UNIVERSITA' COMMERCIALE "LUIGI BOCCONI"

PhD SCHOOL

PhD program in Legal Studies

Cycle: 32°

Disciplinary Field (code): IUS/04

Prospects for integrating Environmental and Sustainability Goals with European Competition Law and Policy. A focus on Article 101 TFEU

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PhD Thesis by

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Year 2021

ABSTRACT

Sustainable development and the fight against climate change represent a top priority both for European institutions and most Member States. With the Communication on "The European Green Deal" released in December 2019, the European Commission identified the response to the ecological crisis and the promotion of a green transition as its new defining missions. Many believe that to achieve these challenging objectives, more robust integration of sustainability concerns into all the Union's policies and activities is required. Moreover, the urgency and complexity of most environmental and sustainability issues impose a shared reaction from national governments, private entities and individuals, as each must do its part. To this respect, in the context growing pressure on the private sector to contribute to achieving sustainability goals, a new perception has emerged, conceiving competition rules as an obstacle to private sustainable initiatives. The main concerns relate to the prohibition set out in article 101 of the Treaty on the Functioning of the European Union, which, according to an increasing number of commentators, might discourage sustainability collaborations between companies. With these premises, this work aims at exploring the theoretical foundations and operational implications of integrating sustainability concerns into European competition policy. More precisely, two fundamental questions will be examined: i) whether the law of the European Union admits an interpretation of competition rules, and article 101 TFEU in particular, that takes into account environmental considerations and ii) the extent to which such integration is actually desirable. This work will explore the different perspectives from which this issue can be assessed: the one of environmental policy-makers, willing to find the most effective measures to achieve their goals and targets; that of companies, which are trying to keep pace with the increasing pressure from consumers and investors for more sustainable practices; and lastly, the perspective of competition authorities, which need to prove to be resilient to the evolving challenges while maintaining their integrity.

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INTRODUCTION

In normal circumstances, a research on the theoretical and practical implications of integrating sustainability concerns into competition law enforcement might be perceived as either a too arduous endeavor or as a niche topic, scarcely relevant for daily life practice. Indeed, one could hardly deny that when the first pages of this work were written, such opinion was probably not so far from being accurate. However, in the last few years, and especially months, this matter has started to gain momentum, both in academic and institutional discourses. As a result, few competition law issues can be said to be in a similar spotlight. Many reasons can explain such exceptional interest. For sure, the very recent initiatives sponsored by the European Commission, including the public consultation launched by the DG Competition on how Competition Policy can better support the Green Deal, have contributed to fire up the debate[1]. Nevertheless, if one looks at the broader picture, the growing interest in competition law enforcement's possible adjustments to integrate sustainability concerns might have more far-reaching explanations. In particular, we could explain it as the crossroad of three distinct but eventually related developments.

First of all, our societies face new extraordinary challenges that threaten their own survival, the most urgent of which are climate change and the unequal distribution of its responsibilities and costs. Indeed, the ecological crisis shed light on the pitfalls of a model of unlimited and unrestricted growth, which is now believed to be far from sustainable. Moreover, the urgency and complexity of most environmental and sustainability challenges impose a shared reaction from national governments, private entities, and individuals, as each must do its part. Consequently, in the last years, there has been an increasing societal demand for more sustainable businesses and effective political action to adopt mitigation and adaptation strategies against climate change's consequences. Such bottom-up pressure is

[1] European Commission, DG Competition Public Consultation on Competition Policy supporting the Green Deal - Call for contributions, (October 2020).

inevitably influencing both policy-making and corporate activities, becoming even stronger after the Covid-19 pandemic hit the global society.

Alongside the environmental crisis, the European Union's project and its Institutions are going through rough times also for reasons of a different kind. For the past thirty years, the realization of a common european market has been the European Union's core mission, where all the other policies and objectives had been often interpreted and adjusted in light of the internal market imperative. The idea was that after the creation of an economic union, achieved by removing cross-border barriers and by creating a more dynamic and competitive economy, a political and social integration would have followed. Today, however, it is common wisdom that the economic integration without a political and fiscal union cannot go too far and that the latter would require a strong sense of affinity and solidarity between countries, especially those from the North and the South, that today seems to lack[2]. Thus, given that part of the initial expectations about the internal market's benefits has been frustrated, the European project is facing an unprecedented crisis. The inability to establish a strong consensus on the direction to follow has favored the rise of sovranist movements calling into question the Union's convenience and complaining about EU's inability to effectively address the most urgent socio-economic issues of our time[3].

Lastly, the third component of this puzzle concerns specifically competition law. In the last few years, competition policy and its institutions, not only in Europe, have been facing an unexpected turmoil relating to the boundaries of its objectives and the effectiveness of its tools[4]. An increasing number of scholars argue that lax antitrust enforcement, especially in the U.S., has led to an increase in market concentration and eventually of inequality[5]. In addition, the emergence of new markets and business models based on sophisticated

[2] Helge Berger, Giovanni Dell'Ariccia, Maurice Obstfeld, "Revisiting the Economic Case for Fiscal Union in the Euro Area" [2018], IMF Departmental Paper n. 18/03.
[3] Agnès Bénassy-Quéré, Markus K Brunnermeier, Henrik Enderlein, et al., "Reconciling risk sharing with market discipline: A constructive approach to euro area reform" [2018] 91 CEPR, 1.
[4] Maurice Stucke Ariel Ezrachi, *Competition Overdose: How Free Market Mythology Transformed Us from Citizen Kings to Market Servants*, (Harper Business, 2020).
[5] See *inter alia* Lina Khan, "The New Brandeis Movement: America's Antimonopoly Debate" [2018] 9(3) Journal of Competition Law & Practice, 131; Ioannis Lianos, "Competition Law for a Complex Economy" [2019] 50 IIC, 643.

technologies and the exploitation of big data on the one hand, and the process of disintegration that is currently affecting the globalized economic order on the other, are now questioning competition laws' resilience to these new challenges, and their adequateness to best protect consumers' interests.

So, where do these three trends converge? It is widely acknowledged that most sustainability and environmental issues cannot be effectively addressed at the national level, and that cooperation among national governments is crucial. To this respect, the EU has an enormous responsibility both as key international player and as a driver of Member States' efforts towards coordinated and ambitious targets. In other words, conceiving the fight against climate change and the promotion of a sustainable and green growth as its new defining mission could represent the perfect occasion for the European Union to remedy to its falling popularity and give a renovated sense to its existence. However, this process would require a revision of its priorities and the adoption of the same ambitious force used to achieve the single market aim during the formative years. It follows that competition policy, as well as the other Union's activities, might be adjusted to contribute to such a new priority. From a competition law perspective, an effective integration of sustainability concerns might also work as a reaction to the growing criticism mentioned above and evidence of its resilience.

With these premises, this work aims to explore the theoretical foundations and operational implications of the integration of sustainability concerns into European competition policy. More precisely, two fundamental questions will be examined: i) whether the law of the European Union admits an interpretation of competition rules that takes into account sustainability considerations, and ii) to what extent such integration is actually desirable.

Now, before describing the structure of this work and its main conclusions, a premise seems appropriate. This research has been driven by a mixture of curiosity and skepticism about the increasing interest in the intersection between competition law and sustainability. More precisely, what seems surprising is that this attention has often resulted in a demand for more flexible enforcement of competition law in light of sustainability concerns. A

request that has also been advocated by the stakeholders generally most attentive to these causes[6]. Conversely, it is not as surprising that companies, given the pressure they are currently facing to improve their environmental performances, may take this opportunity to seek to loosen antitrust rules.

This circumstance thus appears to be puzzling, or at least meritorious of further inquiry. In fact, the skepticism concerns the idea according to which a lax antitrust is necessary to achieve sustainability and environmental protection. A belief that, by borrowing the old and unfortunate motto "less antitrust, more competition"[7] can be summarized in "less antitrust, more sustainability". As we will see in the following pages, given the complexity of the challenge we face, businesses may be reasonably conceived as part of the solution, meaning that their contribution might be crucial to fostering the green transition, but they are also certainly part of the problem. The inability of free markets to ensure optimal use of environmental resources and an equal distribution of costs and benefits arising from economic progress is well-known, as well as the limits of corporate-led environmentalism[8]. This tension is further exacerbated by the increasing reliance upon economic theories that conceive individuals as self-interested and welfare maximizer agents, thus disregarding any other non-economic aspects of human life. In addition, there is broad consensus about the unsustainability in the long run of the current model of growth based on massive production and consumption[9], which, according to many, should be replaced with a "*lentius, profundius, suavius*" development[10]. Therefore, these circumstances cast some doubts about the

[6] See for instance, Fair Trade Advocacy Office, EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links, February 2019, Brussels.

[7] Francesco Denozza, The Future of Antitrust: concern for the real interest at stake, or etiquette for oligopolists? [2017] 1 Orizzonti del diritto commerciale, 1.

[8] To use Polanyi's words: "to allow the market mechanism to be sole director of the fate of human beings and their natural environment indeed, even of the amount and use of purchasing power, would result in the demolition of society". Karl Polanyi*, The Great Transformation. The Political and Economic Origin of Our Time*, (Beacon Press, 1957), 76.

[9] A strong message emerging also in Pope Francis' Encyclical "Laudato Si'" (24 May 205) "The idea of infinite or unlimited growth, which proves so attractive to economists, financiers and experts in technology ... is based on the lie that there is an infinite supply of the earth's goods, and this leads to the planet being squeezed dry at every limit".

[10] Alexander Langer, *Il viaggiatore leggero. Scritti 1961-1995* (Sellerio, Palermo 2011). Langer's thought and his works are extremely relevant for explaining the contradictions of our world. In a work of 1994, titled "*Lettera ad un consumatore del nord*" he wrote: "We should not be concerned with lowering prices but – paradoxically- to increase them in order to make them reflecting the real value of things and services and thus less attractive to dissipation and waste (…) But we should also reject a world without quality ... of the massive

effectiveness and desirability of "more market" to pursue sustainability and environmental protection goals.

However, one cannot deny that collaboration between public and private sectors might be indispensable to bring meaningful changes. Several European environmental programs indeed rely upon private actions to achieve their targets, also in accordance with the solidarity spirit that characterizes a social market economy, like the one mandated by the Treaty of the European Union (art. 3)[11]. As a result, this policy option, based on the encouragement of sustainability initiatives and the removal of any possible legal or operational barriers, such as those erected by competition rules, cannot be *a priori* excluded and deserves a careful examination.

With this in mind, this work will explore the different perspectives from which this issue can be experienced: the one of environmental policy-making, willing to find the most effective measures to achieve their goals and targets (Chapter I); the one of companies, which are trying to keep pace with the increasing pressure from consumers and investors for more sustainable practices (Chapter II); and lastly, the perspective of competition authorities, which need to prove to be resilient to the forthcoming challenges, while maintaining their integrity (chapters III-V). In particular, Chapter I will explore how environmental concerns have been progressively integrated into national and international policies, with specific regard to the objectives and tools that shape the European Union's policy. It will be argued that, in addition to the most recent developments, the law of the Treaties already assigns a primary relevance to sustainability goals, mandating a holistic interpretation of all its norms as not to disregard the fundamental objectives set in article 3 TEU, including the promotion of sustainable development and high level of environmental protection. In Chapter II the analysis will move to the current public-private incentives for more sustainable businesses. There has been a widespread acknowledgment among policy-makers of the importance of

supply of products in quantity, whose manufacture and sale causes human, social and environmental devastation "at the beginning", and often harmful effects even "at the arrival"" (the original version is in italian).

[11] For a careful analysis of the implications of adhering to a social market economy for a firm's perspective, in particular with respect to the CSR theories see Mario Libertini, "Economia sociale di mercato e responsabilità sociale dell'impresa", in *La responsabilità sociale dell'impresa. In ricordo di Giuseppe Auletta* (eds) V. Di Cataldo e P.M. Sanfilippo, (Giuffrè, Milano 2013), 9, 13.

obtaining an active involvement of the corporate world to achieve most of the environmental goals, while increasing interest in CSR theories and corporate environmentalism has emerged. In addition, the main drivers for spontaneous sustainability initiatives adopted by private entities, either unilateral or collective, will be discussed. This section aims to infer the circumstances in which policy-makers should encourage and preserve private initiatives and when instead they are not socially desirable. In fact, sometimes they represent a mere self-interested attempt to protect the status quo and prevent a more stringent state-intervention.

With these premises, Chapter III will discuss the extent to which the current interpretation of competition rules represents an obstacle to sustainability initiatives in light of its objectives and theoretical foundations. It will be argued that since the idea of competition as an end has been correctly abandoned, competition represents a value worth of protection as long as it works as a means to achieve the fundamental aims established in Article 3 TEU. Consequently, although certainly relevant in assessing market practices' legality, the maximization of economic welfare must sometimes make way for other factors that contribute to European citizens' well-being. Thus, after this general analysis, Chapters IV and V will focus on the law on agreements as set out in Article 101 of the Treaty on the Functioning of the European Union[12]. The decision to focus on anti-competitive agreements arises from the intention to contribute to the current debate, focusing on competition rules' as an obstacle to sustainability-driven cooperation between companies. Further work might follow to extend the arguments and conclusions that we will discuss also to unilateral practices and mergers.

Thus, the prospects for integrating sustainability concerns into paragraphs 1 and 3 of article 101 TFEU will be discussed, both in a *de jure condito* and *de jure condendo* perspective. It will be argued that a general antitrust exemption for all the restrictive agreements producing sustainability benefits seems undesirable. Not every private initiative, which implies a restriction of competition, is desirable or necessary to achieve sustainability

[12] The provision now set in Article 101 TFEU was previously included, in an identical version, in Article 81 of the Treaty establishing the European Community, and prior to that, in Article 85 of the Treaty of Rome. In this work, the most recent numbering will be preferred.

aims. Therefore, only when more effective policy alternatives do not exist because of structural or contingent reasons, a restriction of competition against consumers' interests might be accepted as the second-best available solution to achieve small but significant improvements towards a more sustainable world.

CHAPTER I

THE CONCEPTUAL AND NORMATIVE FOUNDATIONS OF THE INTERNATIONAL RESPONSE TO SUSTAINABILITY AND ENVIRONMENTAL CHALLENGES

1. Introduction

The 21st century has begun with the world plunged altogether into new extraordinary challenges, which are threatening its own survival: the global health crisis exploded with the coronavirus pandemic[1] and the increasingly frequent natural disasters and extreme events, such as the Australian bushfires or the Kenyan locust invasion, are only the latest warning shots that nature is sending to humanity. Experts agree that all these events relate to each other, and that phenomena like destruction of wildlife and climate change find their ultimate cause in the deeply diseased relationship between man and nature[2]. Therefore, the main challenge of our era is represented by the urgency to rethink our political, economic and social structures in a different way, trying to remedy to the damages that have been caused so far to the natural world, by putting the protection of the environment, the preservation of the ecosystem and the fight against climate change on top of policy priorities.

Over the last decades, the dominant models of economic development based on massive industrialization and overconsumption of food and energy, along with population growth, put a lot of pressure on the environment and natural resources to an extent that is now believed to be unsustainable. Indeed, the era we live in has been defined by some geologists as the "*Anthropocene*"[3], an age in which mankind represents the main geological

[1] COVID-19 is an example of Zooentinc diseases, meaning a virus able to jump from animals to humans, which are becoming increasingly frequent and, it is believed that they are likely connected with the growing deterioration of natural habitats. See Louise Taylor, Sophia Latham, Mark Woolhouse, "Risk factors for human disease emergence" [2001] Philos Trans R. Soc. Lond B. Biol. Sci, 356.

[2] Coronavirus: 'Nature is sending us a message', says UN environment chief, 25 March 2020, available at https://www.theguardian.com/world/2020/mar/25/coronavirus-nature-is-sending-us-a-message-says-un-environment-chief.

[3] Paul J. Crutzen, "Geology of mankind" [2002] 415 Nature, 23.

force[4]. More precisely, this new epoch has been defined as "the period of Earth's history during which humans have a decisive influence on the state, dynamics, and future of the Earth System"[5].

The Anthropocene's starting date is identified around 1950, with the beginning of the global economic growth that followed the II World War. Indeed, in the scientific narrative on climate change, there are few doubts about the capitalistic system's role in today's planetary emergence. Natural resources have been conceived for a long time as "natural capital" to be exploited to achieve profits, in a logic of continuous and unlimited economic expansions. Therefore, after decades of unsighted faith in the advantages of globalized capitalism, the pitfalls of such a model are now more noticeable, as testified by the increasing inequality and the planetary ecological crisis[6]. As a result, many have now begun to question most of the assumptions and beliefs of the modern world economy[7].

From a policy perspective, designing an effective environmental legal framework is an extremely complex task because it requires an integrated and cross-dimensional approach

[4] The Anthropocene comes after the so-called "Holocene" epoch, which lasted for the last 11,000–12,000 years, which in turn followed the "Ice-age".

[5] Anthropocene Working Group, "Results of Binding Vote by AWG," [2019], available at http://quaternary.stratigraphy.org. For a full discussion of the issues related to the geological dating of the Anthropocene, see Jan Zalasiewicz, Colin Waters, Mark Williams, and Colin Summerhayes, *The Anthropocene as a Geological Time Unit: A Guide to the Scientific Evidence and Current Debate* (Cambridge: Cambridge University Press, 2019). See also John Bellamy Foster, Hanna Holleman, Brett Clark, "Imperialism in the Anthropocene" [2019] Monthly Review, available at < https://monthlyreview.org/2019/07/01/imperialism-in-the-anthropocene/>.

[6] See Millennium Ecosystem Assessment, "Living Beyond Our Means: Natural Assets and Human Well-Being, Statement from the Board" [2005], 5. See also Dani Rodrick, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York and London: W.W. Norton; 2011), 368, OECD Insights: "Globalization: What is the impact of globalization on the environment?" [2013], 108-126.

[7] See, inter alia, Christopher Wright and Daniel Nyberg, *Climate Change, Capitalism, and Corporations: Processes of Creative Self-Destruction* (Cambridge: Cambridge University Press, 2015); Klein Noemi, *This changes everything: capitalism v. the climate* (Simon & Schuster 2014); Tim Jackson, *Prosperity Without Growth: Economics for a Finite Planet* (Earthscan, 2009), 138–9; Jeremy Rifkin, *The Green New Deal: Why the Fossil Fuel Civilization Will Collapse by 2028 and the Bold Economic Plan to Save Life on Earth*, (New York: St. Martin's Press, 2019). For different views, see Rainer Zitalman, "System Change Not Climate Change': Capitalism And Environmental Destruction", *Forbes* (July 2020) available at <https://www.forbes.com/sites/rainerzitelmann/2020/07/13/system-change-not-climate-change-capitalism-and-environmental-destruction/> last accessed in November 2020; Richard Stroup, "Economic freedom and environmental quality" [2003] in Proceedings, federal reserve bank of Dallas, 73-90; Pankaj Ghemawat, "Globalization plays a bit part in environmental issues", [2012] Harvard Business Review, available at <https://hbr.org/2012/05/globalization-plays-a-bit-part>.

and the participation of multiple actors both from the public and private sector. In fact, environmental measures may have substantial implications on different dimensions: the political one, because of their impact on equality and social justice, the economic side, in consideration of effects on market dynamics and corporate responsibility, and also on the ethical dimension, because a serious response to climate change and the environmental crisis implies an assumption of responsibility also at the individual level and a radical revision of people life-styles.

In this first chapter, we will explore how sustainability concerns, especially environmental ones, have been progressively integrated into national and international policies and, in particular, we will focus on the objectives and principles that shape the European Union's policy. The environmental emergency is a global crisis, which can be efficiently tackled only through coordinated action. To favor this process, EU institutions have taken a major role in driving ambitious initiatives on environmental matters both on their internal and external dimensions. In line with these aims, in December 2019 the European Commission proposed a new European Green Deal to preserve Europe's natural environment and meet the ambitious plan of becoming the world's first climate-neutral continent by 2050[8]. This suggests that the environmental protection and the fight against climate change represent today one of the Union's most urgent priorities, with the ultimate consequence that all the Union's policies and activities might be revisited as to take into consideration such a new defining mission.

The following months are decisive in this sense since the new sanitary emergence has become the new global priority, overcoming all the other matters. At the EU level, sustainability and environmental projects might be held up to direct energies and resources to limit the pandemic's effect and help Member States recover from its consequences. We will see then if the EU green ambitions will get shrunk by this new immediate emergency or

[8] Communication from the Commission 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", Brussels, 11.12.2019.

if the necessity to rebuild the hardly-bit European economies will provide a chance to conceive a more sustainable and green growth.

2. Some terminological clarifications: the notions of "environment" and "sustainability"

The discussion about the relationship between humankind and nature and the impact of human activities on its resources often involves the use of a multitude of terms and concepts, such as "environment", "eco-system", "sustainability" or "sustainable development". Despite on everyday conversations we often pay little attention to the true meaning of these words and their distinctive features, such ambiguity actually stems from a lack of commonly shared definitions. For this reason, in order to explore and understand the critical elements of the European Environmental Policy, a terminological clarification of some concepts that will be often used in this work seems imperative also because the ambiguity and the uncertainty associated to some of these notions often reflect the unrevealed reasoning of different policy approaches.

The first clarification concerns the term "environment", which, at first glance, seems to not require much attention, given its quite intuitive sense. At closer look, providing a clear definition of "environment" is not such an easy task, since it hides a twofold nature. Since the early days, the attempt to define the content of environmental policies has been influenced by the debate about the notion of environment, and in particular, its "anthropocentric" or "eco-centric" essence. Anthropocentrism in ethics represents the view according to which only human interests are morally important and therefore, effects on nature matter only indirectly, forasmuch as they also affect human interests, while natural resources and the eco-system do not deserve a per se protection[9]. In this view, as its etymology suggests, the term environment embraces all the external elements and factors that influence human life and that can be used by the individuals to satisfy their needs. Conversely, an "eco-centric" approach imposes to consider all living beings and nature, deserving by themselves some form of protection irrespectively of the value they provide for humankind.

[9] Katie McShane K., "Anthropocentrism in climate ethics and policy" [2016] 40(1) Midwest Stud Philos, 189.

The preference for one view or the other is not only a matter of ethics but it has also significant policy implications. An anthropocentric perspective has traditionally characterized the Western regulatory and normative approach, which puts human health and well-being at the centre of any environmental measure. Also, at the UN level, both the Rio and Stockholm Declarations express this view by conceiving the environment not as a good/value to be protected by itself but as an instrument at the disposal of humankind, and therefore its protection is justified insofar as it coincides with human interests[10]. Moreover, from a policy perspective, it is important to point out that the protection of the environment is connected both to individual interests, in terms of human health or well-being, and to interests of the society at large, primary from an inter-generational perspective. As we are going to see, the presence of such a multitude of interests to be represented also explains the necessity to provide legitimacy for a variety of actors in the environmental policy-making process.

Another crucial concept used by policymakers, academics, as well as in our everyday life is that of "sustainability", and more specifically, "environmental sustainability"[11]. The association of such a word with environmental issues goes back to "green discourses" that in the 70s raised the first concerns about the consequences of unlimited growth[12]. In 1972, on the occasion of the upcoming UN Conference on the Human Environment, in Stockholm[13], a group of scientists signed a "A Blueprint for Survival", urging a reconstruction of human life and societal organizations in order to prevent "the breakdown of society and the irreversible disruption of the life-support systems on this planet"[14]. The document probably

[10] At the EU level, Kingston observes that the anthropocentric approach can be found in much of the EU environmental legislation, and also in the European Action Program where the protection of biodiversity and the ecosystem is always linked to the interests of human well-being and future generations. See Suzanne Kingston, Veerle Heyvaert, Aleksandra Čavoški, *European environmental law* (Cambridge: Cambridge University Press, 2017), 47.

[11] Robert Goodland, "The concept of environmental sustainability" [1995] Annual Review Ecol Syst, 26.

[12] It is generally recognized that notions of sustainability were promoted in `limits to growth' and 'green' discourses in the early 1970s See Donella Meadows et al., *The Limits to Growth: A Report for the Club of Rome*, (Potomac Associates and Pan Books, London and Sydney, 1974).

[13] The Conference held in Stockholm in 1972 is often considered the first attempt to develop a global environmental policy. In this occasion, the participating parties (almost all the countries of the world) agreed on some guiding principles that became the basis of the later international environmental policy.

[14] Edward Goldsmith et al, "A Blueprint for survival", [1972] 2(1) The Ecologist.

used for the first time the concept of sustainability in the context of environmental protection issues, arguing that our "industrial way of life with its ethos of expansion is not "sustainable"" and affirmed the necessity "to create a society which is sustainable, and which will give the fullest possible satisfaction of its members"[15].

The following UN Conference held in Stockholm in 1972 was the first major international conference on environmental issues and represented a defining moment in the development of an international environmental policy. [16] For the first time, at the UN level, governments acknowledged the importance of protecting and improving environmental conditions as a major issue, which affects the well-being of peoples and that "the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future"[17]. These considerations set the stage for subsequent international treaties and conventions addressing environmental protection issues and demanding greater cooperation on transboundary proceedings and management of shared resources.

As a result, since the 1970s, the words *sustainability* and *sustainable development* have entered into the public discourse to indicate the need to adopt a conservative approach to natural resources in order to meet the need and aspirations of future generations. Indeed, the etymology of the word *sustainable*, as well as its Italian equivalent ("*sostenibile*") rely upon the word *sustain*, which means "*to bear, to hold*" for a certain period of time and at a certain level; perhaps the French word used to express the same concept, "*durabilité*" it is clearer with respect to the temporal element, i.e. the attention to future generations' needs. A revealing meaning that we can found also in the Latin "*sustinere*", which can be translated into "to hold, to preserve, to protect".

However, also the academic debate has been characterized by a certain grade of disagreement about the content and meaning of such concept. An effective overview of what

[15] Ibid.
[16] McShane (n.8).
[17] UN, Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972), Principle 2.

"sustainability" means for biologists, economists, ethicists and sociologists is offered by Basiago[18]. Thus, despite the multiple uses, four essential components seem to characterize sustainability: "futurity (a concern for the welfare of future generations), equity (the fair sharing of economic benefits and burdens within and between generations), global environmentalism (a recognition of the global dimension of ecological problems associated with use or depletion of natural capital by one or some at the cost of others) and biodiversity (the maintenance of the integrity of ecological processes and systems)"[19].

These notions also emerge from the definition given by the UN Brundtland Commission in 1987, in the "Our Common Future*"* report, where the goal of sustainable development was defined as "meeting the needs of the present without compromising the ability of future generations to meet their own needs"[20]. Thereafter, the broader goal of sustainability has been constructed around three pillars: social equality, economic growth, and environmental protection, as testified by the conclusions reached by the Earth Summit (1992) and the Rio Declaration on Environment and Development, which identified the achievement of sustainable development, and therefore the integration of environmental protection and social equality concerns into economic development, as the most important policy goal of the century[21].

In conclusion, from the above description, it emerges as the standard definition of sustainability has an intrinsic anthropocentric connotation, given its focus on protecting human well-being from the indirect harm caused by the waste of natural resources. An aspect that is further confirmed by the text of UN Convention on Climate Change which describes

[18] Andrew Basiago, "Methods of defining 'sustainability'", [1995] 3(3) Sust. Dev., 109. The author describes the different ideas beyond the employment of this concept across different disciplines: biologists use this term to refer to the protection of bio-diversity on behalf of future generations; in economy, sustainability is used as a methodology through which internalize environmental costs of industrial activities; to sociologists it means the defense of environmental justice, whereas for environmental ethicist, sustainability is used in the discussion about the relationship between man and nature, and the existence of nature's rights that must be protected regardless of the effects on humankind.

[19] Ibid. See also Jeffrey D. Sachs, *The Age of Sustainable Development* (Columbia University Press, New York, 2015).

[20] Report of the World Commission on Environment and Development: Our Common Future, 1987 (Brundtland Report).

[21] See also See also Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" [2012] 23 European Journal of International Law (EJIL), 377.

its main purpose as the protection of "the climate system for the benefit of present and future generations of humankind"[22]. As we are going to see, even an anthropocentric conception of sustainability, which prioritizes humankind's interests to those of the natural order, has struggled to find recognition within the political debate: a serious response to the issues above mentioned would require unpopular interventions, as the limitation of consumerism and waste, as well as a reduction of population growth and size, and the abandonment of fossil fuels as a primary source of energy. Despite the shared belief about their indispensability, all these measures are felt to be politically damaging, and therefore discarded in favor of much more progress-oriented policies.

3. The global environmental governance and political agenda

The description of the key features of the European environmental policy and the role played by its actors must necessarily start from the global context in which the urgency of international environmental action has emerged. The protection of the environment was not included among the core objectives of the European Economic Community, as set out in the Treaty of Rome of 1957. The European Community was essentially aimed at building a common market, where other policies were considered only in connection with their impact on the realization of the single market. As we know, the European Union assumed a more complex connotation in more recent times, when the common market has become only one of the several, albeit the fundamental, objectives of the Union. Among other things, the evolution of the European project and the extension of its scope were also influenced by increasing awareness and attention to environmental issues at the national level and Member States' willingness to participate in international initiatives. In the beginning, the process that led to the creation of a global environmental governance was driven by European countries as sovereign national states, and only at a later stage, the EU Union took its current leading position.

The growing environmental concerns, both at the national and international level, came forth at the beginning of the 1970s as a reaction to one of the negative aftereffects of

[22] United Nations, "Framework Convention on Climate Change" [1992] (Article 3, par. 1).

the globalization process that began after the II World War. In many countries, the urgency of reconstruction led to a profound change of economic structures, especially regarding production capacities, trade, and international payment systems. The 1945-1970 period is often defined as the "golden age" of economic growth and prosperity. As a consequence of the loosened trade restrictions, many countries benefited from the increased demand for their products and significantly increased their level of production: developing countries' growth was mostly driven by the increased level of export of agricultural and mineral products, which in turn was correlated to the developed countries' growth and increased demand for those products.

However, at that time, there was a shared belief that foreign trade could not be the sole road to economic development. As observed by the World Economic Survey of 1961 promoted by the UN, whereas developed countries' economies were diversified and largely industrial, in developing countries production was mainly based on agriculture, and this could explain the great gap in per capita incomes that used to divide the two groups of countries. There was an "almost universal agreement that industrialization has a major role to play in the economic development of the under-developed countries"[23]. It was also observed, in accordance to the Prebisch-Singer hypothesis[24], that as a result of the changed economic conditions in the advanced economies "the growth in import demand of the advanced areas for most primary products has lost the momentum of earlier decades and, currently, it lags behind the growth in their domestic incomes and output"[25]. Therefore, the promotion of industrialization of less developed countries was one of the main subjects in the UN General Assembly's agenda during the 1950s/60s decade. The post-war prosperity was characterized

[23] United Nations - Department of Economic and Social Affairs "World Economic Survey" [1961], 3.
[24] Hans Singer, "The distribution of gains between investing and borrowing countries" [1950] American 40 Economic Review, 473; Raul Prebisch, "The economic development of Latin America and its principal problems" [1950] UN ECLA, New York. Also published in [1962] 7 Economic Bulletin for Latin America, 1. This thesis, published by the two authors independently in 1950, suggests a long-term decline for primary commodities prices with income growth relative to manufactured good's price. It rested on the belief that primary commodity production, especially agriculture, face diminishing returns to scarce land and other natural resources while producing manufactured goods would face increasing returns. Simultaneously, faster technical progress would increase manufacturing output, further depressing manufactures prices, and population growth and urbanization would keep manufacturing wages and costs in check. The implication was that commodity producing developing countries would benefit through trade from faster technical progress in the industrialized countries.
[25] Ibid.

by intensive industrial production and consumption, both in developed and developing countries, which improved by far life conditions in many areas of the world.

The first criticisms have soon followed the considerable optimism surrounding those years: many academics and policymakers started to question the sustainability of this model of growth by pointing out the negative impacts that such process was having on many aspects of human life, including the unequal share of its costs and benefits[26]. From the environmental perspective, during the same period, many academics called the attention to the increased extraction of natural resources and the level of air and water pollution, as well as other environmental damages caused to the ecosystem by an unrestrained industrialization. This happened in a context of loosen regulations and inadequate forms of control on the externalities that industrial activities were producing and the very little consciousness about the long-term gravity of environmental damages. It was 1962 when Rachel Carson published the first edition of *Silent Spring*[27], a best-seller documenting the damages caused by chemicals to wildlife, animals and nature. Reading her warning today is pretty astonishing, given that the concerns generated by the irresponsible use of pesticides have not been quietened yet. This book, as many other interventions of academics, caused increasing public concern about environmental quality.

At the citizen level, the first environmental movements originated as a reaction to some serious environmental disasters, demanding for stronger government intervention and protection. For instance, on 30 October 1948 in Donora, an industrial town of Pennsylvania, a heavy smog created by hydrogen fluoride and sulfur dioxide emissions from some steel plants based on that area killed 20 people and caused respiratory problems for 6,000 people[28]. This and other environmental calamities boosted public demand for new legislation on pollution control, which eventually succeeded as demonstrated by the 1955 Air Pollution Control Act passed by the US Congress and followed by the Clean Air Act (1963), the Water Quality Act (1965) and the Fauna Conservation Act (1974).

[26] See Meadows et al. (n.12)
[27] Rachel Carson, "Silent Spring" [1962] *The New Yorker*.
[28] William Helfand, Jan Lazarus, Paul Theerman, "Donora, Pennsylvania: an environmental disaster of the 20th century" [2001] 4 Am J Public Health, 91.

Likewise, in Europe, a number of industrial accidents bolstered public debates and eventually led to regulatory interventions on the safety of industrial plants and pollution limits. For example, the environmental disaster caused by dioxin emissions occurred in Seveso (Italy) in 1976 in a small chemical manufacturing plant sounded "the alarm about mankind's fatally laggard approach to the problems of chemical contamination", as affirmed by a New York Times' article describing the accident[29]. The necessity to answer the doubts about chemical plants' safety resulted in the adoption of the EU's Seveso Directive (Directive 82/501/EEC) aimed at minimizing the risks associated with the use of large amounts of chemical materials[30].

Thus, the early environmental policy developed in the European Union was based on a sectorial approach with a lack of comprehensive vision about the importance of environmental protection as a transboundary objective. Moreover, most of the early initiatives were promoted at the national level, especially in Germany, the Netherlands, and Denmark, since the EU did not have the relevant competencies and institutions to play a more effective role. Only at a later stage, the EU started to build its own institutions and took a took a leadership position at the international level together with the United States. Starting from the 1980s, the urgency to mitigate the negative impacts of industrial and human activity on the environment through regulatory interventions entered in all industrialized countries' political agenda while also receiving a formal recognition with the institution of agencies and bureaucratic infrastructures.

