Sustainable development in the EU – Which state of play in competition law?

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Sustainable development is today a guiding objective of the EU. This article therefore analyses if and how it can be integrated in competition law and more specifically in the antitrust rules of art. 101 TFEU. To do so, this paper first explains the legal background of sustainable development, its three dimensions (economic, social and environmental) on the international scene and highlights its enshrinement in the EU treaties. It then specifically focuses on its environmental dimension and identifies three routes to integration in EU competition law: (i) the agreements not restricting competition while protecting the environment; (ii) the objective necessity route whereby agreements whose restrictions on competition are objectively justified and proportionate make them fall outside of the scope of art. 101 TFEU; (iii) and the exemption route of art. 101 (3) TFEU laying down four conditions to be met. This article analyses each of these routes and puts forward the legal points requiring clarifications or modifications in this regard.

Keywords: competition; sustainable development; exemption; environment; integration

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I. Introduction

Sustainable development is increasingly present in our daily lives due to the climate and socio-economic challenges facing humanity. This concept was enshrined at the EU level in the 7th recital of the Preamble of the Amsterdam Treaty. According to art. 22 (2) of the Vienna Convention on the law of treaties[1], a preamble is still an integral part of a treaty and is therefore used for its interpretation. As for competition, it is one of the fundamentals of the EU within the framework of the establishment of the single market. One could see at first glance a contradiction between competition that is based on a free-market economy fostering growth and the will to promote sustainable development. This article therefore aims at assessing how both notions can coexist. As this concept stems from international law, the first part of this paper will briefly explore its sources, legal meaning and present its evolution on the international scene. It

[1] U.N.T.S., 1155, 331.

will then demonstrate from a legal perspective how this concept was received and evolved in the EU treaties before focusing on its impact on the antitrust rules of art. 101 TFEU. This will allow the possibility of highlighting the legal instruments that require clarifications or modifications in this regard.

II. Scope of sustainable development

A. On the international scene

In 1987, the UN published the Brundtland report.[2] Its general objective was to find a way to pursue economic growth and allow a better standard of living, while still protecting the environment and ensuring that the Earth's resources are not overexploited.[3] This report defines this approach as sustainable development i.e., the "[…] development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[4] This concept therefore lies on the idea of human needs that development must provide with a focus on the essential needs of the poor which should have overriding priority.[5] It then relates the needs to the notion of limitations in the development process.[6] These limits are imposed by the state of technology and social organisation on the possibility for the environment to meet present and future needs.[7] To this end, renewable resources must not be depleted beyond a rate of use that allows regeneration and natural growth.[8] Non-renewable resources can be used taking into account a calibrated rate of depletion ensuring that they do not run out before an acceptable

[2] World Commission on Environment and Development (WCED), 'Our Common Future' (UN General Assembly 1987) Doc. A/42/427 (Brundtland Report).

[3] Sander R.W. van Hees, 'Sustainable Development in the EU: Redefining and Operationalizing the Concept (2014) 10 Utrecht L Rev, 60 – 76, 65.

[4] Brundtland Report (n. 2), ch 2, para 1.

[5] Brundtland Report (n. 2), ch 2, para 1.

[6] Brundtland Report (n. 2), ch 2, para 1.

[7] Brundtland Report (n. 2), ch 2, para 1.

[8] Brundtland Report (n. 2), ch 2, para 11.

substitute is available.[9] The Brundtland report therefore laid the foundation of an international approach to issues related with the environment and socio-economic aspects of development.[10] There were then further advancements on the international scene in specifying the definition of sustainable development. In 1992, the Rio Conference enshrined guidance on achievement of sustainable development in the 27 principles of the so-called Rio Declaration.[11] This conference also adopted Agenda 21 which lists various fields in which sustainable development should apply and specifically provides that it "[…] encompasses social, economic and environmental dimensions […]".[12] This constellation of three interdependent dimensions allows to reconcile economic growth as a solution to social and environmental problems[13] or the integration of environmental concerns in the development process.[14]

Twenty years later, the UN conference on Sustainable development shaped a set of Sustainable Development Goals (SDGs) in order to incorporate in a balanced way these three dimensions and their linkages.[15] To this end, 17 SDGs were officially adopted on 25 September 2015 in the Agenda 2030 Resolution.[16] These SDGs cover wide areas such as poverty eradication[17]; decent work and economic growth[18]; the promotion of climate actions[19]; gender equality[20] or the promotion of peace and inclusive institutions.[21] However, such a wide scope for

[9] Brundtland Report (n. 2), ch 2, para 12.

[10] Brundtland Report (n. 2), ch 2, para 1; Maria Kenig-Witkowska, 'The Concept of Sustainable Development in the EU Policy and Law' (2017) 1 J of Comparative Urban L and Policy, 64 – 80, 64.

[11] UN General Assembly, 'Rio Declaration on environment and development' (1992) Doc. A/CONF.151/26.

[12] UN General Assembly, 'Agenda 21' (1992) Doc. A/CONF.151/26, ch 8, para 8.41.

[13] Ben Pruvis, Yong Mao and Darren Robinson, 'Three pillars of sustainability: in search of conceptual origins' (2019) 14 Sustainable Science 681 – 695, 692.

[14] Principle 4 Rio Declaration; Bernhard Braune, *Rechtsfragen der nachhaltigen Entwicklung im Völkerrecht* (Perter Lang 2005), 63; Maria Kenig-Witkowska (n. 10), 65.

[15] UN General Assembly, 'The future we want' (2012) Doc. A/RES/66/288, para 245 ff.

[16] UN General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development' (2015) Doc. A/RES/70/1, 1.

[17] 1st SDG.

[18] 8th SDG.

[19] 13th SDG.

[20] 5th SDG.

sustainable development carries the risk that its content might appear disordered, malleable and too broad to have a precise legal meaning.[22] Nonetheless, three essential legal characteristics of sustainable development and one implementation tool can still be delimited i.a. on the base of the Rio Declaration principles: the preservation of the environment; a balance between the development needs of present generations; the taking into account in this regard of future generations and – according to Principle 4 of the Rio Declaration – the integration of environmental considerations in the development process and of development needs in environmental objectives.[23] Despite these statements, the Rio Declaration or its Principles remain soft law with no binding force.[24] Furthermore, sustainable development is generally neither considered as customary norm nor a rule of international law.[25] It can however be regarded as a general principle of international law based on the opinio iuris that it releases.[26]

B. In the EU

The enshrinement of sustainable development in the treaties was carried out in several milestones. At the EU level, the European Single Act first provided the possibility of Community action in the environmental field.[27] It led to the adoption of art. 130r (2) EEC which stated that environmental requirements shall be a component of the Community policies. A few years later, the Maastricht Treaty (TEU) established environmental protection as a fully-fledged

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[21] 16th SDG.

[22] Gaëtan Blaser, 'Les critères de durabilité environnementale de l'Union européenne', (PhD thesis, University of Fribourg 2016), 112, para 213.

[23] Principles 3 to 7 Rio Declaration; Virginie Barral and Pierre-Marie Dupuy, 'Principle 4: Sustainable Development through Integration' in Jorge Viñuales (ed), *The Rio Declaration on Environment and Development: A commentary* (Oxford 2015), 157 – 179, 158; Blaser (n. 22), 112, para 214 f; Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press 2012), 207.

[24] Viginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 Eur J Intl L, 377 – 400, 384.

[25] For a complete discussion on this issue see: Barral (n. 24), 384 ff.

[26] Barral and Dupuy (n. 23), 168.

[27] Anja Käller, 'Artikel 11 AEUV' in: Jürgen Schwarze and al (eds), *EU-Kommentar* (4th edn, Helbing Lichtenhahn 2019), 471 – 478, para 2; Patrick Thieffry, *Manuel de droit européen de l'environnement*, 2nd edn, Bruylant 2017), 2.

