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Alexander Merkulov

European Union Competition Law and Environmental Policy

Is there a place for environmental considerations in contemporary European Competition law? If not, what are the possible ways of filling the sustainability gap?

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Faculty of Law

Maastricht University

Postbox 616

6200 MD

Maastricht

The Netherlands

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ABSTRACT

This thesis analyses and compares the competition law approaches taken by the European Commission towards sustainability initiatives from the private sector. The research question is formulated as follows: ***Is there a place for environmental considerations in contemporary European Competition law? If not, what are the possible ways of filling the sustainability gap?***

The thesis consists of 3 main parts.

Chapter I sets the scene and identifies the roles of the competition and environmental policies in the EU legal order.

Chapter II divides the Commission's enforcement of competition law in relation to environmental agreements into two principal eras, namely the pre- and post-2004 approaches.
First, the pre – 2004 approach is discussed. It will be demonstrated that under such an approach, the Commission was able to strike a fair balance between enforcing competition law and while respecting environmental initiatives of the private sector.

The discussion then shifts to the post – 2004 approach. It will be argued, that with the release of the 2004 and subsequently 2011 Guidelines, the Commission departed from its approach and as a result, created a sustainability gap in contemporary competition law.
Chapter II ends with the first conclusion of the thesis, namely, that *there currently exists no place for environmental considerations in contemporary European Competition Law*.

Chapter III provides for 3 possible solutions to resolve the sustainability deficit in contemporary EU competition law. The first option is for the Commission to reverts to its pre-2004 strategy. The Second Option is to look into the approach tabled by the Dutch Authority for Consumers and Markets. The third option is to resort to the Ancillary restraint's doctrine.

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INTRODUCTION

The world is in a critical state with regard to pollution, mass extinction, global warming, and other ecological and environmental disasters. Climate change is something to be considered as a possible end to mankind, keeping in mind, amongst others the fact of the occurrence of the 6th mass extinction of species.[1] Europe alone is in grave danger. In particular, 90.000 annual deaths occur due to heatwaves, 400.000 premature deaths per year are caused due to air pollution.[2] From the economical point of view, there is a predicted annual loss worth €190 billion and a 20% price tag increase on foodstuffs by 2050.[3]

The European Union (EU) has on several occasions pledged to tackle the above-mentioned problems.[4] Article 191 of the Treaty on the Functioning of the European Union (TFEU) governs the EU's sustainability policy. It provides that the Unions' policy on the environment shall contribute to the pursuit of the promotion of measures that deal with regional or worldwide environmental problems.[5] This in principle means that the EU institutions must take environmental policy into consideration when applying and enforcing EU law. The Union has several shared competencies which it can use to promote sustainability together with the Member States (MS) and as a result tackle global issues such as climate change, thus integrating Article 191. Such competencies for instance entail (but are not limited to) the environment[6], energy[7] , and transport.[8] However, the EU also holds several exclusive competencies among which is competition. This means that the European Commission is in essence free to determine its strategy in matters related to competition law which can help tackle contemporary societal challenges.

To properly tackle the issues caused by the environmental crisis, the Competition law provisions, and policy, as well as the Commission's approach to its case assessment, must

[1] Suzanne Kingston, 'Competition Law in an Environmental Crisis' (2019) Journal of European Competition Law & Practice 517, 517.
[2] Gianni De Stefano, 'Measurable Environmental Protection as A Necessity for Competition Law' (2020) 2, 2.
[3] ibid
[4] Commission Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The European Green Deal' [2019] COM 640 Final 2; Commission call for Contribution, 'Competition Policy supporting the Green Deal' 1. <https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf> last accessed 31 May 2021; Gianni Di Stefano, 'Measurable Environmental Protection as A Necessity for Competition Law' (2020) 2, 2.
[5] Consolidated versions of Treaty of the European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C115 Article 191.
[6] Consolidated versions of Treaty of the European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C115 Article 4(2)(e).
[7] ibid Article 4(2)(i).
[8] ibid Article 4(2)(g).

be aligned with the aims pursued by the EU.[9] However, the EU cannot tackle the problem alone.[10] According to Di Stefano, the potential solution is to add a second player to the game, namely the private sector.[11] This entails competitors entering into agreements with each other to achieve set standards and practices that can ensure environmental protection.[12] Such an option was also endorsed by Margrethe Vestager in her speech on Competition and Sustainability. The Vice-President is of the opinion, that businesses can respond to the problem even better than public bodies if they agree on certain standards for sustainable products insofar as they do not breach competition rules.[13]

Nonetheless, the private sector is reluctant to conclude such agreements fearing the potential violation of Article 101 TFEU.[14] In the light of the current policy approach, agreements leading to sustainability benefits that are hard to quantify or those agreements the benefits of which are not quantifiable at all are problematic.[15] This means that if the Commission cannot spot economic benefits that can be calculated, the agreement will be regarded as breaching EU Competition law.[16] One of the reasons for that is the contemporary policy approach taken by the Commission. In particular, EU Competition law has as its main priority the enhancement of the economic concept of consumer welfare.[17] Some scholars argue, that this aim is the sole aim pursued by the Commission, meaning that non-economic considerations cannot be taken into account.[18] This, therefore, means that EU competition law as it stands now constitutes a hindrance to sustainability initiatives of the private sector.

This has however not always been the case. Namely, the approach taken by the European Commission in integrating environmental policy into its competition law enforcement plan can

[9] Gianni De Stefano, 'Measurable Environmental Protection as A Necessity for Competition Law' (2020) 2, 3.
[10] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1, 1.
[11] Gianni De Stefano, 'Measurable Environmental Protection as A Necessity for Competition Law' (2020) 2, 14.
[12] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1, 1.
[13] Margrethe Vestager's speech of 24 October 2019, Competition and Sustainability; Gianni De Stefano, 'Measurable Environmental Protection as A Necessity for Competition Law' (2020) 2, 7.
[14] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1, 1.
[15] Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) World Competition 539.
[16] Paul Lugard and Leigh Hancher, 'Honey I Shrunk the Article! A critical assessment of the commissions Notice on Article 81(3) of the EC Treaty' (2004) European Competition Law Review.
[17] Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law', (2017) World Competition 539, 540.
[18] Suzanne Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) 16 Eur LJ 780, 781.

be divided into 2 principal eras, pre-and post-2004. Before the release of the 2004 Guidelines on the application of Article 81(3) (now Article 101 TFEU), the Commission would take environmental considerations into account when assessing agreements under Article 101 TFEU which in itself prohibits anti-competitive agreements or other forms of collusions between competing undertakings.[19] However, things have changed after the release of the above-mentioned guidelines, whereby nowadays goals pursued by other Treaty provisions can only be taken into account if they satisfy the 4 conditions laid down in the exemption provision of Article 101(3) TFEU.[20]

The purpose of this research is to investigate the existence of a clear environmental policy in the contemporary EU competition law regime and to provide for possible options that can help resolve the sustainability deficit in European Competition Law. The research question is formulated as follows: ***Is there a place for environmental considerations in contemporary European Competition law? If not, what are the possible ways of filling the sustainability gap?***

The approach taken for this research is a combination of the Legal Realism and Analytical Legal Research approaches. The former emphasizes that the determination of rules must not be done in isolation from non-legal concerns such as policy or moral considerations.[21] The latter allows for a critical reflection on the law and aims at the 'exposition of the law by looking at its source, the power behind it, the interconnections with norms at different hierarchies, and the force behind it which may reflect social recognition'.[22]

Due to the fact that the topic at stake is broad, certain limitations must be applied. For the purpose of space, only Article 101 TFEU will be discussed. This however provides an incentive for future research that would concern environmental protection in cases related to the abuse of a dominant market position as well as the area of mergers and acquisitions. In addition the proposed changes that will be suggested in the final part of this essay are not exclusive and there exists a number of other possible approaches that can be researched in the future.