Meanwhile, during the 1970s, the basis for an institutionalized international cooperation was established. As said before, the spontaneous environmental movements alongside the findings of advanced scientific researches brought in the international fora the

[29] "Seveso Disaster" *New York Times* (Aug. 19, 1976). Available at <https://www.nytimes.com/1976/08/19/archives/seveso-disaster.html> last accessed January 22, 20. For a close narration of these events see Laura Conti, *Visto da Seveso. L'evento straordinario e l'ordinaria amministrazione* (Feltrinelli, Milano, 1976) and on the growing concerns about environmental disasters see Italo Calvino, "Quando finirà questa estate di disastri?" *Corriere della sera* (25 August 1976).

[30] Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities [1982] OJ L 230, 1.

urgency of linking the economic development growth to the preservation of the environment and the minimization of risks for human health, issues that could only be efficiently tackled by coordinated action of the largest number of countries. At the UN level, these issues were associated with other crucial demands from developing countries, concerning poverty reduction, equality, and health. Therefore, the international discourse was shaped to link the protection of the environment with economic and social development[31].

However, this process of internalization of the environmental discourse has often encountered much resistance. The development of an international environmental governance was defined by two conflicting tendencies: the acknowledgment of the necessity of an international cooperation on one side, and the attempt to preserve the traditional state sovereignty on the other. The Stockholm Conference, which represented the starting point for a coordinated environmental policy at the EU level, saw the EU countries participating as autonomous national states, defending their own national positions and interests[32]. The EU environmental policy was formally founded right after the Stockholm Conference in 1972, with a declaration made by the European Council in Paris, followed by the First Action Program adopted in 1973, which set out the principles and main objectives of its environmental policy[33]. As we will see, this Action Program was followed by other five programs that have progressively extended the scope of the EU intervention on environmental issues.

Moreover, since the 1990s, the EU itself has assumed a leading role in the cooperation initiatives promoted at the international level to achieve a global consensus on the priorities for a coordinated action to tackle the most pressing problems. The Rio Conference of 1992, also known as the Earth Summit, represented a crucial moment in the development of a global partnership on social and environmental actions[34]. There, 178 countries agreed to pursue a

[31] Brundtland Report (n. 20). See also Benjamin Richardson and Stepan Wood, *Environmental Law for Sustainability* (Hart Publishing, 2006) and Philippe, Jacqueline Peel, Adriana Fabra, and Ruth MacKenzie. *Principles of International Environmental Law 4th ed.* (Cambridge: Cambridge University Press, 2018).
[32] See Tom Delreux, Sander Happaerts, *Environmental policy and politics in the European Union* (Red Globe Press ed. 2016), 43-56.
[33] First Environmental Action Programme 1973-1976, [1973] OJ C 112, 1.
[34] For a more detailed description, see Marco Onida, *Europe and the Environment. Legal Iusses in Honor of Ludowig Kramer* (Groningen, 2004).

model of economic development consistent with the scarcity and fragility of the environment, as explained in the Agenda 21, and signed three multilateral environmental agreements: The United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and the UN Convention to combat desertification (UNCCD). With the UNFCC, one of the three Rio Conventions, the signatory parties, with the aim of strengthening the global response to the threat of climate change, committed to stabilizing the greenhouse gas (GHG) emissions "at a level that would prevent dangerous anthropogenic (human-induced) interference with the climate system (…) within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner"[35]. In terms of emissions cuts and financial support for action on climate change, the main obligations were established for industrialized countries, being them the main responsible for greenhouse emissions[36].

These commitments were later specified within the Kyoto Protocol adopted in December 1997[37], which provided individual targets for the 36 industrialized countries and the European Union – on an average of five percent emission reductions against 1990 levels- according to the principle of "common but differentiated responsibility and respective capabilities"[38]. These targets were established for a first five-year commitment period ending in 2008-2012, and the Doha Amendment adopted in 2012 set out the objectives for a second commitment period (2013-2020), where Parties committed to a 18% emission reduction below the 1990 levels. For the European Union and its Member States, the Amendment provided a 20% reduction in GHG emissions compared to the 1990 levels, which matched the objectives set out by the Climate and Energy Package enacted in 2009[39].

[35] UNFCC (n. 22)
[36] The Convention is structured according to the categories to which each country is assigned. This is reflected in the distinction in Annex: Annex I includes industrialized countries that are member of the OECD and economies in transition (EIT Parties); Annex II includes OECD members of Annex I but not EIT countries – these countries committed to provide financial resources to developing countries, identified as Non-Annex I, in order to meet their emission targets;
[37] Kyoto Protocol to the United Nations Framework Convention on Climate Change, [1997].
[38] A principle established by the Convention (art. 3.1).
[39] The Council adopted the Climate and Energy Package in April 2009, which was complemented by a number of other legislative acts, namely four: the Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 Amending Directive 2003/87/EC so as to Improve and Extend the Greenhouse Gas Emission

However, the implementation of these agreements encountered some obstacles: the United States did not ratify the Kyoto Protocol and Canada withdrew from it in 2011. Moreover, the Doha Amendment (2012) was expected to enter into force after the 144 signing Parties' formal acceptance. However, as of 2015, only 31 countries had ratified the amendment, while as of January 2020, 136 countries, including the European Union, formally adopted the commitments provided by the Doha Amendment.

In addition to national measures, the Kyoto Protocol set up some market-based mechanisms to meet the targets: the International Emission Trading Systems, the Clean Development Mechanism, and the Joint Implementation. The promotion of these instruments starts from the assumption that it doesn't matter where pollution reductions occur, as long as they do. The Emissions Trading System (Article 17 of the Kyoto Protocol) allows countries that have emission units, which are permitted but not used, to sell them to countries that cannot meet their targets. This system works primarily for carbon dioxin emissions to establish a "carbon market", where carbon is traded as any other commodities. These emission trading schemes are also operated at regional levels, as in the case of the European Emission Trading Scheme.

The General Assembly of the UN in 2015 adopted the 2030 Agenda for Sustainable Development[40], which identifies 17 Goals and 169 associated targets, reflecting the critical areas of intervention for humanity and the planet, on the broader ambition to achieve a development which is sustainable in social, economic and environmental terms. Goals 13-16, which are intrinsically linked to all the other Goals, specifically address the most urgent environmental concerns related to Climate Change, the preservation of natural resources, the

Allowance Trading Scheme of the Community, OJ L140, 5.6.2009, 63; Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, 16., Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the Geological Storage of Carbon Dioxide and Amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, OJ L 140, 5.6.2009, 114. and Decision No. 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the Effort of Member States to Reduce their Greenhouse Gas Emissions to Meet the Community's Greenhouse Gas Emission Reduction Commitments up to 2020, OJ L140, 5.6.2009, 136.

[40] UN, Transforming our world: the 2030 Agenda for Sustainable Development [2015].

increase of sea level, desertification and the protection of biodiversity[41]. Climate Change is recognized as the greatest challenge of our time, since it can seriously affect national economies and people's lives because of the extreme weather events, rising sea level and changing weather patterns. As scientific studies testify, the GHG emissions produced by human activities represent the main cause for global warming, the average surface temperature reached, in fact, the highest level in history, and without effective action might surpass the 3°C level, with catastrophic consequences, which would be experienced mainly by the poorest and most vulnerable[42].

After Doha, an essential step in the international efforts in combating climate change was achieved with the Paris Agreement – COP 21 signed in 2015, which followed the negotiations in Warsaw (2013) and Lima (2014). The Paris Agreement set out an action plan to mitigate the consequences of climate change by limiting the global warming to an average temperature below 2°C above pre-industrial levels, and trying to limit the increase to 1.5°C. The agreement, among other things, recognized the role of non-Party stakeholders in pursuing its objectives and addressing climate change[43]. The EU played a leading role in achieving this result and committed to reducing greenhouse gas emissions by at least 40% by 2030, according to its 2030 climate and energy framework. Following sessions of the Conference of Paris were held to achieve the full operationalization of the Paris Agreement and take further steps in the UN climate change process. The UN Climate Change Conference COP 25 took place in Madrid in December 2019 and aimed to improve the rules on carbon markets and the other form of voluntary cooperation provided by Article 6 of the Convention[44]. A strong message of the intent of raising ambition was expected, also considering the growing global climate movement, but eventually, the negotiations have not been profitable since the Parties could not reach consensus on many areas due to conflicting

[41] See Goal 13 "Take urgent action to combat climate change and its impacts"; Goal 14 "Conserve and sustainably use the oceans, seas and marine resources for sustainable development", Goal 15 "Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss".
[42] Meadows et al. (n. 12) and Jackson (n. 7)
[43] Cities, regions, academic institutions, civil society, international organization etc. In Paris, it was recognized the importance of involving non-state actors to achieve the goals of the Agreement.
[44] Which states that the "Parties recognize that some Parties choose to pursue voluntary cooperation in the implementation of their nationally determined contributions to allow for higher ambition in their mitigation and adaptation actions and to promote sustainable development and environmental integrity" (…).

interests and priorities[45]. The negotiations of most of the crucial issues have been adjourned to the COP26 to be held in Glasgow in November 2021.

4. The protection of the environment in the law of the European Union

The increasing ecological activism by individuals and associations, and the attention to the impacts of globalization and economic growth on the environment, urged the inclusion of environmental issues in the EC's agenda as well. Although this is not the right context for a deep and comprehensive scrutiny of the European Environmental Policy and its evolution, a brief description of the circumstances in which it has been developed and the forms it assumed seems necessary to infer the normative and substantive foundations of EU Environmental objectives, as now established by the Treaties and the relationship with the other EU's goals and values[46].

In the 1950s when the first academic articles and international conventions on the environment came to light, Europe was discussing the institution of a common market through the promotion of free movement of people and factors of production[47]. As a result, the ECC Treaty signed on 25 March 1957 mainly focused on the achievement of such objective and did not include provisions on environmental protection; the only reference to environmental issues was provided by the then Article 36 EC (now article 36 TFUE) concerning the possible justifications for barriers to trade, which included "the protection of health and life of humans, animals or plants". Nevertheless, in the first decade after the

[45] UN secretary general António Guterres expressed his disappointment with the results of COP25 pointing out as "the international community lost an important opportunity to show increased ambition on mitigation, adaptation & finance to tackle the climate crisis", see the official Twitter Account of Secretary General, Dec 15, 2019 available at https://twitter.com/antonioguterres/status/1206199048660611073, accessed in January 2020.

[46] For a more extensive analysis see Jans H. Vedder, *European environmental law. 4th ed.* (Europa Law Publishing 2012), 22-24; Nicolas De Sadeleer, *Environmental principles from political slogans to legal rules*, (Cambridge, 2005) and David Langlet and Said Mahmoudi "Objectives, Principles, and Resources" in *EU Environmental Law and Policy* (Oxford University Press 2016).

[47] For an historical reconstruction see Ludwig Kramer, *EC Environmental Law* (London, Sweet& Maxwell, 2016), Kingston, Heyvaert, Čavoški, (n.10); Paolo Dell'Anno, Eugenio Picozza, *Trattato di diritto dell'ambiente*, (CEDAM 2012).

institution of the EEC, some legislation concerning the environment was passed, even though it was inspired by the intention of removing the barriers among Member States[48].

The first real step in the buildup of a specific European policy on environmental matters was made in connection with the preparation of the Stockholm Conference held in 1972. In a joint statement published after the Paris European Summit, the Heads of State or Government for the first time recognized that "economic expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced. (…) It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind"[49]. On that occasion, the Heads of States also emphasized the importance of a Community environmental policy and committed to adopt a program of action at the Community level with a precise timetable.

That commitment was eventually maintained and, in 1972, the Council adopted the First Action Program setting the framework of the EU environmental policy for the following 1973-76 period[50]. This program recognized the interdependence of economic development and environmental protection and identified some objectives, such as the prevention and limitation of damage to the environment, the preservation of ecological balance, and rational use of natural resources. These principles have been further specified and improved by the following programmes, through which the Community progressively shaped its environmental policy and introduced some fundamental principles, such as the prevention principle or the polluter pays rule, that had been eventually included within the Treaties[51].

[48] See Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labeling of dangerous substances [1967] OJ 196, 1. Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles [1960] OJ L 76, 1.
[49] Bulletin of the European Communities. October 1972, No 10. Luxembourg: Office for official publications of the European Communities. "Statement from the Paris Summit", 14.
[50] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment [1973] OJ C 112,1.
[51] De Sadeleer (n.46).

However, it was only in the 1980s that environmental protection was for the first time recognized as an objective of the Community[52]. In 1985 a decision of the Court of Justice (*ADBHU*) paved the way for such a change: the Court, without any explicit legal basis, referred to environmental protection as "one of the Community's essential objectives", which in some circumstances could justify a restriction on free movements rules. In particular, in that case, the restrictions on trade imposed by a Directive regulating the disposal of waste oils, and justified by environmental considerations, were considered legitimate under the proportionality and non-discriminatory principles[53].

Soon after, with the Single European Act of 1987[54] – one of the major amendments of the ECC Treaty – environmental protection became an explicit objective of the Community, with a specific legal basis for action under the new Article 100a[55]. In fact, the SEA amended the ECC Treaty by introducing a new Environmental Title (Title VII, Articles 130r-130t) defining the objectives of the European Environmental policy and ways in which they had to be implemented by the Council and Member States. Until then, environmental

[52] See Ludwig Krämer, "Environmental justice in the European Court of Justice" in J. Ebbesson & P. Okowa (Eds.), *Environmental Law and Justice in Context*, (Cambridge: Cambridge University Press 2009), 195-210; Delphine Misonne, "The Court of Justice of the European Union and the High Level of Environmental Protection: Transforming a Policy Objective into a Concept Amenable to Judicial Review" in *International Judicial Practice on the Environment: Questions of Legitimacy*, (ed) Christina Voigt, (Cambridge: Cambridge University Press, 2019), 212.

[53] Case 240/83 *Association de défense des brûleurs d'huiles usages* (ADBHU) [1985] ECR 531 and Case 302/86 *Commission v Denmark* [1988] ECR 4607 (September 1988), para 9 where the Court stated that "the protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty" and Case 213/96 *Outokumpu Oy.* [1998] ECR I-01777. See also C-503/06 *Commission v. Italy,* ECLI:EU:C:2008:279. For an overview of the role of the Court of Justice see For an overview see: Jans H Jans, "Environmental Spill-Overs from the European Court of Justice" [2008] 31 Fordham Int'l LJ, 1360; Misonne, (n. 52).

[54] Single European Act, 17 February 1986, [1987] OJ L 169, 1.

[55] See Dirk Vandermeersch, "The Single European Act and the Environmental Policy of the European Economic Community" [1987] European Law Review, 407. In particular Article 100A Article l00a empowered the Council to act by qualified majority, and permitted member states to apply stricter national measures. Today, the key legal basis for environmental provisions is provided by Article 19(1) TFEU, which sets out, as a general rule, the ordinary legislative procedure, with a prior consultation of ECOSOC and the Committee of the Regions. Paragraph 2 then lists some areas of intervention that requires a special procedure and unanimity of voting in the Council. A *passarelle* clause is also included, which allows for the adoption of the ordinary procedure to the matters above listed, without the necessity for Treaty amendment.

measures could only be adopted as ancillary measures connected to the realization of market integration, and precisely on the basis of Article 235 EC or Article 100[56].

However, a formal recognition of environmental protection as an objective of the Community occurred with the Maastricht Treaty, which replaced Article 2 with a new version establishing that the Community shall have as its task the promotion of "a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment (…)". Moreover, the Treaty of Maastricht further clarified the principles on which the environmental action is based by introducing the precautionary principle. The increased centrality of environmental protection in the law and policy of the Union was further confirmed by the Amsterdam Treaty, which did not bring fundamental changes except for the words of Article 2, where the expression "harmonious and balanced development" was replaced with the more known and meaningful "sustainable development of economic activities". Furthermore, the Amsterdam Treaty moved the integration obligation previously included in the Environmental Title at the beginning of the Treaty among the general principles of the EU (ex Article 6)[57]. Therefore, with the Treaty of Amsterdam the concept of sustainable development as developed in the international discourse entered in the law of the Union and became one of its main goal. However, the reference to the sustainable development still had a relatively narrow scope, being confined to economic activities.

With the Lisbon Treaty, entered into force on 1 December 2009, the wording of Article 2 EC was slightly changed, while moved to the text of the new article 3 TEU listing the objectives of the Union[58]. The new formulation of article 3(3) TEU about the values upon which the Union is based expressly provides a more general understating of the notion of

[56] Francis Jacobs, "The role of the European Court of Justice in the protection of the environment", [2006] 18(2) J Environmental Law, 185.
[57] In accordance to this reinforced obligation, the Treaty was accompanied with a non-binding Declaration which committed the Commission to "prepare environmental impact assessment studies when making proposals which may have significant environmental implications".
[58] For a synthesis of the major changes brought by the Lisbon Treaty on the EU Environmental polity see Hans Vedder, "The Treaty of Lisbon and European Environmental Law and Policy" [2010] 22(2) Journal of Environmental Law, 285. See also Antonio Tizzano, Roberto Adam, *Manuale di diritto dell'Unione Europea*, (Giappichelli, 2014), 22-27 and 798.

sustainability not merely linked to economic development but more similar to the integrated approach on economic, social and environmental matters, as suggested by the Brundtland Commission in 1987[59]. The article in fact establishes that the Union shall work to contribute to "the sustainable development of Europe based on balanced economic growth and price stability (…), and a high level of protection and improvement of the quality of the environment". An objective reiterated in the context of the Union's goals in its external relations where Article 3(5) and Article 21 refer to the contribution to "the sustainable development of the earth" and "the sustainable economic social and environmental development of developing countries"[60].

The Treaties do not provide an explicit definition of the notion of "sustainable development", and the EU has not developed its own interpretation, but followed the main findings arising from the international debate[61]. Indeed, the main components of the implementation mechanisms developed by the EU since the Gothenburg declaration and set out in the EU Sustainable Development Strategy follow the commitments agreed in the context of the Millennium Development Goals agreed in 2000[62]. As we will see, the implementation of such a cross-dimensional goal, having both economic and social implications, required the strengthening the integration mechanisms across the Union's policies and activities, even beyond the general principle of consistency established in Article 7 TEU.

Conversely, the Treaty provides more details on the objectives and principles of European environmental policy under Article 191 TEU (ex 174 EC), which clarifies that the

[59] See Mariachiara Alberton, Massimiliano Montini, *La governance ambientale europea in transizione*, (Giuffrè, 2008) 507; Maria Kenig-Witkowska, "The concept of sustainable development in the European union policy and law" [2017] 1(1) JCULP, 64.

[60] Article 3(5) and Article 21 specify that the EU's external aims include " the sustainable economic social and environmental development of developing countries, with the primary aim of eradicating poverty" and "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development".

[61] See Brundtland Report (n. 20).

[62] See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development, of 24 July 2009; World Summit on Sustainable Development (WSSD, Johannesburg, 2002): Johannesburg Declaration on Sustainable Development and Johannesburg Plan of Implementation.

Union policy on the environment "shall aim at preserving, protecting and improving the quality of the environment, protecting human health, a prudent and rational utilization of natural resources (…)". The same provision provides additional indications on how these objectives must be implemented, the principles that guide environmental action and how to exercise shared competences. With this respect, articles 4 and 5 TEU define the cases in which the Union has exclusive or shared competence, in light of the principles of conferral, subsidiarity and proportionality[63].

Moreover, despite the harmonization measures adopted ex Article 192 TFEU, Article 193 TFEU allows Member States to maintain or introduce more stringent protective measures, as long as they comply with the other Treaty's provisions and are notified to the Commission. The ECJ had the occasion to clarify the scope of this provision and has interpreted it in a more flexible way compared to the safeguard provision established by article 114(5) about internal market measures: the Court affirmed that the harmonization level concluded by a specific European legislation must be considered as to be minimum in nature, Member States may be allowed to adopt more stringent measures in order to achieve a high level of environmental protection[64].

[63] The competence structure within the Commission on environmental issues is characterized, since the Barroso Commission, by the distinction between Environmental Policy and Climate Action in two separates portfolios. The two Commissioners and the Directorates-General, however, work in strict cooperation, although this separation often represent an obstacle to an efficient action. The current President of the Commission appointed as Executive Vice-President Frans Timmermans (Netherlands), who is also in charge coordinating the work on the European Green Deal managing the climate action policy, whereas Virginijus Sinkevičius (Lithuania), took responsibility for "Environment and Oceans". At the EP level, most of the work is conducted within the committees' structure and, in particular, by the "Environment, Public Health and Food Safety Committee" (ENVI), one of the largest and most important committees in the EP. When the Commission submits a legislative proposal, the ENVI Committee can be appointed as "responsible committee", in charge of preparing a report for the Parliament, or, when the legislative proposal regards multiple policy areas, it can share the responsibility for drafting the report with the other competent committees, according to the "associated committee procedure". The ENVI can also request to give an opinion on proposals assigned to other committees. Within the Council, the Working Party on the Environment (WPE) and the Working Party on International Environmental Issues (WPIEI) discuss the internal and external EU policy and the positions to be taken in international negotiations. An important role, at the ambassador level is also played by the COREPER I, which contributes to the preparation of the Council's meetings and also facilitate the horizontal coordination with other policy domains as internal market, transport etc. See Delreux and Happaerts (n. 28).

[64] See Case C-2/10 *Azienda Agro-Zootecnica Franchini* [2011] ECR I-6561, para 57. Under art. 4(2) TFEU environmental policy constitutes an expressed shared competence between the Union and its Member states, with the exception of the conservation of marine biological resources, which belongs to the exclusive competence of the Union. In relation to the EU's external competences, and in particular the question of whether an environmental agreement may be included within the *express* or *implied* exclusive external competence of the EU see the ECJ in the Opinion 2/00 (*Cartagena Protocol*) [2001] ECR 2001 I-09713. As for the implied

4.1. Principles and objectives of the European Environmental Policy

In addition to the general principles that characterize the European constitutional structure (supremacy, direct effect, subsidiarity, loyal cooperation…) and those deriving from the rule of law, the EU environmental policy has its own specific principles, which are expressly set out by the Treaties, namely by article 191(2) TFEU, and form the basis for any EU environmental action. These principles are sometimes considered, including by the ECJ[65], as general principles of EU law, as a consequence of the interpretation of article 11 TFUE which requires that the principles of EU environmental policy should be integrated into all the other EU policies. These general principles represent the inspirational basis for important secondary EU legislation and as a standard of review for both EU and Member States' actions. The specific principles of EU environmental policy are listed by Article 191(2), which provides that such policy shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. This provision doesn't specify the content and the implications of such principles, whose meaning has been therefore detailed by several CJUE judgments and EU official documents.

A crucial principle in environmental law that has been also elevated as a general principle of EU law, is *the precautionary principle*, deriving from the German *Vorsorgeprinzip*. This principle provides the primary guidance for policy-making decisions in conditions of scientific uncertainty to pursue an increased level of environmental, consumer and public health protection[66]. Also, in the international context, despite some criticisms[67], since 1987 the adoption of a precautionary principle has begun to characterize

exclusive competence, according to the *ERTA Judgment* the ECJ must evaluate, case by case, if the conclusion of the agreement is provided in a legislative act of the Union or it is necessary to enable the Union to exercise its internal competence Case C-22/70, *Commission v Council* (European Road Transport Agreement [1971] ECR 263. See Tizzano, Adam (n.58) 433-453.

[65] For instance, the Court of Justice has held that precautionary principle represents a general principle of EU law, See Joined Cases T-74/00 and T-76/00 *Artegodan v. Commission* [2002] ECR 2002 II-04945.

[66] Ibid. paras 183 and 184.

[67] Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005); Giandomenico Majone, "What price safety? The precautionary principle and its policy implications" [2002] 40 *JCMS*, 89; Ian Forrester, "The Dangers of too much Precaution", in M Hoskins and W Robinson (eds), *A True European, Essays for Judge David Edward* (Hart, 2003) Ch. 16.

many States' approach to environmental issues[68]. In 2000 the Commission adopted a soft law measure, i.e. the Communication on the Precautionary Principle, to clarify the content of this principle, as provided by (then) article 174 of the Treaty[69], and to describe how it intended to apply it. The Commission describes the precautionary principle as a risk management tool to be employed when a response to a possible danger to the environment or human health is required, and the necessary scientific knowledge is not available. In case of uncertain and inconsistent scientific knowledge, policy-makers need to find a correct and proportionate balance between individuals' and industry's interests and freedoms on one side and the necessity to eliminate the risk or reduce it at an acceptable level on the other. To this respect, the EU legal framework identifies the precautionary approach as the correct risk management strategy, according to which, after a scientific examination of the potentially negative effects of a phenomenon, product or process, when a precise scientific evaluation of the risk is not possible because of the insufficiency of the data, their inconclusive or imprecise nature, the precautionary principle may justify a political decision to act (or not to act) and the adoption of specific measures, which must, however, comply with the principles of proportionality and non-discrimination.

In other words, as expressed by the case law of the ECJ "where there is uncertainty as to the existence or extent of risks to human health, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent"[70]. Therefore, it seems clear the broad discretion granted to European institutions in the field of risk regulation, considering also how difficult it is for judicial bodies to evaluate the scientific support required to implement precautionary measures.

According to the ECJ case law, EU institutions, once they have carried out a risk assessment and evaluation, enjoy broad discretion in defining the objectives to be pursued and the measures to be taken, in respect to which judicial review must be limited. Courts are

[68] James E. Hickey Jr. and Vern R. Walker, "Refining the Precautionary Principle In International Environmental Law" [1995], 14 Envtl. L.J., 423.
[69] Communication from the Commission on the Precautionary Principle [2000] (COM(2000)1).
[70] The main feature of the precautionary approach was first developed by the ECJ with the so-called "BSE judgements" in relation to a ban on export of live bovine animals to prevent the transmission of a bovine disease to humans, see Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, para 63.

not allowed to substitute their evaluation to those made by other institutions,[71] but they must verify "whether the relevant procedural rules have been complied with, whether the facts admitted by the Commission have been accurately stated and whether there has been a manifest error of appraisal or a misuse of power"[72]. For instance, in *Gowan*, the ECJ scrutinized the Plant Protection Products Directive (PPPD) in relation to the imposition of some restrictions on a fungicide, the fenarimol, after some scientific studies that pointed out the potential adverse effects on the endocrine system. To the claims that sufficient scientific justifications did not support the restriction, the Court responded by scrutinizing the contested Directive against the principle of legal certainty, the possibility of a manifest error of assessment, the precautionary principle and the principle of proportionality. It concluded that measures were suitable and proportionate to achieve the Directives' objectives, and the scientific evidence brought the attention of the Commission were correctly taken into consideration and justified a precautionary approach[73]. The Court, therefore, confirmed the limited judicial review of precautionary measures taken by the EU institutions.

With respect Member States, the European Courts have recalled the precautionary principle in relation to the safeguard clauses provided by internal market provisions, in particular when it was invoked by Member States to justify technical measures derogating the basic free movement provisions under article 36 TFUE or harmonization measures under article 114(4)(5). To this respect, the ECJ held that Member States are allowed to adopt protective measures in the name of the precautionary principle when, following an exhaustive risk assessment, the implementation of such measures appears necessary to prevent or limit potential damage to public health or the environment[74]. In a series of judgments involving fortified food and restrictive measures imposed by some Member States on such products, the ECJ further defined the conditions triggering the implementation of the precautionary principle and the justification of restrictions to the free movement Article 30 EC. In particular

[71] Case T-13/99 *Pfizer Animal Health v. Council of the European Union* [2002], ECR II-3305 166 and 274 and Joined Cases T-74/00 (n.65).
[72] Case C-79/09, *Gowan Comércio Internacional e Serviços Lda v. Ministero Della Salute,* [2010] ECR I-13533, para 56.
[73] Alberto Alemanno, "Annotation of European Court of Justice, Case C-79/09, Gowan Comércio Internacional e Serviços Lda v. Ministero Della Salute (Precautionary Principle) (July 16, 2011)" [2011] 48(4) Common Market Law Review, 1329.
[74] Case C-236/01 *Monsanto* [2003] ECR I-8105.

it held that: "when it proves to be impossible to determine with certainty [after having undertaken the prescribed comprehensive risk assessment] to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialize, the precautionary principle justifies the adoption of restrictive measures"[75].

An example of a specific safeguard clause that permitted Member States to prefer a higher level of environmental protection is Article 23 of Directive 2001/18 on the deliberate release of GMOs into the environment[76]. Such a clause allows Member States to provisionally restrict or prohibit the use and/or sale of that GMOs when, based on a risk assessment of existing information, it has detailed ground to consider them a risk to human health or the environment. As a result, Member States frequently have used this clause to ban specific GMOs within their territory.

Another key principle underlying many EU environmental laws and policies is the *preventive principle*, which implies that preventive actions shall be taken to pursue an adequate level of environmental protection because such an anticipatory approach appears more efficient and effective than attempts to remedy damages already caused[77]. This principle is often used in combination with the above precautionary principle, since it is not easy to find a clear distinction among the two. According to some, the former shall be used when the risk is certain and quantifiable[78]. With respect the rectification at source principle, the ECJ case law has not extensively defined its content and implications. This principle is usually used to support that a polluter or a region responsible for polluting should be responsible for cleaning up the damages caused by their actions. Several EU legislations,

[75] Case 192/01 *Commission v Denmark* [2003] ECR 9693 para 54. See also Case C-333/08 *European Commission v French Republic* [2010] ECR I-00757, where the Court also pointed out that the assessment of the risk cannot be based on purely hypothetical considerations.
[76] Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms, [2001] OJ L 106, 1.
[77] This principle is also present in the Stockholm Declaration (principle 21) which provides that States have the responsibility to ensure that activities in their jurisdictions do not cause damage to the environment.
[78] Wybe Douma, "The Precautionary Principle in the European Union" [2000] 9 Review of European Community & International Environmental Law, 132.

such as the Environmental Liability Directive or the Waste Framework Directive refer to this principle.

Lastly, to respond to the specific problem of pollution, the EU environmental law relies upon *the polluter pays principle (PPP)* that requires who cause environmental damages to pay for the costs of dealing with that pollution or, in other words, that polluters should "internalize" the environmental costs of their activity as part of their production costs. As often confirmed by EU Courts[79], this principle represents an obligation for EU institutions, which are obliged to consider it also in the adoption and implementation of legislative measures. This principle was first developed at the international level, and in particular in the 1972 OECD Recommendation on Environmental Policy and then adopted by the EU institutions first by some soft-law instruments[80] as the First Environmental Action Program (1973)[81] and the Recommendation 75/436/Euratom, ECDC, EEC[82], and then by including the PPP within the text of the Treaties. The PPP's underlying rationale can be described as follow, "charging to polluters the costs of action taken to combat the pollution which they cause encourages them to reduce that pollution and to endeavor to find less polluting products or technologies thereby enabling a more rational use to be made of the resources of the environment. Moreover, it satisfies the criteria of effectiveness and equitable practice"[83].

Therefore, the theoretical foundations are those of the economic reasoning, according to which the PPP works as a means to internalize the costs of negative environmental externalities, thus allowing an efficient allocation of resources. This principle indeed represents the source for inspiration of many market-based instruments aimed at internalizing the side-effects of human activities. For the same reasons, the PPP has often been criticized because conceived as the recognition of a sort of a "right to pollute", as long as the polluter

[79] Case C-293/97, *Standley* [1999] ECR-2603, paras 51–52. See also Suzanne Kingston, "The Polluter Pays Principle in EU Climate Law: an Effective Tool before the Courts?, [2020] 10(1) Climate Law, 1-27.
[80] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States of 22 November 1973 on the programme of action of the European Communities on the environment. Part 1, Title 11, para 5 [1973] OJ C112/1.
[81] Ibid.
[82] Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters 75/436/Euratom, ECSC, EEC: [1975] OJ L 194, 1.
[83] Ibid. Annex I, para 1.

pays for it. This idea in fact implies that environmental damages cannot always be prevented but that negative environmental externalities can be compensated in monetary terms. Notwithstanding the relatively intuitive rationale of such a principle, several issues prevent a full implementation of it, as the ways to identify the actual polluter and establish the exact costs of pollution that he is required to pay.

Moreover, the PPP is often employed in the context of State Aid law and, in particular, to establish whether a measure constitutes a State aid according to Article 107(1) TFEU, and to control whether it is legal or can be exempted, particularly under Article 107(3)(c) ("aid to facilitate the development of certain economic activities or of certain economic areas")[84]. The PPP, indeed, may conflict with certain types of state aid, aimed at relieving polluters from their obligation to internalize environmental damages. The objective of environmental protection does not imply that all environmental aids must be permitted, particularly because they can run against the foundational principles of the Union's environmental policy. Article 107(1) TFEU provides a general prohibition of State aids, given their potential effect of distorting competition in the internal market and affecting trade among Member States. In some circumstances, however, the EU Commission may consider some State aid as compatible with the internal market when the conditions laid down in article 107(2) and (3) are met. In this context, the PPP is often used to implement article 107 TFEU and to prohibit state measures that relieve polluters from their responsibility to pay for the costs they impose on the environment, and ultimately confer to them an undue economic advantage[85]. In fact, to facilitate the implementation of EU standards and to reduce the compliance costs, State aids (in the forms of loans, subsidies, tax exemptions etc.) are often employed as complementary measures to encourage companies to improve their level of environmental protection also beyond what is mandatory or profitable or to comply with the stricter standards adopted at the national level. Of course, such instruments must comply with

[84] See Gerry Facenna, "State Aid and Environmental Protection" in T*he Law of State Aid in the European Union*, (eds) Andrea Biondi, Piet Eeckhout, and James Flynn (Oxford: Oxford University Press, 2004); Nicolas De Sadeleer, "Consistency between the Granting of State Aid and the Polluter-Pays Principle: Aid Aimed at Mitigating Climate Change" [2020] 10 Climate Law, 28. See also Case C-126/01 *Ministre de l'économie, des finances et de l'industrie v GEMO SA* [2003] ECR I-13769, paras 68–70.

[85] Opinion of A. G. Jacobs in Case C-126/01 GEMO [2003] I - 13772, para 66, where he discusses how the PPP is used in the context of State Aid law.

the EU State Aid rules, as not to interfere with the level playing field required by EU law and, on environmental matters, and also with environmental principles as PPP. To consider the new priorities and the urgency to ensure a sustainable growth, the EU Commission decided to review its approach on State aid and adopted some Guidelines that set out the conditions under which aid for energy and environment may be considered compatible with the internal market under Article 107(3)(c) of the Treaty[86]. With this respect, in September 2020 the Commission released a revised version of the EU Emission Trading System State Aid Guidelines adopted in 2012[87] aimed at aligning these guidelines with the European Green Deal and the objective to become the first climate-neutral continent by 2050[88].