Community policy.[28] It also enshrined in its preamble 7th recital that the contracting parties were i.a aimed at promoting social and economic progress for their people by reinforcing environmental protection and enshrined these as objectives of the Community in art. 2 EC.[29] Close to what provides Principe 4 of the Rio Declaration, the TEU reviewed art. 130r (2) EEC (amended as EC) by stating that "[e]nvironmental protection requirements *must be integrated* into the definition and implementation of other Community policies"[30] (emphasis added). Environmental requirements were therefore no longer just a static component of the Community policies.[31] The Amsterdam Treaty reviewed the previously mentioned goals of the 7th recital by expressly referring to the taking into account of sustainable development in their accomplishment.[32] The 130r (2) EC integration clause was moved from the environmental provisions title to art. 6 EC in the general principles of the first part of the EC Treaty.[33] In line with the modification of the 7th recital of the preamble, this provision expressly added that the integration of environmental requirements in other Community policies should have the view to promote sustainable development.[34]

In the current Lisbon Treaty, the 7th recital wording has not changed.[35] The art. 6 EC integration clause became art. 11 TFEU while the former art. 2 EC stating the goals of the Community mostly became art. 3 TEU. Its par. (3) explicitly mentions now that one of the EU objectives is to "[…] work for the sustainable development of Europe based on balanced economic growth […], a highly competitive social market economy, aiming at […] social

[28] Art. 3 (k) EC; Thieffry (n. 27), 2.

[29] 7th recital (now 9th recital as amended) TEU.

[30] Art. 130r (2) EC.

[31] Käller (n. 27), para 4.

[32] Art. 1 (2) Amsterdam Treaty amending the TEU.

[33] Käller (n. 27), para. 5; Owen McIntyre, 'The integration challenge – Integrating environmental concerns into other EU policies' in: Suzanne Kingston (ed), *European perspectives on environmental law and governance* (Routledge 2013), 125-144, 129; Thieffry (n. 27), 3.

[34] Art. 6 EC.

[35] 9th recital TEU.

progress, and a high level of protection and improvement of the […] environment".[36] It is also worth briefly mentioning that the art. 11 TFEU integration clause was reiterated in art. 37 of Charter of Fundamental Right of the EU. Given that the Charter has the same legal value as the Treaties[37], it reinforces the normative density of this objective.[38]

In sum, sustainable development is expressly mentioned in two provisions of the treaties. On the one hand, art. 3 (3) TEU enshrines it as an EU objective with a general political meaning.[39] Even if the treaties do not specifically define sustainable development, the wording of art. 3 (3) TEU recalls its three dimensions as conceived on the international scene.[40] As primary EU law, this provision is obviously legally binding but does not generate any specific obligation for the EU or the Member States.[41] Art. 3 (3) TEU serves as a guide in interpreting the treaties by restating what is already provided in international law.[42] On the other hand, art. 11 TFEU expressly relates the promotion of sustainable development with the integration of environmental protection requirements in EU policies.[43] Art. 11 TFEU is legally binding but – contrary to art. 3 (3) TEU – imposes on the EU institutions and the Member states to integrate the EU environmental requirements in other policies.[44] It is then not merely programmatic.[45] It

[36] Art. 3 (3) TEU.

[37] Art. 6 (1) TEU.

[38] Thieffry (n. 27), 36.

[39] Blaser (n. 22), 119, para 223 f; Käller (n. 27), para 15; Nicolas de Sadeleer, *Environnement et marché intérieur* (Université de Bruxelles 2010), 22.

[40] de Sadeleer (n. 39), 22; Kenig-Witkowska (n. 10), 67; Thieffry (n. 27), 33.

[41] Ulrich Becker, 'Artikel 3 EUV' in: Jürgen Schwarze and al. (ed), *EU-Kommentar*, (4th edn, Helbing Lichtenhahn 2019), 53 – 59, para 5; Astrid Epiney, 'Environmental Principles', in: Richard Macrory (ed), *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?*, (Europa Law Publishing 2006), 19 – 42, 27.

[42] Blaser, (n. 22), 119, para 223 f; Epiney, (n. 41), 27.

[43] Blaser, (n. 22), 120, para 225; Astrid Epiney, *Umweltrecht der Europäischen Union* (4th edn, Nomos 2019, 171, para 32 f.

[44] Wolfgang Kahl, 'art. 11 AEUV' in: Rudolf Streinz & Walther Michl (eds.), *EUV/AEUV*, (3rd edn, Beck 2018), 353 – 367, para 9.

[45] Case C-379/88, *PreussenElektra* [2000] EU:C:2000:585, Opinion of AG Jacobs, para 231.

requires results and goes beyond a simple consideration for environmental expectations.[46] This integration obligation relates to the overall environmental principles and objectives enshrined in art. 191 (1) to (3) TFEU.[47] These are the protection or improvement of the environment but also the protection of human health or the rational utilisation of resources.[48] Furthermore, EU environmental policy must aim at a high level of protection; be based on the precautionary principle; preventive action; rectification of environmental damage at the source and ensure the polluter-pays principle.[49] Finally, the environmental policy must take into account the available scientific and technical data and assess the cost-benefit analysis of an action or lack thereof.[50]

Given the wording of art. 11 TFEU, some scholars note that sustainable development mainly relates to its environmental dimension under EU law and therefore provides us with a principle of environmental sustainability.[51] To include its social and economic dimensions in art. 11 TFEU would give a too broad meaning to this concept and weaken this environmental integration clause.[52] Nevertheless, these authors highlight that this focus on the environmental dimension of sustainable development does not exclude its social and economic aspects which are enshrined in other several key provisions or 'integration clauses' of the treaties.[53] Among others, art. 3 (3) TEU states all three dimensions as general goals of the EU. Art. 9 TFEU requests the EU to 'take into account' several social aspects in the shaping of its policies; art. 12 TFEU states that consumer protection 'shall be taken into account' in defining and implementing other Union policies and activities while according to art. 8 TFEU, the EU 'shall

[46] Case C-379/88, *PreussenElektra* (n. 45), para 231; de Sadeleer (n. 39), 30; Astrid Epiney, 'art. 11 AEUV' in: Christoph Vedder and Wolff Heintschel von Heinegg (eds.), *Europäisches Unionsrecht* (2nd edn, Dike 2018), 330 – 334, para 7.

[47] Marianne Dony, *Le droit de l'Union européenne* (Edition de l'Université de Bruxelles 2018), 598 f; Kahl (n. 44), para 16.

[48] Art. 191 (1) TFEU.

[49] Art. 191 (2) TFEU.

[50] Art. 191 (3) TFEU.

[51] In this regard see: Blaser (n. 22), 120 f, para 226; Epiney, (n. 46), para 6; Epiney, (n. 43), 171, para 32 f; Epiney (n. 41), 26 and 31.

[52] Blaser (n. 22), 120 f, para 226; Epiney (n. 43), 171 f., para 32.

