the shift in the Commission's enforcement priorities when Regulation 1/2003 was adopted had unforeseen negative consequences. If the Commission had continued to issue positive clearance on a scale similar to what was done before the adoption of the Regulation, environmental cooperation could be facilitated further by allowing for an *ex ante* assessment of an agreements effects on competition. This could stimulate increased environmental responsibility among undertakings, as investments into increased environmental protection and sustainability can be costly and do not necessarily pay off in increased profits – making cooperation crucial.

### *5.1.2 Consumer welfare – a too strict a standard?*

With the results of chapters three and four in mind, it appears that separating the maximisation of consumer welfare from other policy aims is artificial, adding to the confusion. For example, if a car producer wanted to reduce particle emissions in its cars, it could do so by either introducing more fuel-efficient engines or by introducing better particle filters. The first example would obviously lead to increases in consumer welfare – consumers do not have to buy as much fuel, thus making the product more cost-effective. Thus, the first improvement would constitute a possible efficiency under Article

[256] As, for example, Brisimi appears to contend; see nn 214 and 216

101 and 102 TFEU. The second example benefits society as a whole, but such improvements are not likely to be covered by the Commission's view of consumer welfare, bearing in mind that the Commission objected to such an approach when suggested by the Dutch Ministry of Economic Affairs.[257]

If the Union antitrust rules are to become compatible with the European Green Deal, an approach which does not consider benefits to society as a whole may lead to unsatisfactory results. Conduct within the ambit of the Union antitrust rules could for example be justified if it creates a greater supply of wind power, thus leading to lower prices for the consumer. If the conduct strives for a different goal, such as reduced GHG emissions in food production, the reduced GHG emissions may be irrelevant. This indeed appears arbitrary. Of course, one may be able to explain the Commission's stance towards the Dutch proposal with that the Commission is sceptic of *NCAs* taking public policy grounds into their own hands. As mentioned above, a part of the reasoning behind the consumer welfare standard was to prevent NCAs from taking national interests into account – and objecting to an antitrust analysis which considered benefits to society as a whole may be part of this. If the issue is that NCAs may take national interests into account, it is possible that the Commission would still be willing to take benefits to society as a whole into account under its own assessment of efficiencies. However, designing a system in order to avoid the problem of NCAs taking national interests into account, which may or may not arise, appears misguided, especially if it comes at the cost of a nuanced and detailed antitrust analysis.

It may be justified to limit the assessment to a strict consumer welfare standard to enable effective enforcement and application of the antitrust rules. As was noted in section 2.5 Public policy considerations in antitrust: Why or why not? one of the arguments for the consumer welfare approach is that it is relatively straightforward to apply. Considering a too wide spectrum of factors may make it quite onerous to assess the effects of a certain conduct. This argument does not apply where undertakings themselves invoke policy grounds, however. In such cases, undertakings essentially do the Commission's job for it by proving that the conduct pursues a public policy goal and that this offsets negative effects on consumers. This holds especially true as regards environmental action and sustainability, where presenting a more sustainable alternative

[257] Cf section 3.2.1

may in itself render the undertaking *more* competitive as its products becomes more attractive. As was found in *Chicken of Tomorrow*, for instance, customers may be prepared to pay more for a more sustainable product. With this in mind, undertakings not being able to invoke environmental aims is therefore both arbitrary from an economic perspective and harmful to the environmental aims of the Union at large.

To summarise in this part, it is evident that more *can* be done to bring competition law in line with the Union's environmental protection and sustainability aims. It should also be possible to achieve this without infringing on aims central to competition policy, such as protecting the competitive process. Whether one considers that undertakings should or should not be able to rely on the environment as a justification, the CJEU and the Commission have the ability to adopt a clearer system of rules in this regard.