4.2. The integration of environmental protection requirements as an obligation ex art. 11 TFEU

All the above principles represent the inspirational basis for the European environmental policy, which, however, is often blamed for being too compartmentalized. These criticisms persist, although the Treaty provided a clear indication for a holistic approach to environmental protection, which is contained in Article 11 of the Treaty on the Functioning of the European Union (TFEU). It sets out that "environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development". The Single European Act introduced the integration clause as part of the first specific title on the Treaties about the environmental policy. The Maastricht and Amsterdam Treaties, at least in terms of semantics, strengthened the obligation of integrating environmental consideration in all the areas of EU law: it was agreed to amend the original expression "*shall be a component of*" to the clear "*must be integrated*", and to move the obligation within the "Principles" section

[86] Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, [2014] OJ C 200, 1.
[87] Communication from the Commission — Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012 [2012] OJ C 158, 4.
[88] See Press Release, State of the Union: Commission adopts revised EU Emission Trading System State aid Guidelines, (21 September 2020). According to the ETS Directive Member States can compensate indirect ETS costs that companies may face as result of the implementation of the ETS scheme. These measures must necessarily respect the State Aid prohibition set out by the Treaties, and so with the ETS State aid Guidelines the EU Commission provided a useful indication of the compatibility criteria that it will apply to State aid rules in the context of the greenhouse gas emission allowance trading scheme.

in the first part of the Treaty (Article 6 EC) [89], to leave few doubts about the importance of such provision[90]. An integration principle is also provided by article 37 of the Charter of Fundamental Fights which reads, "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development". As a consequence, the binding nature conferred to the Charted by the Lisbon Treaty further reinforced the relevance of such an obligation.

Despite the apparent provision's clarity, several doubts persist on the implications and the subjects to which the obligation ex art. 11 TFEU is addressed. A narrow interpretation would suggest that the provision simply binds the EU institutions in the definition of general policies, and not also with respect to secondary legislation. On the other hand, a broad interpretation would imply the binding nature not only for EU general policies and the implementation measures (directives, regulations, decisions) but also for Member States, in relation to their measures implementing the EU law.

To this respect, Nowag offers a careful analysis of the historical and contextual interpretation of the provision and suggests that the *effet utile* imposes the adoption of a broad interpretation of the norm, as imposing an obligation also to Member States when implementing EU law, given that most of the EU policies are implemented at the national level. Otherwise, the reference to "implementation" contained in article 11 TFEU would be vain[91]. The extent to which environmental considerations must be integrated into other EU policies also seems doubtful. First of all, what is clear is that the obligation has a substantive nature, and not only a procedural one, i.e. it is not sufficient to carry out carrying out an environmental impact assessment when proposing policy measures. Moreover, it could be

[89] The Lisbon Treaty placed the integration obligation along with other policy-linking clauses into the newly created section "Provisions Having General Application".
[90] Julian Nowag, *Environmental integration in competition and free-movement laws* (Oxford University Press 2016); Martin Wasmeier, "The integration of environmental protection as a general rule for interpreting community law" [2001] 38(1) Common Market Law Review, 159.
[91] *Ibid*. 24. To support this argument, Nowag cites two decisions of the General Court and the Court of Justice, namely *British Aggregate*, where the Court applied the principle also to a Commission's decision, and *Concordia Bus*, concerning a Member State's measure implementing EU law. See Case T- 210/02 *British Aggregate v. Commission* [2006] ECR II – 2789 para 117 and Case C-513/99 *Concordia Bus v. Helsingin Kaupunki* [2002] ECR I- 7213 para 57.

argued that the integration obligation imposes to prefer environmental objectives to other EU objectives in case of conflict[92]. However, the most agreed position considers that all EU goals, as stated by 3 of the Treaty, have equal importance, which need to be balanced in case of conflict[93]. A balancing process that, although very discretionary, with respect to the environmental requirements, should include the evaluation of the objectives, principles and criteria set out in article 191 TFEU.

However, in practice, the enforcement of such obligation as a standard for judicial review has been quite disappointing: whereas some have argued that the violation of the principle could represent a self-standing ground for annulment, others claim that the review is still narrow in scope as limited to the manifest error of appraisal and misuse of powers[94]. For instance, AG Geelhoed in *Austria v. European Parliament and Council* held that the integration obligation "is to be regarded as an obligation on the part of the Community institutions to take due account of ecological interests in policy areas outside that of environmental protection *stricto sensu*. It is only where ecological interests manifestly have not been considered or where they have been completely disregarded that Article 6 EC (now 11 TFEU) may serve as the standard for reviewing the validity of Community legislation"[95]. The limited justiciability of the integration principle certainly lessens the importance of such a provision. Moreover, the Lisbon Treaty introduced a number of additional integration principles, namely those relating to gender equality (art. 8 TFEU), high level employment, human health (art. 9 TFEU), thus eliminating environmental protection's unique status[96].

[92] Wasmeier, (n.90), 162-163.
[93] Suzanne Kingston, "Integrating environmental protection and EU competition law: Why competition isn't special" [2010] 16(6) European Law Journal, 780.
[94] Case C-341/95 *Bettati v. Safety Hi-Tech Srl*, [1998] E.C.R. I-4355, paras 17–18.
[95] See AG Geelhoed Opinion in Case C-162/04 *Austria v. European Parliament and Council,* where the AG stated that "although this provision [article 11 TFEU] is drafted in imperative terms (…), it cannot be regarded as laying down a standard according to which in defining Community policies environmental protection must always be taken to be the prevalent interest. Such an interpretation would unacceptably restrict the discretionary powers of the Community institutions and the Community legislature. Eventually the Court did not have the opportunity to pronounce on the matter.
[96] Jans H. Jans, "Stop the Integration Principle?" [2011] 33 5 Fordham International Law Journal, 1533.

4.3. Environmental protection and market integration

In the previous paragraphs we noted as the original version of EU Treaties did not contain any provisions on environmental protection, and the only reference was that of Article 36 which listed "the protection of health and life of humans, animals or plants" among the public interests that could justify a restriction to the free movement of goods. Yet, although such provision refers to something different from the protection of the environment *stricto sensu*, Member States often refer to the intention to ensure an increased level of environmental protection to derogate to free movement rules[97].

We already mentioned the *ADBHU* case regarding the compatibility of a Community measure regulating the disposal of waste oils with the principles of freedom of trade, free movement of goods and freedom of competition established by the Treaty. In that case, the ECJ described the protection of the environment as one of the Community's essential objectives and affirmed for the first time that such goal could justify a proportionate and not-discriminatory restriction on trade and competition, thus prevailing over the market integration imperative.

With regard to national legislation instead, according to the notorious *Dassonville* judgment[98], all normative measures adopted by Member States "which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" thus prohibited by the Treaty. However, since *Cassis de Dijon*, the Court of Justice has affirmed that, in the absence of common rules, restrictions to free movement within the common market, resulting from the application of national laws demanding specific requirements for domestic and imported goods, can be accepted as long as such requirements are necessary to satisfy mandatory requirements recognized by EU law, in particular relating the effectiveness of fiscal policies, the protection of public health, and consumer protection[99].

[97] See David Langlet and Said Mahmoudi, "Free Movement of Goods and the Room for Member State Action" in *EU Environmental Law and Policy* (Oxford University Press 2016).
[98] Case 8/74 *Dassonville* ECR [1974] ECR 837, para 5.
[99] Case 120/78 *Rewe-Zentral* ECR [1979] ECR 649 ("Cassis de Dijon") para 8.

The following *Danish Bottles* judgment[100] extended the scope of *Cassis de Dijon* judgment by including the protection of the environment among the list of justifiable mandatory requirements. In that case, the Commission brought a direct action against a normative measure introduced in Denmark, according to which beer and soft drinks could have been sold only in reusable containers, and both manufacturers and importers should have established a deposit-and-return system for empty containers. Following the *ADBHU* judgment the ECJ held that the protection of the environment constituted a "mandatory requirement" under the *Cassis de Dijon* case law, that Member States could use to impose (proportionate and non-discriminatory) restrictions to the entry of goods from other Member States. Indeed, discriminatory measures could only be justified to protect the "health and life of humans, animals or plants", based on article 36 TEU (ex 30 EC).

The ECJ has often interpreted the above case law on environmental protection as a mandatory requirement in an inclusive manner, with the aim of saving a wide range of national environmentally friendly measures. For example, in the *Walloon Waste* case[101], the ECJ saved a national measure establishing a ban on imports of waste from regions other than Wallonia and other Member States, based on the environmental concerns associated with the accumulation of waste. The Commission argued that the regulation had a discriminatory nature, consisting of one of the most dangerous measures against market integration, *i.e.* the restriction of imports of a good, such as waste, produced in other Member States. However, the Court reached a different conclusion, stating that the regulation was not discriminatory and therefore, it could be adopted on the basis of environmental grounds. In doing so it also referred to the self-sufficiency and proximity principles, as set out in international conventions[102].

However, the employment of environmental protection as a mandatory requirement has not been always accepted by European Courts, precisely when the *Cassis De Dijon*

[100] *Danish Bottles* (n.15) para 9.
[101] Case C-2/90 *Commission v Belgium* [1992] ECR I-4431. Case C-379/98 *PreussenElektra AG v Schhleswag AG* [2001] ECR I-2099.
[102] This approach was criticized by some authors including Jacobs, (n. 56)

requirements were not satisfied. In *Commission v. Austria*[103], for instance, the Court considered that an Austrian regulation prohibiting heavy vehicles from transiting on a particular road section was a clear obstacle to free movement of goods and free transit, capable of limiting trading opportunities between northern Europe and the north of Italy. The Republic of Austria argued that the measure could be justified on environmental protection grounds as endorsed by the case-law of the Court of Justice. However, the Court found that the measure infringed the principle of proportionality since the national authority did not sufficiently assess whether the reduction of pollutant emissions could be achieved by other means less restrictive of the freedom of movement, and therefore, it was incompatible with Article 34 TFEU prohibition.

Yet, since the Treaty of Amsterdam, the integration principle could also represent a valid legal basis to justifies measures otherwise restrictive of the internal market. Wasmeier notes that this is particularly true when a common agreement on a certain level of environmental protection cannot be achieved at the EU level: in such a case, a Member State' measure promoting a higher level of environmental protection, although having an adverse effect on trade, can benefit the whole Union and represent a good practice to be followed by other Member States, to eventually stimulate a good competition among jurisdictions towards even higher levels of environmental protection[104]. The case law on the *effet utile* can be used in relation to all Union's objectives, including the environmental ones, therefore, article 11 TFEU could help to permit restrictive national measures that provide added value for the Union environment. As will see in Chapter III, similar considerations could be done to justify otherwise anti-competitive measures.

4.4. The increasing pressure from climate litigation: the *Urgenda* Judgment

Despite the several commitments and increasing political consensus about the need to act against climate change and environmental degradation, most States' pledges take the form of public declarations or agreements on vague aims and targets to be pursued, but they

[103] Case C-320/03, *Commission v. Austria*, [2005] ECR I-09871.
[104] Wasmeier, (n.88) 159.

rarely result in legally-binding obligations. Indeed, among the main shortcomings of current environmental policies, there is the lack of justiciability and actual enforcement. For instance, the legal character of the Paris Agreement is debated[105]: some authors point out that the national determination contributions (NDCs) provided by the Agreement are not hard legal commitments and that the Agreement only establishes *procedural* legal obligations on reporting, transparency and accountability[106]. Thus, it does not create any obligations to realize specific targets, but only to negotiate in good faith and implement the procedural and reporting activities, although without providing any penalties or sanctions for non-compliance. To this respect, an analysis of the States' pledges to achieve the Paris Agreement's goal of keeping global warming below 1.5 degree Celsius above pre-industrial levels found that almost 75% of them are partially or totally insufficient[107].

As a response to Governments' failure to adopt effective environmental policies, in the last years, there has been a sharp rise in climate change-based litigation, both against national governments to influence their action, and against companies to seek compensation for loss and damage caused by polluting activities[108]. According to many commentators, increased litigation from individuals, NGOs and other entities put additional pressure for governments to be more effective and to enforce existing legislation[109].

[105] Dan Bodansky, "The Legal Character of the Paris Agreement" [2016] 25(1) RECIEL, 142.
[106] See Ralph Bodle, Sebastien Oberthür, "Part I Introductory Chapters, 5 Legal Form of the Paris Agreement and Nature of Its Obligations", in *The Paris agreement on climate change: analysis and commentary*, eds Daniel R Klein, María Pía Carazo, Meinhard Doelle, Jane Bulmer, Andrew Higham (Oxford University Press, 2017); Diane Desierto, "COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel States to Act Faster to Implement Climate Obligations?", Blog of the European Journal of International Law, (November 2019).
[107] See, FEU-US, The truth behind Climate Pledges [2019] available at <https://feu-us.org/behind-the-climate-pledges/>.
[108] With respect to the issues related to access to justice in environmental matters on EU law also in accordance with the Arhus Convention see Charles Poncelet, "Access to Justice in Environmental Matters—Does the European Union Comply with its Obligations?" [2012] 24(2) Journal of Environmental Law, 287.
[109] For a synthesis of the major cases see Joana Setzer and Rebecca Byrnes, "Global Trends in Climate Change Litigation: 2019 Snapshot" [2019] London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

In this context, a landmark decision in strategic climate litigation against national governments seeking to increase mitigation efforts[110], is the *Urgenda* Judgment, delivered by the Dutch Supreme Court in 2019, at the end of a proceeding started in 2015[111]. In this case, the Dutch Court relied upon the European Convention on Human Rights (ECHR), and in particular upon Article 2 (right to life) and Article 8 (right of family life), to state that the Netherlands has a positive obligation to take measures for reducing GHG emissions at least 25% by the end of 2020, compared to 1990 levels. In particular, the Court held that the Dutch State had breached its duty of care for not imposing effective measures to tackle climate change and thus to protect its residents against a real and immediate threat to their lives and well-being. The Court found that the Netherlands has a "shared responsibility" along with other global actors to fight climate change and reducing its GHG emission and cannot justify its inactivity by pointing out the limited impact of its emissions on a global scale because, in the Court's reasoning, everyone must do their part. Moreover, in the absence of clear obligations, the Court, with an original argument, determined the least the State needs to do to fulfill its responsibility by looking at scientific data. The Court relied upon the IPCC Report of 2007, which determined that, to reduce global warning to an increase of maximum 2° C, industrialized countries must decrease their emission by 25% to 40% by 2020. Therefore, giving the broad consensus about the maximum 2°C target, the Court identified the 25–40% target as the minimum requirement to satisfy the obligations under Article 2 and 8 ECHR[112].

The *Urgenda* judgment had great resonance in the public and academic debate, and according to many commentators, it is likely to have a significant impact on future climate change litigation both against national governments and corporations[113]. In fact, the risk of litigation will likely foster the current pressure on Member States to increase their efforts to comply with the targets as mentioned above.

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[110] Another landmark decision is the U.S. case *Juliana v. United States of America* 339 F. Supp. 3d 1062 (D. Or. 2018).
[111] Supreme Court of the Netherlands, 20 December 2019, Number 19/00135.
[112] Chris Backes and Garrit van der Veen, "Urgenda: the Final Judgment of the Dutch Supreme Court" [2020] 17(3), Journal for European Environmental & Planning Law, 307.
[113] See Jaap Spier, "The "Strongest" Climate Ruling Yet': The Dutch Supreme Court's Urgenda Judgment", [2020] 67 Neth Int Law Rev, 319. See also Lennart Wegener, "Can the Paris Agreement Help Climate Change Litigation and Vice Versa?" [2020] 9 Transnational Environmental Law, 17.

5. Conclusions

As we have seen in the previous paragraphs, European institutions have progressively strengthened their commitment to the environmental cause over time, and today the European Union as an international actor plays a crucial role in shaping the global environmental agenda. As confirmation of this, the new Commission proposed very recently a new European Green Deal aimed at preserving Europe's natural environment and meet the ambitious plan of becoming the world's first climate-neutral continent by 2050. This new plan consists of a package of measures to reduce greenhouse gas emissions, foster investments in new technologies and research, and mitigate the side effects of the green transition[114]. The idea of a green growth driven by investments and innovation starts from the underlying assumption that markets are not ready and willing to lead the transition as long as it is not profitable. Therefore, the idea is to turn the transition costs into an opportunity for growth and shape behaviors across industries to align market actors' interests to those of society[115].

With the Communication on "The European Green Deal"[116] released in December 2019, the EU Commission identified the response to climate and environmental challenges as its new defining mission and set the roadmap to achieve these challenging objectives. On the official documents that explain the Commission's plan, it recognizes the necessity to decouple economic growth from resource use and to ensure a just and inclusive transition, which implies protecting the most vulnerable ones. The Commission's Green Deal communication recalls that '[a]ll EU actions and policies will have to contribute to the European Green Deal objectives", including Competition Policy, albeit the focus is on state

[114] The expression Green New Deal was used for the first time in the U.S. and proposed by some representatives of the democratic party. It calls for bold public investments to tackle climate change, like those carried out with Roosevelt's New Deal to face the Grand Depression.
[115] Marianna Mazzucato Martha McPherson, "The Green New Deal: A bold mission-oriented approach", IIPP Policy Brief (December 2018) Institute for Innovation and Public Purpose, available at <https://www.ucl.ac.uk/bartlett/public-purpose/sites/public-purpose/files/iipp-pb-04-the-green-new-deal-17-12-2018_0.pdf>.
[116] EU Commission, COM(2019), Communication from the Commission 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" 11.12.2019.

aid rule[117]. On March 4th, 2020, the Commission published its Proposal for a Regulation establishing the achievement of climate-neutrality by 2050. The aim of the proposal is to "to set in legislation the EU's 2050 climate-neutrality objective, in line with scientific findings reported by the IPCC and the Intergovernmental Science Policy Platform on Biodiversity and Ecosystem Services (IPBES), and to contribute to the implementation of the Paris Agreement on climate change, including its long-term goal to keep the global temperature increase to well below 2°C above pre-industrial levels and to pursue efforts to keep it to below 1.5°C."[118] However, the proposal was greeted by a blast of criticism: while some environmental campaigners and NGOs believe that the targets identified by the Commission are not sufficient and too distant, there is still little agreement between Member States about their commitments to achieve the plan's objectives[119]. Anyway, the European Union accounts only for 10% of global emissions. Its challenging plan is undoubtedly not sufficient to solve a crisis that has global dimensions. Therefore, international cooperation, especially with developing countries and alliances with the like-minded, is essential.

[117] Ibid. 3.
[118] Commission Proposal for a Regulation Of The European Parliament And Of The Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), Brussels March 4th, 2020. Available at https://ec.europa.eu/info/sites/info/files/commission-proposal-regulation-european-climate-law-march-2020_en.pdf.
[119] Kalina Oroschakoff, Brussels' climate ambitions run into national resistance, *Politico* (4 March 2020) available at https://www.politico.eu/article/brussels-climate-green-deal-climate-law-ambitions-run-into-national-resistance/ last accessed June 2020.

CHAPTER II

THE CORPORATE CONTRIBUTION TO THE SUSTAINABILITY CAUSE: THE CURRENT PUBLIC/PRIVATE INCENTIVES

1. Introduction

To pursue the objectives and principles mentioned in the previous chapter, the European Union has over time designed a complex mixture of policy instruments and measures. In terms of instrumental production, the European Environmental Policy is often taken as an example of activism and innovation. Such dynamism has often been driven by the attempt to overcome political and institutional frictions and resistances among and within Member States, particularly when the Union did not have a specific environmental competence[1]. However, most of the instruments that characterize the European environmental action have not been made-up at the EU level, but derive from, or are influenced by, tools designed at the national level or by international organizations[2].

Over time, the preference for one category of instruments rather than another has significantly changed: whereas for the first twenty years, the Community has mainly relied upon traditional "command and control" measures, i.e., prohibitions or standards established by lawmakers to be enforced by other public authorities, starting from the 1990s, a neo-liberal shift based on a more economic approach to public policy has emerged, which led to the proliferation of market-based instruments, such as environmental taxes and emission trading schemes. A third set of instruments, although less structured, regards the implementation of bottom-up/collaborative and network-based measures, i.e. instruments that rely upon the active and voluntary participation of private entities and the civil society to achieve environmental aims[3].

[1] Charlotte Halpern, "Governing despite its instruments? instrumentation in EU environmental policy", [2010] West European Politics 33(1) 39-57.
[2] Andrew Jordan, Wurzel Rüdiger K. W., and Anthony Zito, "The Rise of 'New' Policy Instruments in Comparative Perspective: Has Governance Eclipsed Government?" [2005] 33 Political Studies 53 477.
[3] James Swaney, "Market versus Command and Control Environmental Policies" [1992] 26 Journal of Economic 623

Nonetheless, although since the 1990s environmental policies have shifted towards market measures, traditional and hierarchical instruments still constitute an essential component of environmental actions. Indeed, today's EU Environmental Policy consists of a variety of instruments, including both direct regulatory measures and market-based instruments. The underlying belief is that an ideal mix of such instruments would allow the achievement of environmental objectives without imposing excessive burdens on the economy and the most vulnerable ones[4].

After a brief description of the European toolkit developed over time to address environmental issues, this chapter will focus on the incentives that the current legal framework provides for non-state actors to contribute to environmental aims in the general interest. The analysis will move from the correlation between climate change and sustainability issues on the one side, and the corporate world on the other. This relationship can be seen as one of *cause-effect*, being capitalism and corporations' activities among the main causes of the environmental crisis[5] or as a relationship of *problem-solution*, in which corporations and markets constitute indispensable means of dealing with the problem[6]. In fact, in the environmental discourse, a key question concerns the role that should be played by non-governmental actors, and in particular by corporations[7]. There has been a widespread acknowledgment among policy-makers of the importance of obtaining an active involvement of the corporate world to achieve most environmental goals. At the same time, an increasing interest in corporate environmentalism and, more in general, in the role of corporations in

[4] Suzanne Kingston Veerle Heyvaert Aleksandra Čavoški, *European environmental law* (Cambridge University Press 2017)

[5] Matthew Taylor and Jonathan Watts, "Revealed: the 20 firms behind a third of all carbon emissions", *The Guardian*, (London 9 October 2019), < https://www.theguardian.com/environment/2019/oct/09/revealed-20-firms-third-carbon-emissions> last accessed March 2020

[6] These issues are addressed in detail in Andrew Hoffman and Patrima Bansal, *The Oxford Handbook on Business and the Natural Environment* (Oxford University Press. 2011)

[7] See The UN 2030 Agenda for Sustainable Development includes, under *Sustainable Development Goal 17*, entitled "Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development", which call for a strengthened relationship with the private sector. See Marco Frey and Alessia Sabbatino, "The role of the private sector in global sustainable development: The UN 2030 Agenda", in G. Grigore, A. Stancu, and D. McQueen (eds.), *Corporate responsibility and digital communities* (Palgrave Macmillan 2018); Abdulkarim Hasan Rashed and Afzal Shah, "The role of private sector in the implementation of sustainable development goals", [2020] 4 Environment, Development and Sustainability 1.

solving the most urgent issues of society has emerged. This phenomenon can be justified in several ways[8]: as the attempt to respond to market or reputational risks and seek first-mover advantages against competitors, as an opportunity for further expansion and profits, or also as a way to marketize the problem and emphasize the efficacy of self-regulation, by avoiding more radical governmental responses that might further undermine the capitalistic system.

New trends in corporate social and environmental responsibility will be therefore discussed, with the aim of detecting the spontaneous corporate initiatives that should be encouraged and preserved, as opposed to those that represent a self-interested attempt to protect the status quo and prevent a more stringent state intervention. Indeed, the ultimate aim is to understand the extent to which a strict pro-market approach to sustainability issues should be encouraged. This is indeed the first conceptual tangle to be addressed to then discuss whether a more flexible competition policy encouraging corporate environmental initiatives would be desirable or not. It will be argued that, although the corporate attention to sustainability issues might often be explained as a means of self-preservation, spontaneous private initiatives could be a useful complementary tool to pursue environmental aims and therefore, as long as they do not obstacle the adoption of more effective measures including regulatory interventions, they should not be jeopardized. Of course, such an assessment necessarily requires an active involvement of environmental agencies, as only the latter may provide a full understanding of the long-term effectiveness of private initiatives from a policy perspective.

Another crucial, although problematic, aspect of this process, which will not be further discussed in this chapter, concerns the role assigned to individuals, who perform as both polluters and as potential drivers of change. The impact of individual action has a twofold nature, on the one hand, individuals can be conceived as consumers, who are contributing to environmental degradation through their egoistic behaviors, while on the other, they could promote and drive the change from the bottom as citizens (and voters)

[8] Christopher Wright and Daniel Nyberg, *Climate Change, Capitalism, and Corporations: Processes of Creative Self-Destruction* (Cambridge University Press 2015); Michael Porter and Mark Kramer, "Creating Shared Value", [2011] Harvard Business Review 62.

through more sustainable choices. However, it is argued that as a consequence of the now dominant neoliberal paradigm, individuals have lost their self-awareness about being citizens before consumers. The blame for the shortcomings of the economic and social system has been opportunistically shifted to the individual level, notwithstanding that the true responsible are those taking advantage of an economic system based on massive consumptions, unlimited production, and distribution of cheap products around the world. As a result, while the impact of individual actions on the mitigation of climate change is modest[9], especially if based on new forms of consumerism, we know that 100 companies are responsible for 71% of global emissions[10]. Moreover, the "performative environmentalism" is far from democratic, given that today's economic system allows only a small portion of the society, the most affluent and educated, to switch to more environmental and sustainable options.

2. The EU Environmental toolkit: from a command and control approach to market-based incentives

As discussed in the previous chapter, the origins of environmental action at the EU level dates back to the 1970s. At that time, the first generation of EU policies followed the traditional top-down regulatory model, also known as "command and control" or direct regulation. This approach is based on the government's intervention through rules, prohibitions, imposition of standards, or grant of licenses to be observed by individuals and organizations and enforced by other public authorities with monitoring activities and sanctions. The law-making process that leads to such prescriptions follows the principles and procedures that we already discussed, including the application of the precautionary principle.

[9] Annie Lowrey, "All That Performative Environmentalism Adds Up, Don't depersonalize climate change", *The Atlantic* (31 August 2020) <https://www.theatlantic.com/ideas/archive/2020/08/your-tote-bag-can-make-difference/615817/> last accessed in September 2020

[10] Tess Riley, "Just 100 companies responsible for 71% of global emissions, study says" *The Guardian* (London 10 July 2017) <https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change> last accessed April 2020

This approach has been significantly influenced by the German and Dutch models of regulation used at that time to define the limits and standards to be observed by private entities about air, water and waste, including the application of the "best available technology" (BAT). This regulatory technique has also been used at the EU level, where the definition of BAT and other environmental performance levels is carried by specific procedures involving the participation of experts from Member States, the industry, environmental NGOs and services of the Commission. One example of command and control instruments is the Industrial Emission Directive (IED)[11], which established a system of integrated permits to prevent and control industrial emissions into air, water or soil. As a result, all the installations covered by the IED must comply with the conditions provided by the regulatory framework according to the BAT, in order to ensure an efficient use of energy and other resources. The adoption of a traditional regulatory model, in particular during the Community's formative years, has been crucial to bypass the political and institutional constraints to the achievement of some form of consensus among Member States: regulatory instruments, in particular "framework directives" were particularly suited to overcome such resistance, because they were designed to impose few binding obligations on Member States and thus leave the debates about their implementation at the national level.

Many are the advantages of such an approach, as the legal certainty and transparency that characterize the designing process as well as the implementation phase. Regulation is also considered the most effective instrument to address specific issues, such as the preservation of biodiversity, where market-based instruments proved to be unsuccessful. Moreover, if implemented at the same way across all the Member States, command and control measures could prevent "race to the bottom" mechanisms and ensure harmonization and uniform compliance. As noted by Majone, who defined the EU as the "regulatory State"[12], the Union's action significantly relies upon its regulatory powers, and with respect to environmental matters, despite the high level of innovation and creativity of EU tools, command and control measures still represent the primary mechanism of intervention. Of

[11] Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) [2010] OJ L 334

[12] Giandomenico Majone, "The rise of the regulatory state in Europe", [1993] 17(3) West European Politics, 77-101.

course, the success of any regulatory interventions depends on the enforcement's effectiveness both in terms of effective punishment and level of deterrence. The same discourse, however, applies to innovative and market-based approaches which, in the absence of a credible threat of enforcement and monitoring on compliance and effective punishment, would likely fail to deliver the wished outcomes.

2.1. The limits of traditional regulatory models and the increasing concerns about state failures

Notwithstanding the crucial role of command and control measures, there is considerable debate about the limits of government intervention as a policy tool on environmental matters. This discussion that has significantly affected the evolution of the European approach to environmental policy-making. As we will further discuss, the increasing attention on regulatory failures concurs with the rise of neoliberal movements that occurred in the 80s, which promoted deregulation initiatives and the dismantlement of the regulatory State[13]. This neoliberal shift in environmental regulation occurred almost simultaneously in the EU and the US and brought about the development of new market-based environmental instruments (MBI).

With regard to the main limits of command and control measures, many point out the inefficiency and unworkability of these instruments in a rapidly changing world. From an efficiency perspective, some economists argue that regulatory measures provide excessive burdens on economic development and little incentives for innovation: once these standards are set down by the law, for instance in relation to carbon emissions or the usage of specific materials, the addressees have few incentives to develop more cost-effective methods of reducing pollution or waste going beyond what is necessary to satisfy regulatory requirements[14]. In addition, since the latter may clearly not always be the most updated in terms of technological innovation, it is argued that such a policy tool may lead to a suboptimal level of environmental protection.

[13] Halpern (n. 1)
[14] James Salzman, "Teaching Policy Instrument Choice in Environmental Law: The Five P's" [2013] 23 DUKE ENVTL. L. & POL'Y F. 363, 365.

Moreover, another issue is represented by the weak enforcement of environmental measures and policies, especially those that are adopted at the EU level but must then be implemented and enforced at the national level. Indeed, such a mechanism cannot ensure a uniform and adequate level compliance across Member States, given also the poor coordination among EU institutions and other national bodies. In the specific EU context, the protection of natural resources, biodiversity and pollution reduction through regulation, when it is carried out directly by Member States, faces an additional hindrance. As well known, the core aim of the European project, i.e. the economic integration of Member States and the realization of a common market, relies upon free movement rules to favor access to different national markets, and upon competition rules to prevent market distortions. Yet, European institutions carried out several harmonization measures on environmental matters based on both Article 114 and Article 192 TFEU but, the impossibility to reach a broad consensus at the EU level often led to the adoption of flexible measures, such as framework directives that leave to Member States a substantial degree of discretion. As a result, whereas in some cases a form of regulatory competition among Member States is considered to be beneficial as it allows the adoption of alternatives better tailored to specific national needs, a regulatory diversity among Member States could also be seen as a potential obstacle to trade flows within the internal market.

According to Article 193 TFEU, Member States are in fact empowered to adopt stricter environmental standards than those provided by European laws or to regulate their trade for example by prohibiting hazardous or substances in the name of environmental protection. Nonetheless, such national and regional measures could be used to reinforce the competitiveness of national undertakings hindering the level playing field within the internal market[15]. The potential conflict with internal market provisions represent therefore an

[15] It is argued, however, that the heterogeneity of EU case law on the conflicts between free trade and environmental, relating to green certificates, public procurements, renewables, recycling, pesticides, provides little guidance about what is permitted under EU law, see Nicolas de Sadeleer, "Free Movement of Goods and Environmental Product Standards" [2017] 3 Jean Monnet Working Paper Series Environment and Internal Market 1. The author also suggests a shift in CJEU case law due to the increasing importance given by the Treaties to non-economic objectives, which must now be reconciled with the internal market goal.

additional obstacle for Member States to adopt stricter (or more effective) environmental regulations.

Moreover, when implementing such legislation Member States may incur into a liability for a violation of EU competition law according to the joint application of article 4(3) TEU and 10 and 101 and 102TFEU. In principle, when the State does not act as an economic operator, its activities do not fall under the scope of articles 101 and 102 TFEU. However, as we will see, undertakings' initiatives on environmental matters often rely upon or are backed by national regulations, which can eventually produce anti-competitive effects on the market. To this respect, as confirmed by the ECJ jurisprudence, EU law precludes Member States from adopting measures, including regulatory ones, that may undermine the application of EU competition rules, or produce anti-competitive effects[16]. For instance, these situations occur when national regulation requires or favors the implementation of agreements, decisions or concerted practices among undertakings contrary to article 101 TFEU, or as consequence of the concession of special or exclusive rights[17]. The consequences in these cases are multifold: an infringement proceeding ex article 258 TFEU can be promoted against the concerned Member State, national courts and NCAs can disapply national legislation contrary to the Treaties in accordance with the primacy of EU law, and the State can also respond before national courts for the damages caused to those affected by the illegitimate legislation. Competition concerns of this kind have often emerged in association with environmental regulation, and precisely with respect to the implementation of waste management system or the treatment of wastewater at the national level[18]. We will further explore the intersection between environmental protection objectives and competition principles in the next chapter, but for the moment it is important to underline as competition concerns may represent an additional hindrance to direct regulatory models' effectiveness.

[16] Case C-35/99, *Arduino*, [2002] ECR I-1529, para 34.
[17] With respect to this second scenario, the ECJ stated that the mere creation of a dominant position by the concession of exclusive rights to an undertaking does not constitute a violation of article 106 TFEU, unless "the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or when such rights are liable to create a situation in which that undertaking is led to commit such abuses" see Joined Cases C-115/97, C-116/97, C-117/97 *Brentjens*, [1999], ECR I – 6025, para 93. See also Ludwig Kramer, *Casebook on EU Environmental Law* (Hart Publishing 2002), 52-80.
[18] EU Commission, 'DG Competition Paper concerning issues of competition in waste management systems'[2005].

2.2. The economization of environmental protection: the rise of market-based instruments

The growing criticisms about regulatory measures' inefficiency, in particular due to the burdens imposed on economic development, induced a shift of thinking on environmental policy, and precisely to an increased reliance upon market processes to manage natural resources and protect the environment. The ideological foundation of such a change is grounded on the global trends towards neoliberalism experienced in the 1980s, which began to shape the political agenda of western countries. According to the neoliberal thought, the role of central state must be constricted to what is necessary to support a market economy, and therefore, processes of deregulation, privatization, fiscal consolidation are fostered. In this view, the sole lawmakers' task is to provide a neutral legal framework within which market forces operate spontaneously, on the belief that markets' automatic mechanisms of adjustment and the price-system are the best way to ensure welfare maximization[19].