[19] Mathias Kyrklund, 'EU Competition Policy and the Environment: The role of environmental considerations under Article 101 TFEU' (2019) 47.
[20] Commission Notice on the Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/08 paragraph 42.
[21] Caroline Morris and Cian Murphy, 'Getting a PhD in Law' (2011), Hart Publishing 32.
[22] Ishwara Bhat, 'Analytical Legal Research for Expounding the Legal World' (2020).

This paper will be divided into 3 chapters. The first chapter will discuss the fundamentals of competition law and the role of the environmental policy in the EU legal order. It will then be followed by a chapter that will cover the 2 approaches that the Commission used in relation to environmental agreements and will demonstrate the omission of environmental considerations in the contemporary approach and its impact on environmental policy. Finally, and most importantly this paper will bring some potential ways forward that the Commission can take.

CHAPTER I – Setting the Scene

Before embarking on the main area of research it is important to understand the nature of both Article 101 TFEU as well as the Environmental Policy of the EU. This Section will thus first discuss the role of Article 101 as well as provide a brief overview of its requirements. Subsequently, the environmental provisions will be explained. Finally, this chapter will determine whether the so-called integration principle obliges the Commission to take environmental policy into consideration when applying EU law.

1.1. Article 101 – Content and Interpretation

Article 101 TFEU serves an important purpose in maintaining fair and free competition in the internal market of the EU. It was created to combat agreements and collusions between market actors that result in restrictive practices and anti-competitive behaviour.[23] According to paragraph two of the article, any such agreements are null and void.[24] Most notably, Article 101 confers powers on the European Commission (EC) to fine the market actors for their anti-competitive market behaviour.[25]

Article 101 has four core conditions which if satisfied trigger its application. Firstly, the Article only applies to entities engaged in an economic activity, which are referred to as undertakings.[26]

Secondly, Article 101 requires some degree of collusion between two or more undertakings. The three possible collusions are agreements, concerted practices, and decisions of associations of undertakings.[27]

Thirdly, one of the three types of collusion must have the distortion or restriction of competition as its object or effect. Importantly these are not cumulative, but alternative requirements.[28] The object of an agreement, decision, or concerted practice will be established as anti-competitive provided that it will inevitably result in an injury to normal

[23] Nigel Foster, *EU Law Directions* (6th edn, Oxford University Press 2018) 407.
[24] Consolidated versions of Treaty of the European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C115 Article 101(2).
[25] Council, Regulation (EU) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Articles 4 and 5.
[26] Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECLI:EU:C:1991:161, par. 21.
[27] Consolidated versions of Treaty of the European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C115 Article 101 (1).
[28] Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECLI:EU:C:1966:38 page 248.

competition.[29] In particular, for agreements, the distorting nature is established by assessing the objectives of the agreement as well as the economic and legal context of which it forms part.[30] The effect of an agreement is deemed to be distorting competition if it constitutes an appreciable effect on the market in question. In the process of the determination of an effect on competition, it is assessed whether the parties have enough market power to cause harm and if yes what exact effect is at stake, and whether it bears a causal connection between the agreement and the harmful effects.[31]

The fourth and final condition of Article 101 requires the agreement must affect trade between the Member States of the European Union. The Court of Justice of the European Union (CJEU) has ruled that in order to determine such effect, 'it must be assessed whether it was possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential on the pattern of trade between the Member States.'[32]

If an agreement satisfies the above-mentioned requirements, it will be caught by Article 101 TFEU. However, according to paragraph three of the article, an agreement can still avoid the claws of competition law if satisfies the conditions for exemption. In order to do so, four requirements must be satisfied. Firstly, an agreement must improve the production or distribution of goods or promote technical or economic progress. Secondly, the consumers must receive a fair share of the resulting benefit. Thirdly, the restrictions must be indispensable to the attainment of the agreement's objectives. Finally, the agreement cannot lead to the elimination of competition in a substantial part of the products in question.[33] The four requirements will be discussed in further detail in Chapter II.

1.2. **Environmental policy in the EU legal order**

Over the years, the environmental policy has made its way to all constitutional acts of the EU.[34] Firstly, Article 3 TEU stipulates, that the EU internal market must among other aim at

[29] Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] EU:C:2009:343.
[30] Paul Craig and Grenne de Búrca, EU Law: Text, Cases, Materials (6th edn, Oxford University Press 2015) 1018.
[31] Nigel Foster, EU Law Directions (6th edn, Oxford University Press 2018) 412.
[32] Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECLI:EU:C:1966:38 page 248.
[33] Consolidated versions of Treaty of the European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C115 Article 101 (3).
[34] Mathias Kyrklund, 'EU Competition Policy and the Environment: The role of environmental considerations under Article 101 TFEU' (2019) 11.

the improvement of the quality of the environment through sustainable development.[35] Secondly, Article 11 TFEU serves as a connector between the EUs' environmental policy, and in particular environmental protection requirements and other policies of the EU. In other words, one must not isolate environmental considerations from other issues. Additionally, the Charter of Fundamental Rights (CFR) Article 37 entails a legal obligation to integrate environmental protection and improvement of the environment into the policies of the EU. The provisions also add emphasis to sustainable benefit. Finally, Article 191(1) TFEU provides for more clarity and lays down the objectives pursued in relation to the environment. These objectives are the protection, preservation, and improvement of the environment, rational and prudent utilization of natural resources, protection of public health, and the promotion of measures to tackle environmental issues worldwide.[36]

The existence of the above-mentioned provisions leads to a conclusion that environmental policy is treated as one of the fundamental objectives of the EU and constitutes an important factor in the Union's internal market. In particular, Article 191 TFEU prima facie demonstrates the high potential that the EU can achieve with its environmental policy.[37] This is particularly evident from the broad definition of these environmental policies which leave discretion to the institutions during their activities, be that legislation or enforcement of EU law.[38]

However, the existence of such a broad environmental policy does not grant the EU a *carte balance* in its actions related to the matter. The reason for this is the principle of conferral[39] which provides for a constitutional limitation on the competencies of the EU. Particularly in the area of the environment, as stated in Article 4 (2)(e) TFEU the EU enjoys only a shared competence and is thus subjected to the principle of subsidiarity, which in itself stipulates that the Union can only act in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.[40]

Nonetheless, environmental goals set out by the EU can be achieved not only through its shared competence but also through its integration into other policies as it is required by Article 11 TFEU. This integration is of the utmost importance for the discussion on the

[35] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 Article 3.
[36] Consolidated versions of Treaty of the European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C115 Article 191.
[37] Mathias Kyrklund, 'EU Competition Policy and the Environment: The role of environmental considerations under Article 101 TFEU' (2019) 14.
[38] David Langlet and Said Mahmoudi, 'EU Environmental law and policy' (Oxford University Press 2018) 35.
[39] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 Article 5(1).
[40] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 Article 5(3).

existence of environmental policy considerations in European Competition Law. The next section is devoted to explaining what the integration principle entails

1.2.1. Integration explained

As mentioned above, the integration principle plays a big role in the environmental policy of the EU. [41] This section will discuss the principle's scope, its addresses, its nature and will finally establish whether the principle requires the Commission to consider the environmental policy when applying and enforcing EU law.