[53] Blaser (n. 22), 120 f, para 226; Epiney (n. 43), 171 f., para 32; Käller (n. 27), para 15.

aim to eliminate' inequalities and 'promote' gender equality. Despite these various clauses, some scholars consider that the integration of the environmental dimension of sustainable development through art. 11 TFEU has priority as the above-mentioned integration clause make no direct reference to sustainable development.[54] In addition, they highlight that the formulation of art. 11 TFEU ('must') is more decisive than the other integration clauses.[55] In term of legal clarity, this proliferation of integration clauses with their different wording ('shall aim to meet' 'shall take into account' or 'must') also makes this process more complex and reduces the weight to be granted to any one type of interest.[56] In this regard, some scholars highlight that by trying to integrate all the concepts enshrined in these integration provisions, those might even lose clarity, sharpness and thus trigger a reversed integration process by favouring some over others such as environmental standards.[57]

Nonetheless, if a broader approach is taken, art. 7 TFEU is quite straightforward and calls on the EU to ensure consistency between its different policies by taking all of its objectives into account.[58] The EU has thus to align its policies with the objectives of art. 3 TEU and coordinate them in a coherent and consistent manner by ensuring that one policy goal does not take precedence over another.[59] Hence, even if sustainable development refers in the first place to environmental protection, the EU and the Member states have to implement its three dimensions – as stated in art. 3 par. 3 TEU – in a proportionate and balanced way through the EU objectives or the different integration clauses.[60] Integrating its environmental dimension as a priority is

[54] In this regard see: Ludwig Krämer, 'Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies' in: Suzanne Kingston (ed), *European perspectives on environmental law and governance* (Routledge 2013), 83 – 101, 88 and 91.

[55] Krämer (n. 54), 88; Owen McIntyre (n. 33), 137 f.

[56] Owen McIntyre (n. 33), 137.

[57] Jan Jans, 'Stop the Integration principle?' (2011) 33 Fordham Intl L J, 1533 – 1547, 1546 f; Owen McIntyre, (n. 33), 137 ff.

[58] See also art. 13 TEU on the consistency in the EU institutional framework.

[59] Wolff Heintschel von Heinegg, 'art. 7 AEUV' in: Christoph. Vedder and Wolff Heintschel von Heinegg (eds), *Europäisches Unionsrecht* (2nd edn, Dike 2018), 324 – 325, para 5.

[60] Epiney (n. 43), 172 and 176, paras 33 and 39.

therefore not conceivable.[61] The present study will nevertheless mainly focus on art. 11 TFEU and the integration of the environmental dimension of sustainable development into EU competition law.

III. Sustainable development and competition law

A. Development and confluence of policies

Since the enshrinement of sustainable development in the Amsterdam treaty, this concept has been then widely included in different EU policy developments.[62] The EU also played a major role in shaping the 17 UN SDGs adopted in 2015.[63] For the Commission, the SDGs must aim at keeping "[…] the EU focused on a sustainable growth path compatible with planetary boundaries, wellbeing, inclusion and equity".[64] The Commission thus presented an ambitious holistic implementation policy program of these SDGs.[65] They were distributed among six headline ambitions[66] – one being the European Green Deal[67], the EU new growth strategy focused on a modern, competitive, resource efficient and sustainable economy.[68] The Commission approach encompasses then several strands. A first implementation strand insists on better regulation and on ensuring policy coherence for integrating the three dimensions of sustainable development.[69] The most important strand aims at designing and effectively applying deeply transformative policies affecting all dimensions of the economy in order to

[61] Epiney (n. 43), 176, para 39.

[62] See in particular: Commission, 'A sustainable Europe for better world: A European strategy for Sustainable Development' (Communication) COM (2001) 264 final.

[63] Commission, 'Delivering on the UN's Sustainable Development Goals – A comprehensive approach' (Staff Working Document) SWD (2020) 400 final, 1.

[64] Commission, (n. 63), 2.

[65] Commission, (n. 63), 2.

[66] Commission, (n. 63), 2.

[67] Commission, 'The European Green Deal' (Communication) COM (2019) 640 final.

[68] Commission (n. 63), 4 f.

[69] Art. 7 TFEU; Commission (n. 63), 10 to 12.

value the social and environmental dimensions of sustainable development.[70] To achieve this objective, it is nonetheless essential to keep open and competitive markets in a well-functioning internal market as the Green Deal objectives and the SDGs will be reached "[…] in the most cost- and resources-efficient way".[71]

Environmental protection has thus progressively been linked to economic and market-based tools and this results in a certain confluence of competition and environmental policies.[72] Environmental considerations came however closer to competition law and it would be wrong to consider that competition law expanded widely.[73] As a matter of fact, as long that environmental law is ensured by administrative measures such as the large number of existing directives or regulations in this respect, competition law does not intervene.[74] Nevertheless, this marketisation of environmental policies has the benefitting of making it so that undertakings try to obtain more sustainable products for diverse reasons, ranging from shareholders or consumers preference to governmental pressure.[75] Undertakings could pursue this objective independently but might face the first-mover disadvantage or the free-rider concern.[76] Consequently, they might be more efficient on this aspect by acting together and targeting a large part of the market.[77] To this end, the Commission emphasises the importance of civil society, private sector and other stakeholders' engagement for achieving the SDGs.[78] Partnerships among private actors are

[70] Commission (n. 63), 4.

[71] See to this extent: art. 3 (1) (b) TFEU and protocol 27 TFEU; Commission, 'Identifying and addressing barriers to the Single Market' (Communication) COM (2020) 93 final; Commission (n. 63), 4.

[72] See: Commission, 'Green paper on market-based instruments for environment and related policy purposes' COM (2007) 140 final.

[73] Laurence Idot, 'Droit de la concurrence et protection de l'environnement – La relation doit-elle évoluer?', (2012) 3 Concurrences, 1 – 14, 2, para 4 f.

[74] Idot, (n. 73), 2, para 4.

[75] Grant Murray, 'Antitrust and sustainability: globally warming to be a hot topic?', (*Kluwer Competition Law Blog*, 18 October 2019), < http://competitionlawblog.kluwercompetitionlaw.com/2019/10/18/antitrust-and-sustainability-globally-warming-up-to-be-a-hot-topic/?print=print> accessed 20 September 2021.

[76] Murray (n. 75)

[77] Murray (n. 75)

[78] European Commission (n. 63), 17 f.

therefore integral in the SDGs implementation and essential for having progress on the long term.[79] This must however not hinder the fact that some undertakings would put the sustainable development argument forward in order to hide greenwashing activities establishing cartels.[80] In this case, their behaviours must logically be punished accordingly.[81]

For these reasons, DG Competition published a call for contributions on how competition rules and sustainability can best work together. It aims at assessing if the antitrust rules and remedies of art. 101 TFEU are still fit for realising the Green Deal objectives and the SDGs.[82] The Commission published a policy brief on this subject on 14 September 2021 which highlights the points raised by the SHOs and its propositions in this respect.[83] The following sub-sections will therefore analyse the issues and proposals raised in order to determine whether the antitrust rules allow for the integration of the environmental dimension of sustainable development in accordance with art. 11 TFEU.

B. Economic considerations and art. 11 TFEU

1. Economic objectives of competition law.

In order to best assess the intertwining of sustainable development in competition policy, it is necessary to highlight the primary economic objectives of the latter. Competition policy is part of the EU economic policy.[84] It pursues economic goals in line with the realisation of an internal market and the adoption of the Rome Treaty that established the European Economic

[79] Commission (n. 63), 17.

[80] Idot (n. 73), 4, para. 13.

[81] See: *Consumer Detergents* (Case COMP/39579) Commission Decision [2011], OJ C193/14.

[82] Commission (n. 63), 4, footnote 12. 189 stakeholders have provided non confidential contributions available at: <https://ec.europa.eu/competition/information/green_deal/contributions.zip> accessed 1 March 2021.

[83] Commission, 'Competition Policy in Support of Europe's Green Ambition' (*Competition Policy Brief*, 14 September 2021) <https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF> last accessed 23 September 2021.

[84] See: art. 119 and 120 TFEU.