*5.1.3 NCAs as a driving force behind environmental integration in antitrust policy*

The situation is somewhat different when one considers decisions made by NCAs. As noted in section 2.1.3, the chief applications of Article 101(3) and successful invocations of objective justifications have been made by NCAs or in national courts. These decisions have clearly and unambiguously allowed for public policy grounds as justifications or efficiencies. Two examples mentioned in this thesis, *S.A. Tanklux* and *Chicken of Tomorrow*, clearly show that NCAs – in this case the Dutch and the Luxembourgian – are willing to take a wide view of the interests undertakings can pursue. *Chicken of Tomorrow* is particularly interesting, as the Dutch ACM not only established that it considered the pursuit of animal welfare as a possible justification for restrictive agreements, but also took quantified both the gains and the higher willingness to pay, when weighing the benefits of the agreement against its restrictive effects. Although the agreement in *Chicken of Tomorrow* was found incompatible with Article 101 TFEU, the message from the ACM was clear. Undertakings *can* pursue public policy grounds, even if it means restricting competition, as long as the net effects on society are still positive. In comparison to the stance of the Commission and the CJEU, the ACM's position is both clear and allows both public policy grounds and competition to be protected, by weighing the interests against each other.

Of course, not all increases in environmental protection or sustainability have effects that can be quantified. The ACM's approach may, in particular, be useful as

regards such effects as reductions in GHG emissions, in transport for example,[258] which can be measured with relative ease and thus given a pecuniary value. It may be more difficult to apply it to such justifications as protection of, for example, biodiversity – the protection of which is also a key area under the European Green Deal. As the decision in *S.A. Tanklux* shows, however, undertakings have been able to successfully invoke even justifications that cannot be quantified easily before NCAs, such as personal and environmental safety.

On the face of it, there is nothing preventing the Commission from incorporating the methods applied by the NCAs into the respective guidance documents, or even its own decisions. Therefore, NCAs can be seen as the driving force behind environmental integration in the Union antitrust rules.

## 5.2 The second issue: Inconsistencies in case-law and decisions

A second issue, which relates to the one raised in the previous section, is that there appears to be inconsistencies in when and how environmental justifications or efficiencies may be invoked. Of course, the Commission's choice to adopt the consumer welfare standard entailed changes to what justifications are permissible – which is to be expected. However, even since then, there have been statements by primarily the Commission, but also by the CJEU, which seem incompatible with one another.

Most statements made regarding this topic can be roughly characterised as belonging to one of three groups: (1) sustainability and environmental protection are incapable of constituting efficiencies, (2) undertakings cannot invoke public policy as a justification for restricting competition and (3) undertakings *can* invoke public policy grounds (including sustainability and environmental protection).

To the first category belongs, in particular, the Guidelines on Article 101(3) TFEU and the corresponding efficiencies defence under Article 102 TFEU. Under the Guidelines, efficiencies must both be economic in nature – that is, either improve the product or lead to lower prices – and they must relate to a particular market and thus not be general in nature. Therefore, environmental action that does not result in economic gain for the customers will not constitute an efficiency. As was noted above, such

[258] As mentioned in section 2.4.3, GHG emissions in the transport sector are to be reduced by 90 %

increases in environmental action can be, for example, reductions in GHG emissions in food production.

The second category consists of statements in many of the cases and decisions, such as *Hilti, GVG/FS* and *OTOC*. The reasoning in such cases is characterised by that the undertaking under scrutiny is not allowed to take unilateral action that risks eliminating competition, with somewhat varying methodology. In *OTOC*, the issue was sooner that the Order's measures were disproportional. The Order could as such invoke public policy grounds to justify a *restriction* on competition, but it could not justify eliminating most competition in the market for vocational training for chartered accountants. In *Hilti*, the situation was different. The undertaking was simply not considered able to take matters into its own hands when it could have relied on the Member State's authorities.