As for the scope of the environmental integration, the Articles' wording: 'definition and implementation', leads to the conclusion that the principle applies to a rather broad range of EU actions. It is important to note that the environmental integration principle was previously used by the CJEU for matters directly concerning the internal market. In particular, the Court of Justice previously applied the principle in cases related to the free movement provision of the TFEU, whereby it explicitly resorted to the integration principle.[42] More importantly, the Court applied the integration principle in a case concerning competition law, in which the CJEU interpreted a Directive in light of the integration principle.[43] In Concordia Bus Finland, the CJEU interpreted a Directive on public services per the integration principle thus granting the addressed authorities the possibility to implement environmental criteria.[44] However, at the moment of writing, the CJEU has yet to apply the principle to Article 101 TFEU.[45]

Concerning the addressee of the integration principle, the Article itself hints that it is addressed to the Institutions.[46] However, some scholars even suggest that the principle is also addressed to the Member States.[47] Nonetheless, this discussion falls beyond the scope of this thesis and it is sufficient to note here that the European Commission, being one of the institutions of the EU is an addressee of the principle.

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[41] Mathias Kyrklund, 'EU Competition Policy and the Environment: The role of environmental considerations under Article 101 TFEU' (2019) 15.
[42] Case C-379/98 *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* [2001] ECLI:EU:C:2001:160, para. 76 and 81.
[43] Mathias Kyrklund, 'EU Competition Policy and the Environment: The role of environmental considerations under Article 101 TFEU' (2019) 16; Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECLI:EU:C:2002:495, para. 57.
[44] ibid
[45] Mathias Kyrklund, 'EU Competition Policy and the Environment: The role of environmental considerations under Article 101 TFEU' (2019) 17.
[46] Ludwig Krämer, '*EC Environmental Law'* (5th edn, Sweet & Maxwell 2003) 11.
[47] Julian Nowag, *'Environmental Integration in Competition and Free-Movement Laws'*(Oxford University Press 2016) 21; Mathias Kyrklund, 'EU Competition Policy and the Environment: The role of environmental considerations under Article 101 TFEU' (2019) 17.

Finally, the last question to answer is whether Article 11 TFEU entails a mandatory obligation on its addresses or is it of optional nature? When looking at the provision itself, it is clear that the word 'must' highlights the mandatory nature of the provision.[48]

This chapter demonstrated that there is in principle room for the incorporation of environmental policy into other policies of the EU. Therefore, under Article 11 TFEU, the Commission is bound to consider the environment when assessing green agreements. The next chapter will demonstrate the 2 different approaches to such agreements taken by the Commission over the past 20 years.

[48] Ibid 18; Hans Vedder, '*Competition Law and Environmental Protection in Europe*' (Europa Law Publisher 2003) 168.

CHAPTER II – The past and the reality

The stance of the European Commission towards environmental considerations in the implementation and the execution of European Competition law can be divided into 2 eras. Namely, the pre-2004 era which was more friendly towards non-economic considerations such as environmental issues, and the post-2004 era which came with the simplification of the Union's Competition policy and entailed a much stricter approach to Article 101 TFEU. This section will therefore cover the old and new approaches of the EC and as a result, establish whether the change of the competition policy affected environmental considerations in the analysis of Article 101 cases.

2.1. History – pre-2004

Prior to the release of the 2004 Guidelines[49], the Commission used to take a rather open and liberal approach with respect to non-economic (and in particular environmental) policy considerations. A textbook example of this was the *CECED* decision[50] which concerned an agreement concluded between manufacturers of washing machines. The aim of the agreement was to remove and substitute specific parts of the machines that proved to be energy inefficient. The detriment to consumer welfare was a price increase.[51] Nonetheless, the Commission cleared the agreement based on two considerations. Firstly, due to the enhanced energy efficiency, the consumers would be able to consume less energy and as a result, pay lower utility bills.[52] Secondly, the pollution level would drop due to the removal of energy inefficient machines.[53] Therefore, the former consideration constituted an individual economic benefit for the consumers and the latter related to a collective environmental benefit.[54]

In addition, 3 other cases must be addressed. Firstly, in *ACEA,*[55] a decision dating to 1998, the Commission cleared an agreement concluded by the members of the Association of European Automobile Manufacturers, whereby the main goal of the agreement was the reduction of CO2 emissions from cars. The Commission's reasoning was based on its

[49] Commission Notice on the Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/08
[50] *CECED* (Case IV.F.1/36.718.) Commission Decision [1999].
[51] ibid para 34.
[52] ibid para 52.
[53] ibid para 55.
[54] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1, 2.
[55] Communication from the Commission to the Council and the European Parliament of 29.7.1998, `Implementing the Community strategy to reduce CO2 emissions from cars : an environmental agreement with the European Automobile Industry' (COM (1998) 495 final).

environmental guidelines.[56] Accordingly, the agreement did not infringe competition law because it merely set an average CO2 reduction target. Therefore, ACEA members had the flexibility to set their levels and targets and work on them independently.[57]

Secondly, in *EACEM* the Commission allowed an agreement covering a voluntary commitment to reduce the electricity consumption of electrical equipment when it is in standby mode. In that case, the Commission explicitly considered environmental benefits that will be achieved by the agreement. Namely, it was found to improve energy-resource management as well as CO2 reduction which are all regarded as methods of combating climate issues such as global warming.[58]

Thirdly, in *Exxon/Shell*, the Commission considered among other the reduction of customers' use of raw materials, and the volume of plastic waste, which relates to the environment.[59] Namely, the Commission found the agreement covering the transportation of ethylene as beneficial 'at times when the limitation of natural resources and threats to the environment are of increasing public concern'.[60]

What must be taken away from these decisions is that European Competition law had a place for sustainability considerations. This can also be deduced from the subsequent Commissions Guidelines on Horizontal Agreements (hereinafter 2001 Guidelines)[61] which were released two years after the *CECED* decision. The Guidelines contained a chapter dedicated to environmental agreements intended for 'pollution abatement.[62] The EC also referred to what is now Article 191 TFEU (Ex Article 174 TEC) covering environmental policy.[63] Accordingly, Article 101(3) TFEU examination would also look into the *'net contribution to the improvement of the environmental situation overall'*.[64]

Under the 2001 Guidelines, the EC classified environmental agreements into three different categories. These are agreements that (1) will never fall under Article 101(1) TFEU[65], (2) will

[56] ibid 3.
[57] Commission XXVIIIth Report on Competition Policy [1998] para 131.
[58] ibid para 152.
[59] *Exxon Shell* (Case IV/33.640.) Commission Decision [1994] para 67.
[60] ibid para 71.
[61] Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02.
[62] ibid para 179.
[63] ibid.
[64] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1, 2.
[65] Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02 para 184 – 187.

always fall under Article 101(1) due to their anti-competitive nature[66], and (3) may potentially fall under Article 101(1) and thus create the necessity for a more elaborate assessment.[67] These agreements will now be discussed and will eventually demonstrate that the Commission had a clear view on how to deal with sustainability agreements. It will become apparent that the third category will be discussed in most detail due to its complex nature.