Community.[85] Its conduct is ensured by specialised and independent authorities such as the EU Commission through DG Competition or national authorities at the level of the Member States. These authorities apply competition law in order to regulate competition and ensure its well-functioning.[86] Without competition law, the latter would be distorted or eliminated by the behaviour of certain economic players or the structure of certain markets.[87] EU competition law stricto sensu encompasses three pillars. These are the antitrust rules of art. 101 (1) TFEU and their exemption conditions in art. 101 (3) TFEU; the art. 102 TFEU rules on abuses of dominant position and Regulation 139/2004[88] on the concentrations of undertakings. Aside from the ordoliberal concept of commercial loyalty in competition that can still be found in the prohibition of abuses of a dominant position[89] and the Harvard school structuralist approach which ensures that a wide number of actors are active on a market[90], the Chicago school placed the economic efficiency objective as the ultimate goal of antitrust.[91] For this school, non-economic goals remain outside competition policy.[92]

Economic efficiency is generally defined under three aspects: allocative efficiency so that consumers can obtain the goods they wish at the price they are ready to pay; productive efficiency so that goods are produced at the lowest possible cost and dynamic efficiency as a

[85] Nicolas Petit, *Droit européen de la concurrence*, (3rd edn, LGDJ 2020), 77, para. 119; Richard Wish and David Bailey, *Competition Law*, (9th edn, Oxford University Press 2018), 23.

[86] Vincent Martenet and Andreas Heinemann, *Droit de la concurrence*, (2nd edn, Schulthess 2021), 49.

[87] Protocol 27 TFEU; Martenet and Heinemann (n. 86), 1 f.

[88] Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

[89] 4th Recital Rome Treaty; *AstraZeneca* (Case COMP/A 37.507/F3) Commission Decision 2006/857/EC [2005] OJ L 332/24; Case C-457/10 P *AstraZeneca* [2012] EU:C:2012:770; Petit (n. 85), 78, para 121.

[90] See: Case C-95/04 P *British Airways* [2007] EU:C:2007:166, para 106; Joint Cases C-501/06 P, C-513/06 P, C-515/06 P *GlaxoSmithKline* [2009] EU:C:2009:610 para 63; Petit (n. 85), 80, para 126.

[91] Petit (n. 85), 83, para. 131.

[92] Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012), 25.

firm innovates and creates new markets.[93] When a firm is efficient, the total welfare – which is the sum of the consumer and producer welfare – grows.[94] Each welfare is based on the concept of surplus, i.e. the difference between the price at which producers sell their products and the minimum price at which they are willing to sell them. For the consumers, this is the difference between the maximum price they are willing to pay and the price they pay. By focusing on certain European Court of Justice (ECJ) precedents, it can be seen that the economic efficiency concept had some influence on EU competition law and plays today a significant role therein.[95] This is also the case when the EU Commission asserts that non-economic goals cannot be relevant in examining exemptions grounds of art. 101 (3) TFEU.[96] Nonetheless, contrary to the Chicago school total welfare approach, EU competition law specifically focuses on consumer welfare and contains therefore certain equity or distributive aspects by ensuring that the consumers are favoured.[97] In addition, consumer welfare under EU law goes beyond the short-term price effect and is understood in a broad and non-technical sense.[98] Consumers indeed look for low prices but also for high-quality products, a wide selection of goods or services and await innovation.[99]

[93] For a complete analysis see: Joseph Deiss and Philippe Gugler, 'Les aspects économiques du droit suisse de la concurrence' in: Vincent Martenet, Christiant Bovet and Pierre Tercier (eds), *Commentaire romand: Droit de la concurrence*, (2nd edn, Helbing Lichtenhahn 2013), 87 – 89, paras 14 to 16.

[94] Petit (n. 85), 83, para. 132.

[95] Case C-209/210 *Post Danmark A/S* [2012] EU:C:2012 :172, para 21 f; Case C-413/14 P *Intel Corp* [2017] EU:C:2017:632, para 133 f; Giorgio Monti, *EC competition law*, (Cambridge University Press 2008), 21.

[96] Commission, 'Guidelines on the application of article 81 (3) of the Treaty', OJ 2004 C 101/97, paras 50, 56, 57 and 59 (Art. 101 (3) TFEU Guidelines).

[97] Kingston (n. 92), 28; Petit, (n. 85), 87, para 139; Roger van den Bergh and Peter Camesasca, *European Competition Law and Economics: A Comparative perspective* (2nd edn, Sweet & Maxwell 2006), 37 and 41.

[98] Kingston (n. 92), 173.

[99] Art. 101 (3) TFEU Guidelines (n. 96), footnote 84.

2. Environmental requirements in competition law

Art. 11 TFEU provides that the environmental dimension of sustainable development must be integrated into EU policies. As for other policies, art. 11 TFEU applies to competition policy.[100] In line with the Commission considerations and questionings, the following sub-section will focus on how environmental requirements contained in agreements between undertakings can be integrated in the antitrust rules of art. 101 TFEU.[101] However, it is necessary to take first a broader view and discuss how such requirements can generally be integrated in competition provisions. A first method would be to consider that art. 11 TFEU is normatively superior to the competition provisions.[102] On the one hand, this could allow the justification of anticompetitive behaviours if they permit protection of the environment.[103] On the other hand, a behaviour reducing costs and increasing efficiency could be prohibited if it came to have adverse effects on the environment.[104] Such a strong integration would be inconsistent – and thus possibly contrary to art. 7 TFEU which insists on consistency between the Union policies – because the correct application of competition law would be hampered by forbidding behaviours that do not restrict competition. Thus, another way of interpretation would be to prevent conflicts between environmental policy and competition policy or to integrate both in a balancing exercise.[105] Consequently, if there is on the one hand a behaviour that does not restrict competition while damaging the environment, art. 11 TFEU does not apply.[106] Indeed, this provision cannot favour a contra legem solution.[107] On the other hand,

[100] Simon Holmes, 'Climate change, sustainability, and competition law' (2020) 8 J of Antitrust Enforcement, 354 – 405, 361; Sander R.W. van Hess (n. 3), 66.

[101] For a brief and complete overview on the other two pillars and the integration of environmental requirements see: Holmes (n. 100).

[102] Monti (n. 95), 93 f.

[103] Monti (n. 95), 94.

[104] Monti (n. 95) 94.

[105] Holmes (n. 100), 366.

[106] Kingston (n. 92), 116.

[107] Kingston (n. 92), 116; See also on this idea: Case C-105/03 *Pupino* [2005] EU:C:2005:386, para 47.

there are no particular problems if a given behaviour does not restrict competition while allowing to protect the environment.[108] However, where competition is restricted in order to achieve some EU environmental policy goals, this will be allowed as long as the concerned restriction is proportionate by being appropriate and no more restrictive than necessary.[109] In accordance with these integration approaches, three possible routes can therefore be mainly identified for integrating environmental requirements in art. 101 TFEU.[110] The environmental agreements between undertakings that do not restrict competition while favouring environmental protection; and two routes stemming from the proportionality principle: the ancillary restraints/objective necessity route and the exemption route of art. 101 (3) TFEU.

C. Environmental requirements in art. 101 TFEU

1. Agreements that do not restrict competition

The assessment of environmental issues in the analysis of agreements between undertakings is not new. In its 2001 Horizontal Guidelines on the application of art. 101 (1) TFEU, the Commission defined an environmental agreement as mean "[…] by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set out in Article [191 TFEU]".[111] The 2001 Horizontal Guidelines identified three situations in which environmental agreements would not restrict competition:

- if the agreement does not place individual obligations on the parties or if they commit loosely to contribute to a wide sectorial environmental objective or;

[108] Kingston (n. 92), 117.

[109] Kingston (n. 92), 117.

[110] See: Holmes (n. 100); Kingston (n. 92).

[111] Commission, 'Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements' OJ 2001 C 3/2, para. 179 (2001 Horizonal Guidelines).