There are also judgments and decisions where the undertakings have been able to invoke public policy as a justification. To this third category belongs both *Albany* and *Wouters* under Article 101 TFEU and decisions such as *Baltic Rail* and *Port of Genoa* under Article 102 TFEU. Under Article 101 TFEU, the main argument appears to be that the public policy goal pursued by the agreement would be hindered if the agreement was put under scrutiny under Article 101(1). In *Albany*, the ECJ therefore held that the social policies of the Union required that collective bargaining agreements do not come under the scrutiny of Article 101(1) TFEU, so as to avoid that those agreements were prohibited by competition law. A similar approach was also adopted in *Wouters*, in which the ECJ found that the prohibition of lawyer-accountant partnerships pursued a legitimate public policy goal and was necessary to achieve that goal, and could therefore be justified. Under Article 102 TFEU, *Baltic Rail* is easily identified as an application of the same argumentation in *Hilti*: Undertakings cannot pursue public policy if they can turn to a responsible authority to achieve that aim, without eliminating competition. However, in *Baltic Rail*, LG was responsible for the maintenance of the rail the undertaking had removed. Thus, LG could rely on the need to safeguard the integrity of it as a justification. The third category is thus somewhat complex – it contains both judgments where the CJEU takes heed of other Union policies, and decisions concerning undertakings with a special responsibility to pursue the public policy aim invoked, such as in *Baltic Rail*.

The first category can be set apart from the second and third with relative ease, as it concerns efficiencies. Efficiencies have clearly been defined as gains to what the Commission defines as consumer welfare. As regards the second and third category

compared with one another, however, there are no clear differences. The main rule appears to be that only undertakings who have been authorised in one way or another to pursue a certain public policy goal can invoke that goal as a justification for restrictions of competition. That was the case in, e.g., *Wouters* and *Baltic Rail*. In *Wouters*, the Dutch bar had been authorised to set out disciplinary rules for lawyers. In *Baltic Rail*, LG was responsible for the maintenance of the rail infrastructure. With regards to *Port of Genoa*, it is difficult to conclude what the decisive difference would be. While the Corporation of Pilots was dominant, it was not tasked with protecting the environment in the same way that LG was tasked with maintaining the rail infrastructure. It may, however, be possible to explain the statements in *Port of Genoa* by virtue of that the Corporation of Pilots had the exclusive right to offer the mandatory piloting services. Drawing the line at that point appears odd, however. There is nothing indicating that the Corporation of Pilots would have acted with anything but its own best interests in mind, rather than in the public interest.

The division between what undertakings may and may not invoke public policy aims made by the CJEU and the Commission begs the simple question of *why* this difference is made. At the outset it may seem reasonable that only undertakings with some type of public power be able to invoke public policy grounds to exclude or exempt conduct from Article 101 and Article 102 TFEU. That reasoning is, however, disconnected from the economic analysis, rendering it inconsistent with the main assessment. Namely, it is not based on the weightiness of the public policy goal pursued or its value to the consumers. Instead, it is based on *who* is pursuing that aim, without much regard to whether the action is reasonable or not. If one considers the judgment in *Hilti*, for instance, almost the entirety of the GC's judgment concerns that Hilti should have turned to the responsible authorities instead.

As is obvious from cases such as *Wouters* and *Baltic Rail*, it is possible to weigh public policy goals against the requirements of unrestricted competition. Such a proportionality test seems more fitting than drawing the line at whether or not the undertaking has some semblance of public power. That latter test is too obscure and undeveloped to serve as a general rule. If the line between which undertakings can and cannot invoke public policy should be drawn at having been authorised to pursue a certain public interest, that must be done in a transparent and foreseeable way. The current standard appears to make more difficult the achieving of the goals of the European Green

Deal. Only certain undertakings who fulfil criteria – that have to be inferred from the relevant case-law – on having public authorisation to pursue environmental protection could justify restrictions on environmental grounds. A proportionality test would no doubt be more suitable to render the antitrust provisions more sustainability-friendly. Such a test could still take into account, under the suitability criterion, whether the undertakings' claims of environmental protection could more easily have been achieved by turning to the responsible Member State authority. However, such an assessment would have to be made *in casu*, bearing in mind what the undertakings can achieve through unilateral action (under Article 102 TFEU) or concerted action (under Article 101 TFEU). Undertakings agreeing on environmental protection, or deciding to do so unilaterally, may for example avoid the negative effects associated with public intervention into markets.