The other cornerstone of neoliberalism, i.e. that markets, to work properly, must be free and competitive, promoted the adoption of competition rules and market liberalization, to avoid market distortion and to foster economic growth[20]. Holding up the discussion about the contradictions of such a construction, as suggested by some commentators, neoliberalism can be used as a pair of eye glasses through which we can interpret and understand much of what happened since the 1980s, as well as today's idea of society and individuals. In other words, to realize the conditions of a free market economy, all aspects of human life and democratic processes have been reshaped in purely economic terms. It also explains much of the European project and its policies, as they evolved since the 1980s/1990s, including the development of its approach to environmental matters.

[19] John Harvey, "Neoliberalism, Neoclassicism and Economic Welfare"[2010] 44 Journal of Economic Issues 359-368,

[20] Dieter Helm, "The assessment: the economic borders of the state," [1986] 2 Oxford Review of Economic Policy, 1; Nicholas Stern, "The Economics of Development: A Survey", [1989] 99 The Economic Journal, 597; Joseph Stiglitz, "On the Economic Role of the State", in A. Heertje (ed.), *The Economic Role of the State*, (Oxford, Blackwell 1989), 9.

Such a neoliberal shift, and precisely the reliance upon the market process and deregulation, shaped the environmental discourse too, which has been significantly influenced by the so-called *free market environmentalism*[21]. High pollution levels and environmental disasters registered in the Soviet Union and the Eastern bloc in the 1980s were used in the U.S, especially during the Raegan Administration, to point out the failures of direct government intervention, and support the case of market-oriented societies. The foundational idea of free market environmentalism is that natural resources should be conceived as property rights because individual owners have a stronger incentive to protect their resources and maximize their value. This approach is consistent with the neoliberal view of humans as self-interested individuals who tend to overuse common resources, as the "tragedy of commons" invoked by the ecologist Garrett Hardin occurs[22]. Free market environmentalism therefore suggests abandoning direct government regulations in favor of market-based measures aimed at privatizing the commons by creating property rights[23].

Consistently with the law and economics approach, environmental damages are thus conceived as negative externalities, *i.e.* unintentional negative impacts caused by one actor's decisions or activities on third parties or the environment, where no compensation is provided. Accordingly, polluters do not consider these external costs imposed to others in their production and investment decisions. Hence, a market failure exists[24], since there is no market for such public goods or they are not correctly priced[25]. In other terms, profit maximizing firms consider only the resources they have to pay for, as opposed to natural resources which are for free. Moreover, consistently with the idea of firms as profit-maximizer entities, unilateral investments in green production in a context of fierce competition may lead to short-term losses and so represent a first mover disadvantage[26].

[21] Terry Anderson and Donald Leal, *Free Market Environmentalism* (Palgrave 2001), 1-8.
[22] Garret Hardin, "The tragedy of the commons", [1962] 162 Science, 1243–1248. See also, Ronald Coase, "The problem of social cost" [1960] 3 Journal of Law and Economics, 1–44.
[23] See Wendy Larner, "Neo-liberalism: Policy, Ideology, Governmentality" 63 STUD. POL. ECON., 5; Melanie DuPuis and Brian Gareau, "Neoliberal Knowledge: The Decline of Technocracy and the Weakening of the Montreal Protocol" [2008] 89 SOC. SCI. Q. 1212, 1213; Salzman, (n. 14)
[24] "The greatest market failure the world has ever seen" as defined by Stern, N., "Stern Review: The Economics of Climate Change" [2006] London: Department of Industry, UK Government.
[25] Wolfgang Buchholz and Dirk Rübbelke, *Foundations of Environmental Economics* (Springer Texts in Business and Economics 2019).
[26] These issues will be further discussed in Chapter V, para 2.

Therefore, the only way to reconcile the public interest not to waste the environment and firms' profit maximization aim is to make them pay for the value of the environmental resources used up for production. An idea that is also reflected in the general accepted "polluter pays principle"[27].

Within this view, market-based instruments (MBI) serve to internalize such negative externalities into market actors' behaviors and decisions by changing their economic incentive structure. This is done by placing a price on pollution or, in other terms, by giving a value to such external costs so that market actors can take them into account in their decisions and reduce their environmental impact. The most common instruments employed to make this mechanism work are charges, taxes, tradable permit schemes and environmental state subsidies. An additional way to improve price signals is to regulate information dissemination about products and services' environmental impact to influence consumer preferences.

In Europe, the Fifth Environmental Action Program (1992-2002) contained the first clear shift towards market-based instruments, which have been then strengthened by the following Environmental Programmes, as well as by the European Commission's 2007 Green Paper on Market Based instruments in Environmental Policies[28]. With the Green Paper, the Commission further emphasized the advantages of economic instruments over regulatory measures as a way to apply the polluter pays principle in an efficient way, precisely in terms of lower compliance costs for companies and greater flexibility to meet their objectives, as well as increased incentives to pursue technological innovation[29].

Environmental taxation is the most immediate form of economic environmental measure: also referred to as Pigouvian taxes[30], this cost is added directly to the price of a

[27] See Alfred Endres and Volker Radke, *Economics for Environmental Studies, A Strategic Guide to Micro and Macroeconomics* (Springer Textbook in Business and Economics 2018), 106-116.
[28] See Green Paper on Market-Based Instruments for Environmental and Related Policy Purposes, COM(2007), [2008] available at https://ec.europa.eu/taxation_customs/consultations-get-involved/tax-consultations/green-paper-market-based-instruments-environment-related-policy-purposes_en , accessed in March 2020.
[29] *Ibid.*
[30] The original idea of environmental taxes belongs to the British economist Arthur Cecil Pigou and its most important contribution *The Economics of Welfare*, (London, Macmillan & Co. 1920).

certain product or service to reflect the environmental externalities caused by its production or consumption. The idea is that these additional costs would then be passed on to consumers, who in turn will change their preference and demand about that product or service[31]. In the EU context, environmental taxes had little success, as a wide consensus among Member States about tax rates and basis has often been difficult to achieve. For instance, current rules about excise duties on energy products used for heating and transport, an example of environmental taxation, are laid down in Energy Tax Directive[32], which, however, only establishes the minimum excise duty rates that Member States must apply to energy. With the same rationale of environmental taxation, positive incentives can be provided through tax concessions or environmental-motivated subsidies to activities that the government wants to promote, in respect of which the EU plays an important role with its state aid policy.

An alternative way to create economic incentives to change actors' behaviors and reduce pollution is to implement permit trading schemes, also referred to as "cap and trade systems", an example of which is the European Emissions Trading Scheme (EU ETS)[33]. This mechanism is based on the quantification of the total level of GHG emissions that can be emitted by the installations covered by the scheme (cap) and the creation of emission allowances to be allocated among market actors pursuant to certain criteria. Since these emission allowances can be traded among polluters according to their needs, the ETS creates a market for emissions, ensuring that permits are allocated in an efficient way and that, on an aggregate level GHG emissions are reduced cost-effectively, according to the pre-determined targets[34]. The European ETS is today the world's major carbon market, while other countries have also developed their emissions trading schemes[35].

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[31] For a more detailed overview of environmental taxation systems see Claudia Dias Soares, Janet Milne, Hope Ashiabor, Larry Kreiser, Kurt Deketelaere, *Critical issues in environmental taxation, vol. VIII* (Oxford University Press, Oxford 2010).

[32] Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity, [2003] OJ L 283, 51.

[33] For more information on the EU ETS, see the EU ETS Handbook available at <https://ec.europa.eu/clima/sites/clima/files/docs/ets_handbook_en.pdf> last accessed in March 2020.

[34] For a more detailed description of the EU ETS targets and the functioning of the EU carbon market see Carbon Market Report: Emissions from EU ETS stationary installations fall by more than 4%, available at <https://ec.europa.eu/clima/news/carbon-market-report-emissions-eu-ets-stationary-installations-fall-more-4_en> last accessed in March 2020.

[35] Beside the EU ETS other countries and regions have developed their emission trading systems (Canada, China, Japan, New Zealand, South Korea, Switzerland and the United States), which have been further

Other market-based instruments are those aimed at addressing information asymmetry issues regarding the environmental impact of firms' products or processes, which could influence consumers' or investors' choices. Indeed, firms may be tempted to not reveal sensible environmental information that could harm their reputation or affect their ability to operate unless they are not required to do so. To address these issues, the EU regulator promoted several initiatives to increase transparency on environmental information. Examples can be the labeling or disclosure regulations[36], such as the recent EU Regulation on sustainability-related disclosures in the financial services sector (the "Disclosure Regulation"), which provided what information managers and advisers must disclose to provide more transparency to investors[37]. The Disclosure Regulation was recently amended by the Taxonomy Regulation, a legislative initiative which is part of the European Action Plan aimed at boosting private sector investment in green and sustainable projects[38].

Despite the increasing attention on market-based instruments to tackle environmental issues, they are not free from criticisms, mainly because a privatization of the commons is not always feasible or desirable. Public goods might not always provide monetary remuneration for the users, as in case of the protection of biodiversity[39], or in some circumstances, market processes might not lead to optimal outcomes, from an environmental protection perspective. For these reasons, as noted above, direct regulatory interventions still represent an indispensable tool of most environmental policies, including the European one,

reinforced by the Paris Agreement. For more information about these systems see the International Carbon Action Partnership (ICAP) Status Report on "Emission Trading Worldwide" [2020], according to which in 2020 there are 21 trading systems operating in four continents.

[36] An important initiative in this sense is the EU Eco label governed by Regulation (EC) No 66/2010 of the European Parliament and of the Council 9 on the EU Ecolabel [2010]OJ L 27, 1–19.

[37] Regulation (EU) 2019/2088 of the European Parliament and of the Council on sustainability-related disclosures in the financial services sector [2019] OJ L 317, 1–16. With the same rationale in October 2014, the European Union adopted the Directive 2014/95/EU OJ L 330 1-9, regulating the publication by companies of certain size of non-financial declarations covering also the impact of firms' activities on society and the environment.

[38] More precisely, EU Regulation 2020/852 of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment, and amending Regulation [2020] OJ L 198 13-43.

[39] For a critical appraisal Karen Morrow, "Editorial:1 Ecosystem services and capitalism: a valuation or de-valuation of 'nature'?" [2014] 5 Journal of Human Rights and the Environment, 107-111.

which is characterized by a constant research for the optimal mixture of regulatory and economic measures.

3. A decentralized correction of governmental failures: the corporate voluntary contribution to the environmental cause

With the attempt of providing a clear description of the different environmental policy techniques that have been designed at the EU level, we have tried to categorize them according to two parameters: the role and size of the state on the one hand, and the reliance on free market mechanisms on the other. To this respect, command and control measures and MBIs have been identified as two opposed approaches to ensure adequate levels of environmental protection: the former is characterized by a wide potential for government intervention where market participants' sole role is to comply with the rules and proscriptions addressed to them; conversely, the latter relies upon market mechanisms where profit maximizer market actors, by pursuing their own interests, contribute to achieving environmental aims.

This is of course an over-simplified description, which undervalues as the two approaches are indeed complementary. With respect to the government's role, MBIs still require some form of state intervention in order to sustain and stimulate market mechanisms. Moreover, also the most neoliberal positions acknowledge that markets regulating themselves are not able to deliver the optimal level of environmental protection without somewhat of state intervention. Some tasks, as the definition on medium- and long-term objectives for the economy and the society as a whole, can be carried out only by the government.

This ineludible muddling about the optimal environmental instruments' mixture also generates some confusion about the role that should be played by corporations and the extent of their contribution to the environmental cause. Both direct regulation and MBI assume that all market actors, including corporations, are rational agents who behave according to their own interests with the aim of minimizing their costs and maximizing their profits, so the only way to align their interests to the society's ones is to alter their behaviors by either means of

binding rules of conduct or by influencing their economic strategy. As a consequence, both market and non-market approaches see the government as the *pro-active agent*, which sets standards and regulates markets, whereas corporations and private actors in general act as the *reactive subjects*. In other words, if it were not for these external stimuli, corporations would not spontaneously act to pursue objectives that benefit the general public, as the protection of the environment.

However, this narrative is only partial, as the corporate contribution to the environmental cause may also take a pro-active form: corporations may indeed recognize the harmful impact that their activities have on the environment and undertake spontaneous efforts to reduce pollution and waste. This attitude is commonly defined as corporate environmentalism, a notion that has been developed during the 1990s and gained attention over the last years in response to the climate change crisis[40]. Corporate environmentalism can be defined as the spontaneous action taken by corporations to mitigate the environmental impacts of their own activities, going beyond what is required by the applicable legal requirements[41]. Firms may undertake these actions individually or collectively, where the initiative may be sponsored by industry associations, non-governmental organizations (NGOs) or the government. From a theoretical perspective, corporate environmentalism is often described as an articulation of the broader concept of Corporate Social Responsibility (CSR), which rejects the traditional idea that the sole firms' purpose it to maximize shareholders value and insists on the necessity to consider the interests of a multitude of stakeholders, including firm's employees, customers as well as the community in which the firm operates[42].

[40] Frances Bowen, *Perspectives on Symbolic Corporate Environmentalism, After Greenwashing: Symbolic Corporate Environmentalism and Society* (Cambridge University Press 2014).
[41] Ibid.
[42] See paragraph 4.

3.1. Unilateral and collective initiatives and the emergence of environmental agreements

The main features of CSR will be further discussed in the following paragraphs, when we will try to describe why spontaneous environmental initiatives could be appealing from a corporate perspective and particularly, why they do not necessarily conflict with the shareholders' primacy motif. For the moment, it is important to point out that the idea that sustainable development cannot be achieved without the contribution of businesses, and that they would not do enough on a voluntary basis, stimulated the development of a third hybrid category of environmental measures, aimed at encouraging voluntary initiatives from private actors. This societal-driven method to achieve policy aims is often described as "network-based approach", because it implies the cooperation of a multitude of actors, by means aimed at encouraging individuals, companies and non-governmental organizations to get involved in pursuing policy aims, as environmental ones [43].

An expression of this approach is the so called "environmental agreements", frequently termed as "negotiated agreements", "covenants", or "voluntary agreements". Voluntary approaches to environmental protection, which at least in Europe were firstly experienced in Germany and the Netherlands, have gained great popularity at EU level since 1990s, consistently with the ideological pro-market shift in regulation described above. The European Commission has started to promote environmental agreements as part of the strategy set out by the EAP7 in 1996, with the Communication on Environmental Agreements. This document recognized environmental agreements as an efficient cost-effective solution to many environmental issues and provided some guidelines on their design and implementation. Since then, environmental agreements have been subject to extensive studies by the academic literature, exploring their impact from an efficiency and social welfare perspective[44].

[43] Bruno De Witte, "Variable geometry and differentiation as structural features of the EU legal order", in *Between Flexibility and Disintegration* (Cheltenham, UK: Edward Elgar Publishing 2017), 340-341.
[44] Edoardo Croci, *The Handbook of Environmental Voluntary Agreements - Design, Implementation and Evaluation Issues* (Springer, 2005); Thomas Lyon and John Maxwell, "'Voluntary' Approaches to Environmental Regulation: A Survey", [2002] In M. Franzini & A. Nicita (Eds.), *Economic Institutions and Environmental Policy* (U.K. Ashgate Publishing).

Following an OECD categorization, voluntary approaches can be distinguished into two typologies: (i) unilateral commitments taken at industry or firm level to reduce pollution or to tackle other environmental issues, and (ii) voluntary agreements (VAs) negotiated by firms, both individually and collectively, with the public authority, where the former accept to comply with specific standards and targets, and the regulator commits not to introduce a new legislation (e.g. compulsory standards or environmental taxes), unless the contracting parties fail to comply with the agreed obligations[45].

In the second scenario, firms assume these obligations in the absence of any mandatory requirements, but "in the shadow of hierarchy"[46], i.e. with the threat of regulator intervention in case of failure to meet the objectives set out by the agreement. Generally, the public authority may either decide to stipulate individual agreements with a specific firm or group firms, or instead to develop voluntary programs to which individual firms are invited to participate. The agreement's content can be either included in legally binding schemes, or conceived as non-binding and pure self-commitments, where the voluntary aspect predominates[47]. Voluntary Programs also can be promoted by non-state actors as international organizations or NGOs. In this case, there is no "shadow of hierarchy", but firms may still find it appealing mainly because of reputational returns. For instance, the International Organization for Standardization (ISO) has developed the ISO 14001 environmental management systems standards that provide guidance to companies to design and implement their environmental management systems. Firms adhere to these standards on

[45] Communication COM/2002/0412, from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Environmental Agreements at Community Level - Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, [2002] OJ L 202 1.

[46] Adrienne Héritier and Sandra Eckert, "New Modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe" [2008] 28 Journal of Public Policy 28, 113-38.

[47] Examples of voluntary environmental programs in the U.S. are the *Responsible Care Program* in the Chemical industry or the *Climate Vision*, a program established in the U.S. by the Bush administration to encourage companies to reduce GHG emission, by providing voluntary data on their emissions' levels. For an assessment of these programs' effectiveness in promoting the common interest as well as on the different motives for VEP's success see Toddy Steelman and Jorge Rivera, "Voluntary Environmental Programs in the United States: Whose Interests are Served?" [2006] 19 Organization & Environment, 505-526; and Andrew King and Michael Lenox, "Industry self-regulation without sanctions: The chemical industry Responsible Care Program" [2002] 43 Academy of Management Journal, 698-716.

a voluntary basis to increase their environmental efficiency and ameliorate their image and reputation. The EU has its own voluntary Eco-Management and Audit Scheme (EMAS)[48], which in substance reflects the ISO 14001 standards.

With respect to Voluntary Agreements (VAs), as above defined, they were introduced at the EU level in the late 80s/beginning of 90s, so even before the adoption of the EAP5 that fostered the importance of non-regulatory tools for EU environmental policy, and they mostly concerned reduction targets in the chemical sector. Following the Communication on Environmental Agreements (1996)[49] additional VAs were adopted, addressing other issues as energy consumption and reduction of carbon dioxide emissions in the car sector. However, the initial enthusiasm about VAs faced several setbacks during the following years, mainly due to the disappointing results delivered by some important agreements. For instance, in 1999 the Association of the European Automobile Industry (ACEA), after a 5 years negotiation, entered into an agreement with the European Commission aimed at reducing CO2 emissions[50]. After a couple of years, both the automobile industry and the EU Commission expressed their dissatisfaction with the agreement. Despite the low progress, the former failed to meet the agreed standards, blaming the consumers for their scarce interest in greener products. As a result, new binding legislation was introduced, obligating car producers to cut their emissions and meet specific targets.

Notwithstanding the practical difficulties of adopting EU-wide VAs, the EU Commission has recognized a number of voluntary agreements formally, through the adoption of Recommendations[51] reporting the agreement's content, or informally by the exchange of letters with the agreeing parties. On several occasions, however, the Commission made clear that although these instruments in some circumstances may deliver satisfactory

[48] Regulation (EC) n. 1221/2009 of the European Parliament and of the Council on the voluntary participation by organizations in a Community eco-management and audit Scheme (EMAS) [2009] OJ L 342, 1.
[49] European Commission, Communication COM (96) 561 from the Commission to the Council and the European Parliament on Environmental Agreements [1996] OJ L 333, 69.
[50] Anders Pedersen, "Environmental Governance in Europe: A Comparative Analysis of New Environmental Policy Instruments" [2014] 32 Environment and Planning C: Government and Policy, 1–2.
[51] See for instance Commission Recommendation about a voluntary agreement on the labelling of detergents. 89/542/EEC, OJ 1989 L 291, 55

outcomes, they are not intended to replace traditional regulatory measures[52]. Today, most of the voluntary agreements adopted at the EU level gave way to more modern instruments like the ETS, while several voluntary schemes involving either entire industries or single firms are still in place as part of national environmental policies, addressing a wide range of issues, including waste management, air pollution, climate change, water pollution[53].

If, from a corporate perspective, the two forms of VA reflect a similar rationale, which will be explored in the following paragraph about corporate environmentalism, from a regulator's point of view VAs may also be an appealing alternative to traditional regulation. The reasons are similar to those described in relation to market-based instruments, meaning as a response to regulatory failures and the drawbacks of state regulation, and precisely (i) the complexity of regulatory processes that are often too long and costly, thus unable to keep up with technological innovation (ii) the weak enforcement of environmental measures and policies (iii) the excessive burdens imposed to corporations and (iv) the low incentives to innovate and develop solutions that are more cost-effective than those required by the law. Therefore, VA and other market-based instruments may represent a way to overcome these shortcomings and to enable regulators to reduce the transaction costs associated with environmental regulation, providing firms with greater flexibility in their abatement activities, which eventually might lead to greater efficiency. Voluntary programmes or negotiated agreements may also enable consensus building between the relevant stakeholders in order to compose different interests and achieve broad consensus on the adopted solutions. It has been noted that larger firms, particularly those exposed to external pressure from activist or consumers' associations, are more likely to take part into such agreements.

Different opinions have emerged over time concerning the usefulness and effectiveness of such instruments and the opportunity to rely upon voluntary approaches to

[52] European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions: Environmental Agreements at Community Level, [2002] OJ 321, 6.
[53] For instance, in Italy article 206 of the Testo Unico Ambientale, expressly set out this policy option.

meet environmental targets[54]. As reported by an OECD Report[55], some studies reveal that voluntary approaches often brought few environmental improvements, compared with those that would have occurred anyway, while designing and implementation costs remain high. It is also noted that both free-riding and regulatory capture risks may substantially affect VA's effectiveness[56].

In contrast with voluntary agreements or schemes that require public authority's participation, corporate voluntary approaches to environmental protection also include firms' unilateral commitments, where no public body is involved. Firms may decide, individually or collectively, to undertake pro-environment initiatives, as the development of management systems or process to improve their environmental performance, the creation or adherence to codes of conducts, at firm or industry level, the disclosure of information about their environmental practices to enable greater accountability, or more in general all the pro-active attempts to reduce the negative environmental impacts caused by their activities. As we will see in the next paragraph, unilateral initiatives may be preferred because they can be tailored to the firm's specific structure and needs and provide reputational gains that do not have to be shared with competitors.

Many companies have adopted environmental reporting and disclosure practices to provide consumers and other stakeholders with information about the impact of their actions on the environment. Moreover, several studies have been carried out on the correlation between a firm's value and corporate disclosure about their environmental performance: some of them found that corporate environmental disclosure may increase firms' value, particularly in terms of lower cost of capital, as they provide useful information to investors about the company's efficiency and long run profitability[57]. Better environmental

[54] Croci (n. 44)
[55] OECD, *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes* (OECD Publishing, Paris 2003).
[56] *Ibid.* 19.
[57] Omaima Hassan, "The impact of voluntary environmental disclosure on firm value: Does organizational visibility play a mediation role?" [2018] Bus Strat Env, 1569– 1582; Stefania Veltri, Francesco De Luca, Ho-Tan Phan, "Do investors value companies' mandatory nonfinancial risk disclosure? An empirical analysis of the Italian context after the EU Directive" [2020] Bus Strat Env, 1– 12; For the risks associated with litigation see William Savitt, Anitha Reddy, and Bita Assad, "Climate Change Litigation takes an ominous turn" [2020]

performance may lead to increased brand image and a better reputation, and sometimes also in cost savings, both in terms of more efficient resource usage and lower litigation costs. In other terms, whereas generally speaking, switching to more sustainable forms of production and/or distribution imposes new and higher costs that few companies are willing to sustain, it is believed that, at least part of them can be recouped from other cost efficiencies, like those mentioned above.

In addition to voluntary disclosure initiatives, we find many other practices motivated by sustainability aims. For instance, in September 2019, during the Climate Action Summit hosted by the UN General Secretary in New York, 87 companies, including L'Oréal, Nestlé, Nokia, Orange Group, Saint-Gobain, with a combined market capitalization of over US$ 2.3 trillion, committed to contribute to the goal of limiting global temperature rise to 1.5°C above pre-industrial levels by cutting their emissions and become neutral by 2050. Another example of such voluntary commitments is the program launched by Nike "Move to Zero", aimed at minimizing the company's environmental footprint: Nike committed to reduce its carbon emission across its supply chain by 30% by 2030, to eliminate the use of single use plastic among its campus and to divert 99 percent of all its footwear manufacturing waste from landfills.

Other companies, like Patagonia, focus their entire business model on sustainability by relying on renewable energy infrastructures, using sustainable or recycled materials and donating part of their revenues to environmental causes. As part of its "Common Threads Recycling Program", Patagonia has also encouraged its customers to fix damaged clothing before buying new ones, providing them with information and assistance to self-repair their products on the attempt to sensitize its customers about the environmental impact of consumerism[58].

Harvard Law School forum on Corporate Governance, < https://corpgov.law.harvard.edu/2020/06/09/climate-change-litigation-takes-an-ominous-turn/> last accessed October 2020.

[58] Eventually, the decision to invest on products' useful life and engage in persuasive campaigns like "Don't buy this jacket" end up to be very successful and profitable, increasing Patagonia's sales and popularity. For more info see < https://www.patagonia.com/stories/dont-buy-this-jacket-black-friday-and-the-new-york-times/story-18615.html>

These are only a few examples of the several initiatives that have been taken both unilaterally and collectively by companies across the world, which may take different forms and be driven by different motives. As a result, from a policy-making perspective, to investigate how the regulator should treat such initiatives it is crucial to analyze the motivations behind corporate initiatives to discern those meritorious from those that may lead to suboptimal levels of environmental protection.

4. Understanding Corporate Environmentalism

In the previous paragraph, we provided a broad description of the vast array of initiatives that firms may undertake to pursue environmental aims[59]. We also explained how movements empowering civil society and calling for an increased corporate social responsibility as response to government failures are gaining momentum, as also testified by the increasing interest in equitable-trade and responsible-investments[60]. Whereas it is clear why today corporations are being asked to assume broader responsibilities to society than ever before, what is missing is a deep understanding of the motives that induce firms to modify their corporate strategy to include environmental considerations, going beyond what is required by the law. To the purpose of this analysis, a clear understanding of corporate environmentalism is crucial to comprehend whether, from a policy perspective, such initiatives should be further encouraged by the government, and at which cost[61].

4.1. The theoretical premises for corporate environmentalism: CSR theories and the increasing popularity of stakeholder capitalism

The notion of Corporate Environmentalism (CE) represents an expression of the broader concept of Corporate Social Responsibility (CSR), whose content has been subject to a debate as old as capitalism itself, which has not been settled yet[62]. This is because CSR

[59] Thomas Lyon and John Maxwell, "Corporate Social Responsibility and the Environment: A Theoretical Perspective", [2007] Review of Environmental Economics and Policy Advance, 1-22.
[60] See WFE and UNCTAD, "The Role of Stock Exchanges in Fostering Economic Growth and Sustainable Development" [2017] London World Federation Exchanges and UNCTAD.
[61] Aseem Prakash, Greening the Firm: The Politics of Corporate Environmentalism (Cambridge University Press 2000).
[62] For some recent contributions to the discussion, see Dorothy Lund, Corporate Finance for Social Good, 121 Columbia Law Review, Forthcoming 2021, available at SSRN: <https://ssrn.com/abstract=3511631> last

theories question some of the fundamental assumptions of the neo-liberal theory of the firm and precisely the idea that its sole role is to maximize shareholders' value[63], being them the ultimate residual claimants who provide the company with the necessary resources to operate[64]. In this view, it is an exclusive government's responsibility to pursue social ends by stepping in in case of market failures or remedying wealth inequality through contracts or regulation. CSR advocates question this vision, calling for a greater corporate contribution to social causes in consideration of their privileged status and as a response to market and regulatory failures[65].

Although much has been said about CSR, there is no standard agreed definition of such a concept[66]. A useful definition has been set forth by Davis who argued that CSR refers to "the firm's consideration of, and response to, issues beyond the narrow economic, technical, and legal requirements of the firm. It is the firm's obligation to evaluate in its decision-making process the effects of its decisions on the external social system in a manner that will accomplish social benefits along with the traditional economic gains which the firm seeks. (…) It means that social responsibility begins where the law ends[67]. A firm is not being

accessed November 2020; Jill Fisch and Steven Davidoff Solomon, "Should Corporations Have a Purpose?" [2020] Faculty Scholarship at Penn Law, 2163; Dalia Tsuk, "From Dodge to eBay: The Elusive Corporate Purpose" [2019] 13 Virginia Law & Business Review, 155-211; Colin Mayer, Prosperity: Better Business Makes the Greater Good, (Oxford University Press 2018). A good summary of the discussion is provided in Ira Millstein, Jeff Gordon, Ron Gilson, Colin Mayer, Kristin Bresnahan, and Marty Lipton, "Session I: Corporate Purpose and Governance" [2019] 31 Journal of Applied Corporate Finance, 10-25, and in the same issue, Leo Strine, Eric Talley, Mark Roe, Jill Fisch, and Bruce Kogut, "Session IV: The Law, Corporate Governance, and Economic Justice", 44-63.

[63] David Ciepley, "The Neoliberal Corporation, in The Oxford Handbook of the Corporation", in *The Oxford handbook of the Corporation* eds. by Thomas Clarke, Justin O'Brien, and Charles R. T. O'Kelley, (Oxford University Press 2019).

[64] Milton Friedman, *Capitalism And Freedom* (University of Chicago Press 1962), 133; Armen Alchian and Harold Demsetz, "Production, Information Costs and Economic Organization" [1972] 62 *Am. Economic Rev*. 777.

[65] For a critique of the economic arguments of shareholders' primacy see Lenore Palladino, The Economic Argument for Stakeholder Corporations [2019] Report: Roosevelt Institute, New York; Lynn Stout, "On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)" [2013] Cornell Law Faculty Publications, 865; Thomas Clark, "Deconstructing the Mythology of Shareholder Value: A comment on Lynn Stout's "The Shareholder value Myth"" [2013] 3 Accounting, Economics and the Law, 15-22.

[66] For an interesting analysis of the ways in which corporate social responsibility has been defined by economists and academics since the 1950s see Archie Carroll, "Corporate Social Responsibility – Evolution of a definition construct" [1999] 38 Business & Society, 268-295.

[67] Keith Davis, "The Case for and against Business Assumption of Social Responsibilities" [1973] 16 The Academy of Management Journal, 312-22.

socially responsible if it merely complies with the minimum requirements of the law, because this is what any good citizen would do"[68]. The European Commission, instead, defined CSR in more general terms as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis"[69]. Thus, more in general, two elements seem to characterize socially responsible actions by corporations: (i) the voluntary intent of going beyond legal requirements on social and environmental matters and (ii) a corporate expenditure that may imply a returns' sacrifice[70].

The debate about the societal role of corporations and whether business managers should be accountable only to their shareholders or also to the society in which they operate is an old one[71]. It was 1953 when Bowen, one of the precursors of CSR theories, queried "what responsibilities to society may businessmen reasonably be expected to assume?"[72]. Even earlier, the shareholder/stakeholder debate was discussed in a famous exchange between the Columbia professor Adolf A. Berle Jr and the Harvard professor E. Merrick Dodd Jr[73]. The conflicting positions expressed by the two scholars reflect the bottom line of

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[68] Ibid.

[69] European Commission Green Paper on "Promoting a European framework for Corporate Social Responsibility" [2001] COM(2001) 366 and Communication on "A renewed EU strategy 2011-14 for Corporate Social Responsibility" [2011] COM(2011) 681.

[70] These elements have also been identified by Henry Manne and Henry Wallich, *The Modern Corporation and Social Responsibility* (American Enterprise Institute for Public Policy Research, Washington D.C. 1972).

[71] U.S Courts have extensively discussed the matter. In *U.S. Dodge v. Ford Motor Co*., 170 N.W. 668, 507 (Mich. 1919) the Court famously stated that "[a] business corporation is organized and carried on primarily for the profit of the stockholders". An idea that, in the context of hostile takeovers was confirmed in *Revlon, Inc v. MacAndrews & Forbes Holdings*, 206 A.2d 173 (Del. 1986) § 176 and 182, *contra Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985); *Steinway v. Steinway & Sons*, 40 N.Y.S. 718, 721 (N.Y. Sup. Ct. 1896). A similar position was maintained in the more recent decision *eBay Domestic Holding Inc. v. Newmark*, 16 .3d. 1 (2010) where Chancellor Chandler of the Chancery Court of Delaware affirmed that "The corporate form . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. . . . Directors of a for-profit Delaware corporation cannot deploy a [policy] to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law". For a comment see David Wishnick, "Corporate Purposes in a Free Enterprise System: A Comment on A on Ebay" [2012] 121 Yale L.J., 2405. More recently, *Burwell v. Hobby Lobby* 134 S. Ct. 2751 (2014) and *Citizen United v. Federal Election Commission*, 558 U.S. 310 (2010) examined by Lyman Johnson and David Millon, "Corporate Law After Hobby Lobby" [2014] 70 The Business Lawyer 8.

[72] Howard Bowen, *The social responsibility of the businessman* (Harper 1953), 9.

[73] Adolf Berle, The 20th century of Capitalist revolution, (Harcourt, Brace 1954) and "Corporate Power as Powers in Trust" [1931] 44 Harvard Law Review, 1049; Merrick Dodd, "For Whom are corporate Managers Trustees?" [1932] 45 Harvard Law Review, 1145; For a comment on the two positions see Joseph Weiner, "The Berle-Dodd Dialogue on the Concept of the Corporation" [1964] 64 Columbia Law Review,1458; William

a not yet settled confrontation between shareholders' supremacy positions and the advocates of a more pluralist approach. Whereas Berle argued[74], in line with the traditional view, that the management of a corporation could only be held accountable to shareholders, Dodd answered that corporate managers were responsible to a wider range of subjects and to the society as a whole, because the modern corporation is "permitted and encouraged by the law primarily because it is of service to the community rather than because it is a source of profit to its owners"[75]. These concerns about business managers' social responsibility were also expressed by F.D. Roosevelt in 1932 in a famous speech to the Commonwealth Club, often recalled as "The New Individualism" speech, where he noted that managers "have undertaken to be, not business men, but princes of property". So, he continued, "they must fearlessly and competently assume the responsibility which goes with the power, (…) the responsible heads of finance and industry instead of acting each for himself, must work together to achieve the common end. They must, where necessary, sacrifice this or that private advantage; and in reciprocal self-denial must seek a general advantage"[76].

Bratton and Michael Wachter, "Shareholder Primacy's Corporatist Origins: Adolf Berle and 'The Modern Corporation'" [2008] 34 Journal of Corporation Law, 99. See also see Henry Manne, "Mergers and the Market for Corporate Control" [1965] 73 The Journal of Political Economy, 110-120. In the Italian debate, see Mario Libertini, "Impresa e finalità sociali. Riflessioni sulla teoria della responsabilità sociale dell'impresa", [2009] Riv. soc., 23, and from the same author, "Economia sociale di mercato e responsabilità sociale dell'impresa", in *La responsabilità sociale dell'impresa. In ricordo di Giuseppe Auletta* (eds) V. Di Cataldo e P.M. Sanfilippo, (Giuffrè Milano 2013), 9, 13.