2.1.1. Agreements that always fall under Article 101 TFEU

This category covered agreements that are in their essence 'cartels in disguise'. In other words, such agreements are only labeled as environmental by the undertakings concluding them in order to cover up price-fixing, market division, and other market behaviour common to Article 101(1). In the competition law practice this is commonly referred to as *Greenwashing.*[68]

It can be argued that this category was added to the guidelines to satisfy the opinions of sceptics of the idea that environmental and competition policies should be integrated in relation to agreements concluded by market actors. The main reason for such concern is the belief that leniency toward environmental agreements would lead to cartels hidden behind sustainability claims.[69] Although this train of thought can sound conservative to some,[70] the author is of the opinion that it is an absolute necessity to add such a category, since it will not affect *bona fidei* environmental agreements and would simultaneously filter out clear examples of bad faith commercial practices.[71]

2.1.2. Agreements that do not fall under Article 101 TFEU

The key takeaway of this category is that not every single environmental agreement concluded between undertakings will have a restrictive effect on competition.[72] The Commissions 2001 Guidelines provided for three possible situations whereby an agreement would not fall under Article 101 TFEU despite the undertakings concluding it hold substantial market shares.[73] *The first situation* covered agreements that do not entail any individual obligations on the undertakings concerned. Hence, an agreement that creates merely a

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[66] ibid para 188.
[67] Tanya Krause, ' EU Competition Law and Environmental Protection - Are environmental benefits considered in assessment of Article 101 TFEU ?' (2020) 18; Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02 para 189.
[68] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1.
[69] ibid 1.
[70] ibid.
[71] ibid.
[72] Simon Holmes, 'Climate change, Sustainability, and Competition Law' (2020) Journal of Antitrust Enforcement 354, 368.
[73] Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02 para 184.

loose commitment to contributing to a specific environmental target which allows for the discretion of the respective undertakings would also fall under this category.[74] An example of such agreement can be deduced from the *ACEA* decision whereby the Commission found an agreement that had merely set a sector-wide carbon dioxide emissions target and gave the contracting parties *carte blanche* in the achievement of the target.[75]

The Second situation covered those agreements that set the environmental performance for products and/or processes albeit not having an appreciable effect on the diversity of the products in the relevant market. Additionally, this situation applies to agreements that do not substantially influence the purchase decisions of the consumers.[76]

The third and final situation tabled by the Commission concerns those agreements which result in the creation of new markets.[77] It is important to add that an agreement would only escape Article 101 if it was indispensable for the creation of a new market. Hence, the Commission would only raise concerns in situations where the undertakings could have achieved the goals on their own but would instead resort to collusion through agreements.[78]

2.1.3. Agreements that may fall under 101

Such agreements stand on a thin line between either falling under or avoiding Article 101 TFEU. The main characteristic of such agreements is the share that they cover. Namely, if an environmental agreement covers a substantive market share and significantly hinders the undertaking's freedom in production and sale, it will almost inevitably fall under the prohibition.[79]

Nonetheless, an agreement can still be exempt from the prohibition of Article 101(1) if it satisfies the criteria of paragraph 3 of the same Article. The old Guidelines stated that an agreement must provide for a certain economic benefit that would outweigh the costs incurred by competition distortion. What is important is that when the old guidelines referred to the benefits, the relevant consumer was not only defined as the individual consumer, but

[74] ibid para 185.
[75] Communication from the Commission to the Council and the European Parliament of 29.7.1998, `Implementing the Community strategy to reduce CO2 emissions from cars : an environmental agreement with the European Automobile Industry' (COM (1998) 495 final); Tanya Krause, ‘ EU Competition Law and Environmental Protection - Are environmental benefits considered in assessment of Article 101 TFEU ?’ (2020) 19.
[76] Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02 para 186.
[77] ibid 187.
[78] Tanya Krause, ‘ EU Competition Law and Environmental Protection - Are environmental benefits considered in assessment of Article 101 TFEU ?’ (2020) 19.
[79] Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02 para 189.

also the aggregate consumer.[80] The same stands for the benefits which are split into collective and individual benefits. This is perfectly in line with the CECED decision whereby the EC has referred to both individual economic benefit and collective environmental benefit.[81]

These types of agreements were seen as problematic when compared to their counterparts from the 'environmental chapter' of the 2001 Guidelines. Due to their borderline nature, such agreements serve as the main source of conflict between competition law and environmental policy. This meant that when assessing the agreement under Article 101(3), the Commission had to strike a fair balance between the preservation of competition in the relevant market on the one side and the effective level of environmental protection on the other side.[82] In doing so, the EC was willing to consider environmental improvements as economic benefits, as can be deduced from the 2001 Guidelines.[83] Hence, the Commission has made clear that the assessment of environmental agreements under Article 101 TFEU was not at all limited to strict economic assessments and that environmental improvements stemming from such agreements could be taken into account.[84]

When it came to the Indispensability requirement under Article 101(3), the Commission was rather clear that this requirement relied on whether the economic efficiencies of an environmental agreement were objectively defined. In other words, the more objective the established benefit the more indispensable the agreement was for the achievement of the environmental goals.[85] Just as with any other type of agreement examined under Article 101, environmental agreements must not eliminate competition in the market.[86] This indicates that although the Commission took environmental policy into account under the old regime, it did not grant superiority over the free competition in the market.[87] In any event, elimination of competition cannot be treated as being beneficial for the environment, since it will likely

[80] ibid 193.
[81] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1, 2.
[82] Tanya Krause, ' EU Competition Law and Environmental Protection - Are environmental benefits considered in assessment of Article 101 TFEU ?' (2020) 21.
[83] Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02 para 193.
[84] Tanya Krause, ' EU Competition Law and Environmental Protection - Are environmental benefits considered in assessment of Article 101 TFEU ?' (2020) 25.
[85] Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02 para 195; Zsófia Tari, 'Competition or Environmental Protection: Is it Necessary to Choose?' (2010) Iustum Aequum Salutare 277, 281.
[86] Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02 para 197.
[87] Tanya Krause, ' EU Competition Law and Environmental Protection - Are environmental benefits considered in assessment of Article 101 TFEU ?' (2020) 28.

hinder innovation thus stopping the technological process which could help resolve some environmental concerns. However, this criterion should not lead to the conclusion that there is no place for environmental policy in the competition law regime. The only conclusion that should be taken away is that competition law was initially created for preserving the well-functioning of the internal market which should not be sacrificed for other policies.[88]

As for the criterion of fair share, the Commission indirectly referred to the CECED decision in an example scenario whereby it discussed both individual and collective benefits under case facts nearly identical to the decision.[89]

2.1.4. What did the old approach mean for environmental policy?

Having discussed the pre-2004 EC approach to environmental agreements, it can be seen, that the competition framework was structured in light of the integration principle under what is now Article 11 TFEU. This also meant that it was able to accommodate private-sector initiatives by way of collusion. The framework was capable of tackling *mala fidei* undertakings trying to conceal anti-competitive agreements by framing them as environmental.[90] It also provided for leniency towards those agreement that despite the relevant undertakings concluding them held a market share that would satisfy the *de minimis* requirements would still fall out of Article 101(1); such as those which merely set a specific environmental goal that should be achieved.[91] Finally, and most importantly, the 2001 Guidelines contained a clear explanation of how agreements should be assessed for exemption under Article 101(3) should they be anti-competitive in nature.[92] Moreover, the guidelines were also in line with the Commission's past decisions such as *CECED* and *ACEA*.