- if the environmental performance of the agreement does not have an effect on product or production diversity or;
- if the agreement leads to the creation of a new market.[112]

There are then several decisions on undertakings cooperation that were considered as not restricting competition and that thus fell outside the scope of art. 101 (1) TFEU.[113] The current 2011 Horizontal Guidelines do not encompass a part dedicated to environmental agreements as this was incorporated and specifically replaced by a paragraph in the standardisation section.[114] However, the Commission notes that the removal of the environmental agreement in the latter does "[…] not imply any downgrading in the assessment of environmental agreements".[115] The 2001 Horizontal Guidelines might therefore remain useful for interpreting the current 2011 Horizontal Guidelines on environmental concerns.[116] Nevertheless, in order to ensure the possible application of the three above-mentioned situations, the latter should be explicitly stated in the current 2011 Horizontal Guidelines. In this respect, the Commission indicated in its September policy brief its intention to revise these Guidelines.[117]

2. The ancillary restraints or objective necessity route

Over the years, a line of cases developed a certain rule of reason by considering that several agreements would fall outside the scope of art. 101 (1) TFEU if the restrictions to competition were objectively justified and proportionate.[118] An interesting focus can be put on

[112] 2001 Horizontal Guidelines, (n. 111), paras 184 to 187.

[113] See: Commission, 'XXVIII Report on Competition Policy' (1999), 56, para 131; *Eco-Emballages* (Case COMP/34.950) Commission Decision 2001/663/EC [2001] OJ 2001 L 233/37.

[114] Commission, 'Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements' OJ 2011 C 11/1, para 329 (2011 Horizontal Guidelines); Giorgio Monti, 'Four options for a Greener Competition law' (2020) 11 J of Eur Competition L. & Practice, 124 – 132, at 125.

[115] Commission, 'Competition: Commission adopts revise competition rules on horizontal co-operation agreements' MEMO/10/676; See also: 2011 Horizontal Guidelines (n. 114), para 18, footnote 1.

[116] Holmes (n. 100), 369.

[117] Commission (n. 83), 5.

[118] Case C-67/96 *Albany* [1999] EU:C:1999:430; Case C-309/99 *Wouters* [2002] EU:C:2002:98; Case C-519/04 P *Meca-Medina* [2006] EU:C:2006:492; Kingston (n. 92), 233.

the *Albany* case. In its reasoning, the ECJ emphasised that collective bargaining does inherently restrict competition.[119] However, the Court stressed that these social policy objectives would be seriously undermined if they were subject to art. 101 (1) TFEU.[120] Consequently, following a holistic, effective and consistent interpretation of the treaty provisions, the Court considered that collective bargaining fell outside of the scope of art. 101 (1) TFEU by virtue of their nature and social purpose.[121] In the *Wouters* case, the ECJ decided that the restrictions of competition – such as a ban on multi-disciplinary partnership – were necessary to ensure the proper practice of legal professions and did thus not come under the scope of art. 101 (1) TFEU.[122] This would allow the sound administration of justice and ensure the fundamental principles of independence and professional secrecy for lawyers.[123] It is then legitimate to wonder if this route could also apply to environmental agreements.[124] In the *Albany* judgment, the ECJ reasoning remains in line with art. 3 TEU, 7 TFEU and especially 9 TFEU which states that social protection policy – that is a dimension of sustainable development – is taken into account in other policies. In contrast, according to art. 11 TFEU environmental requirements must be integrated in other EU policies. The art. 9 TFEU formulation is therefore weaker than the art. 11 TFEU obligation.[125] As previously mentioned, some scholars note that these different wording of the integration clauses may raise some questions of interpretation. Consequently, if this integration route is open to the social dimension of sustainable development with this weaker formulation, there would be no manifest valid reason why it would be closed to environmental requirements. This method would allow the reconciliation of art. 11 TFEU and art. 101 TFEU and therefore be in line with this integration route.

[119] Case C-67/96 *Albany* (n. 118), para 59.

[120] Case C-67/96 *Albany* (n. 118), para 59.

[121] Case C-67/96 *Albany* (n. 118), para 60.

[122] Case C-309/99 *Wouters* (n. 118), para 109 f.

[123] Case C-309/99 *Wouters* (n. 118), paras 97 to 102.

[124] Holmes (n. 100), 371; Kingston (n. 92), 236.

[125] Robert Rebhahn, 'Artikel 9 AEUV' in: Jürgen Schwarze et al. (eds), *EU-Kommentar* (4th edn, Helbing Lichtenhahn 2019), 465 – 468, para 3.

However, this approach brings up some significant comments. Firstly, it goes against the systematic and wording of the competition provisions by eluding the exemption conditions set in art. 101 (3) TFEU.[126] The art. 101 (3) TFEU assessment is indeed specific to competition as for being exempted a restrictive agreement must respect four cumulative conditions.[127] In this regard, the ECJ might have applied this ancillary doctrine to social policy or to regulations of the Dutch bar because – as it will be discussed further – these considerations would hardly subsume into the stringent conditions of art. 101 (3) TFEU.[128] Secondly, this route could be problematic as the authorities would have a certain political discretion in selecting which public interest would allow to consider the restrictions of competition as being ancillary or necessary.[129] This route is however close to the *Cassis de Dijon*[130] overriding exemptions mechanism which has been effective for a long time in the shaping of the internal market four freedoms. Such proportionate and non-discriminatory case law based justifications are not provided by the treaty[131] but allow to maintain a policy that restricts the free movement provisions.[132] In this field, the ECJ did expressly consider that environmental policies could be a legitimate ground to restrict the free movement of goods.[133] However, the Court was not always consistent in its reasoning as – contrary to its decision in *Albany*[134] – it considered in the *Laval* and *Viking* cases that trade unions and collective actions rights would not be admissible and unlawfully restricted

[126] Kingston (n. 92), 241.

[127] Kingston (n. 92), 241.

[128] In this sense see: Julian Nowag, 'Competition Law's Sustainability Gap? Tools for an Examination and a Brief Overview' (*Lund University Legal Research Paper Series*, 21 November 2019), 8, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3484964> accessed 1 March 2021.

[129] Heike Schweitzer, 'Competition Law and Public Policy: Reconsidering an Uneasy Relationship: The Example of Art. 81', (*European University Institute Working Papers*, 2007), 5, < https://cadmus.eui.eu/bitstream/handle/1814/7623/LAW-2007-30.pdf?sequence=3&isAllowed=y> accessed 1 March 2021.

[130] Case 120/78 *Rewe-Zentral AG* [1979] EU:C:1979:42.

[131] See: art. 36 TFEU.

[132] Case 120/78 *Rewe-Zentral AG* (n. 130), para 8; Kingston, (n. 92), 238.

[133] Case C-2/90 *Walloon Waste* [1992] EU:C:1992:310, para 32.

[134] See to this extent in particular: Ioannis Lianos, 'Some Reflections on the Questions of the Goals of EU Competition Law' in: Ioannis Lianos, (*CLES Working Paper Series*, January 2013), 49 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875> accessed 1 March 2021.

the freedom of establishment or to provide services.[135] Thirdly, the competition cases that beneficiated from this ancillary route all had a certain connection with the State.[136] This is also true for the internal market exemptions as the ECJ assesses a state restriction.[137] For this reason also, the ECJ might have favoured this way in *Albany* or *Wouters*. Nevertheless, art. 101 (3) TFEU is broader as it is available for all measures.[138] In sum, this ancillary doctrine or objective necessity route still lacks clarity and consistency. If it were better shaped and defined it might be an interesting path to integrate environmental requirements in competition law.

3. The exemption route

For an agreement being exempted on the basis of art. 101 (3) TFEU, the Commission assesses if its pro-competitive effects outweigh its anticompetitive effects in order to be favoured by consumers and increase their welfare.[139] Art. 101 (3) TFEU contains four cumulative conditions. Each of them will be studied below to see to what extent an environmental agreement can meet them. It should nevertheless be noted that a restrictive environmental agreement can also obviously be exempted on the basis of different block exemptions such has the Vertical Block Exemption Regulation if the said agreement fulfil their requirements.[140] In addition, it must be highlighted that art. 101 (3) TFEU puts the burden of proof on the undertakings that must substantiate the claimed efficiencies contrary to the assessment of the restriction performed under 101 (1) TFEU which puts such a burden on the authorities.[141]

[135] Case C-341/05 *Laval* [2007] EU:C:2007:809; Case C-438/05 *Viking* [2007] EU:C:2007:772.