[74] The most frequently cited work is Adolf Berle and Gardiner Means, The Modern Corporation And Private Property, (New York McMillan, 1932).

[75] *Ibid.* at 1149.

[76] Commonwealth Club Address, address by Franklin D. Roosevelt, September 23, 1932. See also Davis Houck, "FDR's Commonwealth Club Address: Redefining Individualism, Adjudicating Greatness" [2004] 7 Rhetoric and Public Affairs, 259.

The intellectual dispute over the theory of the firm[77] and the implications for a corporate governance perspective is central in this sense[78], given the significant repercussions on the identification of the purpose of the corporation[79] and the content and beneficiaries of directors' fiduciary duties. On the one hand, the traditional and so far dominant theory of the firm, secured by the process of financialization and increasing reliance on capital markets, does not admit a multi-purpose corporation, being its sole objective the maximization of shareholders' value: managers operate as the agents of the shareholder principal, and therefore any corporate governance issues is aimed at addressing the "classic agency

[77] In this context, it is worth mentioning the long dispute in the academic discourse, especially in the U.S., among those who advocated an economic or contractual theory of the firm, which describes corporate relationship in economic terms of agency and transaction costs and the "institutional" one, which refuses a purely efficiency-driven and individualistic conception of the firm. According to the contractual theory, the corporation is a legal fiction reflecting a nexus of contracts among individual factors of production, motivated by egoistic interests (for the original formulation of this concept see Ronald Coase, "The Nature of the Firm" [1937] 4 Economica 386, and Michael Jensen and William Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" [1976] 3J FIN. ECON, 305, 310, arguments further expanded by, inter alia Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1996); William Bratton, "The New Economic Theory of the Firm: Critical Perspectives from History" [1989] 41 STAN. L. REV. 1471, 1482-85. From this perspective, the shareholders' supremacy is justified by the fact that only shareholders take all the risks without appropriate guarantee, as opposed to other stakeholders, protected by contracts. The operation of corporation must then be subject to shareholders' control over directors, who work as principal of their agents. According to this view, corporate governance must be structured as to address potential agency costs by effective monitoring mechanisms.

[78] The debate about the corporate purpose and the content of directors' fiduciary duties has emerged also in reaction to the publication of the American Law Institute (ALI) Principles of Corporate Governance, which provided at section 2.01 that corporation should be operated to enhance "corporate profit and shareholder gain", but it afforded managers wide discretion in devoting resources to "public welfare, humanitarian, educational, and philanthropic purposes". This section was subject to a very intense debate, see inter alia, Donald Schwartz, "Defining the Corporate Objective: Section 2.01 of the ALI's Principles" [1984] 52 GEO. WASH. L. REV. 511; See Roswell Perkins, "The ALI Corporate Governance Project in Midstream" [1986] 41 Bus. Law., 1195. Similarly, Section 172 (1) of the UK Companies Act 2006, states that directors should consider the impact of the company's operations on the community and the environment

[79] With this respect, the French law was recently amended by the *PACTE loi*, which introduced a new Article 1835 of the Code Civil allowing corporations to define their corporate purpose or *raison d'etre* in their statute. For a comment see Bruno Dondero, *Loi PACTE et Droit des Affaires* (Editions Francis Lefebvre, Levallois, 2019). An analogous debate has emerged in Italy, as discuessed in *inter alia* Gastone Cottino, "Contrattualismo e istituzionalismo (Variazioni sul tema da uno spunto di Giorgio Oppo)" [2005] Riv. soc., 703-704; Carlo Angelici, "La società per azioni e gli «altri»", in *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholderism in ricordo di Pier Giusto Jaeger*, (Giuffrè Milano, 2010) 45; Monica Cossu, *Società aperte e interesse sociale* (Milano, Giappichelli 2006); Paolo Montalenti, "Interesse sociale ed amministratori", in *Società per azioni, corporate governance e mercati finanziari* (Milano, Giuffrè 2011). Other commentators took more skeptical positions, see *inter alia* Francesco Denozza, "L'interesse sociale tra «coordinamento» e «cooperazione»" in *L'interesse sociale tra valorizzazione del capitale e protezione degli stakeholders in ricordo di Pier Giusto Jaeger*, (Milano, Giuffrè 2011) 9, and from the same author "Quattro variazioni sul tema: «contratto, impresa e società nel pensiero di Carlo Angelici" [2013] 40 Giur. comm., 480; Mario Libertini (2009), (n. 73); Stella Richter jr., "A proposito di interesse sociale e governo dell'impresa in Europa", Valerio De Luca (ed.) *Capitalismo prossimo venturo – Etica Regole Prassi*, (Bocconi, Milano, 2010), 454.

problem"[80]. On the other side, the advocates of an "institutional" or "communitarian" theory[81] suggest a very different idea of the corporation, i.e. as an institution that has been recognized with a special status (limited liability, legal separation from natural persons, perpetual existence[82]) because of the valuable services that it provides to the society, and therefore entitled to maintain its legitimacy as long as it performs its societal role. As a result, managers bear fiduciary duties over shareholders and other constituencies, who must be put in the condition to exercise an effective control by internal organization mechanisms.

These issues persisted among economists and lawyers during the 1970s when the managerialist conception of the firm was abandoned, and the arguments about the nature of the firm and its purpose have been further expanded[83]. The most famous advocate of shareholders' supremacy was Milton Friedman, whose seminal work "Capitalism and Freedom" is frequently cited in support of the traditional theory of the corporation and the classical economic doctrine of a free market[84]. On a later essay published in 1970 he maintained that those who argue that "business is not concerned "merely" with profit but also with promoting desirable "social" ends, that business has a "social conscience" and takes seriously its responsibilities for providing employment, eliminating discrimination, avoiding pollution" are indeed "preaching pure and unadulterated socialism"[85]. According to this view, CSR must be conceived as an agency problem and hence undesirable: by engaging in activities not directed at maximizing shareholders' value but aimed at pursuing broader purposes or the interests of other constituencies, managers are breaching their fiduciary duties to shareholders. Likewise, other economists contested the feasibility of CSR in a context of

[80] For the evolution of fiduciary duties U.S. law see Henry Hanmann and Reinier Kranman, "The end of History for Corporate Law" [2001] 890 Geo L. J., 439
[81] See William Bratton, "Nexus of Contracts Corporation: A Critical Appraisal" [1989] 74 Cornell L. Rev., 407; John Parkinson, "Models of the company and the employment relationship" [2003] 41 British Journal of Industrial Relations, 481; Kent Greenfield, "Workers, shareholders, and the purpose of corporations," in K. Greenfield, *The Failure of Corporate Law*, (Chicago, University of Chicago Press 2006), 41–71.
[82] Lynn Stout, "Corporations as Sempiternal Legal Persons" [2019] in *The Oxford Handbook of the Corporation*, (n. 63).
[83] Michael Jensen and William Meckling, (n.76), Olivier Weinstein, "Firm, Property and Governance: From Berle and Means to the Agency Theory, and Beyond" [2012] 2 Accounting, Economics, and Law, 2.
[84] Friedman (n. 64).
[85] Milton Friedman, "The social responsibility of business is to increase its profits", *New York Times Magazine*, (Sept. 13, 1970).

intense competition where firms cannot engage in profit sacrifices in the name of public interest.

Not everyone, however, agreed with this idea. Others argued that "a large corporation (…) not only may engage in social responsibility, it had damn well better try to do so"[86]. The reasons why firms should consider the interest of stakeholders, i.e. specific groups or persons (employees, consumers, customers etc..), have been famously expressed by Freeman in its well-known work about the stakeholder theory[87]. He argued that corporations have relationships with several constituencies, which indirectly influence business operations and their profitability, and therefore, corporate leaders cannot operate regardless of the interest of "any group or individual who can affect or is affected by the achievement of an organization's purpose"[88]. Although the stakeholder theory is often used as theoretical basis in support of CSR, the two concepts do not perfectly overlap[89]. Whereas CSR focuses on companies' responsibilities toward the community and the society at large (environmental efforts, ethical labor practices, education, reduction of poverty etc.), stakeholder theory stresses the importance of creating value for a narrower category of stakeholders, more proximate to the firm, like employees, suppliers and investors. In any case, both concepts share the idea that corporations have responsibilities for a broader range of subjects and that creating value for firm's stakeholders can also make shareholders better off, by increasing its reputation and consumers' affection, attracting talented people and avoid punitive actions from the government[90]. These results can be achieved for instance by providing employees with salaries beyond the legal minimum, health care or social benefits, the adoption of more sustainable materials and so on.

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[86] Paul Samuelson, "Love That Corporation", *Mountain Bell Magazine* (Spring 1971).
[87] Robert Freeman, *Strategic Management: A Stakeholder Approach* (Pitman Publishing 1984). See also Robert Freeman, Jeffrey Harrison, Andrew Wicks, Lauren Parmar, Simone De Colle, *Stakeholder theory. The state of the art* (New York: Cambridge University Press 2010).
[88] Ibid. 46.
[89] The relationship between CSR and stakeholder theory is well explained by Robert Freeman, Sergiy Dmytriyev, "Corporate Social Responsibility and Stakeholder Theory: Learning From Each Other" [2017] 1 Symphonia, 7.
[90] In this sense Paul Godfrey, "The Relationship between Corporate Philanthropy and Shareholder Wealth: A Risk Management Perspective" [2000] 30(4) Academy of Management Review, 777; Lynn A. Stout, *The Shareholder Value Myth* (Penguin, 2018). For a more detailed analysis of what kind of initiatives are carried out by firms as part of their CSR commitments see Jennifer Griffin and Aseem Prakash, "Corporate Responsibility: Initiatives and Mechanisms" [2014] 53(4) Business & Society, 465.

Moreover, an additional argument in support of CSR commitments is that the incorporation of societal interests in business operations maximizes the firm's value in the long term, by an enhanced public image and because a better society produces better conditions for business to operate. According to this view, CSR might be perfectly consistent with the profit-maximizer imperative in the sense that pursuing only the interest of the owners and short-term profitability would negatively affect the long interest of shareholders themselves[91].

On the other side, one of the main criticisms of such an approach is that it would allow managers too much discretion in deciding what is good and in setting purposes that might destroy shareholders' wealth. The adoption of an effective pluralist approach would imply that shareholders and stakeholders' interests have the same weight and that when conflicts occur, shareholder value may be sacrificed in the name of a broader purpose. In this scenario, someone has to take this decision, typically corporate leaders. In other words, stakeholderism rises concerns about managers' accountability and correct assessment of their actions, as they retain the crucial discretionary power that allows them to decide in which cases and on what conditions stakeholders' interest could prevail over shareholders' ones[92].

This debate has further proceeded and today it is as intense as never, although the external conditions have partially changed[93]: in the 1970s a real market for corporate control was not fully developed and managers enjoyed a high level of discretion that allowed them to go beyond a strict shareholders' value approach. Conversely, starting from the 1990s the increasing critical scrutiny from capital markets, as well as an intensified competition, put

[91] Some argued that the "long-term" formula is just a rhetoric way to pursue other objectives rather than shareholder value maximization, as for instance longevity, a goal that can be at odds with shareholders' interests, as argued by J.B., Heaton, "The 'Long Term' in Corporate Law" [2017] 72 The Business Lawyer, 353. See also Porter and Kramer, (n. 8); Daniel Greening and Daniel Turban, "Corporate Social Performance as a Competitive Advantage in Attracting a Quality Workforce" [2000] 39(3) Business & Society, 254. see, e.g., Margaret Blair and Lynn Stout, "A Team Production Theory of Corporate Law" [1999] 85 VA. L. REV. 247

[92] See Thomas Clarke and Jean Francois Chanlat, *European Corporate Governance* (London and New York: Routledge 2009).

[93] For a critical view see Francesco Denozza and Alessandra Stabilini, "The Shortcomings of Voluntary Conceptions of CSR" [2013] Orizzonti del diritto commerciale, 1.

more pressure on managers to focus on shareholders' value maximization[94]. An approach that has been further incentivized by share-based executive compensations. Moreover, competition on financial marketplace and the risk of losing investors, reduces firms' opportunity to review its business and corporate governance as to pursue broader goals.

4.2. The most recent trends for a more conscious capitalism

Over the last years however, the predominant profit-focused view has begun to hesitate. Moreover, it is worth to mention that in Europe the debate about the theory of the firm and the space for CSR gained a new momentum after the Lisbon Treaty entered into force because of the explicit adherence to a "social market economy" (SME) thereby included. Some authors indeed wondered whether the adoption of this political doctrine also reflected a new conception of corporations and their role in European societies[95].

More in general, corporations' ability to adapt to new pressing issues such as climate change and increasing inequality, as well as the capacity to combine profits with broader social purposes and responsible actions have been recently described by many commentators as a matter of survival for free enterprise capitalism. In other words, giving that corporations represent today some of the most influential institutions, with revenues that sometimes are larger than those of many countries, it is argued that they retain a special responsibility in responding to the crucial challenges of our era, as the fight against climate change and the achievement of other UN Sustainable Development Goals. In fact, it is believed that business that fail to combine profits with other purposes that benefit a wider range of stakeholders, as employees and consumers and the society at large, will struggle to survive in the long run. Therefore, an increasing number of commentators and business managers is advocating the integration of social and environmental issues into companies' strategies and policies arguing

[94] Tsuk (n.62); Simon Deakin and Giles Slinger, "Hostile Takeovers, Corporate Law, and the Theory of the Firm" [1997] *Journal of Law and Society*, 124. However, it is argued that presumptions like the business judgment rule protect directors' corporate decisions that pursue interests other than shareholders' value maximization, see Stephen Bainbridge, "Unocal at 20: Director Primacy in Corporate Takeovers" [2002] 55(3) Stanford Law Review, 791.
[95] See Libertini (2013) (n. 73).

that such initiatives would benefit both firms in terms of better risk management and greater financial performances[96], and the society at large[97].

In line with this trend, innovative measurements of companies' performance have become increasingly popular, such as those considering not only financial outcomes but also social and environmental ones, like the so called "triple bottom line" focusing on "profit, people and planet"[98]. The increasing attention of investors to companies' performance on environmental, social and governance (ESG) measures has further provided another incentive to change[99]. Big investment groups and not only ESG-focused funds are becoming more focused on these issues calling for greater transparency on ESG data, on the idea that companies that value the interests of employees, customers, the environment have greater resilience to mitigate risks and better performances in the long run[100]. For instance, in a recent statement, Larry Fink, the CEO of BlackRock, the world's largest asset manager, affirmed that their "investment conviction is that sustainability and climate-integrated portfolios can provide better risk-adjusted returns to investors. And with the impact of sustainability on investment returns increasing, we believe that sustainable investing is the strongest foundation for client portfolios going forward. (…) as we have seen again and again, these actions that damage society will catch up with a company and destroy shareholder value. By contrast, a strong sense of purpose and a commitment to stakeholders helps a company connect more deeply to its customers and adjust to the changing demands of society. Ultimately, purpose is the engine of long-term profitability"[101].

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[96] Robert Eccles, Ioannis Ioannou, George Serafeim, "The Impact of Corporate Sustainability on Organizational Processes and Performance" [2014] 60(11) Management Science, 2835.

[97] See Ioannis Ioannou, and George Serafeim, "Corporate Sustainability: A Strategy?" [2019] Harvard Business School Accounting & Management, Unit Working Paper No. 19-065.

[98] John Elkington, J. "Enter the triple bottom line" in *The triple bottom line* (Routledge 2013), 23-38.

[99] For a discussion about the rise of ESG investing see, John G. Ruggie, "Corporate Purpose in Play: The Role of ESG Investing" [2019] 5 M-RCBG Faculty Working Paper Series, 1.

[100] There are several indices that investors use to measure companies' ESG performance, including the FTSE4Good Index Series and the S&P Dow Jones Sustainability Indices (DJSI).

[101] Larry Fink letter, "Sustainability as BlackRock's new Standard for Investing" [2020], available at https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter. For a comment, See Giovanni Strampelli, "Gli investitori istituzionali salveranno il mondo? Note a margine dell'ultima lettera annuale di BlackRock" [2020] 1 *Riv. Soc.*, 51, who points out the obstacles towards a model in which institutional investors are the drivers of a real change, as for instance the *stewardship costs* they have to bear for an effective monitoring. Moreover, according to many the BlackRock's letter was a response to the accusations against its previous practices to refuse to back landmark sustainability resolutions, see Attracta Mooney, "Nuns take on BlackRock over climate change", *Financial Times* (December 2019), available at

Also, the World Economic Forum Global Risks Report recognized that climate change's impacts are among the top risks faced by business firms because in the absence of efficient adaptation processes, they could disrupt companies' ordinary operations and put their survival at risk[102]. Moreover, the idea that a more sustainable performance allows better risk mitigation has been in part confirmed by the data released by Morningstar about the financial performance during the coronavirus COVID-19 crisis: in March 2020 the 62% of the ESG focused funds outperformed the global tracker, whereas the MSCI World Stock index went down by 14.5%[103].

A new shift towards stakeholder capitalism has also been officially backed by prominent organizations such as the World Economic Forum, whose recent manifesto clearly states that "[t]he purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders"[104]. Moreover, influential scholars within the International Business Council of the World Economic Forum proposed a "new paradigm", urging to abandon shareholder primacy and adopt stakeholder governance that would reduce the current pressure on managers to focus on short-term profits and facilitate firms' sustainable long-term growth. The urgency to replace a shareholders-focused capitalism has been advocated also as a remedy to the shortcomings of current corporate governance models[105]. It is argued that a corporation-centric theory, according to which directors have a fiduciary duty to the corporation and all of its stakeholders would enable companies to counter short-terminist attacks by activist hedge funds, which are undermining corporate investments and economic

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https://www.ft.com/content/9f84e865-31ad-4a13-9398-8781e2cb0581 last access September 2020. And these criticisms continued even after the statements, see Attracta Mooney, "BlackRock accused of Climate Change Hypocrisy", *Financial Times* (May 2020) available at <https://www.ft.com/content/0e489444-2783-4f6e-a006-aa8126d2ff46> last accessed in September 2020.

[102] WEF, Global Risk Report 2019, Available at <http://www3.weforum.org/docs/WEF_Global_Risks_Report_2019.pdf> last accessed in November 2020.

[103] Madison Darbyshire, "ESG Funds continue to outperform wider market", Financial Times, (April 2020) Available at https://www.ft.com/content/46bb05a9-23b2-4958-888a-c3e614d75199 las accessed May 2020.

[104] Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution (Dec. 2, 2019).

[105] See inter alia, Olicer Hart and Luigi Zingales, "Companies Should Maximize Shareholder Welfare Not Market Value" [2017] 2(2) Journal of Law, Finance, and Accounting, 247.

growth and eventually inhibit sustainable value creation that benefit the society as whole[106]. On the other hand, this transition can be interpreted as a CEOs' attempt to use the protection of stakeholders' interest's argument to pursue their own interests, i.e. to obtain more autonomy vis-à-vis activist shareholders and investors, whose monitoring activity is reducing directors' freedom to operate and to prevent their replacement in case of hostile takeovers.

Surprisingly, organizations that have traditionally promoted more conservatory views about the societal role of corporations have also reconsidered their positions. This is the case of the U.S. Business Roundtable (BRT), one of the largest business groups in the world which includes almost 200 CEOs from companies like Amazon, Walmart, Apple, JP Morgan and General Motors[107]. In August 2019, the Business Roundtable released a statement of purpose neglecting its historical mantra according to which "corporations exist principally to serve their shareholders"[108]. With this statement, the agreeing corporate leaders committed themselves to operate by considering the interests of a list of stakeholders, including customers, employees, suppliers and communities alongside with shareholders, by pledging to provide employees with fair compensations and other "important benefits," as training and education or by protecting "the environment by embracing sustainable practices across our businesses". This initiative received great resonance mainly because of the discrepancy with the traditional shareholders' primacy approach that has historically characterized that institution, as well as the standing of the agreeing CEOs[109]. However, the BRT did not provide specific information about how these commitments will be carried out in practice.

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[106] Leo Strine Jr., "Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System" [2017] 126 Yale L.J. 1870; Steven Rosenblum," Hedge Fund Activism, Short-Termism, and a New Paradigm of Corporate Governance" [2017] 126 Yale L.J. F., 538. See also Martin Lipton, "It's time to adopt a new Paradigm", in Harvard Law School forum on Corporate Governance" (February 2019) available https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/ last accessed in April 2020. The author refers to "a meaningful and successful private-sector solution to attacks by short-term financial activists and the short-termism that significantly impedes long-term economic prosperity".

[107] Business Roundtable, Business Roundtable redefines the purpose of a corporation to promote 'An economy that serves all Americans [2019] <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>

[108] Ibid.

[109] For a discussion on the implications of this initiative see Vincenzo Calandra Buonaura, Francesco Denozza, Mario Libertini, Giorgio Marasà, Marco Maugeri, Roberto Sacchi, Umberto Tombari, "Lo statement della Business Roundtable sugli scopi della società. Un dialogo a più voci" [2019] 7(3) Orizzonti del diritto commerciale, 589.

Moreover, some scholars noted as none of the companies whose CEOs signed the Roundtable Statement changed their corporate governance documents to include the new pluralistic approach and remove the explicit reference to shareholder primacy[110].

Similarly, in 2018 the British Academy, the UK national institution for or the humanities and the social sciences, sponsored a program based on the research of 32 academics about the "Future of the Corporation"[111]. As a result, a report was published, entitled "Reforming business for the 21st century", which suggested the necessity to abandon the idea of businesses as primarily focused on profit maximization and replace it with a purpose-oriented capitalism, on the assumption that "the purpose of business is to solve the problems of people and planet profitably, and not profit from causing problems". On a second report released in 2019, "Principles for Purposeful Business", the Academy set out a series of principles, covering aspects of law, regulation, measurement etc., to guide policymakers and corporate leaders towards a re-definition of 21st century business around corporate purpose. These reports affirm that a shift is needed, as business as usual is not an option anymore, given that corporations share a crucial responsibility to solve global challenges, starting from climate change and the achievement of a sustainable development[112].

Although declarations from the corporate world towards an enhanced stakeholderism have been often described as a crucial turning point in the evolution of the corporation, and as the beginning of a new "*more inclusive capitalism*", other commentators reasonably raised some skepticism about the effective corporate's intention and capacity to bring such meaningful changes[113]. Whether it is clear that these initiatives are a punctual response to the growing public disaffection with capitalism and its inability to guarantee prosperity for all in a sustainable and fair way, a hostility that could eventually undermine its existence, one must

[110] For a skeptical reaction to the initiatives see, *inter alia* Lucian Bebchuk and Roberto Tallarita, "The Illusory Promise of Stakeholder Governance"(February 26, 2020), Forthcoming, Cornell Law Review, December 2020; Luca Enriques, "The Business Roundtable CEOs' Statement: Same Old, Same Old", Oxford Business Law Blog, (September 12, 2019) available at <https://www.law.ox.ac.uk/business-law-blog/blog/2019/09/business-roundtable-ceos-statement-same-old-same-old>

[111] The Future of Corporation, British Academy (2018).

[112] Piergaetano Marchetti, "Dalla "Business Roundtable" ai lavori della "British Academy" [2019] 5-6 Riv. Soc., 1303.

[113] Ibid.

be cautious in expecting that these promises will be followed by substantial changes on how companies conduct their business and thus effective progress on social and environmental issues. In fact, one can hardly overlook that this time such demands for a broader scope of corporate purpose come directly from boards of directors and top management and not, as it was used to be, from civil society or labor unions.

In this respect, some authors described such event as "the illusory promise of stakeholder governance"[114]. They criticize this shift towards stakeholderism, arguing that it would be not only ineffectual but also contrary to the interests of stakeholders and society at large. Corporate leaders do not have proper incentives to pursue stakeholders' interests at shareholders' expense, so they would not use their discretion to pursue other objectives beyond what is necessary to maximize shareholders' value. Moreover, it is argued that corporate managers wish to use stakeholderism to respond to hedge funds activism and institutional investors' pressure, but such insulation from shareholders' scrutiny would also reduce managers' accountability, making it easier for them to pursue their private interests and undermining companies' economic performance[115]. As a result, initiatives such as the BRT statement might be nothing more than a sham stakeholderism and "a PR move rather than as the harbinger of a major change"[116]. For these reasons, it would probably be too naïve to conceive the decision to abandon the shareholder primacy as a purely altruistic move, where it might be instead a good self-interest strategy.

In fact, CSR commitments can be used strategically to produce a wide array of benefits for a company. Precisely it could be a means of improving a company's reputation, enhancing its brands, a source of competitive advantage and innovation or it could be conceived as a part of a differentiation strategy. CSR initiatives could also be employed to placate protests from activists' campaigns that might lead to strict supervision by the

[114] A. Bebchuk and R. Tallarita, (n. 108)
[115] Mark Roe, "Why Are America's CEOs Talking About Stakeholder Capitalism Now?", Blog University of Oxford Faculty of Law, (November 2019), < https://www.law.ox.ac.uk/business-law-blog/blog/2019/11/why-are-americas-ceos-talking-about-stakeholder-capitalism-now>
[116] Ibid. para 13.

government and new restrictions by regulatory means[117]. Indeed, the threat of new legislation and regulatory burdens on companies and the attempt to pre-empt them is often considered as one of the main benefits of strategic CSR. For instance, the advocates of the "New Paradigm", in explaining how this approach would benefits corporations also state that it would be "premised on the idea that corporations and institutional investors can forge a meaningful and successful private-sector solution, which may preempt a new wave of legislation and regulation"[118]. Whereas in this specific case the author refers to the concrete threat of new regulations imposing such a long-term approach, CSR initiatives or their proclamation can be used strategically to show that corporations are able to make progress and solve social and environmental issues on their own, thus discouraging and preventing regulatory measures that could impact their operations in an even more radical way. It is no surprise that such initiatives have been taken when both in the U.S. and in U.K. more radical left-wing leaders have started to propose major changes on how corporations are run[119].

Therefore, setting aside its possible strategic use and the reasons to remain skeptical, a renewed corporate commitment to multiple stakeholders should not always be interpreted as a repudiation of the capitalistic structure but instead as an enhanced version of it, on the belief that the free-market system and private decision-making are the best means not only of achieving prosperity but also social and environmental sustainability, innovation, economic opportunity for all.

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[117] Susan Feinberg, T. L. Hill, Izzet Sidki Darendeli, "An institutional perspective on non-market strategies for a world in flux", in *The Routledge Companion to Non-Market Strategy* (Routledge, 2015); Daniel Esty and Andrew Winston, *Green to Gold: How Smart Companies Use Environmental Strategy to Innovate, Create Value, and Build Competitive Advantage* (Hoboken, NJ John Wiley & Sons 2006).

[118] See also Martin Lipton, "On the purpose of Corporation, in Harvard Law School forum on Corporate Governance" (May 2020) available at https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation/. See also Leo Strine, "Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future" (October 3, 2019). Available at <https://ssrn.com/abstract=3461924> last accessed in October 2020.

[119] See Simon Kack, "UK "has particularly extreme form of capitalism"", *BBC News* (27 November 2019) available at < https://www.bbc.com/news/business-50562518> last accessed in April 2020.

4.3. The practical and strategical motives for environmental initiatives

At this point, much of the arguments used to explain the rationale behind corporate initiatives towards broader social purposes also apply to pro-sustainability initiatives. Likewise, the adoption of voluntary initiatives, such as the commitment to reduce carbon emissions beyond what is required by the law, may cause lower profits and smaller dividends and therefore it might not always be sustainable in the face of competitive pressure. To this respect, several studies have been carried out to identify the market conditions that allow the adoption of profit-sacrificing activities on a sustainable basis[120]: imperfect markets, conditions of asymmetric information or economies of scale may indeed facilitate firms to over-comply with environmental rules, either whether motivated by pure altruistic aims admitting profit sacrifice, or because such strategy is believed to increase shareholders' value. As noted by some scholars, "the debate over whether environmental protection poses a threat or opportunity for business will not soon be settled."[121] However, whereas in principle firms may decide to engage in altruistic CSR activities in light of broader purposes and a more sustainable capitalism, corporate environmentalism may well be conceived as part of a business strategy that contributes to firms' profitability in a more traditional sense.

More in general, a CE compatible with shareholders' value maximization can be understood both in terms of market strategies and non-market strategies. Among the main market drivers for CE, it is worth noting that firms may decide to adopt environmental plans to improve their environmental performance, as a cost-minimization strategy, where pollution represents a signal of inefficiencies. When waste and pollution are seen by companies as internal costs, the implementation of technological innovation that allows more efficient processes and use of raw materials would create a win-win opportunity for both the company and the society. Moreover, as showed by the recent "MSCI Principles of Sustainable Investing", by integrating ESG criteria into business strategies, companies incur in lower cost of capital and financing costs, as markets consider firms with high-ESG-scoring

[120] See David Baron, "Private Politics, Corporate Social Responsibility, and Integrated Strategy" [2001] 10(1) Journal of Economics and Management Strategy, 7.
[121] Dennis Rondinelli and Gyula Vastag, "International Environmental Standards and Corporate Policies: An Integrative Framework" [1996] 39/1 California Management Review, 106.

less susceptible to systematic market risks and tend to reward companies with a good management of human and natural resources[122].

A second common market strategy explaining CE is the attempt to respond to new "green consumers" willing to pay higher prices for more sustainable products. Firms may engage in product differentiation by reducing the environmental impact of their products or processes to capture customers more interested in eco-friendly products and receive the price-premium paid for these additional attributes. Of course, the profitability of such a strategy depends on a number of factors, including firms' capabilities, market structure, the information available to consumers and the rivals' ability to replicate the strategy[123]. Several studies pointed out the limits of consumer-led environmentalism: while individuals seem concerned about environmental issues, they show little awareness about the impact of their actions as consumers, as they are often poorly informed about the existence of more eco-friendly products and brands, and reluctant to pay higher prices for them[124]. In this respect, the growing attention to "green" consumption both through advertisement strategies, lobbying activities and collective pressure would probably boost the demand for more eco-friendly products.

Corporate environmentalism may also be employed to influence regulatory processes and, as an ancillary but still crucial side effect, to raise rivals' costs. A firm may encourage the adoption of stricter environmental regulation and exploit its advantage against rivals in delivering such ambitious targets. As an example of this kind of strategy, in 1988 Dupont announced its commitment to eliminate by 2000 the production of chlorofluorocarbons (CFCs), a significant source of carbon emissions. This announcement followed the 1987 Montreal Protocol where it was established the less ambitious target of a 50% reduction of CFCs and the Dupont's decision to propose a stricter target and a total ban of its own product

[122] The MSCI Principles of Sustainable investing available at <https://www.msci.com/www/blog-posts/esg-and-the-cost-of-capital/01726513589> accessed in April 2020.
[123] Forest Reinhardt, "Environmental Product Differentiation: Implications for Corporate Strategy" [1998]40(4) California Management Review, 43-73. See also Sheila Bonini and Jeremy Oppenheim, "Cultivating the Green Consumer" [2008] 6(4) Stanford Social Innovation Review, 56.
[124] Sukhbir Sandhu, Lucie Ozanne, Clive Smallman, Ross Cullen, "Consumer Driven Corporate Environmentalism: Fact or Fiction?" [2010] 19 Business Strategy and the Environment, 356.

was quite unexpected, as Dupont was the world's leading producer of such chemicals and no effective substitutes were available at that time. However, as it emerged later on, during the previous years, Dupont had sponsored huge investments in R&D to develop alternatives to CFCs, thus gaining a temporal competitive advantage against its rivals in such new greener markets[125]. As this example demonstrates, pro-environment initiatives may also be motivated by the attempt to gain competitive advantages against rivals through "signaling" to the regulator that some innovation is indeed possible and mandate it across the industry.

Indeed, the relationship between companies and the government is often at the heart of non-market strategies, or "political theories" explaining corporate environmentalism. As we already noted, companies operate according to the restrictions imposed by the competitive process and regulation. Government's intervention through regulation is therefore seen as a constraint in terms of compliance costs that firm would prefer to reduce or avoid. To this respect, forms of "self-regulation", i.e. the voluntary adoption of initiatives that restrain companies' own conduct represent a common strategy *to preempt* more stringent public regulations from emerging or influence ongoing regulatory processes. The threat of new regulation may induce firms to voluntarily commit, unilaterally or collectively, to adapt their activities to the societal needs, thus advocating the futility of direct regulation. For instance, in 1995 as a response to a carbon tax proposal to be discussed by the government, the German industrial trade association (BDI) promoted the adoption of some private voluntary agreements across sectors aimed at reducing CO2 emissions. This initiative was so successful that the tax proposal was eventually withdrawn[126].

The variety of explanations justifying the adoption of such voluntary initiatives and the different regulatory and market contexts in which they emerge make it difficult to assess the impact on social welfare[127]. Discerning companies' real intentions in promoting pro-environment behaviors going beyond what is required by the law, to eventually understand

[125] Forest Reinhardt, "DuPont Freon Products Division (A)" [1989] Harvard Business Case 9-389-111, Harvard Business School.
[126] Thomas Lyon and John Maxwell, *Corporate Environmentalism and Public Policy* (Cambridge: Cambridge University Press, 2004), 11.
[127] In this sense, Mark Bagnoli and Susan G. Watts, "Selling to Socially Responsible Consumers: Competition and the Private Provision of Public Goods" [2003] 12 Journal of Economics and Management Strategy, 419.

whether they should be encouraged by the regulator or instead seen with skepticism, is an uneasy task. For instance, a voluntary commitment by firms to reduce their carbon emissions may lead to positive outcomes in terms of decreased pollution, but also to higher prices and lower output, thus passing the cost of such green transition on consumers or again, they might reach a suboptimal level of environmental protection compared to other policy alternatives.

4.4. All that glitters is not…green: the risk of "greenwashing"

So far, we pointed out the costs, from a corporate perspective, of a transition of business strategies towards more sustainable practices, as well as the benefits that can derive from such kind of decisions. Whereas it not always feasible to identify the actual motives that drive this change in business operations and investment decisions, it seems easier to understand why so many companies in almost every economic sector, are putting a lot of effort into *presenting* themselves as sustainable and environmentally friendly. In other words, an important distinction to bear in mind when assessing corporate sustainable practices is that between firms' commitments and actual accomplishments.