The main takeaway here is that the Commission was able to strike a fair balance between enforcing competition law on the one side and respecting environmental initiatives of the private sector. However, as it was already mentioned, in 2004 the Commission brought significant changes to its assessment process in relation to sustainability agreements. The new approach is much more restrictive and somewhat close-minded, in which the influence of non-economic factors barely plays a role.

[88] ibid.
[89] Commission Notice on the Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] OJ C3/02 para 198.
[90] ibid 188.
[91] ibid 185.
[92] ibid para 192-197.

2.2.1. The post – 2004 approach – The changes and what they mean for environmental policy?

The release of the 2004 Guidelines by the Commission marks the beginning of the end of the sustainability agreements regime that existed before the reform. There are in total two key actions taken by the Commission that lead to such a conclusion.

The *first* significant impact comes with the Commission explicitly underlying in its 2004 Guidelines that objectives pursued by Treaty provisions other than the ones covering competition law can only be considered if they honour the four conditions enshrined in Article 101(3).[93] This meant that from now on the influence of non-economic factors on the Commission's competition law analysis would be restricted.[94] As a result, environmental considerations falling under the category of non-economic factors now have to go through the general requirements of Article 101(3) TFEU without receiving specific attention.[95]

Secondly and most importantly for environmental agreements, the Commission chose to entirely remove the environmental section from its Guidelines.[96]As a result, the comprehensive analysis of environmental agreements under the 2001 Guidelines which was properly aligned with the *CECED* has been effectively left as a matter of history. Nevertheless, environmental considerations were integrated into the broader notion of standardization agreements. This was done with the release of the 2011 Guidelines solidified the new competition law approach under which the Commission centralised the notion of economic efficiencies and consumer welfare.[97]

However, the Commission claims that the removal of a specifically dedicated chapter does not entail a change of policy and does not entail any form of downgrading for the assessment of environmental agreements.[98] DG Competition is nonetheless of the opinion that environmental actions will be best dealt with under the broader chapters like R&D,

[93] Commission Notice on the Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/08 para 42.
[94] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1, 2.
[95] ibid.
[96] Such a Section is not at all present in the 2004 Guidelines and is merged with standardization section in the 2011 Guidelines
[97] Communication from the Commission—Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1.
[98] Commission MEMO/10/676 Competition: Commission adopts revised competition rules on horizontal co-operation agreements [2010] <https://europa.eu/rapid/press-release_MEMO-10-676_en.htm?locale=en MEMO> last accessed 31 May 2021.

production, commercialization but most importantly under the chapter dedicated to standardization agreements.[99]

In support of its claim, the Commission inserted an example of an environmental agreement (under the standardization section) that would fulfil Article 101(3) TFEU. The example contains similar case facts to the ones found in the previously discussed *CECED* decision.[100] However, the Commission's reasoning as to why the agreement would be cleared is far from similar to its 1999 line of reasoning.[101] The main benefits considered in the hypothetical example are the consumers' possibility to enjoy a greater choice of washing machine programme cycles and the benefit from a cost-efficiency stemming from the reduced consumption of soap water and electricity.[102] As a result, no mention is given to environmental protection and emphasis is given solely to efficiency gains, thus making it the exclusive factor for assessment.[103] Furthermore and not surprisingly, collective environmental benefits can also not be found in the example.[104]

Hence, the example presented in the 2011 Guidelines demonstrates that the Commission contradicts its statement that the role of environmental aims will not be downplayed. It also contradicts its own past decisions related to the subject matter and brings ambiguity and further uncertainty to the private sector, thus hindering it from joining the fight with the environmental crisis.[105]

The change in approach to non-economic consideration reflects the modernisation of EU competition law and in particular its at the time new objective of improvement of consumer welfare.[106] However, it appears that the Commission chose to narrow the notion of consumer welfare by only covering economic efficiencies, thus leaving the broader definition as a

[99] Communication from the Commission—Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1 7.
[100] ibid para. 329.
[101] Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1, 2.
[102] Communication from the Commission—Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1 para 329.
[103] Mathias Kyrklund, 'EU Competition Policy and the Environment: The role of environmental considerations under Article 101 TFEU' (2019) 46.
[104] Communication from the Commission—Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1 para 329; Giorgio Monti, 'Four Options for a Greener Competition Law' (2020) Journal of European Competition Law & Practice 1, 2.
[105] ibid 3.
[106] Tanya Krause, ' EU Competition Law and Environmental Protection - Are environmental benefits considered in assessment of Article 101 TFEU ?' (2020) 12.

matter of the past.[107] Kingston even argues that economic efficiency is seen in the academic world as the 'sole objective of modern competition law'.[108] This is further backed up by Jones and Sufrin.[109] Namely, considerations related to the promotion of social policy goals have been put to the bottom if not entirely excluded from the list of significant factors in competition law assessment.[110] There exists an alternative view on the issue. In particular, Townley claims that the text of the TFEU, as well as its structure, allows one to take non-economic factors into account.[111] The author of this thesis sides with the former opinion and is of the opinion that the current approach centralises economic efficiencies and omits other policy aims.

It has been demonstrated in this section, that the competition law reform significantly affected green initiatives arising from the private sector by way of the inconsistency of the Commissions actions as well as the abolition of a clear and categorised approach that was present in the 2001 Guidelines. As a result, it can be argued that there exists a need for change to the contemporary EU competition law approach. The next chapter will discuss several possible changes that can take place to breach the sustainability gap in competition law.

[107] ibid.
[108] Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012) 9.
[109] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th edn, OUP 2016).
[110] Ibid; Tanya Krause, ' EU Competition Law and Environmental Protection - Are environmental benefits considered in assessment of Article 101 TFEU ?' (2020) 12.
[111] Christopher Townley, *Article 81 EC and the Public Policy* (Hart Publishing 2009) 48.

Chapter III THE WAY FORWARD

There exist several possible scenarios that can be taken by the Commission to realign its competition policy so that it could accommodate private sector initiatives that have as their goal the improvement of the environmental situation that currently exists in the world. These scenarios are, but not limited to (A) the return of the pre-2004 approach, (B) the (partial) adoption of the Guidelines on Sustainability Agreements drafted by the Dutch Authority for Consumer and Markets (ACM), and (C) the more exotic approach via doctrines developed by the CJEU. These approaches will now be discussed in the order of their mention.

3.1.Back to pre-2004

It goes without saying that one of the easiest ways to resolve the existing sustainability gap in competition law is to take a step back and reintroduce a chapter exclusively dedicated to environmental agreements.

A suggestion to (at least partially) revisit the approach had previously been tabled by the Dutch Minister of Economic affairs, albeit with no success due to their refusal by the ACM and the Commission.[112] The Minister suggested widening the scope of benefits that can be considered under Article 101(3) among which was the wider benefit to society. Not surprisingly, the approach was found to be too broad and going beyond the purpose and scope of Article 101(3) TFEU. The Commission stayed loyal to its economic approach and the pursuit of protection of consumer welfare.