[136] Nowag (n. 128), 8.

[137] See: Case 8/74 *Dassonvile*, [1974] EU:C:1974:82, para 5.

[138] Nowag, (n. 128), 8.

[139] Art. 101 (3) TFEU Commission Guidelines, (n. 96), paras 11 and 33; Kingston (n. 92), 262 f.

[140] Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of art. 101 (3) TFEU to categories of vertical agreements and concerted practices [2010] OJ L 102/1.

[141] Art. 101 (3) TFEU Commission Guidelines (n. 96), paras 50, 51, 56 f.

a) Improvement of the production or distribution of goods or promotion of technical or economic progress. Under this first condition, the pro-competitive effects or efficiencies stemming from an agreement have to create additional value by lowering the production costs, improving the quality of a product or creating a new one.[142] The Commission considers that the alleged efficiencies must offer objective economic benefits or have a positive economic effect.[143] This economic approach is in line with the Commission's most recent review of its Guidelines on art. 101 and 102 TFEU.[144] At that point, the Commission emphasised that the role of art. 101 (3) TFEU was to provide a legal framework for an economic assessment of restrictive practices and to avoid a situation where competition rules would be set aside because of political considerations.[145] Therefore, efficiencies stemming from a restrictive agreement can be qualitative – non-price-based with regard to the quality of the products – or cost efficient – price reduction or economy of scales.[146] To this end, cost efficiencies have to be calculated or estimated as reasonably as possible.[147] For qualitative efficiencies, they must be described and should explain in detail how and why they constitute an objective economic benefit.[148]

In line with the Chicago doctrine, the Commission therefore tends to exclude non-economic benefits from the efficiency concept. It thus has to be determined if and how environmental benefits can be translated into economic ones. In this regard, the previous 2001 Horizontal Guidelines expressly allowed for environmental benefits in themselves to be taken into account, provided that they could be economically valued and outweigh the costs of the

[142] Art. 101 (3) TFEU Commission Guidelines (n. 96), para 33.

[143] Art. 101 (3) TFEU Commission Guidelines (n. 96), paras 33, 57 and 59.

[144] Commission, 'White Paper on the Modernisation of the Rules implementing Articles 85 and 86 EC Treaty' OJ 1999 C 132/1.

[145] Commission (n. 144), para 57; See: 2011 Horizontal Guidelines (n. 114), para 48 f; Commission, 'Guidelines on Vertical Restraints' OJ 2010 C 130/1, para 122.

[146] Art. 101 (3) TFEU Commission Guidelines (n. 96), paras 55 to 57.

[147] Art. 101 (3) TFEU Commission Guidelines, (n. 96), para 56.

[148] Art. 101 (3) TFEU Commission Guidelines, (n. 96), para 57.

restriction.[149] This view of the Commission was encouraging as it aimed at placing a value on and internalising environmental costs and gains. It also included in its assessment the art. 191 (3) TFEU demand for a cost-benefit analysis of an action or lack thereof in the environmental field.[150] These environmental economic benefits could be generated at individual consumer or at aggregate level.[151] If the consumers could individually have a positive rate of return under reasonable periods because of the agreement, there was no need to objectively establish the aggregate environmental gains.[152] In other cases, a cost-benefit analysis was necessary in order to assess if the environmental benefits for the consumers were likely.[153] To this extent, the *CECED* decision is a perfect example. The Commission exempted an agreement between producers and importers of washing machines which represented 95 % of the EU market shares.[154] This agreement encouraged the manufacturing of energy efficient machines and prevented its parties to produce or import a certain range of inefficient washing machines.[155] To this end, it established a minimum efficiency standard.[156] As a result, this agreement was considered restrictive of competition and increased the prices up to 14%.[157] However, the Commission emphasised that the individual benefits with energy consumption reduction and especially the collective environmental benefits outweighed the costs.[158] This because the external costs of reducing greenhouse gases emissions were seven times higher than the price increase of more efficient washing machines.[159] Consequently, the Commission statement that

[149] 2001 Horizontal Guidelines (n. 111), para 193; European Commission, 'XXV Report on Competition Policy', (1996), 40, para 85.

[150] Kingston (n. 92), 269; 2001 Horizontal Guidelines (n. 111), footnote 55.

[151] 2001 Horizontal Guidelines (n. 111), para 194.

[152] 2001 Horizontal Guidelines (n. 111), para 194.

[153] 2001 Horizontal Guidelines (n. 111), para 194.

[154] *CECED* (Case IV.F.1/36.718) Commission Decision 2000/475/EC [1999] OJ 2000 L 187/47, para 24.

[155] Commission, *CECED* (n. 154), para 37.

[156] Commission, *CECED* (n. 154), para 47 f.

[157] Commission, *CECED* (n. 154), para 16.

[158] Commission, *CECED* (n. 154), paras 52 to 57.

[159] Commission, *CECED* (n. 154), paras 52 to 57.

the removal of environmental considerations from its 2011 Horizontal Guidelines did not aim at any downgrading of environmental considerations would hold as long as environmental benefits can be economically valued.[160] These environmental prices allow the possibility to reflect the true costs of a product as assessed in the *CECED* decision. Moreover, this is in line with the Commission general consideration that other provisions of the treaty – such as art. 191 TFEU – can be taken into account as long as they can be subsumed in the conditions of art. 101 (3) TFEU.[161] More broadly, this approach allows the reconciliation of the need of objective economic benefits while promoting environmental protection. It would then meet the requirements of art. 11 TFEU and art. 101 (3) TFEU. In addition, it would ensure that the objectives of the Green Deal are fulfilled vis-à-vis both cost and resources efficiencies.

Nevertheless, there are some environmental benefits which are more remote and for which it is difficult to ascertain an economic value.[162] In the case *Chicken of Tomorrow*[163], the Dutch competition authority tried to economically value an agreement restrictive of competition that aimed at making the breeding conditions for chickens more environmentally friendly. This national authority used the willingness to pay method by evaluating how much value the consumers would put on 'greener' chickens. As the price that the consumers were ready to pay was lower than the chicken price increase caused by the agreement, the Dutch authority refused the exemption on the base of the Dutch provision equivalent to art. 101 (3) TFEU.[164] This method is close to measuring the consumer surplus. It also has merit to directly take non-economic benefits into account for the consumers.[165] It is however doubtful if this subjective approach is most appropriate to properly integrate and quantify environmental requirements in

[160] See*:* Kingston (n. 92), 274.

[161] Art. 101 (3) TFEU Guidelines (n. 96), para 42; Case T-17/93 *Matra* [1994] EU:T:1994:89, para. 139.

[162] Murray (n. 75)

[163] *Chicken of tomorrow* (Case 13.0195.66) Autoriteit Consument & Markt Decision [2015].

[164] Ioannis Lianos, 'Polycentric Competition Law' (2018) 71 Current L Problems, 161 – 213, 191.