The difficulty in verifying when firms' decisions to adopt more sustainable practices are eventually followed by actual change, and beneficial outcomes for consumers and the whole society has favored a very hazardous practice, named greenwashing[128]. This activity has been described as "the disclosure of one element of a corporation's environmental performance—for example, a commitment to zero emissions, and withdrawing from this commitment when the mismatch is exposed between the proactive-sounding statements and less favorable ongoing environmental impacts"[129]. As a response to the increasing demand for greener products and services, companies are in fact engaging in marketing campaigns aimed at presenting distorted information about their commitments and performance on social and environmental matters, as well as the environmental benefits of their products thus taking advantage of an improved reputation. When poor environmental performance is

[128] The expression was used for the first time in 1986 by the environmentalist Jay Westerveld after the launch of the very successful Chevron's campaign "People do". This campaign was used to promote Chevron's as an environmentally friendly company whose employees cared about animals and the environment. Later on, these advertisement were highly criticized because unfaithful and misleading.
[129] Bowen, After Greenwashing (n.40).

followed by public statements on the positive environmental impact of a given activity, the effects on the environmental cause are adverse[130]: consumers may lose their confidence and trust in sustainable initiatives and, companies that are truly investing in environmentally better products and services may suffer from such unfair competition. A clear example of greenwashing comes from the very recent Volkswagen case, i.e. its marketing campaign on low emissions cars, whose environmental performance was even worse than common cars. In 2015 the U.S. Environmental Protection Agency (EPA) found that many of these cars that were sold in the U.S. incorporated "defeat devices" designed to cheat emissions tests on carbon dioxide emissions levels[131]. In this case, Volkswagen not only exaggerated the beneficial qualities of its products' but actually used marketing campaign to cover or wash its wrongdoing.

Despite the substantial legal and reputational risks associated with such kind of practices, there are several economic studies explaining drivers for greenwashing[132]. It bears noting that the absence of effective punishment and deterrence certainly encourages the assumption of these risks. From a legal perspective, environmental or "green" claims, i.e. companies' statements about the beneficial environmental qualities of their product in terms of packaging, distribution or the adoption of ethical standards might fall under consumer protection laws. At the EU level, there is no specific legislation on the matter, however, Directive 2005/29/EC concerning unfair commercial practices (UCPD) applies to all claims made in the context of business-to-consumers commercial practices, including those having an environmental/sustainable content. In 2016 the European Commission issued an updated document containing some guidance on the implementation and application of the UCPD, containing a specific section on environmental claims, where it specifies the circumstances in which they can be considered misleading under articles 6, 7 and 12 of the UCP Directive[133].

[130] Kent Walker and Fang Wan, "The Harm of Symbolic Actions and Green-Washing: Corporate Actions and Communications on Environmental Performance and Their Financial Implications", [2012] 109(2) Emerald Management Reviews, 227.

[131] Russel Hotten, "Volkswagen: the scandal explained", *BBC news* (December 2015) available at <https://www.bbc.com/news/business-34324772> last accessed April 2020.

[132] Catherine Ramus and Ivan Montiel, "When Are Corporate Environmental Policies a Form of Greenwashing?" [2005] 44(4) Business & Society, 377-414; Delmas MA, Burbano VC. "The Drivers of Greenwashing" [2011] California Management Review, 64.

[133] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, [2005] OJ L 149, 22. In particular, according to Articles

These issues have been further addressed by implementing national laws[134] and discussed in several national guidance documents on environmental claims[135]. Similarly, Directive 2006/114/EC on misleading and comparative advertising set out the conditions under which comparisons of the environmental benefits of products are permitted.

With the aim of reducing consumer confusion on products' characteristics, the EU introduced legislation providing rules on the use of some commonly used terms on commercial practices, such as the labels "bio" and "eco" on food products and in general organic foods[136] and the product information of fuel and energy-related products[137]. Very recently, in the context of the European Commission's Action Plan on Financing Sustainable Growth (the EU Action Plan), the same purpose inspired the adoption the "Taxonomy Regulation"[138], aimed at providing clarification on which financial investments can be labelled as environmentally sustainable. The Taxonomy Regulation, by amending the Disclosure Regulation, introduced new disclosure obligations for a wide array of entities, both financial and large non-financial companies and, more importantly, provided the criteria for identifying a sustainable economic activity. In this respect the Regulation provides a list of six Environmental Objectives according to which qualifying any sustainable activity[139].

6 and 7 "traders must present their green claims in a clear, specific, accurate and unambiguous manner, to ensure that consumers are not mislead", whereas based on Article 12 they "must have the evidence to support their claims and be ready to provide it to competent enforcement authorities in an understandable way if the claim is challenged".

[134] For instance, in Italy, the provisions of Codice del Consumo apply. For a recent application see AGCM, case 28060, *Eni Diesel+/Pubblicità Ingannevole,* 20 December 2019.

[135] See for instance the Guidance on the use of environmental and other claims in marketing issued he Danish Consumer Ombudsman (available at http://www.consumerombudsman.dk/Regulatory-framework/dcoguides/Environmental-and-ethical-marketing) and the French Practical Guide to Environmental Claims for traders and consumers, by the Ministry for Ecology, Sustainable Development, Transport and Housing and the Ministry for Commerce, Trades, Small and Medium-sized Enterprises, Tourism and Consumer Affairs (available at http://www.economie.gouv.fr/files/files/directions_services/cnc/docs/the_practical_guide_to_environmental_claims_2012.pdf).

[136] Regulation (EC) No 66/2010 (n.36)

[137] Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling [2017] OJ L 198, 1.

[138] (n. 35)

[139] Ibid. Which are "climate change mitigation"; "climate change adaptation"; "sustainable use and protection of water and marine resources"; "transition to a circular economy"; "pollution prevention and control" and "protection and restoration of biodiversity and ecosystems",

The regulator's intent is to reduce due diligence costs of those investing in sustainable activity while opposing greenwashing practices in the financial sector.

5. Conclusions

From a policy making perspective, some general conclusions can be made: first of all, it is clear that a corporate contribution to the environmental cause is essential more than ever to face todays' challenges and that business as usual is not an option anymore. However, in light of the market and regulatory failures observed above, it is necessary to find the right means for encouraging responsible behaviors without hindering the effectiveness of government's action. In fact, despite the growing interest in more conscious capitalism, there are still significant doubts about business-led environmentalism, i.e. a pure market solution to environmental issues. As a consequence, corporations by themselves will not drive this transition in a fair and effective way, and direct regulation and government-backed mechanism are still the primary tools to achieve environmental aims. Nonetheless, voluntary initiatives that are not aimed at pre-empting more socially efficient government interventions or at reaching suboptimal levels of environmental protections should not be discouraged, and when legal or procedural obstacles exist they should be removed.

For our purpose, this general overview on EU environmental policy's instruments appears revealing. Indeed, as we will further explain in the following chapters, a common argument against a more flexible enforcement of competition rules is that they should not be used to pursue environmental aims, because it is a regulator's job. As we have seen, there is no such a straightforward solution. In fact, the EU Environmental policy is characterized by a mixture of regulatory and market-based instruments, and the economization of environmental protection that shaped the EU policy has been justified, indeed, by the urgency to rely on market processes and confine the role of the state, considered as a source of inefficiencies and failures.

CHAPTER III

THE INTERNAL AND EXTERNAL BOUNDARIES OF EUROPEAN COMPETITION POLICY IN LIGHT OF ITS THEORETICAL ROOTS

1. Introduction

"Competition law is both political and cyclical" (Hovenkamp)[1].

In the first two chapters, we examined the instruments and objectives of the European environmental policy and the role of non-state actors to achieve the Unions' aims. It was argued that, despite the limits of corporate-led environmentalism, in some circumstances corporate contributions are essential to face today' social and environmental challenges. For this reason, voluntary initiatives that are not aimed at pre-empting more socially efficient government interventions or at reaching suboptimal levels of environmental protections should not be discouraged. It follows that when legal or procedural obstacles exist, they should be removed. At this point, we now move our investigation to competition policy, and more precisely, to the core values and instruments that characterize the European framework. Our aim is to understand whether the enforcement of European competition rules may represent an obstacle to private environmental initiatives, thus putting in jeopardy the achievement of the Union's environmental and sustainability aims.

Such analysis must inevitably start from the goals of European competition law since they shape the enforcement priorities and the legal standards used by competition authorities and courts to assess the legality of businesses' behaviors. The literature on the subject is extensive, and the academic debate is still alive and kicking. In fact, an increasing number of scholars and political representatives is questioning the ability of antitrust rules to address the new challenges coming from a globalized and digitalized world[2]. The accumulation of

[1] Herbert Hovenkamp, "Antitrust Policy after Chicago" [1986] 84 Michigan Law Review 84, 213.
[2] The discussion has been especially vivid in the U.S., for instance see inter alia Lina Khan, "The New Brandeis Movement: America's Antimonopoly Debate" [2018] 9(3) Journal of Competition Law & Practice, 131. For the European reactions see Florian Kraffert, "Should EU competition law move towards a Neo-Brandeis

economic power by private firms, the consequent growing inequality and distortion of democratic processes are leading to an increased demand for a revision of competition rules. The current discussion concerns not only whether such revision is actually possible but also whether it is indeed desirable, taking into consideration the practical shortcomings arising from a multi-purpose competition policy.

In this context, this chapter will explore the origins and content of the debate about the goals of competition law in the European Union, by looking at the ideological and operational shifts that have occurred over time. The analysis will be organized as follows: after a brief inquiry on the notion of competition, it will proceed on exploring the theoretical foundations of competition provisions as set out in the Treaty of Rome and how they evolved over time. More precisely, we will discuss how the German ordo-liberal thought influenced the European competition policy in its formative years and the changes brought by the neo-liberal transition. The following paragraphs will describe the shift towards a purely economic approach to competition that occurred since the late 1990s, and the extent to which neo-classical notions and methods have been actually integrated into EU Commission and Courts' practice.

What emerges from the following analysis is that competition law, including the European version, has always been "political and cyclical", if with political we mean a policy reflecting a specific idea about the society, the role of individuals, and the interaction between the State and markets. In these terms, also the recent attempt to adopt a technical and neutral approach to competition is the result of a political choice about the scope of government intervention in a market economy.

approach?" [2020] European Competition Journal, 55; Ioannis Lianos, "Competition Law for a Complex Economy" [2019] 50 IIC, 643; Josef Drexl, "Economic Efficiency versus Democracy: On the Potential Role of Competition Policy in Regulating Digital Markets in Times of Post-Truth Politics", in Damien Gerard and Ioannis Lianos (eds.), *Competition Policy: Between Equity and Efficiency* (Cambridge, Cambridge University Press 2017). For a comment in the Italian debate see Roberto Pardolesi, "Hipster Antitrust and sconvolgimenti tettonici? «back to the future»?" [2019] 1 Mercato Concorrenza e Regole, 84.

2. What model of competition?

The European Treaties, as well as most national competition laws, do not provide an explicit definition of what is competition or when markets can be said to be competitive, nor the objectives that competition law is meant to pursue, or the relationship with the other Union's core values. Furthermore, competition law's substantive provisions are characterized by a loose language that leaves room for different interpretations. To this respect, an inquiry about the historical meaning of the Treaties is of little help, as European Courts have generally preferred a teleological interpretation of EU law in order to foster the achievement of the Union's objectives[3]. Indeed, European Courts have played a crucial role in the development of the European project, especially when the lack of political consensus among Member States risked to slow down or even interrupt the integration process[4].

Anyway, also in the academic discourse, the notion of competition has been contested for a long time[5]. Without going too far, over the years, two main conceptions of competition have emerged in the economic discourse [6]. The traditional idea of competition, which dominated until the XIX century, refers to a natural market status resulting from the exercise of individuals' economic freedom to trade, thus characterized by a fierce rivalry among economic agents "in a race to get limited supplies or a race to be rid of excess supplies"[7]. This idea was developed by classical economists, who believed that such a process would

[3] See Pablo Ibáñez Colomo, *Theory. In The Shaping of EU Competition Law* (Cambridge: Cambridge University Press 2018), 1-82; Anca Chiriță, "A Legal-Historical Review of the EU Competition Rules" [2014] 63 International and Comparative Law Quarterly, 281.

[4] The litterature on the Court of Justice activism especially for fostering market integration is extensive, see inter alia Antonio Tizzano, "Qualche riflessione sul contributo della Corte di giustizia allo sviluppo del sistema comunitario" [2009] 14 Il diritto dell'Unione Europea, 141. See also Thomas Horsley, "Reflections on the Role of the Court of Justice as the Motor of European Integration: Legal Limits to Judicial Law-making" [2013] 50 Common Market L. Rev., 931

[5] An engaging reconstruction is provided by Mario Libertini, "Voce "Concorrenza"", in *Enciclopedia del diritto*, (Milano Giuffrè, 2010) and "Concorrenza e coesione sociale" [2013] 3 Orizzonti del diritto commerciale, 1. See also Vincenzo Meli, *Rifiuto unilaterale di contrattare e tutela della concorrenza nel diritto antitrust comunitario* (Giappichelli, Torino, 2003), 33-41. A different interpretation is provided by Francesco Denozza, "La frammentazione del soggetto nel pensiero giuridico tardo-liberale", [2014] Rivista del Diritto Commerciale, 12, 32 according to whom the dichotomy the two conception of competition represents an actual friction among conflicting forces eventually leading to different compromises.

[6] John Vickers, "Concepts of Competition" [1995] 47(1) Oxford Economic Papers, 1-23

[7] George J. Stigler, "Perfect Competition, Historically Contemplated" [1957], 65 The Journal of Political Economy, 1.

have led price towards an equilibrium of supply and demand, constantly shifting in response to changing circumstances[8]. The protection of economic freedom was therefore essential to make this process work and to ensure an economic development benefiting all. And also, the role of the State was confined to what was necessary to protect individuals' economic freedom.

This idea of competition as a spontaneous but still dynamic process has been then replaced by the neoclassical concept of perfect competition[9], a formal and static notion, which reflects a status of equilibrium where precise market conditions occur[10]. According to the neoclassical theory, any deviations from the *first best*, i.e., perfectly competitive markets, lead to monopoly, another static but undesirable market condition. Conversely, classical economists did not believe in such a formal dichotomy between perfect competition and monopoly but instead considered those deviations as part of the game, in an incessant process of continuous re-adjustment towards a new equilibrium. For instance, Von Hayek, criticized the assumptions of the perfect competition model, arguing that the advantages of competition emerge when it works as a process, not when it reaches a "perfect" equilibrium.[11]

Anyway, it was soon clear that the conditions for perfect competition were "a wishful thinking", to use Schumpeter's' words[12], and too distant from the functioning of real markets, where firms can differentiate their products and set their prices[13]. The concept of perfect

[8] *Ibid.*
[9] Massimo Motta, *Competition Policy: Theory and Practice*, (Cambridge University Press 2004) [115], See also Ioannis Lianos, "Some reflections on the question of the goals of EU competition law", in *Handbook on European Competition Law*, (Cheltenham, UK: Edward Elgar Publishing, 2013).
[10] In particular: a large number of firms sell their (homogeneous) products to a large number of consumers, and i) all firms are price-takers ii) information asymmetry is absent iv) consumers' preferences are given and v) factors of production are perfectly mobile. See Lefteris Tsoulfidis and Persefoni Tsaliki, *Classical Political Economics and Modern Capitalism* (Springer, Cham 2019), 197-245.
[11] Friedrich Von Hayek, "The Meaning of Competition" [1948] 13(2) Econ Journal Watch, 371, which reads "Competition is essentially a process of the formation of opinion: by spreading information, it creates that unity and coherence of the economic system which we presuppose when we think of it as one market. It creates the views people have about what is best and cheapest, and it is because of it that people know at least as much about possibilities and opportunities as they in fact do. It is thus a process which involves a continuous change in the data and whose significance must therefore be completely missed by any theory which treats these data as constant".
[12] Joseph Schumpeter, *Capitalism Socialism and Democracy* (New York Harper and Row Publishers 1942), 106.
[13] For a critique of the perfect competition model and the development of theories based on imperfect competition see Piero Sraffa, "The Laws of Returns Under Competitive Conditions" [1926] 36 Economic

competition has been crucial in the development of law and economics, but it has never been fully integrated into competition policies neither in Europe nor in U.S. The dissatisfaction with the model of perfect competition led some scholars to develop a less idealistic notion of competition, consistent with what happens in real markets, and thus "workable" for policy purposes[14]. A concept that, how we will see, has also been employed, at least semantically, by the European Court of Justice[15].

Without going further, this brief description of the academic debate about the meaning of competition and the implications for a policy perspective explains why, when it comes to its normative implementation, it is so difficult to determine what kind of competition the law should protect, and which is the best way to do it. However, despite the uncertainty that still characterizes the theoretical foundations of competition policy, two elements can be emphasized.

First of all, even after the emergence of the neoclassical theories, the description of competition as a dynamic process and not as a static natural order has prevailed. A crucial contribution in this sense was provided by the Austrian School, and precisely Schumpeter's works, which pointed out as a static notion of perfect competition is not only unrealistic but also undesirable because some form of market power (even if temporary) is crucial to spur innovation[16]. In this view, the main advantage of a capitalistic system is its "creative destruction", the ability to foster innovation and technological progress in a continuous

Journal 535; Joan Robinson, *The Economics of Imperfect Competition* (London: MacMillan 1933); Edward Chamberlin, *The Theory of Monopolistic Competitio*n, (Cambridge Mass., Harvard University Press 1933).

[14] John Maurice Clark, "Toward a Concept of Workable Competition" [1940] 30(2) The American Economic Review, 241. See also Meli (n.5) 36-41.

[15] In the landmark judgment Metro I, the Court of Justice affirmed that: "the requirement contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market. In accordance with this requirement the nature and intensiveness of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors", ECJ Case C 26/76 *Metro v. Commission*, [1977] ECR 1875, paras 20-21.

[16] See Schumpeter (n. 12), 83 ("A system—any system, economic or other—that at every point in time fully utilizes its possibilities to the best advantage may yet in the long run be inferior to a system that does so at no given point in time, because the latter's failure to do so may be a condition for the level or speed of long- run performance").

selective process, capable of satisfying the emerging needs coming from market actors[17]. These ideas eventually shed light on the importance of promoting competition as a means to foster dynamic efficiency[18].

Second, competition has never been really considered a value to be protected in itself but always as an instrument to ensure or pursue other aims. As we will see, the common narrative[19] assigns to the Chicagoan revolution the merit of describing competition not as an end, but as an instrument to achieve welfare maximization. But instead, as we briefly noted when discussing the notion of competition according to classical economists, or as we will see in analyzing the ordoliberal thought, the competitive process has never been protected *per se* but always as a means to achieve socially desirable ends[20]: when to guarantee the formation of "the right price"[21], or the protection of individual freedom from private or public power, or as an instrument to ensure innovation and economic development. Thus, the sole novelty brought in this sense by the Chicago School was to propose *one single* and economic end, i.e. allocative efficiency[22].

Anyway, even the acknowledgment of these important statements leaves plenty of unsolved issues about the definition of the goals to be pursued and how to properly translate them into legal rules and standard. To over-simplify, the historical dichotomy here is between those who argue that economic efficiency should be the sole goal of competition policy, and those who admit a multi-purposes dimension (and among them those who include different sets of goals). Both of these arguments are not immune to critiques. Recognizing a multitude

[17] However, Schumpeter did not believe in the necessity of a strict antitrust regulation, on the basis of the assumption that monopolies and alliances between competitors might be beneficial for the competitive process, in terms of innovation and growth. This position is generally opposed to Arrow's works on the positive correlation between competition and innovation, see Kenneth Arrow, "Economic Welfare and the Allocation of Resources to Invention" In *The Rate and Direction of Inventive Activity: Economic and Social Factors*, edited by the Universities-National Bureau Committee for Economic Research and the Committee on Economic Growth of the Social Science Research Councils (Princeton, NJ: Princeton University Press 1962), 609.
[18] Carl Shapiro, "Competition Policy and Innovation," [2002] OECD Science, Technology and Industry Working Papers 2002/11, OECD Publishing. See also Meli (n.5) 171-179.
[19] Alberto Pera, "Changing Views of Competition Economic Analysis and EC Antitrust Law" [2008] 4 Eur. Competition J. 127.
[20] This argument has been suggested by Mario Libertini (2010) (n.5), 227. See also Meli (n.5), 33.
[21] Ibid.
[22] Joseph Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress", [1987] 62 N.Y.U. L. Rev., 1020.

of goals raises the issue of how to balance different and conflicting values but, most importantly, how to translate them into predictable standards. To not forget the problems of legitimacy and accountability when political aims are assigned to independent agencies. Moreover, implementing economic methods into legal analysis inevitably means that they must be translated into standards that can be managed by authorities and tribunals[23]. Nevertheless, even by adhering to a pure economic-oriented conception of competition policy, we do not solve all our issues. What do we consider "economic efficiency"? Allocative efficiency? Dynamic efficiency? Both? In addition, is there a hierarchical order between these types of efficiencies that might be of help in case of conflicts? [24]

3. Competition as a means to an end: from the ordo-liberal perspective to the neoliberal turn

Despite the increasing global convergence of antitrust laws, these questions can be answered only by looking at the specific normative framework in which competition rules are embedded. Indeed, there might be several more or less explicit justifications for adopting a competition law and enforcing its rules, and several ways in which it can be designed[25]. Indeed, many jurisdictions have adopted some form of regulation of the competitive process, with the aim of pursuing a variety of economic and non-economic objectives, including fairness, social justice, full employment, or environmental protection[26]. Nowadays, the dominant narrative among economists and lawyers indicates economic efficiency and consumer welfare as the main goals of European competition law[27]. However, this idea, if not carefully clarified and contextualized, may provide significant misconceptions about the scope of EU competition provisions, as well as their normative content. Indeed, until very

[23] This is where for instance the structuralist approach developed by the Harvard School, which tried to combine economic analysis with a flexible and predictable legal standard, see William Kovacic, "The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago Harvard Double Helix" [2007] Columbia Business Law Review 1, 13.
[24] Ibid.
[25] See Francesco Denozza, "Il disegno di legge antitrust: qualche problema tecnico" [1988] 15 Giur. Comm., 756, where the author mentions the "different - and not always pure - souls of antitrust".
[26] Eleanor Fox, "Against Goals" [2013] 81 Fordham L. Rev., 2157.
[27] Federico Ghezzi and Gustavo Olivieri, *Diritto antitrust* (Giappichelli, Torino 2013) See also Robert O' Donoghue and Jorge Padilla, *The law and economics of Article 82 EC* (Hart Publishing 2006). Massimo Motta, Michele Polo, *Antitrust. Economia e politica della concorrenza* (Bologna, Il Mulino 2004);

recently, competition rules have been interpreted and enforced to pursue a broader array of aims, including non-economic ones[28].

With respect to the law of the Treaties, Article 3 of the Treaty of the European Union (ex article 2) contains the list of the ambitious aims that guide any Union's activities. The only reference to competition emerges in paragraph 3, which states that the Union shall work for Europe's sustainable development based, among other things, on a "highly competitive social market economy". To this regard, the Lisbon Treaty brought a major change in the role assigned to competition[29]. Former Article 3(1)(g) EC included among the activities of the Community for the purpose of the objectives established in Article 2 "a system ensuring that competition in the internal market is not distorted". With the Lisbon Treaty, this provision was moved to a Protocol (No 27) on the Internal Market and Competition, annexed to the European Treaties. Now, considering that protocols form an integral part of the Treaties and that the wording of Protocol 27 resembles that of former art. 3(1)(g), it could be argued that the revision brought by the Lisbon Treaty had little if any impact on the actual role of competition policy in the Union[30].

However, many commentators pointed out as this new collocation of the principle of undistorted competition necessarily implies a revision of its constitutional status, which ceases to be an objective of the Union – assuming it was one - to become a "means" to achieve the fundamental aims as set out by article 3 TEU[31]. In this sense, such an interpretation could provide some answers to the question about the goals of competition law: it could be argued that, according the combination of article 3 TEU and Protocol 27, a system where

[28] Giorgio Monti, "Article 81 EC and Public Policy", [2002] 39, Common Market Law Review, 1057
[29] See Mario Libertini, "A "highly competitive social market economy" as a founding element of European economic constitution", [2011] Concorrenza e mercato, 491. See also, Francesco Denozza, "La responsabilità dell'impresa e il diritto antitrust", in *La responsabilità dell'impresa*, (Giuffrè 2006) and Mario Libertini, *Diritto della Concorrenza dell'Unione Europea*, (Milano, Giuffrè 2014), 157 ss.
[30] Nicolas Petit and Norman Neyrinck, "A Review of the Competition Law Implications of the Treaty on the Functioning of the European Union" [2010] 2 The CPI Antitrust Journal, 1. See also Ben Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?: Non-efficiency Consideration under Article 101 TFEU*, (Kluwer Law International 2012), citing CJEU, C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, 17 February 2011, ECR I-00527, para 20.
[31] Alan Riley, "The EU Reform Treaty And The Competition Protocol: Undermining EC Competition Law" [2007] 142 CEPS Policy Brief, 1.

competition is not distorted is instrumental to the maintenance of "sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment and the promotion of scientific and technological advance". Moreover, affirming that correcting market distortions is legitimate only when carried out to pursue one of the aims above listed would be consistent with the idea of a "social market economy" (SME) adopted by the Treaty, which recognizes the role of markets for achieving growth and prosperity but considers the intervention of the State legitimate when aimed at pursuing a multitude of social goals that otherwise could not be ensured by a pure reliance upon market processes[32]. It was argued that the SME represents indeed the political ideology through which giving consistencies to the economic and social "souls" of the Union[33].

Hence, since the law of the Treaties left many open issues about the application of their rules, as well as the objectives to be pursued, the European Commission and the Courts had the crucial task to determine the content of those provisions and thus actually develop the European competition policy. In light of this ambiguous normative framework, European competition policy has historically been inspired by three core values: the promotion of market integration, the protection of economic freedom and economic efficiency[34]. These objectives have retained different weights over time: while during the formative years, the Commission identified economic freedom and market integration (but also fairness) as the fundamental objectives of its competition policy[35], since the late 1990s, economic efficiency

[32] With respect to the protection of competitive markets in a social market economy, Libertini argues that: "European legislators are entitled to approve rules conflicting with the protection of market competition when this is necessary for other public interests prevailing on the scope of market protection, to be protected and realized", (n.29), 492.
[33] Ibid.
[34] Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007).
[35] From the *First Competition Policy Annual Report*, published in 1971, it seems clear that Competition rules were interpreted as a means to achieve a multitude of objectives, with a priority given to the protection of the internal market: "Competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. (…) competition enables enterprises continuously to improve their efficiency, which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the Community. (…) In this respect, the Commission is not only concerned with increasing by means of the rules of competition the quantity of goods available for consumption, but is also taking action to

has started to prevail both on its decisions and soft-law instruments, as a consequence of an institutional and cultural shift that touched most of the Union policies.

With this respect, some authors provided a good empirical analysis of how the Commission's priorities have changed over time, and they confirm that after the adoption of Regulation 1/2003 the Commission has revisited its prioritization criteria by relying more upon economic analysis and a strict cooperation with national authorities and courts[36]. As a matter of objectives, although the commitment to contribute to the integration of Member States' economies has not disappeared[37], the "more economic approach" has become the guiding principle, as the Commission has prioritized cases on the basis of the likelihood of consumer harm. However, as we will discuss in the following chapters, it would be too naïve to describe the recent European evolution towards a purely economic interpretation of competition law due to an enlightening process, a modernization of the previous obscure and obsolete approach[38]. In fact, the reasons and extent of such a transition in Europe are certainly more complex and therefore deserve a careful examination.

Among the different perspectives, the evolution of goals pursued through competition law in Europe can be assessed through the lens of the changing political ideologies that influenced European Competition Policy during the Union's formative years and its following developments.

promote better information for consumers and to bring about the harmonisation of laws and the removal of technical barriers to trade, in order to provide the best possible opportunities for establishing a genuine common market. The Commission would also like to underline the importance it attaches to competition policy as a means of fighting inflation (…) Competition policy also contributes considerably to the better use of labour, since ill adjusted structures which are encouraged by inflation give rise to underutilisation of the labour potential within the Community and to under-payment of skilled workers", 11-13.

[36] Pablo Ibáñez Colomo, and Adriani Kalintiri, "The Evolution of EU Antitrust Policy: 1966–2017", [2020] 83 The Modern Law Review, 321.

[37] See for instance the recent European Commission Decision in Case AT 40428 *GUESS* of 17 December 2018 and case AT.40181 – *PHILIPS* of 6 October 2018.

[38] Francesco Denozza, Alberto Toffoletto, "Contro l'utilizzazione dell'"approccio economico" nell'interpretazione del diritto antitrust" [2006] Mercato Concorrenza e Regole, 563.

3.1. The ordoliberal conception of competition and its influence on European Competition law

Notwithstanding the vivid discussion[39], the dominant narrative about the origins of the European Competition law and policy suggests a euro-centric dimension and refuses to conceive it as a mere response to some kind of external pressure or as a replication of the US experience[40]. More precisely, it is often argued that the introduction of competition rules within the Treaty of Rome reflects the influence exerted by the German ordoliberal thought, a particular conception of liberalism promoted by some scholars associated with the Freiburg School in the 1930s and 1940s. Many scholars[41], in particular David Gerber[42], showed how ordoliberal thinking influenced the European unification process by urging the establishment of a legal framework aimed at ensuring the proper functioning of competitive markets[43].

This genus of liberalism emerged during the Nazi regime, when a group of lawyers and economists belonging to the School of Law and Economics of Freiburg, started to explore the events and the economic system developed during the Weimar Republic[44]. They focused in particular on the shortcomings of laissez-faire liberalism that led to centrally planned economies, as the one experienced under the Nazi regime. They believed that those events

[39] See Pinar Akman and Hussein Kassim, "Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy" [2011] 48(1) Journal of Common Market Studies, 111; Pinar Akman, "The Role of 'Freedom' in EU Competition Law" [2014] 34(2) Leg Stud (Soc Leg Scholars), 183.

[40] For an interesting analysis see Wyatt Wells, *Antitrust and the Formation of the Post-war World* (New York: Columbia University Press, 2002), Ch. 5-6.

[41] See Giuliano Amato, *Antitrust and the Bounds of Power*, (Oxford Hart 1997); Giandomenico Majone, "From the positive to the regulatory state: causes and consequences of changes in the mode of governance",[1997] 17(2) Journal of Public Policy, 139; Kiran K. Patel and Schweitzer Heike, *The Historical Foundations of EU Competition Law* (Oxford University Press 2013); Viktor J Vanberg, "The Freiburg School: Walter Eucken and Ordoliberalism", Freiburger Diskussionspapiere zur Ordnungsökonomik, No. 04/11, Albert Ludwigs-Universität Freiburg, Institut für Allgemeine Wirtschaftsforschung, Abteilung für Wirtschaftspolitik, Freiburg i. Br. (2004).

[42] David Gerber, "Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe", [1994] 45 American Journal of Comparative Law, 25; from the same author, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press: Oxford University Press 1998).

[43] Ibid. Gerber points out as Germany had just passed the first European competition law and it obtained von der Groeben to be appointed as the first Commissioner for Competition Policy of the European Commission.

[44] As a consequence of a rapid industrialization, since 1871 German economy had been dominated by few players who engaged in strong cartels that took control of most of the strategic industries. Despite the increasing concern about such cartelization, the legislative body did not intervene, and such cartels became even stronger during the World War I. The first sanctions against cartels were introduced in 1923, although they were never enforced.

showed how confining the powers of the State and relying upon sole market forces was not sufficient to protect individuals' freedom. This is because, as Bohn described it, "the issue of private power in a free society"[45] represent a threat too, both for political institutions and for individual economic freedom[46]. Ordoliberals in fact were concerned about the misuse of economic power, which, in the context of free markets, could be used not only as a means to influence political powers and undermine democratic processes but also to limit other market participants' economic freedom[47]. A phenomenon that eventually jeopardizes the advantages of a market economy.

Therefore, they believed that strong competition, allowing the participation to market of multiple actors on equal terms, was crucial to protect individuals from the possible misuse of economic power. However, they added, and this is the main difference with pure liberal thoughts, they did not believe in the long term self-healing nature of markets. On the contrary, they argued that unregulated markets left alone tend to self-destruct, as firms tend to collude and abuse their power to restrict competition and harm others' economic freedom[48].

Thus, according to the ordoliberal thought, the first consequence of these assumptions is the need for a strong state as guardian of free markets' proper functioning. The famous slogan "Strong State, Free Market" exactly reflects this belief: it was argued that, as the Weimar disaster showed, a weak State facilitates the private accumulation of economic power and, as a result, the misuse of it at the expense of market pluralism and individual freedom. Of course, this public power was meant to be limited to what is necessary to ensure

[45] Bohm, "Die Forschungs-und Lehrgemeinschaft zwischen Juristen und Volkswirten an der Universitat Freiburg in den dreissiger und vierziger Jahren des 20. Jahrhunderts" in Franz Bohm, *Reden und Schriften* [1960] 158, 162.

[46] An idea that has been recently recalled also by Stiglitz, who affirmed that "an agglomeration of economic power almost inevitably results in an agglomeration of political power—which can and typically does reinforce the agglomeration of economic power", Joseph E. Stiglitz, "Towards a Broader View of Competition Policy", In *Competition Policy for the New Era: Insights from the BRICS Countries*, edited by Tembinkosi Bonakele, Eleanor Fox, and Liberty Mncube (Oxford: Oxford University Press, 2017).

[47] Many scholars studied the political consequences of economic power, Robert Pitofsky "The Political Content of Antitrust" [1979] University of Pennsylvania Law Review, 1051. For s similar position see Amato (n.41).

[48] Walter Eucken, W., *The Foundations of Economics - History and Theory in the Analysis of Economic Reality* (Berlin, New York: Springer. Reprint of the first English edition published 1950 by William Hodge, London), 304-308; Frank Maier-Rigaud, "On the Normative Foundations of Competition Law - Efficiency, Political Freedom and the Freedom to Compete" in Daniel Zimmer (ed), *The Goals of Competition Law* (Elgar 2012), 137.

that markets work well, without any possibility for discretionary intervention in the economy. For these reasons, the "strong state" slogan may be misleading, in the sense that at a closer look ordoliberals' idea of the State is limited to those interventions aimed at restoring market mechanisms when they do not work as they should, and it does not allow any intrusions from the State in the economy to pursue social ends. Thus, this conception of public power may be conceived as "strong" only if compared to the more radical views of pure liberal thinkers.

Secondly, although ordoliberals accept the basic liberal assumption that markets, when working properly, ensure prosperity, economic development and minimize the risk of totalitarianism associated with strong political power, they believed that to do so, such economic process must be embedded in a legal and institutional order[49]. Indeed, the main innovation brought by ordoliberal thinkers is the necessity to rethink the relationship between the economic system and the law, and as a consequence, the role of the State. As opposed to the neo-liberal belief of the market as a "natural order"[50], they assumed that markets and competition do not exist in nature and a constitutional framework is necessary to shape the economic order in a functional way, as "the problem will not solve itself simply by our letting economic systems grow up spontaneously. The history of the last century has shown this plainly enough. The economic system has to be consciously shaped"[51].