Despite the rejection, the author believes that this approach is still possible to implement. The strongest argument is the fact that the Commission itself used to adhere to such an approach before amending its policy.[113] Such an approach would without doubt cover a large number of agreements by undertakings which themselves will be less reluctant to conclude them due to a comprehensive chapter in the Guidelines which is backed up by an ironclad set of past decisions.[114] Some opponents of the reintroduction argue that such an approach would lead to a larger number of disguised cartels. However, the reintroduction of a more favourable regime to sustainability agreements shall not be seen as a mere excuse to cartelize. In any event, such a concern was adequately covered by the 2001 Guidelines that

[112]Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) World Competition 547.
[113] This can be evidenced from decision. like *CECED, ACEA, Exxon/Shell* that were discussed earlier.
[114] Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) World Competition 547.

clearly defined greenwashing and declared its incompatibility with the Treaties.[115] Moreover, the approach to greenwashing was never forgotten even under the modern regime and the Commission is well – aware of such a possibility.[116]

As a result, the return to the 2001 Guidelines constitutes one of the possible approaches to mitigating the sustainability deficit. In the past years, it can be seen that several national competition authorities have been working on draft proposals on Guidelines on sustainability agreements.[117] Most authorities tend to take the 2001 Guidelines and the Commission's decision as a starting point which proves the feasibility of reintroduction of the old approach.[118]

3.2.The Dutch Draft Guidelines

In the past years, several national authorities of the Member States have demonstrated their enthusiasm in relation to the sustainable competition law debate.[119] The main contributions stem from *the Dutch ACM* which has proven to be a prominent advocate of 'green antitrust' as can be seen from a variety of suggestions related to sustainability and environmental agreements.[120] The latest initiative taken by the ACM was the 2020 Guidelines on Sustainability Agreements.[121] The guidelines acknowledge the tension that exists between sustainability and competition law in the European Union, but at the same time suggests that many agreements in the area are competition law compliant and are thus legal.[122] It is also important to state, that the underlying purpose of these Guidelines was to offer guidance to the private sector and clarify some important matters that are necessary for the self-assessment that undertakings may need to conduct to determine the compatibility of their sustainable initiatives.[123]

The ACM begins its guidelines by defining the notion of sustainability agreements. Accordingly, *any agreement between undertakings that is aimed at the identification,*

[115] Gianni Di Stefano, 'Measurable Environmental Protection as A Necessity for Competition Law' (2020) 2, 10.
[116] *Consumer Detergents* (Case 39579) Commission Decision [2011].
[117] Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: WhereWe Are and WhereWe Could Go (2021) Journal of European Competition Law and Practice 1, 2.
[118] ibid.
[119] ibid
[120] Francisco Costa-Cabral, 'Competition law and Sustainability: Dutch authority makes headway with draft guideline' (2020) European Law Blog <https://europeanlawblog.eu/2020/10/09/competition-law-and-sustainability-dutch-authority-makes-headway-with-draft-guidelines/> last accessed 31 May 2021.
[121] Authority for Consumers and Markets, 'Guidelines: Sustainability agreements Opportunities within Competition law' (2020).
[122] ibid.4
[123] Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: WhereWe Are and WhereWe Could Go (2021) Journal of European Competition Law and Practice 1, 2.

prevention, restriction, or mitigation of the negative impact of economic activities on people, animals, the environment, or nature fulfills the definition of a sustainability agreement.[124] This is already beneficial for the private sector since the undertakings now have a clear definition of what can be reviewed under the sustainable competition lens.

Similarly, to the 2001 guidelines of the Commission, the ACM split its work into 3 different scenarios (opportunities), albeit with somewhat different content. These opportunities will now be discussed in detail. It will be seen that the first two opportunities will receive more attention than their third counterpart. The reason is that the first two opportunities are more important from an article 101 TFEU perspective, due to the third opportunities suggestion for an involvement of the State.

3.2.1 The First Opportunity

The first tabled opportunity creates the dichotomy between agreements that fall and do not fall under the *cartel prohibition* as a starting point. Namely, the ACM suggests that agreements covering such actions as price-fixing, distribution, collective refusals to buy/sell lead to a *prima facie* case of a cartel. The same cannot be concluded in respect of agreements which concern actions of lesser importance and which do not impair competition to a substantive extent.[125] One example of sustainable agreements that will not infringe competition law are non-binding agreements that aim to incentivize undertakings to contribute to a sustainability objective.[126] The same can be said about agreements that lead to the creation of new products/markets, provided that the creation cannot occur without joint efforts of 2 or more undertakings.[127] The third example provided by the ACM are agreements aimed at quality improvement of products while simultaneously restricting the production and/or sales of non-sustainable goods (albeit with the requirement of not appreciably affecting price/product diversity).[128] Finally, the ACM also mentions codes of conduct promoting environmentally conscious or climate-conscious practices.[129] Importantly such

[124] Authority for Consumers and Markets, 'Guidelines: Sustainability agreements Opportunities within Competition law' (2020) 5.
[125] ibid.
[126] ibid 7.
[127] ibid.
[128] ibid; Martijn Snoep, 'CPI Talks … with Martijn Snoep' (2020) <https://www.competitionpolicyinternational.com/cpi-talks-with-martijn-snoep/> last accessed 31 May 2021.
[129] Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: WhereWe Are and WhereWe Could Go (2021) Journal of European Competition Law and Practice 1, 6.

codes of conduct must fulfil conditions such as transparency of participation requirements, the grant of access on the basis of non-discriminatory criteria, etc.[130]

These examples (all but the last) resemble the approach taken by the Commissions in the 2001 Guidelines.[131] The key takeaway from these examples is that the ACM views sustainability agreements as a means to promote the quality and diversity of products as well as the innovation of an existing market or the creation of a new market. Importantly this is all to be done without an appreciable effect on the core competition law requirements.[132] It can be argued that the first opportunity is the most significant out of the three because many undertakings often tend to abandon their sustainability agreement negotiation and conclusion if there arises a risk of it falling under Article 101 TFEU, referred to as the cartel prohibition.[133]

3.2.2. The Second Opportunity

The Second opportunity developed by the ACM covers the possible changes that a competition authority or the Commissions DG Competition can take when assessing an agreement under Article 101(3) TFEU or its national equivalent.[134] Here, the Dutch authority refers to the Commissions Guidelines and decisions, but at the same time brings new ideas to the sustainable Article 101(3) discussion.[135] The guidelines, therefore, respect the standard competition law rules and non-surprisingly require the fulfilment of all four requirements of the long-existing Article 101(3) TFEU.