A possible solution could rely on the aims of the European Green Deal, and only allow for such environmental action that has clearly been set out as necessary to achieve net GHG neutrality or to prevent biodiversity decline, for example. Given that the European Green Deal is primarily a framework document, it could be envisioned that undertakings may rely on supplementing documents instead, such as the Farm to Fork strategy.[259] This would allow undertakings to invoke environmental grounds while still limiting the scope of such justifications or efficiencies, so as to also protect competition. Under such circumstances, it would be reasonable that the Commission adopts particular guidelines on the relationship between the European Green Deal and the antitrust provisions.

To summarise, the scope *ratione personae* of undertakings capable of invoking public policy grounds needs to be clarified. To facilitate increased sustainability and environmental protection and ultimately the achieving of the aims of the European Green Deal, any undertaking should *prima facie* be able to invoke environmental aims.

## 5.3 Antitrust as a sword – the final frontier?

Although there obviously is ample possibility in theory to apply Article 101 and Article 102 TFEU against conduct that limit sustainability or degrade the environment, many such applications of the Union antitrust rules are far away from its contemporary use.

[259] Cf section 2.4.4

There is certain overlap between the goals of competition law and the Union's environmental policy, however, and that overlap should not be understated.

An interesting case is *Car Emissions*. By intervening against undertakings agreeing on not to improve cars' environmental performance, the Commission shows that the Union antitrust rules can – even *de lege lata* – be used to intervene against practices that are contrary to the aims of the European Green Deal. The case will no doubt grant additional and much needed answers to the questions asked by this thesis. The fact that the Commission indeed does consider limiting environmental protection as an issue under Article 101 TFEU is hopeful from the European Green Deal perspective, as it also indicates that an agreement creates efficiencies if it leads to increased environmental protection under Article 101 TFEU. Thus, the application of Article 101 TFEU as a sword may clarify the state of the law even as regards the Article's application as a shield, and be beneficial to the development of the law as regards antitrust as a whole.

With regard to Article 102 TFEU, however, the use of the Article as a sword is mostly theoretical. Although Article 102 TFEU *prima facie* allows for environmental degradation or other unsustainable practices to be considered abusive, that does not appear to be the case in practice.

As regards, firstly, exploitative conduct, the Commission is unlikely to intervene against such conduct at all. As a result, there is little guidance to be found in decisions or in the CJEU's case-law. However, if the Union is to reach the overarching aims of the European Green Deal, increasing sustainability is mandatory. It may thus prove necessary to intervene against conduct that causes environmental harm and thus ultimately harms the consumers. A dominant undertaking may for example create a large amount of environmental externalities in the shape of GHG emissions, pollution or harm to biodiversity, which can reasonably be avoided. Intervention in such cases must of course be decided on with care. For example, it should at first be evident that the market will not self-correct. While undertakings *can* compete on sustainability and environmental protection, it does not appear that it is an as strong competitive constraint as price. Under such circumstances, intervention against exploitative environmental abuses may be justified from a competition policy perspective.

The concept of exclusionary abuses can in some situations catch the same issues as exploitative abuses. As noted, there appears to be a connection between market power and unsustainable conduct insofar as it is easier for a dominant undertaking to act

unsustainably. Here, too, however the scope of application is limited to the more extreme situations, i.e., where a dominant undertaking creates environmental externalities in order to reduce price, thus excluding competitors who cannot or will not act unsustainably.

On the one hand, applying Article 102 TFEU as a sword against unsustainable practices is and will likely remain a fringe application, as it cannot be relied upon to increase sustainability and environmental protection in a general manner. On the other hand, it is important that the Union antitrust rules can be applied in situations where dominant undertakings set themselves apart from their competitors by acting unsustainably, should such situations appear. Not doing so would essentially mean, firstly, acting contrary to the consumer welfare standard by not intervening where products that consumers value higher are being removed from the market in favour of cheaper, less sustainable alternatives. Secondly, it would also grant legitimacy to unsustainable practices by construing the Union's antitrust rules so as not to consider such practices as harmful.