Thus, ordoliberals promoted the idea of an economic constitution (*Wirtschaftsverfassung*), i.e., a clear constitutional choice about the economic systems providing the rules for all market participants. So, the core of the ordoliberal thought is that a legal-institutional framework is crucial to realize an "economic order" and find the right balance between what Giuliano Amato defined "the risk of 'too much' public power or, contrariwise, 'too much' private power'"[52]. A constitutional framework would indeed provide, on the one hand, the conditions for the participation in the market ("the rules of the

[49] This reference to an "economic order" also explains the etymologic origin of "ordo-liberalism", as well as the name of the economic journal "Ordo" founded by Franz Bohm and Walter Eucken in 1948.
[50] For a critical view see Bernard Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Harvard University Press 2011) 140-146.
[51] Eucken (n. 48), 314.
[52] Amato (n.41)

game") in order to prevent competitive distortions. On the other, it would minimize the role of the State to what is necessary to guarantee that those conditions are respected[53].

These ideas were further expanded by other scholars associated with ordo-liberalism, as the economists Alfred Muller-Armack, Röpke, Rüstow, who pointed out the limits of free markets with respect to societal concerns. They shared the belief about markets' efficiency in delivering prosperous societies but were concerned about markets' ability to produce by themselves an equitable and just society[54]. Muller-Armack therefore introduced the concept of "social market economy", which eventually marked also the normative foundations of post-war Germany as well as the European project. The reference to a social dimension is based on the belief that market economies should be complemented by social policies aimed at addressing the "social irrationality of capitalism"[55]. This idea is guided by a *Vitalpolitik* approach suggesting that the deficiencies of capitalism and the impact of market competition on workers may lead to class conflict and political revolts, which must be avoided to preserve a liberal market-economy[56]. The "social market economy" label has been then used to denote a third way between unregulated free markets and more radical forms of socialism[57].

Coming back to the core of this discussion, which is the role of competition provisions according to the ordoliberal thought and the goals they are meant to achieve, it emerges that the prohibitions of cartels or monopolization have as their ultimate goal the maintenance of pluralistic and rivalrous markets, being them essential to protect a social market economy and individual freedom of action. A "disciplined pluralism"[58], in fact, represents a crucial assurance against the misuse of either the public power of the state or private economic

[53] A concept that was then embraced into the neoliberal thoughts, as described by Ernst-Urlich Petersmann in 1983 "the common starting point of neoliberal economic theory is the insight that in any well-functioning market economy the "invisible hand" of market competition must by necessity be complemented by the "visible hand" of the law". Quotation reported by Quinn Slobodian, *Globalists: the end of empire and the birth of neoliberalism*, (Harvard University Press 2020), 7.
[54] Vanberg (n.41)
[55] Michel Foucault, *The birth of biopolitics: Lectures at the Collège de France*, (New York: Palgrave Macmillan, 2008), 106.
[56] Werner Bonefeld, "Freedom and the Strong State: On German Ordoliberalism", [2012] 17 New Political Economy, 633-656.
[57] Ruger Claassen, Anna Gerbrandy, Sebastiaan Princen, Segers Mahtieu, "Rethinking the European Social Market Economy: Introduction to the Special Issue", [2019] 57 JCMS, 3.
[58] John Kay, *The truth about markets*, (London Penguin 2003), 334.

power, which might restrict economic freedom and impair democratic processes on the other. As result, the ordoliberal version of competition policy is not directly aimed at pursuing economic efficiency and welfare maximization, albeit they are recognized as positive indirect effect of maintaining competitive markets, whereas instead at protecting competitive process as a means for preserving "private autonomy, freedom of choice for consumers and producers and freedom to compete (market access)"[59]. It follows that only in competitive markets, producers are free to make their choices and to provide consumers with sufficient alternatives.

More precisely, with respect to competition law and its enforcement, the "lodestar of ordoliberal thought" as Gerber defined it, was the idea of "complete competition"[60], which reflects a situation in which all market players are price takers and where no firm is able to coerce other firms in the market[61]. If "complete competition" represents the guiding standard, according to ordoliberals, competition law should be designed to re-create such condition in the market, by preventing the creation of monopolistic power, both in the form of cartels and by single firms, and where possible, the abolition of existing monopolistic positions[62]. To this respect, they developed the famous "as if standard", which required single firms having monopolistic power to act as if they were in a situation of complete competition and as if they had no monopoly power[63]. As a consequence, competition authorities would need to apply this standard, preventing all those conducts and practices that a firm could not have employed if it was not for its monopolistic power[64]. In summary, ordoliberals suggested that competition law should be aimed at pursuing a situation close to "complete competition", by

[59] Elias Deutscher and Stavros Makris, "Exploring the Ordoliberal Paradigm" [2016] 11 The Competition Law Review, 186.
[60] Gerber uses the term "complete competition", as a translation of "Vollstandiger Wettbewerb" to distinguish it from the neo-classical concept of perfect competition, which was indeed criticized by ordoliberals. See Lianos (2013) (n.9).
[61] Gerber (n.42) 51.
[62] Indeed, they distinguished "voidable monopolies" from "unavoidable monopolies", as natural monopolies or those protected by intellectual property rights. With regards to the latter, since their elimination might be unfeasible, ordoliberal suggested that they must be subject to a control from the public authority.
[63] Massimiliano Vatiero, Ordoliberal Competition, [2010] 1 Concorrenza e Mercato, 371. To use Eucken's words: "The aim of monopoly legislation and monopoly supervision is to ensure that the bearers of economic power behave as if complete competition prevailed", Walter Eucken, "The Competitive Order and its Implementation" [1949] reprinted in 2(2) Competition Policy International 222 (2006), 230.
[64] Ibid.

dismantling and sanctioning cartels and by preventing single firms from engaging in forms of "impediment competition" [65].

At this point, however, we must point out that this reconstruction of the ordoliberal conception of competition policy, albeit very common, has been questioned by several commentators[66], who argued that the notion of complete competition as well as the as if standard, promoted by the first ordoliberal movement, Eucken *in primis*, were soon abandoned, as after the II World War it was contaminated by other ideas, in particular neo-liberal ones. It would be wrong therefore to use them as parameters of the ordoliberal influence on the EU law.

Anyway, as we will see, the differences with the neo-classical notion of competition, based on the pursuit of economic efficiency, are substantial. Ordoliberals recognize economic welfare only as a positive indirect effect of competition, but not as a primary goal to be achieved through competition. Indeed, although the protection of economic freedom is often compatible with welfare maximization, the choice about the ultimate goal assigned to competition rules becomes crucial in case of conflicts. The welfarist approach is in fact reluctant to any form of limitation of economic welfare, even whether justified by the need to protect democratic values or individual freedom. On the contrary, ordoliberals put economic freedom at the top of any priorities and, "would prefer a state of inefficiency coupled with freedom to a totalitarian, but efficient, state of affairs"[67].

Different enforcement practices based on the economic freedom or welfare approaches are therefore inescapable, and the evolution of the interpretation of European competition rules is instructive in this sense. From a historical perspective, it is important to

[65] Gerber (n.42). Another idea whose roots are found in the ordoliberal thought is the one of "impediment competition" as opposed to "performance competition". The former in fact refers to those practices as predatory pricing, boycotts or loyalty rebates through which a single firm acquires market power not because of its superior products or services but impeding other actors' ability to compete.
[66] Peter Behrens, "The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU", [2015] Discussion Paper N°7/15, Europa-Kolleg Hamburg, 33; Yannis Karagiannis, "The origins of European competition policy: redistributive versus ideational explanations" [2013] 20 Journal of European Public Policy, 777.
[67] Monti (n. 34) 23.

point out how concepts very familiar to the ordoliberal and German tradition, such as the establishment of a social market economy based on high level of competition, have been eventually become core values of the EU integration[68]. If we read the core competition provisions contained in the Treaties through the lens of ordo-liberalism we find some consistencies with the assumptions and ideas about market processes and competition that we have analyzed. First, ordoliberals suggested that competition policy should rely on the rule of law, as part of a broader economic constitution based on open markets and individual freedom. As a consequence, the enforcement of competition rules should not be subject to discretionary political powers but governed by independent regulatory authorities, secured from any political manipulation[69]. To this respect, although the Treaty did not provide clear indications about the enforcement mechanisms, Regulation 17/62, which then disciplined the matter, opted for an administrative enforcement of competition rules.

Yet, ordoliberals' conception of competition policy, based on the protection of economic freedom, also played a crucial role in the design of the European competition substantive norms. The decision to introduce two separate provisions, one for dominance and one for cartels, is in fact the result of a compromise among the negotiating parties, especially between the French and German delegations. With respect to monopolistic conducts, the latter strongly rejected a *per se* prohibition of dominance as suggested by the French delegation[70]: it was indeed recognized that dominant positions could be acquired by legitimate means, as innovation and better performances, which could not be discouraged. Therefore, the Treaty introduced a mechanism aimed at preventing the abuse of such dominant positions, providing a not comprehensive list of examples covering both exclusionary and exploitative abuses.

[68] In addition to the arguments mentioned above (n.33-34), see Wernhard Möschel, "The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy" [2001] 157 Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift Für Die Gesamte Staatswissenschaft, 3.
[69] Pinar Akman, "The Concept of Abuse in EU Competition Law: Law and Economic Approaches", in *Hart Studies in Competition law series* (Hart publishing 2015), 376. Möschel, Ibid., 9.
[70] David Gerber, *Law and Competition in Twentieth Century Europe*, (Oxford University press 1998), 264 supporting the ordoliberal origins of the notion of abuse; For a different position see Akman, (n.64) 49-105.

Moreover, despite the little importance in the European context of legislative intent, it is frequently maintained that the ordoliberal economic freedom approach has long influenced also the European Commission and Courts' interpretation of competition rules[71]. With respect to article 102 TFEU, such influence is associated with the formalist approach that has characterized the enforcement of EU rules until very recently. More precisely, such provision has been interpreted from the beginning to prohibit those conducts that negatively impact market structure by reducing the rivalry among producers or suppliers by means different from genuine competition[72]. The Court of Justice on its very first case on abuses, *Continental Can*, affirmed that "the provision is not only aimed at practices which may cause damage to consumers directly but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty".[73] And for a long time this has been the direct goal pursued by the Commission, which, as expressed its official documents, considered that "effective competition preserves the freedom and right of initiative of the individual economic operators and fosters the spirit of enterprise"[74].

Some authors also found ordoliberal concepts, such as the "complete competition" or the "as if standard", in some key features of EU law on dominance, as the dominance threshold and the "special responsibility doctrine"[75]. However, using these concepts to demonstrate the existence of an ordoliberal touch on EU law is critical: ordoliberalism has evolved over time, especially in relation to how to treat monopolies, and Eucken's ideas have

[71] Vatiero (n.60); Deutscher and Stavros Makris (n.56)
[72] Jorge Padilla and Christian Ahlborn, "From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008), 1-2.
[73] ECJ Case C-6/72 *Europemballage and Continental Can v Commission*, [1973] ECR 215.
[74] Commission, Fifteenth Annual Report on Competition Policy (1986). 11. Such idea of competition based on the protection the freedom of decision of either competitors or consumers and thus market structure characterized most decisions also in more recent cases, as in *TeliaSonera Sverige*, where the Court of Justice held that: "in order to determine whether the dominant undertaking has abused its position [...], it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition" See Case C-52/09, *TeliaSonera Sverige*, [2011] ECR, I-527, para. 28.
[75] See Case C-322/81, *NV Nederlandse Banden-Industrie v Commission* [1983] ECR 3461, para. 57. Case 322/81, *Michelin v Commission* [1983] ECR 3461. See also Padilla and Ahlborn (n. 27).

never been the defining cornerstone of such movement of thought[76]. What is undoubted, however, is that EU competition law on dominance, as interpreted by the ECJ, has been for long time characterized by a formalistic approach, in the sense that several behaviors when employed by a dominant firm were deemed as anti-competitive, with no need to further address the effects of such conducts in the market, and where fairness considerations, meaning the protection of market structure and so small and medium enterprises, have been a meaningful guidance.

Similar considerations can be done with respect to article 101 TFEU. Some argued that the structure of article 101 seems to collide with a purely economic paradigm, which associates a restriction of competition with a reduction of economic welfare[77]. According to this (minority) view, the structure of article 101 TFEU makes more sense if read through the lens of the economic freedom approach, according to which every restriction of economic freedom is considered as a distortion of competition falling within the prohibition of paragraph 1. It follows that other pro-competitive effects may justify an exemption from such prohibition as a result of a balancing activity between economic freedom reduction on one side, and efficiencies benefiting consumers on the other. Moreover, further evidence of the primary relevance of market structure is that paragraph 3 still requires as a negative condition for the exemption the absence of elimination of substantial competition in the relevant market. This shows that in the EU law competition as such, meaning the maintenance rivalrous markets, has an intrinsic value, which cannot be completely given up in the name of efficiency gains. The ECJ in fact affirmed that such provision "is designed to protect not only the immediate interests of individual competitors or consumers, but also to protect the structure of the market and thus competition as such"[78].

The first conclusion that we can draw about the formative years of EU Competition policy and the goals it was meant to achieve is that the influence of the ordoliberal paradigm

[76] To this respect, it must be noted the most radical positions among ordoliberals, as the one supported by Eucken ("prohibition of voidable monopolies and regulation of the unavoidable"), were soon abandoned also in Germany both for political and efficiency considerations, as proved by the text of the 1957 *Gesetz gegen Wettbewerbsbeschränkungen* (GWB), which did not provide any of such strict prohibitions.
[77] Monti, (n. 34) 26-30.
[78] Case C-8/08 *T-Mobile Netherlands BV and Others* ECLI:EU:C:2009:343 para 38.

promoted a fundamental political dimension of competition, where economic efficiency considerations, albeit present, were not the primary guidance in the interpretation and enforcement of competition rules.

3.2. A matter of priorities: the single market imperative

As just briefly mentioned, the Community's leading priority during its formative years had been the realization of a single European market, where no barriers could hinder the free movement of goods, services, people, and capitals. The European institutions have addressed this objective not only through the implementation of internal market provisions, aimed at removing the existing barriers and at creating a European level playing field but also by interpreting all the other community policies, including competition, in light of this imperative[79].

With respect to competition policy, the Commission has been for a long time concerned that business firms, by portioning markets, could erect barriers with similar effects of those created by state measures, as tariffs and quotas, prohibited by internal market rules. Hence, given that pursuing specific goals means also designing enforcement priorities accordingly, since the very beginning, the Commission has prioritized in its enforcement activities those practices that could have threatened the integrity of the single market. Moreover, it also established *per se* prohibitions for some practices, such as market sharing, territorial discrimination, or licensing agreements preventing parallel trade between Member States, because considered particularly dangerous, regardless of their economic effects. In other words, keeping the common market "open and unified" has been for a long time among the main fundamental objective of the Community's competition policy[80]. The First Competition Policy Report, released by the Commission in 1971, clearly expresses such priority[81].

[79] Claus Ehlermann, "The Contribution of EC Competition Policy to the Single Market" [1992], 29(2) Common Market Law Review, 257.
[80] Ninth Competition Policy Report [1996], 9.
[81] First Competition Policy report [1971], 13. "With regard to rules of competition applicable to enterprises, the Community's policy must, in the first place, prevent governmental restrictions and barriers—which have been abolished—from being replaced by similar measures of a private nature. Agreements on quotas as well as

European Courts have confirmed such an approach, paying great attention to the impact of enterprises' practices on the common market. In one of the earliest cases, *SA Musique Diffusion Francaise*, the Court agreed with the Commission's finding that an attempt of some undertakings to restrain imports and exports of hi-fi equipment to maintain different prices between Member States was anticompetitive under article 85 EC, affirming that such conducts "jeopardize the freedom of intra-Community trade, which is a fundamental principle of the Treaty, and they prevent the attainment of one of its objectives, namely the creation of a single market"[82]. Similar conclusions were reached in several other cases, also more recent ones[83]. Moreover, some scholars observed as the Commission, particularly in the context of vertical arrangements, often adopted an extensive interpretation of the notion of "agreement" in order to capture some practices having the effect of limiting parallel trade[84]. Today, similar cases would probably be treated in a different way, but at that time European institutions' priority was clearly to boost the realization of the internal market and, from a competition policy perspective, it also meant to establish some *per se* prohibitions, perhaps to give a signal to market participants about the importance of removing every barrier to trade between Member States.

However, albeit most of these cases often appear sound also from an economic perspective, given the efficiency-reducing effect of conducts like market allocation and price-fixing, this is not always the case. Indeed, the protection of the internal market through competition rules may collide with other objectives, as economic freedom or consumer welfare, creating a tension that must be solved by a balancing activity and, firstly, by

agreements for the purpose of dividing the Common Market into regions, or of dividing up or fragmenting markets by other means are in flagrant contradiction to the provisions of the Treaties. (…) Moreover, competition policy must ensure fair competition so that enterprises operating within the Common Market can, in general, benefit from the same conditions of competition".

[82] Joined Cases 100-103/80 *SA Musique Diffusion Francaise* [1983] ECR 1825 para 107.

[83] Case 48/69 *ICI v. Commission* [1972] ECR 619, C-40/73 *Suiker Unie and Others v Commission* [1975] ECR 1663; Case T-62/98 *Volkswagen v. Commission* [2000] ECR II-2707.

[84] Joined Cases 25 and 26/84 *Ford Werke AG v. Commission* [1985] ECR 2757 para. 21. Case C-277/87 *Sandoz v. Commission* [1990] ECR I-45. For a different solution, see Case T-41/96 *Bayer AG v. Commission* [2000] ECR II-3383 para. 69.

identifying the competition policy's priorities[85]. The European Commission and Courts had the occasion to deal with these conflicts and, most of the time, the concerns over the possible adverse effects on the common market prevailed over economic efficiency considerations. A landmark example of this approach is the *Consten and Grundig* judgment concerning a system of absolute territorial protection [86]. The Commission found a violation of Article 101 based on the fact that the exclusive distribution agreement was capable of hampering parallel imports between Member States and therefore was particularly dangerous for the common market. A decision that was then confirmed by the Court of Justice on the assumption that a market division represents a sufficient distortion of competition in the common market as to fall within the article 101 prohibition. By reaching such a straightforward solution, the European Court failed (or decided not) to consider the pro-competitive effects generated by that vertical agreement, i.e. the incentives for Consten to promote and advertise Grundig's products in the new French market and to prevent free-riding from other distributors, with the ultimate result of intensifying inter-brand competition. Some noted that such an agreement would have eventually favored market integration, allowing a German producer to effectively expand its business over the Common market[87]. A similar approach was followed in case of geographical discriminations carried out by dominant firms, as in *United Brands* where the Court refused to consider the efficiency implications of discriminatory practices and the actual effects on final consumers[88].

Even more recently, with the well-known *Glaxo saga*[89] European Courts had to deal with a possible source of tensions between the protection of the internal market and a pure welfarist approach to competition rules. In that case, the Court scrutinized the effects on consumers produced by a restriction to parallel trade, in a market such as the pharmaceutical

[85] Liza Lovdahl-Gormsen, "The Conflict Between Economic Freedom and Consumer Welfare in the Modernization of Article 82 EC" (2007), 3(2) European Competition Journal, 329.
[86] Joined Case 56-58/64 *Consten/Grundig v. Commission* [1966] ECR 299. This case concerned a distribution system adopted by Grundig, a German producer of televisions and other electrical goods, in favor of Consten the French sole sales representative of Grundig's products. According to this contract, Grundig agreed not to provide with its products other distributors operating in the area assigned to Consten, and imposed an export prohibition upon all its distributors, German and foreign.
[87] Monti (n. 34).
[88] Case 27/76, *United Brands Company and United Brands Continentaal BV v. Commission* [1978] ECR 207.
[89] Joined Cases C-501, 513, 515 & 519/06P, *GlaxoSmithKline Services Unlimited v. Commission*, [2009] ECR I- 9291, para 61.

one, subject to intense price regulation. The General Court, with an original interpretation of *Consten and Grundig* and the previous case law on parallel trade, affirmed that the objective of Article 81(1) EC was to prevent undertakings from reducing the welfare of the final consumer and that therefore, an agreement aimed at limiting parallel trade could not be considered *per se* a restriction of competition, but a competitive analysis of the effect of such conduct on final consumers' welfare were indispensable[90]. However, the Court of Justice took a more traditional position and re-affirmed the centrality of market integration as a fundamental objective of the Union and considered "agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports to be agreements whose object is to restrict competition within the meaning of that article of the Treaty"[91].

Although restrictions to export or territorial allocation are still generally valued as restrictions by object under article 101(1) and excluded from the block exemption and *de minimis* rules, over the years, the Commission has progressively changed its enforcement priorities, reducing the volume of investigations on practices that impaired market integration only. Two parallel phenomena can explain this change: on the one hand, the integration of Member States' economies has gradually achieved an appreciable level, on the other, the neo-liberal shift that has affected the Union's policies invoked a more economic and politically neutral approach to competition policy, and a downgrading of non-economic objectives. Anyway, despite the dominant narrative, which describes market integration as a recessive factor in competition law enforcement, in favor of more efficiency-based outcomes, some authors argue that the commitment to the integration cause has not disappeared but has only got a new shape: whereas in the first period the Commission aimed to eradicate cross-border barriers to trade and thus focus on territorial allocation or restriction to exports, more

[90] Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006], ECR II-02969 para. 118;

[91] And with respect to the CFI arguments the ECJ stated that "there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Ibid. para 62.

recently it has tried to secure the advantages of liberalization processes and encourage competition and rivalry in newly opened markets by reinforcing its scrutiny on incumbent firms' practices[92]. In addition, new market integration concerns have arisen also in the context of the digital economy, such in the case of online sales' restrictions or geo-blocking and geo-filtering practices[93].

3.3. The neo-liberal transition: competition as an instrument to *one* end

As already mentioned, European competition policy has been adapted over time to the specific needs and priorities of the European integration project. At least with regards to the Commission's interpretation of competition rules, a significant shift has occurred in the late 1990s and early 2000s, leading to a "modernization" of its procedures and the endorsement of "a more economic approach" to its enforcement. As a result, the European Commission identified economic efficiency as its guiding principle in interpreting the Treaty's provisions and defining its enforcement priorities, with the consequent confinement of any other non-economic factors.

A similar pattern was already experienced in the U.S. antitrust law, a transition that might have also influenced the evolution of the European law[94]. When the Sherman Act was adopted in 1890[95], its specific aim was to contain the economic power of big trusts and preserve the American dream led by small and medium enterprises. Therefore, the most famous antitrust law was meant to pursue socio-political objectives, to prevent the creation or maintenance of monopolies, which could have used their power the expense of consumers and smaller competitors[96]. As a result, U.S. Courts firstly employed a structural approach based on market characteristics and firm size, where efficiency considerations had a very

[92] Ibanez-Colomo, (n. 3), 371. See also n. 31.
[93] See Ariel Ezrachi, "EU Competition Law Goals and the Digital Economy" [2018] Oxford Legal Studies Research Paper, 1.
[94] Many authors studied the prospects for convergence among the U.S. and EU law, for a contribution in this sense see Federico Ghezzi, "Verso un diritto antitrust comune ? il processo di convergenza delle discipline statunitense e comunitaria in materia di intese" [2002] 2 Riv soc., 499.
[95] Sherman Antitrust Act of 1890, 26 Stat. 209, 15 U.S.C.
[96] See *inter alia* George J. Stigler, "The Origin of the Sherman Act", [1985] 14 J. LEGAL STUD. 1, 4–5; Herbert Hovenkamp, *The Antitrust Enterprise: Principle And Execution* (2005); Maurice E. Stucke, "Reconsidering Antitrust's Goals" [2012] 53 B.C. L. Rev. 551;

marginal role. The Sherman Act was indeed described as "the Magna Carta of free enterprise", i.e. a tool for the protection of economic freedom and the free-enterprise system[97]. Therefore, similarly to what we have seen in the EU, antitrust law represented a response also to non-economic concerns related to the accumulation of economic power and, as Robert Pitofsky observed, the enactment of the Sherman Act was motivated by "fear that excessive concentration of economic power will breed antidemocratic political pressures"[98]. As a consequence, U.S. Court have for a long time interpreted those few provisions has having a political, social, and moral rationale, and not a merely economic one, and thus pursued a multitude of goals, including fairness and economic freedom[99].

A split moment in the U.S. antitrust history is represented by the publication of the work of some scholars associated with the Chicago University. Their work laid the first stone of what is often labeled the Chicago Revolution, a movement of economic thought that has deeply influenced the political and economic discourse all over the world[100], also in relation to competition policy. They believed that the predominant approach taken by U.S Courts that far, having fairness as primary guidance, was the result of populist ideas, which was leading to conflicting outcomes and hindering innovation. The Chicago School instead, suggested that antitrust law should have a sole ultimate goal, economic efficiency (allocative and productive) to be assessed according to neoclassical price theory. More precisely, they affirmed that the maximization welfare "is the ultimate goal of antitrust, and competition is a mediate goal that will often be close enough to the ultimate goal to allow the courts go no further'[101]. Chicagoan antitrust policy is based on few, but significant assumptions, *i.e.* that markets are generally competitive, composed of rational, self-interested market participants,

[97] See *United States v. Topco Assocs., Inc*., 405 U.S. 596, 610 (1972)
[98] Robert Pitofsky, (n.47). See also William Kovacic W:, Module I: Origins and Aims of Competition Policy, ICN (May 2011).
[99] Roger Blair and Daniel Sokol, "Welfare Standards in U.S. and E.U. Antitrust Enforcement" [2013] 81 Fordham L. Rev., 2497.
[100] The extent to which this process actually took place is examined in Anu Bradford, Adam S. Chilton & Filippo M. Lancieri, "The Chicago School's Limited Influence on International Antitrust" [2019] 87 University Of Chicago Law Review, 297.
[101] See Richard Posner, *Antitrust Law* (University of Chicago Press 2001); Robert H. Bork, The Antitrust (Paradox, Free Press, 1978); George Stigler, *The Organisation of Industry* (University of Chicago Press 1968) and the seminal work of Aaron Director & Edward Hirsch Levi, "Law and the Future: Trade Regulation" [1956] 51 Northwestern University Law Review, 281.

that monopolies tend to be self-correcting, and natural barriers to entry rarely exist. These assumptions suggest that markets should be left alone by the State, whose intervention represents a *second best*, on the presumption that firms' conducts are generally efficiency-enhancing and that antitrust enforcement should be highly permissive, especially in relation to unilateral conducts, in order to not impede or penalize efficient conducts [102].

The Chicago school of thought became very appealing, particularly for its claims of being politically neutral, because governed by economists, and for leading to predictable results. As a consequence, since the 1970s it started to highly influence U.S. policymaking, particularly in relation to the need to relax the antitrust enforcement. Soon after, the same ideas were reflected by the law of the Supreme Courts, starting from the famous decisions in *Continental T.V., Inc. v. GTE Sylvania Inc.*[103] and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*[104]. We won't further explore the goals of U.S. antitrust law, although the debate is rich and still thriving[105], but what is important to recall is that Chicago School was very effective in influencing policymakers in the U.S. and abroad, and not only in relation to competition policy[106]. Since this shift, the antitrust discourse progressively focused on one single objective, which is economic welfare, and the more effective ways to enhance it. Although the ideas of the Chicago school have been subject to a vivid debate, and most of its assumptions were progressively abandoned with the emergence of Post-Chicago[107] movements and the increasing reliance upon empirical tools and game theory, the mono-dimensional and efficiency-based approach still defines most of the modern antitrust policies.

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[102] Herbert Hovenkamp, "Antitrust Policy After Chicago" [1985] 84 Michigan Law Review, 214.
[103] *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977)
[104] *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc*., 429 U.S. 477 (1977).
[105] Stucke (n.96); and the new Brandeis movement, whose principles are well summarized in Khan, (n.2).
[106] The exportation of the US Economic agenda and free market beliefs around the world, is commonly defined as "Washington Consensus" and strongly relied upon Chicago scholars and their work. See John Williamson, "From Reform Agenda to Damaged Brand Name: A Short History of the Washington Consensus and Suggestions for What to Do Next" [2003] Finance and Development, 10.
[107] Daniel Crane, "Chicago, Post-Chicago, and Neo-Chicago. Review of How Chicago Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust" [2009] by R. Pitofsky, editor., 76 U. Chi. L. Rev.,1911; Jonathan B. Baker, Competition Policy as a Political Bargain, 73 Antitrust L.J. 483, 512 n. 109 (2006). Despite these changes, it is argued that one feature of Chicagoan thought still dominates, the belief that: " a) efficiency is the main, or the sole, goal of antitrust law and b) this goal can guide the interpretation and the enforcement of antitrust law unambiguously, sheltering it from the influence of any (arbitrary) political evaluation", see Francesco Denozza, "The Future of Antitrust: Concern for the real interests at stake, or Etiquette for oligopolists?" [2017] 1 Orizzonti del diritto commerciale, 1, 4.

Many investigated the extent to which the Chicago School has also influenced the EU law and its shift from the original ordoliberal paradigm since the link is not so immediate. As we were saying, the more economic approach in Europe, albeit grounded on similar economic premises, has been promoted almost 30 years later than the analogous turn in the U.S., and its rationale goes beyond the discussion about goals. Moreover, despite of the loud academic debate about the Commission's new approach, European Courts have been quite reluctant to accept fully economic efficiency as a sole objective of EU Competition law[108]. Therefore, it is necessary to clearly distinguish the evolution of the European Commissions' beliefs, from the law of the Union, whose content is largely determined by the European Courts' decisions.

This new attitude towards competition policy in Europe has complex ideological and theoretical foundations and had significant practical consequences on businesses operating in the common market. As we have already observed in the previous chapters, European policymaking has witnessed a neoliberal-inspired restructuring since 1980s, which significantly affected the evolution of most of its policies, particularly the economic ones[109]. The transition towards a revisited competition policy heavily grounded on economic analysis is often described as a "modernization" phase promoted by the European Commission in the early 2000s to overcome the shortcomings of the previous inefficient and too politicized approach. But even before, the crisis of embedded liberalism and the paralysis of the integration process in the 1970s paved the way to the rise of neoliberal free-market beliefs. The neoliberal project - firstly supported by the conservative U.K. government and then by other European governments - sponsored the creation of homogeneous and free markets

[108] Damien Geradin and Nicolas Petit, "Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment" [2010] TILEC Discussion Paper No. 2011-008, 1, 34.Their analysis shows that" the GC has been quite impermeable to basic – yet critically important – economic concepts (such as "consumer welfare") and has had a tendency to repeat the old formalistic standards adopted by the ECJ in landmark – although controversial – cases, such as Hoffman-La Roche and Michelin II".

[109] See David Harvey, "Neoliberalism as Creative Destruction", [2007] The Annals of the American Academy of Political and Social Science, 22, where neoliberalism is defined as "a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade".

where European firms could benefit from greater economies of scale and scope and where the accumulation of capital could proceed without restraints[110].

Therefore, to facilitate the trans-nationalization of production, the maintenance of free and competitive markets became a top priority, to be complemented by other measures on the flexibilization of labor markets, as well as by deregulation and liberalization actions. The underlying idea was that the exposure to competition automatically leads to more competitiveness, innovation and economic growth, while benefiting consumers in terms of lower prices and better/more products. It emerges that the premises on which a neo-liberal inspired competition policy is based are significantly different from the ordoliberal perspective, which ties competition to a broader set of social and political objectives. The new paradigm aims instead at limiting State intervention by relying upon market processes to achieve economic growth and competitiveness of European firms. As a consequence, it could not admit an enforcement of competition rules driven by non-efficiency considerations or political interests, as for instance it often occurred with respect to crisis cartels.

Since 1985, when first Peter Sutherland and then Sir Leon Brittan (1989-1995) became Competition Commissioners, neoliberal thinking entered into the Commission's rooms, and progressively shaped its enforcement priorities: the protection of small and medium enterprises gave way to a more welfare-based considerations and the fight against cartels and the control over state aids became the top priority, because considered the most dangerous threat to free-market functioning[111]. In line with this commitment to increase the stringency against anti-competitive conducts, the Commissions started an unprecedented number of investigations and also the amount of fines reached an extraordinary level. At the same time, the Commission supported the adoption of a merger control system to be administrated at the EU level and based on pure competition considerations. Until then, the control over mergers was a national matter, often characterized by protectionist or politically

[110] Hubert Buch-Hansen and Angela Wigger, "Revisiting 50 years of market-making: The neoliberal transformation of European competition policy" [2010] 17 Review of International Political Economy, 20.
[111] Ibid. 36. The Authors argue that "As part of the broader neoliberal market restructuring at EC level, also cartels were prosecuted with an unprecedented stringency since the mid 1980, marking a sharp contrast with the previous lenient stance. The fight against privately erected market barriers was meant to establish the notion of free competition".

driven aims. The Commission, to overcome the growing concerns about the fact that a new merger regulation could have hindered economic expansion, pointed out that the decentralized system was responsible for legal uncertainty and additional costs for firms, and that the adoption of an EU regulation would have instead facilitated cross border mergers[112]. This revolution of EU competition policy comprised many other initiatives, such as those aimed at dismantling public monopolies in strategic markets, and also in an external dimension at transplanting EU model of market economy abroad[113].

4. A more economic approach to ensure consistency in a decentralized enforcement system

Describing the transition towards an economic-based approach only as a consequence of an ideological shift within European institutions would be deceptive, as the adoption of economic standards to interpret competition rules and to assess business practices' legality has indeed several explanations, including of institutional and operational nature[114]. Between the 1990s and the early 2000s European Commission' competition policy has been subject to a modernization phase, which operated on two parallel but strictly connected dimensions: on the one hand, the Commission has gradually revised its approach towards a number of market practices, particularly vertical and cooperation agreements, while on the other, the enforcement structure and the role of assigned to the European Commission was profoundly reformed.

With regard to the "substantive modernization"[115], as Gerber defined it, since the 1990s the Commission adopted several soft-law instruments through which it set out the principal rules of interpretation of competition rules, with the ultimate aim of providing some guidance for companies' self-assessment activities. With this new set of instruments, the Commission fully embraced the neoclassical approach to competition, not only by

[112] Ibid.
[113] Anu Bradford, Adam Chilton, Katerina Linos, and Alex Weaver, "The Global Dominance of European Competition Law Over American Antitrust Law" [2019] 16 Journal of Empirical Legal Studies, 731.
[114] Anna Witt, "Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order" [2012] 8(3) European Competition Journal, 443.
[115] David Gerber, "Two forms of modernization in European competition law" [2008] 31 Fordham International Law Journal, 1235.

identifying competition law's goal with consumer welfare and allocative efficiency, but also by transplanting economic analysis into legal standards through which assessing firms' practices legality.