When it comes to the *nature of the concerned benefit* and the possibility of invoking a non-economic benefit, the Guidelines allow the private sector to either prove their case by substantiating the benefits qualitatively or quantitatively.[136] This way the ACM understands that the quantification of non-economic benefits can cause hurdles to the undertakings and relieves them from such a burden if the concerned parties hold collectively less than 30% of the concerned market or when the benefits stemming are 'obviously' greater than the harm caused to competition.[137] Such an approach may bring an easier application and assessment

[130] ibid.
[131] ibid.
[132] ibid 7.
[133] Francisco Costa-Cabral, 'Competition law and Sustainability: Dutch authority makes headway with draft guideline' (2020) European Law Blog <https://europeanlawblog.eu/2020/10/09/competition-law-and-sustainability-dutch-authority-makes-headway-with-draft-guidelines/> last accessed 31 May 2021.
[134] Authority for Consumers and Markets, 'Guidelines: Sustainability agreements Opportunities within Competition law' (2020) 6; In the case of the Netherlands, Section 6(3) Dutch Competition Act.
[135] ibid 10.
[136] ibid 11.
[137] Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: WhereWe Are and WhereWe Could Go (2021) Journal of European Competition Law and Practice 1, 9.

of competition law due to the peculiar nature of green agreements.[138] By giving such preferential treatment to sustainability agreements through the recognition of non-economic benefits, the ACM brings its suggested approach close to the *CECED* era of European Competition law enforcement.[139]

Concerning *the fair share of benefits* for the consumer, the ACM ones again opted for a broader scope and included both direct/current as well as future users to the personal scope of the concept.[140] However, what requires more attention is the definition of 'fair share' which demonstrates an approach completely different from the one taken by Brussels. Before immediately embarking on the cost-benefit analysis, the ACM chose to first test the agreement on the fulfilment of 2 additional criteria which if fulfilled will lead to a more preferential analysis. Firstly, the agreement must have as its target the prevention or limitation of obvious environmental damage. Secondly. Such an agreement must help comply with (inter) national standards to prevent such environmental damage to which the government of a Member State is bound.[141]

If an agreement satisfies the above-mentioned criteria, it will be subjected to a preferential analysis. Accordingly, an environmental-damage agreement can avoid the claws of competition law even if the costs do not outweigh the benefits. The ACM reasoned this with the argument that it '*can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions'.*[142] Should that not be the case the agreement will fall under the 'other' category and will be assessed under the traditional cost-benefit analysis.[143]

The *necessity* criterion requires the parties to prove that there exists no lesser anticompetitive alternative for the attainment of the set environmental objective.[144] Here the ACM brings the first market actor issue as an example. The issue is present where no undertaking can be the first market actor to change its behaviour to attain an environmental goal and as a result, a coordinated market response is necessary.[145]

[138] ibid.
[139] ibid 8.
[140] Authority for Consumers and Markets, 'Guidelines: Sustainability agreements Opportunities within Competition law' (2020) 11.
[141] ibid 12.
[142] ibid
[143] ibid 13.
[144] ibid 18.
[145] ibid.

Finally, the requirement of non-elimination of competition is non-contentious in the sustainable competition law dispute and just like in the previous sections will not be discussed in detail here.

3.2.3. The Third Opportunity

With its *third opportunity,* The ACM took another brave step forward by suggesting that even if the agreements fail the analysis and will be declared anti-competitive, the undertakings that intended to conclude them can have an option of referring their proposal to the Legislative of the relevant State (Presumably also the EP).[146] Alternatively, a private sector initiative if sufficiently reasoned and supported by the undertakings that will have to comply with it, may be submitted to the Dutch Minister of Economic affairs and Climate. If the Minister is left satisfied, he/she may declare the initiative statutorily binding on the entire sector. It goes without saying that this can only be done if the constitutional requirements are satisfied.[147] It is important to note that the option involving the Minister is still to be clarified and developed.

3.2.4. ACM Guidelines, the criticism, and the way forward.

All in all, the ACM Sustainability Guidelines should be interpreted as an ambitious attempt to resolving the sustainability gap in European Competition law. The Guidelines reflect the aim of increasing the number of green initiatives from the private sector by providing a structured approach through its first two opportunities. In addition, they invite the undertakings to engage with the State by proposing ideas that cannot be executed under the competition law regime but could potentially be done via State interference.[148]

However, the Sustainability Guidelines were faced with a fair amount of criticism in the academic world. In particular, the first two opportunities have been scrutinized due to their inconsistency with EU law as well as their sometimes unnecessary complications.

Firstly, the use of the wording 'cartel prohibition' under the first opportunity which provides for a dichotomy between legal and illegal agreements has not been appreciated. For instance, Costa-Cabral argues that a cartel is a practice that is anti-competitive by object whereas Article 101(1) covers both restrictions by object and/or effect.[149]

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[146] ibid 19.
[147] ibid 19
[148] Martijn Snoep, 'CPI Talks … with Martijn Snoep' (2020) <https://www.competitionpolicyinternational.com/cpi-talks-with-martijn-snoep/> last accessed 31 May 2021.
[149] Francisco Costa-Cabral, 'Competition law and Sustainability: Dutch authority makes headway with draft guideline' (2020) European Law Blog <https://europeanlawblog.eu/2020/10/09/competition-law-and-sustainability-dutch-authority-makes-headway-with-draft-guidelines/> last accessed 31 May 2021.

Moreover, due to the 'cartel prohibition,' the guidelines do not contain much explanation on the anti-competitive effects of green agreements. This leaves one with the assumption that the Commissions *de minimis* notice will apply. [150] However, it is important to stress that the 10% rule found in the Notice is needed for anti-competitive arrangements that produce no positive output.[151] Sustainability agreements do not fall under such a description due to their positive effects on both the direct consumers and society as a whole.[152] There, therefore, exists some room for improvement of the first opportunity whereby two actions should be taken. It is suggested that the wording 'cartel prohibition' be changed to a less misleading alternative. The author believes that the easiest and least ambiguous option would be the change to 'Article 101(1) TFEU' or its national equivalent. Additionally, a subsection covering the effect of sustainability agreements could be added.

The *second* point of criticism comes from the insertion of a specific type of sustainability agreement, namely the environmental-damage agreements in the second opportunity. Gassler believes that the inclusion of a separate type of environmental agreements for which full compensation is not a necessity is questionable.[153] In particular, it is suggested that general guidance for all kinds of sustainability agreements would be preferred.[154] Furthermore, it is argued that although environmental – damage agreements are economically justifiable, they are not acceptable by competition law due to the conflict with the notion of consumer welfare.[155] This argument revolves around consumer protection and the principal idea that the consumers must not be worse off as a result of the agreement. It is further stated that the notion of fair share to consumers forms an inseparable part of Article 101(3) TFEU and cannot be tweaked in any way. Hence, it is unacceptable for one to provide the consumer with partial or even no compensation in the event of environmental – damage agreement, but full compensation in the event of an 'other' sustainability agreement.[156] Therefore such tweaking of an article 101(3) TFEU requirement potentially

[150] ibid.
[151] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 (1) of the treaty on the Functioning of the Europena Union (De Minimis Notice) [2014] OJ C291/01.
[152] Francisco Costa-Cabral, 'Competition law and Sustainability: Dutch authority makes headway with draft guideline' (2020) European Law Blog <https://europeanlawblog.eu/2020/10/09/competition-law-and-sustainability-dutch-authority-makes-headway-with-draft-guidelines/> last accessed 31 May 2021.
[153] Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: WhereWe Are and WhereWe Could Go (2021) Journal of European Competition Law and Practice 1, 8.
[154] ibid.
[155] Francisco Costa-Cabral, 'Competition law and Sustainability: Dutch authority makes headway with draft guideline' (2020) European Law Blog <https://europeanlawblog.eu/2020/10/09/competition-law-and-sustainability-dutch-authority-makes-headway-with-draft-guidelines/> last accessed 31 May 2021.
[156] ibid.

runs contrary to EU law.[157] As a result, the ACM should reconsider the regime of environmental–damage agreements to align it with EU law.