To conclude in this section, it appears that the application of antitrust as a sword against unsustainable practices carries the greatest importance as regards Article 101 TFEU. Here, the Union's antitrust can facilitate innovation by striking down agreements that prevent it and thus making sure that the market remains open for new products and services that increase sustainability.

## 5.4 Does EU competition law allow the Green Deal's aims to be reached?

The final question to answer in this analysis, then, is whether the Union's antitrust takes sufficient heed of sustainability and environmental protection so that the Green Deal's aims can be achieved. The Green Deal is radical in its ambitions, in that it requires a total overhaul of many sectors of the economy: for example, GHG emissions in the transport sector is to be reduced by 90 %, and wind power production must increase 25-fold. To achieve this, it is thus crucial to remove and prevent the obstacles that restrictions of competition or abuses of dominant position might entail. It is evident that there is room for sustainability and environmental protection in the Treaty Articles themselves. Some applications of the antitrust provisions may be too detached from the economic scope and purpose of the Articles themselves to realise, such as more extensive applications of Article 102 as a sword. This is not an issue with the *Union's antitrust*, however, but a

limitation of what antitrust can achieve as such. The Union's antitrust provisions will not replace sectoral or general environmental regulation.

However, as has been shown in the above, there are issues in the application of the antitrust Articles that can be resolved in order to make it easier for undertakings to, for example, establish themselves as wind power producers or introduce vehicles that do not cause as high levels of GHG emissions as their alternatives. First and foremost, this includes setting out clear guidelines on when undertakings can cooperate to achieve the aims of the European Green Deal and when they may take unilateral action to do so, without running afoul of the Union's antitrust rules. Secondly, it also means that the Commission must be prepared to intervene *using competition law* where a dominant undertaking can act unsustainably in spite of competitors and customers.

The answer is ultimately that the Union antitrust rules are not Green Deal-compatible – *yet*. There is nonetheless a great deal of potential, and upcoming decisions from the Commission and judgments from the CJEU will no doubt shed additional light on the question. If the antitrust rules are construed correctly, they can facilitate environmental action. That requires more information being given to the undertakings involved, though, so that they can rest assured that environmental action is supported by the Union's antitrust regime.

# 6 Conclusion

Just as Commissioner Vestager stated in her 2019 speech, the Union's competition law does indeed have a role to play in the sustainability efforts of the Union. Whether that role will be a driving or supporting one is ultimately up to the Commission and the CJEU. There are many possibilities to apply Article 101 and Article 102 TFEU so as to facilitate sustainability and thus help the Union reach its goals for sustainability and environmental protection, as set out in the European Green Deal. On an overarching level, these take two shapes – antitrust can be applied both as a shield, so that environmental action is protected, and as a sword, against unsustainable practices. Within these two categories, there are different types of environmental integration – that is, situations where the environmental aims and the antitrust analysis meet.

Regarding the application of Article 101 and 102 TFEU as a shield, there is primarily the possibilities to invoke *efficiencies* or *objective justifications*. The scopes of these two concepts are unclear, and appear to exclude many types of environmental action. However, it is quite possible that sustainability efforts and environmental protection can be efficiencies or objective justifications, at least on the face of it.

As to the application of the Articles as a sword, other issues arise. On the one hand, the antitrust provisions aim to protect the will to innovate in the Union's economy, as well as ensure that markets remain open to new, sustainable products and services. These two are in themselves key to reaching the goals of the Green Deal. Here, the Articles already serve an important function. On the other hand, many applications of the Articles as a sword exist in theory only, and are far away from their usual applications in contemporary antitrust. This is the result both of a lack of information – important concepts are not yet developed – but also the inherent limitations in competition law.

The sum of it all is that the Commission and the CJEU have their work cut out for themselves: to integrate environmental aims into the antitrust assessment and thus pave the way for a more sustainable economy.

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