[165] Rutger Claassen and Anna Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach', (2016) 12 Utrecht L R, 1 – 15, 3.

art. 101 (3) TFEU given the existing social disparities among a given group of consumers.[166] A broader approach might be to look at the facts, benefits and issues and apply art. 101 (3) TFEU accordingly.[167] In the latter, economic progress is indeed only one of the four possibilities in which an agreement can meet the first condition.[168] There might not be the need to translate all improvements into economic terms and have narrow financial considerations.[169] In any case, the current economic approach of the Commission is not in line with some ECJ precedents and decisions of the Commission itself in which non-economic factors (including environmental benefits) were considered.[170] In addition, the Commission itself generally emphasised already in 1996 that when facing environmental agreements, it would weigh up the restrictions to competition against the environmental objectives of the agreement and apply the proportionality principle accordingly.[171] It indeed stated that "[…] improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress".[172] In any case, the Commission raised the need to clarify the extent to which environmental benefits can be assessed as qualitative efficiencies in its last September policy brief.[173]

[166] See: Holmes (n. 100), 379 f.

[167] Holmes (n. 100), 373.

[168] Holmes (n. 100), 372.

[169] Holmes (n. 100), 372.

[170] See: Case 75/84 *Metro II* [1986] EU:C:1986:399, para 65; *Exxon/Shell* (Case IV/33.640) Commission Decision 94/322/EC [1994] OJ 1994 L 144/20, para 67 f; *Philips/Osram* (Case IV/34.252) Commission Decision 94/986/EC [1994] OJ 1994 L 378/37, para 25; Joint Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole* [1996] EU:T:1996:99, para 118; *DSD* (Cases COMP/37366 et al.) Commission Decision 2001/837/EC [2001], OJ 2001 L 319/1, para 143.

[171] Commission (n. 149), para 85.

[172] Commission (n. 149), para 85.

[173] Commission (n. 83), 5 f.

b) Consumers are allowed a fair share of the resulting benefit

i) Consumers. For the Commission, the consumer concept encompasses all direct or indirect users of the products covered by the agreement.[174] The consumers are thus the customers of the parties to the agreement and the subsequent purchasers.[175] For the Commission, the efficiencies stemming from a restrictive agreement must be made in the relevant markets to which the agreement relates.[176] Therefore, negative effects on consumers in one geographic or product market cannot be balanced by positive effects for consumers in another geographic or product market.[177] Nevertheless, the Commission admits that if two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of beneficiaries and affected consumers remain substantially the same.[178] The Commission also maintained this approach in its September policy brief.[179] The latter can be summarised with the example – close to the *CECED* case – that it uses in its 2011 Horizontal Guidelines. It focuses first on the benefits that are passed on to the consumers on the relevant market i.e., the buyers of the washing-machines.[180] These consumers would see their costs reduced despite the price increase of the machines because their electricity, soap and water consumption costs would be lower.[181] Even if these costs reductions happen on different markets, the Commission considers them because the affected consumers are substantially the same.[182] However –contrary to the broad

[174] Art. 101 (3) TFEU Guidelines (n. 96), para 84.
[175] Art. 101 (3) TFEU Guidelines (n. 96), para 84.
[176] Art. 101 (3) TFEU Guidelines (n. 96), para 43.
[177] Art. 101 (3) TFEU Guidelines (n. 96), para 43.
[178] Art. 101 (3) TFEU Guidelines (n. 96), para 43.
[179] Commission (n. 83), 6.
[180] 2011 Horizontal Guidelines (n. 114), para 329.
[181] 2011 Horizontal Guidelines (n. 114), para 329.
[182] 2011 Horizontal Guidelines (n. 114), para 329; To this extent see: *Star Alliance* (Case AT.39595) Commission Decision [2013] OJ C 201/13, 17, paras 58 and n. 43.

approach held in its *CECED* decision – there is no mention of the environmental benefits that would pass on to society as a whole.[183]

This narrow reasoning is not in line with several ECJ precedents. In *Compagnie Générale Maritime*, the Court emphasised that in assessing the efficiencies of an agreement under art. 101 (3) TFEU, regard should not be given specifically to the relevant market but also to every other market on which the agreement in question might have beneficial effects.[184] In its approach, it seems that the Commission mainly tries to ensure that the net effect of the agreement remains neutral from the point of view of the consumers directly or likely affected.[185] This might be based on certain equity grounds to avoid some consumers paying for the benefits of others.[186] Nonetheless, environmental agreements benefits have a wide scope and encompass the entire society and not only the directly affected consumers. In *CECED*, the Commission did consider the environmental benefits for society as a whole and therefore had a broader approach. Interestingly, in the *Chicken of Tomorrow* case, the Dutch government called for considering the benefits for society as a whole in the assessment of such efficiencies instead of using the narrow willingness to pay method.[187] Nonetheless, the Commission intervened and stated that if certain policy goals are valuable for society as a whole but not by the consumers in the relevant market, regulation was the right tool but not competition law.[188] In order to better assess environmental agreements, the Dutch Competition Authority drafted sustainability Guidelines which propose to

[183] 2011 Horizontal Guidelines (n. 114), para 329.

[184] Case T-86/95 *Compagnie générale maritime* [2002] EU:T:2002:50, para 343; See also: Case C-67/13 P *Groupement des cartes bancaires* [2014] EU:C:2014:2204, para 78; Case T-111/08 *MasterCard* [2012] EU:T:2012:260, para 228.

[185] Art. 101 (3) TFEU Guidelines (n. 96), para 85; Murray (n. 75).

[186] Murray (n. 75).

[187] Lianos (n. 164), 191.

[188] Lianos (n. 164), 191; On the role of legislation in the Commission's September 2021 policy brief see: Commission (n. 83), 6.

distinguish between environmental damage agreements from other sustainability agreements.[189] In the former agreements, the undertakings aim at improving their production process reducing harm to environment.[190] Undertakings would, for instance, try to reduce their CO2 emissions and thus support the implementation of public environmental policy. In this situation, it would be possible to take into account benefits for consumers that are not in the relevant market.[191] This is because it is the consumers of the concerned products that create the environmental damage for which a solution is needed.[192] Nonetheless, in other sustainability agreements – which would e.g. increase the sustainability of a product or considering animal welfare – the focus would remain on the consumers in the relevant market.[193]

The Commission's narrow approach is all the more curious if the focus is put on the 101 (3) TFEU Guidelines. Indeed, the latter still have consideration for the whole of society as it is an acknowledged beneficiary – in addition to consumers – of an agreement which has an overall positive effect.[194] The efficiencies of an agreement indeed lead to fewer resources being used to produce the output consumed, to the production of more valuable products and thus to a more efficient allocation of resources.[195] The Commission nonetheless happily considers that future consumers can be taken into account in the assessment.[196] This is obviously crucial for environmental benefits as they might appear on a certain time scale.[197] Moreover, the need to consider future generations is central for the scope of sustainable development. Finally, the issue

[189] Autoriteit Consument & Markt, 'Guidelines – Sustainability agreement – Opportunities within competition law', (2021), 12, paras 40 to 43 <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf> accessed 20 September 2021.

[190] Autoriteit Consument & Markt (n. 189), 12, para 39.

[191] Autoriteit Consument & Markt (n. 189), 12, para 40 f.

[192] Autoriteit Consument & Markt (n. 189), 12, para 41.

[193] Autoriteit Consument & Markt (n. 189), 12 f., paras 39 and 43.

[194] Art. 101 (3) TFEU Guidelines (n. 96), para 85.

[195] Art. 101 (3) TFEU Guidelines (n. 96), para 85.

[196] Art. 101 (3) TFEU Guidelines (n. 96), para 87; Kingston (n. 92), 278.