Finally, the ACM faced criticism for not trying to integrate the long-discussed *Wouters*[158] line of case law which would allow the private sector to avoid the requirement of consumer benefit.[159] This possibility, together with the uncertainty that it brings will be discussed separately in the next section.

3.3.Exotic Stretch of the Doctrines

As mentioned above, another option of clearing the way for environmental agreements is by resorting to the Ancillary Regulatory Restraint Doctrine developed by the CJEU and apply it to environmental agreements. According to this doctrine, Article 101 TFEU is inapplicable if the agreement at stake is necessary for a legitimate non-economic objective. [160] It is important to stress that the doctrine entails a proportionality test, which can help protect the internal market from greenwashing.[161]

The most notable decision known to every Competition law scholar is *Wouters.*[162] In its judgment, the CJEU ruled that despite the prohibition imposed by the Dutch Bar Association ran contrary to the TFEU, it did not fall under the scope of European Competition Law.[163] The Court reasoned that the prohibition in Wouters was imposed with the motivation to protect the integrity of the legal profession which is a public interest.[164] The main takeaway from this case is that the Court confirmed the possibility of a balance between economic and non-economic considerations in competition cases.[165]

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[157] ibid.
[158] C-309/99 *C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [2002] ECLI:EU:C:2002:98.
[159] Francisco Costa-Cabral, 'Competition law and Sustainability: Dutch authority makes headway with draft guideline' (2020) European Law Blog <https://europeanlawblog.eu/2020/10/09/competition-law-and-sustainability-dutch-authority-makes-headway-with-draft-guidelines/> last accessed 31 May 2021.
[160] Gianni Di Stefano, 'Measurable Environmental Protection as A Necessity for Competition Law' (2020) 2, 12; Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: WhereWe Are and WhereWe Could Go (2021) Journal of European Competition Law and Practice 1, 5.
[161] ibid.
[162] C-309/99 *C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap* [2002] ECLI:EU:C:2002:98.
[163] ibid.
[164] ibid.
[165] Victor Holmberg, 'EU Competition Law and environmental Protection - Integrate or Isolate (2014) 35.

In *Meca-Medina* the Court found that anti-doping rules not fulfilling Article 101(1) albeit having a restrictive effect on competition in the internal market. Luxembourg reasoned this by stating that the concerned anti-doping rules carried a legitimate objective of safeguarding fairness in competitive sport.[166]

What can be seen is the Ancillary Regulatory Restraint Doctrine approach avoids factors like a fair share for consumers and the preservation of competition. It is only concerned with the proportionality of the measures laid down in the respective agreement.[167] It is this relatively easy set of requirements that make this doctrine appealing to proponents of green agreements. Hence, it can be argued that agreements between undertakings aimed at tackling issues like global warming and other environmental concerns fall outside of the realms of Article 101 TFEU. In fact, environmental solutions can very much be classified as matters of public interest.[168] However, the application of the doctrine to sustainability agreements proves to be problematic. Namely, the most important question that must be answered is whether the participation of public authority is necessary? [169] The national competition authorities of the MS have diverging opinions. For example, on the one side, the German Federal Cartel office suggests that it is unclear whether the doctrine can only be applied to sustainability agreements if there is a delegation or presence of state power.[170] Alternatively, the Hellenic Competition Commission is of the opinion that the doctrine should be applied freely to sustainability agreements containing proportionate restrictions which are necessary for the conclusion of the agreement and for the completion of its goals irrespective of the presence of a public authority.[171] No matter what the view may be, the reality is that the doctrine has never been applied to a sustainability agreement and the applicability of the doctrine to the subject matter lies in the hands of the CJEU. Alternatively, as mentioned in the discussion on the ACM guidelines, a national competition authority of a Member State can take the risk and become a pioneer in the matter.

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[166] Victor Holmberg, 'EU Competition Law and environmental Protection - Integrate or Isolate (2014) 36; C-519/04 *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2006] ECLI:EU:C:2006:492.

[167] Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: WhereWe Are and WhereWe Could Go (2021) Journal of European Competition Law and Practice 1, 5.

[168] Anna Gerbrandy, 'Solving a Sustainability-Deficit in European Competition Law' (2017) World Competition 556.

[169] ibid.

[170] Martin Gassler, 'Sustainability, the Green Deal and Art 101 TFEU: WhereWe Are and WhereWe Could Go (2021) Journal of European Competition Law and Practice 1, 5.

[171] ibid; Hellenic Competition Commission, 'Staff Discussion Paper on Sustainability Issues and Competition Law' (2020), para 58.

CONCLUSION

The purpose of the research was to determine ***whether there is a place for environmental considerations in contemporary European Competition law? If not, what are the possible ways of filling the sustainability gap?***

Firstly, the roles of competition and environmental policy in the EU legal order have been identified. It was stressed the importance of Article 101 TFEU as a safeguard for free and fair competition in the internal market. Furthermore, it has been established that under the integration principle found in Article 11 TFEU, the Commission is in principle bound to take the Unions environmental policy into consideration when assessing agreements under Article 101 TFEU.

Secondly, the research divided the Commission's enforcement of competition law in relation to environmental agreements into two principal eras, namely the pre and post 2004 approach. Under the pre-2004 approach, the competition framework was structured in light of the integration principle under Article 11 TFEU. The Commission was thus able to strike a fair balance between enforcing competition law on the one side and respecting environmental initiatives of the private sector. The framework was capable of tackling *mala fidei* practices of *greenwashing* while at the same time providing leniency to good faith agreements that could potentially trigger the application of Article 101 TFEU.

However, with the release of the 2004 and subsequently 2011 Guidelines, the Commission departed from its approach and as a result, created a sustainability gap in contemporary competition law. This was first evidenced with the removal of a specifically dedicated chapter on environmental agreements from the guidelines. In addition, the Commissions statement that non-economic factors can only become relevant in the competition law analysis if they can be submerged under the four criteria of Article 101 (3) TFEU.

As a result, the answer to the first limb of the research question is that ***there currently exists no place for environmental considerations in contemporary European Competition Law***.

The answer to the second limb of the research question is therefore that **there exist at least three opportunities to resolve the sustainability gap**. Firstly, it was suggested that the Commission reverts to its pre-2004 strategy. However, it has been demonstrated that the Commission is reluctant to do so due to its preference for a policy that centralizes economic efficiency. Secondly, the approach tabled by the Dutch ACM has been discussed. It has

been established that although the ACM Guidelines are ambitious, they still require improvement. Finally, this essay suggested a third route via the Ancillary restraint's doctrine. Despite providing for an easy opportunity to avoid the complex requirements of Article 101 TFEU, the doctrine is yet to be applied to environmental agreements.

However, for the reasons discussed in the respective sections of this essay all approaches have either not yet been implemented or were rejected by the Commission. This must not be interpreted as a failure but as a means of motivation to continue researching potential solutions to finally resolve the sustainability gap and restore the status quo between competition law and the environmental policy of the EU.

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