[197] Murray (n. 75).

of considering consumers outside the EU is still undecided.[198] This can have some significance as environmental benefits will not be limited to the EU. To this end, art. 3 (5) and 21 TEU on the EU external action are worth mentioning. These provisions call upon the EU to foster the sustainable development of the Earth in its three dimensions especially in developing countries. Moreover, several national courts decided that their state had to ensure that its activities do not damage the environment outside of its jurisdiction.[199]

ii) Fair share of the resulting benefits. In assessing this condition, the Commission does not limit itself in considering that the consumers must benefit from a fair price.[200] This reasoning is in line with the consideration that for EU competition law consumer welfare is a broader concept than pure Chicago price effects considerations. For example, in its *DSD* decision, the Commission acknowledges that consumers benefit from lower prices due to more efficient collection of waste for recycling.[201] However, it adds that they thus benefit from a healthier environment which is one of the goals of the treaties.[202] The Commission nevertheless considers that assessing if qualitative efficiencies are passed on to consumers is vague and require value judgments as it is difficult to assign precise value to these efficiencies.[203] Consequently, the evaluation of a fair share to consumers is in this case closely related to the previous developments of the first condition of art. 101 (3) TFEU on the quantification of non-economic environmental benefits. It is worth mentioning that some alternative methods propose to broaden the consumer welfare concept in order to better include non-economic efficiencies in

[198] Holmes (n. 100), 378; Kingston (n. 92), 278.

[199] Supreme Court of the Netherlands, 'Dutch State to reduce greenhouse gas emissions by 25% by the end of 2020' (2019) <https://www.hogeraad.nl/actueel/nieuwsoverzicht/2019/december/dutch-state-case-reduce-greenhouse-gas-emissions/> accessed 1 March 2021.

[200] Holmes (n. 100), 378 f.

[201] *DSD* (n. 170), para. 148; For environmental efficiencies passed on to consumers aside economic ones see also: *Exxon/Shell* (n. 170), para 71; *Philips/Osram* (n. 170), para 27.

[202] *DSD*, (n. 170), para 148.

[203] Art. 101 (3) Guidelines (n. 96), para 103.

competition law analyses and to better assess if a fair share is passed on to consumers. For example, the capability approach considers that individuals all have capabilities to function.[204] Therefore, certain capabilities – ranging from the capacity for undertakings to conclude agreements, the consumer to access their basic needs and the effects of a restrictive agreement on third parties – are taken into account and weighed in order to determine if consumers are fairly favoured.[205]

Finally, in the *CECED* case the Commission surprisingly considered that consumers would have received a fair share even if no benefits would have accrued to individual purchasers of washing machines.[206] Emissions reductions to society as a whole were indeed sufficient.[207] This possibility of not fully compensating the consumers in the relevant market – which are responsible for the environmental damage – and taking into account the benefits for the whole of society also stems from the Dutch sustainability guidelines in environmental damage agreements. Nonetheless, in other sustainability agreements the consumers in the relevant market must still be fully compensated for the harm they suffer.[208]

c) Restrictions indispensable to the attainment of the objectives. The third pitfall is the expression of the proportionality principle which is an important condition for integrating environmental requirements in competition law.[209] Proving that scientific environmental benefits could not be achieved by alternative means can however seem like a large hurdle.[210] Nevertheless, theoretical and hypothetical means are considered.[211] In *CECED*, no other means than building more efficient washing machines could achieve the reduction of energy

[204] For a complete explanation of this approach: Claassen and Gerbrandy (n. 165), 4.
[205] Claassen and Gerbrandy (n. 165), 5 f. and 12 f.
[206] *CECED* (n. 154), para 56.
[207] *CECED* (n. 154), para 56.
[208] Autoriteit Consument & Markt, (n. 189), 13, para 43.
[209] Kingston (n. 92), 280.
[210] Kingston (n. 92), 281.
[211] Kingston (n. 92), 281 f.

consumption.[212] In other cases, this condition was often not fulfilled because the alleged environmental benefits had no connection with the agreement at stake, established a fix restrictive fee or were a pretext brought to establish entry barriers to the market.[213] In the *Chicken of Tomorrow* case, the Dutch authority considered that providing information to the consumers about animal welfare by creating a label at a lower cost could have been a less restrictive measure.[214] As standardisation agreements are quite loose and ambiguous[215], it remains to be seen whether labelling is appropriate for effectively integrating environmental requirements in competition law. This third condition nevertheless undoubtedly invites to find less restrictive methods to achieving environmental goals[216] in accordance with the Green Deal objectives. For example, in line with the idea of fair trade, one could think of a system no more restrictive than necessary allowing to determine a fair price to be paid to suppliers for their products without going towards price fixing.[217] In any case, contrary to the specific problems identified in the two previous conditions, this one is standard to all agreements and should not cause specific issues to environmental agreements. Furthermore, the Commission sometimes requested several commitments for proportionality to be respected regarding environmental objectives.[218]

[212] *CECED*, (n. 154), paras 58 to 63.

[213] *Navewa Anseau* (Case IV/29.995) Commission Decision 82/371/EEC [1981] OJ 1982 L 167/39; *ANSAC* (Case IV/33.016) Commission Decision 91/301/EEC [1990] OJ 1999 L 152/54; Commission, 'XXII Report on Competition Policy' (1993), para 177 ff.

[214] Lianos (n. 164), 191.

[215] 2011 Horizontal Guidelines (n. 114), para 280.

[216] Holmes (n. 100), 381.

[217] Holmes (n. 100), 381.

[218] See: *DSD* (n. 170), para 157.

d) No elimination of competition. This final condition aims at protecting the competitive process.[219] Generally speaking, this requirement is rarely going to prevent the exemption of an environmental agreement.[220] In *CECED*, the parties to the agreement held 95% of the market but had sufficient means to compete within the framework of this agreement in order to be the most energy efficient producer.[221] Competition was thus not eliminated and 5% of the market was still not concerned by the agreement. Moreover, as for the third condition, several commitments may allow the undertakings to fulfil this condition and to maintain the environmental agreement.[222]

IV. Conclusion

This article has presented the concept of sustainable development from its origins to its integration in the EU treaties. The author notes that this concept is an objective of the EU and should be implemented in EU policies in its economic, environmental and social dimensions. Art. 11 TFEU specifically provides for an obligation to integrate the environmental dimension of sustainable development into EU policies and activities. Competition law is therefore concerned by this integration obligation. Consequently, undertakings can cooperate to this extent by following several routes which do not breach art. 101 TFEU and are mainly based on the proportionality principle. However, some grey areas, pitfalls or contradictions deserve discussion and possible modifications in this respect and the Commission's position on this in its September policy brief is an encouraging development.

Firstly, a chapter regarding environmental agreements in the current 2011 Horizontal Guidelines would be welcomed in order to also explicitly determine when such agreements do not restrict competition. This would indeed allow the authorities or undertakings to properly and

[219] Art. 101 (3) TFEU Guidelines (n. 96), para 105.

[220] Holmes (n. 100), 382.

[221] *CECED* (n. 154), paras 64 to 67.

[222] See: *DSD* (n. 170), para. 163; *ARA — ARGEV, ARO* (Cases COMP/A.35.470/D3, COMP/A.35.473/D3) Commission Communication [2002] OJ 2002 C 252/2.

more certainly reflect the requirements set out in art. 3 TEU and 11 TFEU.[223] Secondly, the ancillary restraints route might be appropriate for integrating environmental considerations in competition law. However, clearer guidance regarding how to implement this method is necessary in order to ensure an integration which fulfils legal certainty requirements. Thirdly, it is a welcomed development that environmental benefits that can be economically valued would be considered under the first condition of art. 101 (3) TFEU. However, it must still be discussed if and how non-economic environmental benefits could fit into this condition. To this extent, the willingness to pay method has the merit of attempting an approach even though it may be debatable as to its appropriateness. Finally, it appears that the 101 (3) TFEU Guidelines are not always consistent when it comes to assessing which consumers must benefit from the flowing efficiencies. In this regard, they also either contradict certain decisions of the Commission itself or of the ECJ. It might then be necessary to review them, to broaden the scope of the consumers to include in this assessment[224] and to adopt a new interpretation of consumer welfare.

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[223] In this sense see: Holmes (n. 100), 369.

[224] Holmes (n. 100), 381; Murray (n. 75).