The Guidelines on Vertical Restraints issued by the Commission in 2000[116], by which it provided the principles for the assessment of vertical agreements under article 101 TFEU, represent an example of this transformation process. The European approach to vertical restraints had been subject to several criticisms from both academics and practitioners, especially after the Chicago school's arguments started to gain support also on this side of the Atlantic[117]. In response to the increasing criticisms, the Guidelines confirmed the intention to verify the existence of a restriction of competition according to the economic effects produced on consumers, and not by using presumptions or formalisms, in recognition of the fact that they also have efficiency enhancing potentiality. Consistently with this economic-inspired trend, the Commission also adopted the Regulation 2790/1999 establishing a block exemption for a category of vertical agreements considered as normally satisfying the conditions laid down in Article 81(3), because of their efficiency-enhancing effects[118]. This Regulation confirmed that the anti-competitiveness of vertical restrictions could not be presumed, but it must be assessed having regard to the degree of market power of the concerned undertakings, as well as the amount of competition faced by those undertakings at different levels of the supply chain. Moreover, application of the same neo-classical inspired approach was further extended to other areas of competition law, including cooperation agreements and mergers[119]. Conversely, as we will further discuss in the next chapter, the implementation of the more economic approach to unilateral practices has been more cautious.

[116] Commission Notice on "Guidelines on Vertical Restrictions" [2000] OJ C291/1.
[117] Barry Hawk, "System Failure: Vertical Restraints and EC Competition Law" [1995] 32 COMMON MKT. L. REV, 973. See also Gerber (n. 115), 1248.
[118] Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices OJ L336/21.
[119] See Commission Notice, Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, O.J. L 3/02 (2001). Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395, 1.

However, such proliferation of guidelines and soft-law instruments was aimed at helping companies in self-assessment activity and at providing more clarity about the Commission's interpretation of competition rules, but it also had another strategic rationale. It was indeed strictly connected to the institutional reform brought in the same years by Regulation 1/2003[120], and precisely, the renewed central role assigned to National Competition Authorities and National Courts, now empowered with the obligation to apply competition rules directly.

The previous Regulation 17/62 in fact established a centralized authorization system where undertakings willing to obtain an exemption under article 101(3) TFEU had to notify the agreement to the Commission, which had the exclusive power of granting an exemption[121]. Only the prohibition set out in Article 101(1) TFEU was directly applicable also by national courts and authorities. This system, however, was impossible to manage as the Community continued to expand. The Commission was in fact receiving an uncountable number of notifications, which absorbed all its time and resources, with little room left for other enforcement activities. To face this issue, the Commission issued a White Paper for the modernization of the application of competition rules[122], which was then followed by the Council Regulation 1/2003. This Modernisation Regulation, among other things, introduced a decentralized enforcement system, based on the abolition of the *ex-ante* notification to benefit of Article 101(3)'s exemption and the establishment of its direct applicability by NCAs. According to this new system, the Commission and the NCAs have maintained the burden of proving the existence of a restriction ex article 101(1), while the application of the exemption depends on the evidence provided by the defendants[123].

The introduction of a decentralized enforcement structure has certainly contributed to improving the system's effectiveness and spreading competition culture over the Union,

[120] See Council Regulation (EC)1/2003on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, O.J. 2003, L 1/1.
[121] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 013, 0204.
[122] European Commission "White Paper on Modernization of the Rules Implementing Arts 85 and 86 of the EC Treaty" [1999] OJC132.
[123] Although according to article 5 Regulation 1/2003 they cannot take binding decisions in applying 101(3).

but these advantages brought some risks too. For instance, the open-texture wording of article 101(3) assigns to NCAs a wide margin of discretion, with the inherent risk of self-interested outcomes, with national authorities willing to exempt those agreements favoring national firms to the detriment of European competitors. Additionally, it brought the risk of fragmentation as consequence of an inconsistent application of competition rules over the Union. In this context, we can understand the urgency of providing some guidance regarding the substantial content of competition rules[124]. The several notices and guidelines above cited were thus used by the Commission to ensure consistency and legal certainty on the interpretation of the Treaties and to avoid a national-interested use of competition rules[125].

In addition, also the transition towards an economic-inspired approach to competition can be explained as a means to achieve the very same objective: the application of economic standards and methods to evaluate market behaviors appeared to be the best tool to ensure a uniform, politically-neutral and predictable enforcement of competition rules, thus preventing NCAs from considering other politically sensible factors, especially after the Union's expansion occurred in those years. This was indeed the implicit aim of the 2004 Notice on the Application of Article 81(3)[126], another document by which the Commission clarified one of the most sensitive issues, i.e. the conditions for allowing an exemption in case of infringement of paragraph 1. In such a document the Commission took a very clear position about the aim of European competition rules, defined as "the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"[127]. The Commission's aim was in fact to reduce the margin

[124] See also Commission Notice on Cooperation within the Network of Competition Authorities, O.J. 2004, C 101/43; Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC, O.J. 2004, C 101/54.

[125]With the same objective, in order to make this network governance work, a separate Commission Notice, established a highly regulated cooperation mechanism between NCAs and the Commission, named the "European Competition Network" (ECN), based on a hierarchical structure, where the latter still retained a position of supremacy. A process recently fostered by the Directive ECN + Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L 11, 3. For an historical overview see Firat Cengiz, "The European Competition Network: Structure, Management and Initial Experiences of Policy Enforcement" [2009] 5 EUI MWP, 4.

[126] Communication from the Commission, "Guidelines on the application of Article 81(3) of the Treaty", [2004] 0J C 101/97. Pera (n.19)

[127] Ibid para 42.

of discretion of NCAs in accepting indirect or non-economic benefits as a justification for an exemption[128].

5. The economic foundations of modern competition policy

We anticipated that modern U.S. and EU approaches to competition law rely upon similar economic premises based on the efficiency theory and neoclassical economics. However, as we are going to illustrate, they maintain small but significant differences that ultimately define the peculiarity of the two models. Recognizing the deviations from the pure Chicagoan economic approach is extremely useful to our purposes because while they might undermine the integrity of the economic paradigm, they provide crucial insights about the internal and external boundaries of competition law in Europe.

Economics is not a monolithic science. Indeed, it is characterized by a constant confrontation between diverse and conflicting theories, which often reflect different ideologies and views about society and how it should be administrated. Adhering to one economic theory rather than another can make the difference in determining the legality of market behaviors when economic analysis is fully embedded into legal reasoning. In the U.S. in fact, the evolution of economic theories, from the early "structure-competition-performance" to the Chicago and post-Chicago ideas, has significantly impacted the antitrust enforcement standards and priorities[129]. In this view, the most recent DG Competition's attitude cannot be described as an attempt to rely upon neutral economic tools, because the adherence to one economic theory, namely the neoclassical one, is by itself a political choice, meaning a judgment of value about which interests must be preserved.

Since the middle 20th century, the neoclassical theory has emerged as the dominant economic paradigm, especially in the law and economics field[130]. Although it might seem redundant at this stage to describe the content of this model, such inquiry seems an

[128] In the White Paper on the modernization, the Commission had also clarified that the purpose of Article 85(3) was "to provide a legal framework for the economic assessment of restrictive practices and not to allow application of the competition rules to be set aside because of political considerations", para 57.
[129] See contribution at n. 104.
[130] Denozza (n.107)

indispensable step to understand where the conflict between European competition law and other policy goals, including sustainability, truly arises. First of all, the conception of competition adopted by the neoclassical theory has a static dimension, i.e. an end-state that reflects the conditions that must be held in the market so as to ensure the maximization of economic efficiency. As a consequence, all market conditions that do not reflect this model are considered deviations from the optimum.

We have seen how these ideas are very different from the classical conception of competition, which is instead described it as a dynamic process, i.e., an endless equilibrating mechanism of rivalry among firms. In fact, many reject the static conception of competition, arguing that it is not a mere expression of enterprises' economic freedom, but a continuous tension among firms that try to survive to the "creative destruction", i.e. 'the essential fact about capitalism'[131]. Anyway, the adherence to a capitalistic system and its creative destruction force inevitably creates winners and losers, who eventually will leave the market, along with their stakeholders (employees, suppliers, customers). However, according to the neoclassical economics on which these ideas are grounded, the exclusion of less efficient firms represents the legitimate result of a neutral selective process determined by consumers' choices and not by political and arbitrary decisions.

With respect to the micro-level, the first assumption of neoclassical economic theory is that economic agents, including consumers and businesses, when making decisions, act rationally in order to maximize their satisfaction. So how do consumers express their satisfaction? By making choices according to what they believe benefits them the most. These choices are made on the basis of several subjective factors (like education, culture, tastes), which determine their utility, i.e. the satisfaction that derives from the consumption of a particular good or service[132]. Therefore, consumers are used to ranking bundles of goods according to the utility they provide to them. Given that consumers are rational agents trying to maximize their utility, they are considered the best judges of what is better for themselves.

[131] Schumpeter (n.12).
[132] Angus Deaton and John Muellbauer, *Economics and Consumer Behavior* (Cambridge: Cambridge University Press 1980). Paul Samuelson, *Foundations of economic analysis* (Cambridge, MA: Harvard University Press 1947)

Welfare economists have used this premise to infer from consumers' choices their preferences about what increase or decrease their satisfaction and so ultimately their well-being. The way in which individuals measure their utility is strictly related to another important assumption of neo-classical economics, which is that goods' value depends not on cost of production (materials and labor as classical theories suggested[133]) but on the value that consumers assign to them, according to a theory of value that lies at the heart of today's economic theory, which is marginalism[134].

The crucial variable in determining goods' value is scarcity; the scarcer is a product, the more utility it gives to consumers (higher marginal utility), who will be willing to pay more for it. The marginalist way to determine the value of things was quite revolutionary, with respect to the previously predominant labor theory of value, elaborated by Smith, Ricardo and then developed by Marx[135]. The famous paradox of water and diamonds is often used to explain the neoclassical intuition connected to marginal utility and scarcity as crucial variables to determine the value and price of everything: for centuries, economists and thinkers have tried to explain why water, which is essential to life has a lower price than diamonds, which are not[136]. The theory of value based on marginal utility provided an answer to this question, showing that whereas water has a greater total utility than diamonds, the latter have a greater marginal utility, meaning that an additional unit of diamonds is more valuable to consumers than a marginal unit of water, which explains its higher cost.

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[133] Adam Smith, *The wealth of nations* (New York: Random House 1937), Ch. 6-7; Karl Marx, *Capital 3 vols*, (New York, International Publishers, (1967, [1867-94])

[134] According to this theory, the standard to determine things' value is subjective as it depends on the marginal utility they provide to consumers at different times, and given their budget constraints. This theory of marginal utility applies to consumption as well as to production, where producers behave as to maximize their profits basing their decisions on their marginal cost of production. The first generation of marginalist included William Stanley Jevons, *Theory Of Political Econo*my (1871); Carl Menger, *Principles Of Economics* (1871); Leon Walras, *Elements Of Pure Economics* (1874); and in the United States, John Bates Clark, *The Distribution Of Wealth: A Theory Of Wages, Interests And Profits* (1899). Their work was further developed by Alfred Marshall, *Principles Of Economics* (1890). Criticized by Piero Sraffa, *Production of commodities by means of commodities. Prelude to a critique of economic theory* (Cambridge: Cambridge University Press. 1960)

[135]Pierangelo Garegnani, "Value and distribution in the classical economists and Marx" [1984] 36(2) Oxford Economic Papers, 291; Lefteris Tsoulfidis, "Economic theory in historical perspective" [2011] 2(1) Journal of Economic Analysis, 32–45.

[136] Robert B. Ekelund and Robert F. Hébert, *A History of Economic Theory and Method. 4th ed*. (New York: McGraw-Hill 1997) 294.

To go back to the premises of modern competition policy, the first theorem of welfare economics states that when markets work properly and competition is not distorted, welfare is maximized and resources are allocated in the most efficient way, i.e. the price and output at which the exchange occurs allow both consumers and producers to maximize their utility, as the supply and demand curves cross at the specific point where the market is said to be at the equilibrium[137]. This status of equilibrium is characterized by the maximization of economic welfare, which is measured by the combination of two elements: producers' surplus (total revenues – total costs) and consumers' surplus (the positive difference between consumers' willingness to pay for a specific good and price actually paid). Such equilibrium is defined in terms of Pareto efficiency, which refers to a state of affairs where resources are allocated in the most efficient way because they cannot be reallocated without making at least one side worse off. However, translating this standard into the real world appeared to be too complicated, given that most of the changes cause at least one loser. Therefore, the more practical notion of Kaldor-Hicks efficiency was introduced: according to such notion, a given condition is efficient if the overall benefits outweigh the cost, thus admitting that some individuals will result in a pejorative status. In other words, even in the presence of losers and winners, the improved status is said to be Kaldor Hicks efficient if, in abstract, the winners can compensate the losers[138].

The adoption of this standard has several repercussions, the most important being the so-called separability thesis[139]. Assuming that resources must be allocated solely according to the efficiency implications and that the Kaldor Hicks standard is adopted, the consequence is that the distributive consequences are left out. Despite the fact that market functioning has a substantial impact on wealth distribution and inequality, only efficiency should guide the allocation of resources, as long as a redistribution is then, in abstract, possible. Instead, the Kaldor–Hicks parameter implies the separation of efficiency considerations from issues of

[137] Vickers (n.6)
[138] John R. Hicks,. "The Foundations of Welfare Economics" [1939] 49(196) Economic Journal 696; Nicholas Kaldor, "Welfare Propositions in Economics and Interpersonal Comparisons of Utility" [1939] 49(145) Economic Journal 549.
[139] Richard Posner, "Utilitarianism, Economics, and Legal Theory" [1979] 8 Journal of Legal Studies, 103. For a critique of the separability thesis see Lionel Robbins, "Economics and Political Economy" [1981] 71 American Economic Review 1- 10.

social justice, which need to be addressed by the political system through taxes or other redistributive instruments.

From a competition policy perspective, the main consequence is that the adoption of an efficiency theory implies that when a market conduct produces a consumers' loss, it can be outweighed by the benefits caused to producers. In other words, it implies the adoption of a total welfare standard. Moreover, it confirms that a competition policy pursuing economic efficiency cannot in any case incorporate distribution considerations, which must be addressed by the political system with other instruments. The other cornerstone of such theory is that markets generally tend to increase efficiency and welfare and therefore, the enforcement of antitrust rules should be reduced as to not jeopardize the beneficial effects of market processes[140], and so their only concern should be economic efficiency. Therefore, the State must ensure that markets function well because competitive markets guarantee not only an efficient allocation of resources but also productive and dynamic efficiency, increasing the incentives for firms to reduce their cost and innovate.

5.1. The adoption of neoclassical economics: the relevance of the consumer welfare paradigm in the Commission's decisions and European Courts' case law

At this point, once we have clarified the core values and theories that have shaped the narrow economic focus of modern competition policy, we have the instruments for discerning the key features of the European approach towards competition and how it deviates from the original parading from which it takes inspiration.

First, the methodological individualism that characterizes mainstream economics and neoliberal thought in general[141], as well as the theory of revealed preferences, have been fully

[140] An approach lucidly summarized by Richard Werner "[The] key beliefs [of neoclassical economics] are that the pursuit of individual self-interest will lead to a better society, that government intervention beyond the narrow maintenance of law and order should be minimized if not eliminated and that the powers of unfettered markets should be unleashed in virtually every part of society, at home and abroad. For this purpose, structural reforms are recommended to deregulate, liberalize, privatize and open up as many industries and aspects of the economy as possible, as the beneficial forces of the invisible hand, if only allowed to operate freely, would improve people's lives, create wealth, produce prosperity and lead to maximum happiness" in Richard Werner, *New Paradigm in Macro-economics* (Palgrave, Macmillan 2005), 3.
[141] Denozza (n.5)

embedded into European economic policies, including competition, as the WTP is used to measure consumers' preferences and ultimately the value of things[142]. Accordingly, their welfare is calculated in pure economic terms: consumers, as self-interested individuals, are believed to be the best judges of their own well-being, which in turn has a mono-dimension, being measured mainly in terms of wealth, *i.e.* money consumers save in market exchanges[143]. To this respect, several commentators, in line with a dynamic conception of competition, criticized the methodological individualism when applied to enterprises[144].

Moreover, in line with a "micro" approach, the extent of market functioning is assessed by looking at a narrow group of actors and consumers, those participating in the relevant market, and they do not include other actors or markets that might be affected by the conducts at stake. If we take Article 101(3), for instance, and how the European Commission and Courts have interpreted it, we find that the existence of benefits that might outweigh an agreement's anti-competitive effects must be assessed looking at the same market where the harm occurs. As we are going to see in the next chapter, this narrow interpretation of the rules can be very problematic when assessing an agreement's environmental benefits, which often have a collective and inter-generational dimension[145]. Moreover, this lack of consideration for the macro implications is at odds with the way in which modern corporate business

[142] George McKenzie, *Measuring economic welfare* (Cambridge: Cambridge University Press; Willig, R. 1976).
[143] Daniel Hausman, *Preference, Value, Choice, and Welfare* (Cambridge: Cambridge University Press 2011), who argues that: "In some contexts, self-interest does not predominate. In others, people's beliefs are badly mistaken or their preferences are systematically distorted by factors such as framing. (...) When people are bad judges or are not seeking their own advantage, there is little reason to take their preferences to be evidence concerning what will benefit them", at 90.
[144] They point out that firms' behavior cannot be described in terms of individual and free choices in the market that eventually lead to a long-term equilibrium, because enterprises are subject to fierce rivalry in an incessant struggle for survival, and therefore their decisions are better explained in terms of reactions to shifting market conditions. See Vickers (n.6), Libertini (n. 5). This idea of competition as an endless battle was also found Engels' work: "competition is the completest expression of the battle of all against all which rules in modern civil society. This battle, a battle for life, for existence, for everything, in case of need a battle of life and death, is fought not between the different classes of society only, but also between the individual members of these classes. Each is in the way of the other, and each seeks to crowd out all who are in his way, and to put himself in their place. The workers are in constant competition among themselves as are the members of the bourgeoisie among themselves. The power-loom weaver is in competition with the hand-loom weaver, the unemployed or ill-paid hand-loom weaver with him who has work or is better paid, each trying to supplant the other", Frederick Engels, *Condition of the Working Class in England*, (1845), 111.
[145] Giorgio Monti, "Four Options for a Greener Competition Law" [2020] Journal of European Competition Law & Practice, 124; For a critique of the static dimension of CW see Barak Orbach, "The Antitrust Consumer Welfare Paradox" [2010] 7(1) Journal of Competition Law & Economics, 133.

operate, or more precisely with the general tendency of capitalistic firms to maximize their profits by externalizing their costs and passing them on to the rest of the society. This trend of separating the benefits from costs is even more evident in a globalized society, where national states have insufficient power to prevent such practices because firms are free to transfer their operations to countries with weaker regulatory constraints.

Second, an economic approach consistent with the neo-classical paradigm assumes that markets are naturally competitive and that the way they work allows efficient firms to emerge. This idea generates a presumption that firms' practices and market behaviors are normally efficiency-enhancing. In line this view, the enforcement of competition rules should not be too stringent even against dominant firms because, from an efficiency perspective, the risk of false positives ("type I" errors) is more costly than false negatives, given their adverse effects on innovation and ultimately on economic growth. Although most recent economic theories, like those related to game theory or the study of information asymmetries, rejected most of these theses, including that market are generally (perfectly) competitive and efficient, these presumptions about the inherent market competitiveness have long influenced courts and authorities, especially in the U.S.

The acceptance of this idea in Europe, however, has not been equally straightforward. Surely, the modernization process initiated by the Commission in the in the mid 1990s[146] has moved in this direction[147]. The Commission has in fact revised its assessment of competitive harm, focusing less on market structure and firms' economic freedom, and more on practices' impact on consumer welfare, measured in terms of price, quantity quality, innovation[148]. As discussed in the paragraph above, the reluctance towards a pure neo-classical notion of markets and competition has emerged particularly in the context of unilateral practices, where the European Commission and the ECJ have struggled to reach common and clear answers[149].

[146] The "Green Paper on Vertical Restraints in EC Competition Policy" COM(96)721, 1997, has marked the beginning of the Commission's reliance upon economic theory as part of its competitive assessment.
[147] Giorgio Monti, "Article 82 EC: What Future for the Effects-Based Approach?" [2010] 1 Journal of European Competition Law & Practice, 3.
[148] Guidelines of the Commission, "Guidelines on the Assessment of Horizontal Mergers Under the Council Regulations on the Control of Concentrations between Undertakings" [2004] OJ 31/5, para 8.
[149] Pinar Akman, Consumer Welfare' and Article 82 EC: Practice and Rhetoric [2009] 32(1) World Competition, 71.

In 2009 the Commission issued a Guidance Paper on the enforcement priorities in applying Article 82 to abusive exclusionary conducts by dominant undertakings, where its commitment to adopt a more economic approach resulted in the rejection of the previous formalism to many business practices in favor of a more effect-based analysis, based on a detailed assessment about the actual and potential probability that the conduct in question results in consumer harm[150]. An assessment that could be avoided only when «[...] the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred»[151].

However, European Courts have been more reluctant to abandon the traditional approach, being more willing to take Type 1 errors to preserve market structure and pluralism[152]. Indeed, until very recently, EU case law, especially in the context of unilateral practices, has been characterized by several presumptions of anti-competitiveness and *per se* prohibitions, as the ones introduced by the ECJ in the *Hoffman-La Roche* judgment[153] in relation to exclusive dealing schemes or in *Post Danmark II* about loyalty rebates[154]. European Courts have developed a form-based approach also in relation to pricing strategies to distinguish legitimate price competition from abusive exclusionary practices[155]. According to the test elaborated in *AKZO*[156] and further developed in *Tetra Pack II*[157], a pricing strategy is always considered as abusive when a) the charged prices are lower than average variable costs (AVC), or b) when the prices are higher than AVC but lower than average total cost and the Commission proves the undertaking's intention to eliminate competitors. Thus, in the case of prices below AVC the ECJ does not require any additional examinations of the

[150] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings issued in December 2008 [2009] OJ C45/7.
[151] Ibid. 22.
[152] Nicolas Petit, "The Judgment of the EU Court of Justice in Intel and the Rule of Reason in Abuse of Dominance Cases" [2018] (43(5) European Law Review,728.
[153] Case 85/76, *Hoffmann-La Roche &. Co. AG v Commission* [1979] ECR 461
[154] Case C-23/14 *Post Danmark A/S v Konkurrenceradet* EU:C:2015:651 (Post Danmark II). See also Daniel Crane, "Formalism and Functionalism in the Antitrust treatment of Loyalty Rebates: A Comparative Perspective" [2016] 81 Antitrust Law Journal, 209.
[155] Case C-202/07 *P, France Télécom SA v. Commission*, [2009] E.C.R. I-2369.
[156] Case C-62/86, *AKZO Chemie BV v. Commission* (AZKO) [1991] E.C.R. I-3359.
[157] Case T-83/91, *Tetra Pak Int'l SA v Commission,* [1994] E.C.R. II-755, C-333/94 P, *Tetra Pak Int'l SA v. Commission,* [1996] E.C.R. I-5951.

actual effects on the market and consumers, and more importantly, it repeatedly affirmed that the proof of recoupment of losses is not a precondition to find of predatory pricing[158].

The ECJ approach to predatory pricing has been highly criticized[159], especially compared to the equivalent U.S. approach which conversely includes the recoupment test[160]. In fact, it is argued that excluding the possibility of recoupment from the elements of the offense could jeopardize the positive effects of price competition, because, as affirmed by the U.S. Supreme Court "[t]he costs of erroneous findings of predatory-pricing liability are quite high because the mechanism by which a firm engages in predatory pricing--lowering prices--is the same mechanism by which a firm stimulates competition, and therefore mistaken liability findings would chill the very conduct the antitrust laws are designed to protect"[161].

More in general, on several occasions, the European Courts confirmed a formalistic reading of Article 102 TFEU[162], affirming that "since the structure of competition on the market has already been weakened by the presence of the dominant undertaking, any further weakening of the structure of competition may constitute an abuse"[163]. These considerations, therefore, implied that a full assessment of the effects on the market of dominant firm's practices was not always necessary, because "the anti-competitive object and the anti-competitive effect are one and the same thing (…) and [if] it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect"[164]. A turning point is represented by the ECJ

[158] See *Akzo* Judgment, (n.156).
[159] Michal Gal, "Below-Cost Price Alignment: Meeting or Beating Competition?" [2007] 28 *European Competition Law Review*; Emmanuel Mastromanolis, "Predatory Pricing Strategies in the European Union: a Case for Legal Reform" [1998] 19 *E.C.L.R.,* 211; Niels Gunnar, "Article 82: Effect not Form?" [2006] *5* Competition Law Insights, 6. See also the Opinion of Mr. Advocate General Mazák delivered on 25 September 2008 in *France Télécom SA v Commission* of the European Communities.
[160] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*., 509 U.S. 209 at 226.
[161] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc*., 127 S.Ct. 1069, 1077 (Decided Feb. 20, 2007).
[162] Case 322/81 *Nederlandsche Banden- Industrie-Michelin* v *Commission* [1983] ECR 3461 (Michelin I);, [2003] ECR II-4071; Case C-95/04 P, *British Airways plc v Commission*, [2007] ECR I-2331; Case C-8/08 T-Mobile Netherlands BV and others v Commission, judgment of 4 June 2009 paras 36–39 and Case C-549/10 P *Tomra Systems and Others* v *Commission* [2012] ECR 0000.
[163] Ibid. C 23/14, para 72.
[164] Case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission* (Michelin II), 241.

judgment in the *Intel* case, delivered in 2017[165], which provided the first clear endorsement of the more economic approach promoted by the Commission in an art. 102 case, requiring a full effect-based assessment of market practices' anti-competitiveness[166]. The Grand Chamber of the ECJ set aside the General Court judgment, delivered in 2014, which confirmed the Commission's finding of an abuse of dominant position realized by Intel through a fidelity rebates scheme[167]. With this decision, the ECJ rejected the GC and Commission's decision to follow the *per se* illegality rule established by the *Hoffman La Roche* judgment in the context of exclusive agreements and extended it to the "fidelity rebates" category[168]. Moreover, the Court recognized that the exclusionary effect may be outweighed by efficiency gains beneficial to consumers and that therefore, once that the capacity to foreclose has been ascertained, the Commission is also required to carry out a balancing of the favorable and unfavorable effects of the practice in question[169].

With regard to the law on agreements, we already discussed how the wording of Article 101 might be inconsistent with the neoclassical notion of competition. At the same time, however, the Commission's most recent approach to agreements better shows the attempt to encompass economic analysis into the competitive assessment: since the 2004 Guidelines the existence of market power has become a crucial factor in finding a restriction of competition under article 101(1), and the Commission clarified that the only benefits that could outweigh anti-competitive effects are efficiency gains[170]. Moreover, the Regulation

[165] Case C- 413/146 *Intel v Commission, September* [2017], P, EU:C:2017:632, para 140.
[166] A position confirmed very recently in C-307/18, *Generics (UK) Ltd and Others v Competition and Markets Authority*, para 167: "It follows that the assessment of whether a practice that may be subject to the prohibition laid down in Article 102 TFEU is justified requires, inter alia, a weighing of the favorable and unfavorable effects on competition of the practice concerned, which requires objective analysis of its effects on the market".
[167] See Giuseppe Colangelo and Mariateresa Maggiolino, "Intel and the Rebirth of the Economic Approach to EU Competition Law [2018] 49 International Review of Intellectual Property and Competition Law, 685. Nicolas Petit, "The Judgment of the EU Court of Justice in Intel and the Rule of Reason in Abuse of Dominance Cases", [2018] 43 European Law Review, 728.
[168] *Intel*, 139. Conversely, it required a full analysis of the dominant firm's practices to be assessed in light of all the circumstances in order to determine whether the practice has the "capacity to foreclose". To this respect, the Court affirmed that the Commission is required to assess a series of factors to reach such a conclusion, including "the extent of the undertaking's dominant position on the relevant market, the share of the market covered by the challenged practice, the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market".
[169] Ibid, 140.
[170] Article 81(3) Guidelines, points 48–72. See also Witt (n. 114)

1/2003 certainly reinforced the presumption of market behaviors as generally efficient by abolishing the ex-ante notification for all the agreements falling under article 101(1). As we will see in the following paragraph, however, since the law of the Treaty has not been changed, these commitments bind the Commission only[171].

This said, it might be paradoxical, but a crucial deviation of European Commission's approach to competition analysis from the neo-classical paradigm is indeed the central role assigned to consumer welfare. The idea of a competition law having as its sole objective the protection of consumer welfare, despite the practical difficulties, has become very appealing among competition authorities, including European ones. The notion of CW is generally explained in economic terms as the aggregate utility of individuals deriving from the consumption of a specific good or service, and it is generally measured starting from consumers' surplus (benefit occurring when the price actually paid is lower than the maximum amount consumers were willing to pay). The concept of CW encompasses however something more than just price and output effects, since also other components as quality and innovation have an impact on consumers' utility. These components, though, are difficult to measure and to be balanced with other price and output effects, with the consequence that with the adoption of the CW standard only one aspect of efficiency, the allocative one, might be eventually preferred[172].

As already noted, neo-classical economists use the Kaldor-Hicks compensation principle to assess the impact of firms' practices on efficiency, by looking at the aggregate surplus of both producers and consumers, in terms of total welfare, without regard to the distributional consequences between the two groups. This means that to register a welfare improvement, the adverse impact of a competitive condition on consumers can be balanced by benefits produced on the producers' side and vice versa[173]. In other words, the notion of consumer welfare is partially inconsistent neo-classical economics, particularly if used as a

[171] Or Brook, "Struggling With Article 101(3) TFEU: Diverging Approaches Of The Commission, Eu Courts, And Five Competition Authorities" [2019] 56 (1) Common Market Law Review, 121.
[172] See Motta (n.9)
[173] On the outcomes based on the applied welfare standard See Roger D. Blair and. Daniel Sokol, "The Rule of Reason and the Goals of Antitrust: An Economic Approach" [2012] 78 Antitrust L.J. 471

benchmark of economic efficiency, because the application of the Kaldor-Hicks standard to welfare economics implies the adoption of a "total welfare" perspective (the aggregate surplus of producers and consumers) [174]. The second fundamental theorem of welfare economics in fact states that only the size of the pie matters, not its composition (distribution) and thus using CW as a benchmark means to some extent addressing distributive concerns through antitrust rules.

In the U.S. in fact the introduction of the CW concept in the legal discourse resulted from a misunderstanding of Robert Bork's words in the *Antitrust Paradox*, where he mistakenly used the expression CW to refer to the maximization of total welfare to achieve allocative efficiency[175]. As a result, the U.S. debate has been for a long time focused on the distinction between consumer welfare and total welfare standard[176], where the second generally prevails[177].

In Europe, instead, the notion of total welfare as a measure of efficiency has never found real consent. The hostility for the total welfare approach has both moral and normative foundations. Article 101(3) TFEU for instance provides that, in order to exempt an anticompetitive agreement from the prohibition, a fair share of efficiency gains resulting from the agreement must be given to consumers. Since the 2000s, the European Commission has thus introduced the adoption of a consumer welfare standard as a cornerstone of its renewed economic approach[178]. In 2001 the Commissioner Mario Monti rejected the argument of an

[174] For a comparative analysis see Roger D. Blair and Daniel Sokol, "Welfare Standards in U.S. and E.U. Antitrust Enforcement" , 81 *Fordham L. Rev*. 2497 (2013).
[175] Robert H. Bork, (n. 101). For an explanation of the "The Chicago trap" See Katalin Cseres, *Competition Law and Consumer Protection* (Kluwer Law International, The Hague, 2005), 331-333; Mark Glick, "The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust" 63(4) The Antitrust Bulletin, 455–493.
[176] Roger Blair and Daniel Sokol, (n. 174), 2509.
[177] Some argue few that on practice there are differences among the two standards see Alan Meese, "Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare" [2013] 81 Fordham Law Review, 2197, 2199 ("The choice between these two standards often will not matter for antitrust doctrine. At the same time, there is a subset of conduct that a "purchaser welfare" standard would condemn, but that a "total welfare" approach would leave unscathed and even applaud");
[178] For a definition of consumer welfare see, OECD Glossary of Industrial Organisation Economics and Competition Law (1993) R. S. Khemani and Daniel Shapiro (eds) as seen in OECD Glossary of Statistical Terms ("Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore requires information about individual

EU competition law aimed at protecting competitors and stated very clearly that "the goal of competition policy, in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer"[179].

One of the first references to consumer welfare into EU official documents appeared in the 2004 Guidelines on the application of article 81(3), where the Commission clearly stated that competition rules' objective was "to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of a single open market promotes an efficient allocation of resources throughout the Community for the benefit of consumers"[180]. In the same document the Commission also provided a definition of competitive harm, which refers to a market condition that results in higher prices, lower quality, less variety, or lower innovation than would otherwise have occurred[181].

These short definitions provide two important insights about the content and scope of the Commission's interpretation of competition rules: first of all, the adoption of a functional interpretation of competition, which is seen as a means to achieve, alongside with market integration, economic efficiency, and precisely allocative efficiency. Secondly, the Commission has progressively made clear that it was not going to adopt a narrow interpretation of consumer welfare, limited to price and output components, preferring a

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preferences. [...] In practice, applied welfare economics uses the notion of consumer surplus to measure consumer welfare. When measured over all consumers, consumers' surplus is a measure of aggregate consumer welfare. In anti-trust applications, some argue that the goal is to maximize consumers' surplus, while others argue that producer benefits should also be counted").

[179] Extracts from a speech by Mario Monti European Commissioner for Competition matters The Future for Competition Policy in the European Union Merchant Taylor's Hall London, 9 July 2001.

[180] Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97 para 13. A reference to final consumers' interests was also expressed in the 'Green Paper on Vertical Restraints in EC Competition Policy' (Green Paper on Vertical Restraints) COM (96) 721 final, 22 January 1997, 17.

[181] Ibid. footnote 84; a similar definition was provided in other documents, including: Guidelines on the Assessment of Horizontal Mergers [2004] OJ C31/5 para. 8; Notice: Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements [2004] OJ C101/2, para 5; the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [2009], para. 19

broader formulation also encompassing products' quality and choice. The consequence is that in the common narrative economic efficiency has become a primary objective of EU Competition law, although not the only one[182], and CW a proxy for evaluating anti-competitive effects.

However, whereas the adoption of CW as standard of the lawfulness of market behaviors has continued to proliferate into academic debates[183], European Courts have shown some resistance with respect to the adoption of a purely economic approach to competition analysis having efficiency as its sole ultimate goal[184]. This resistance has been expressed in several judgments that followed the adoption of the above cited documents, and resulted on the one hand, on the maintenance of a formalist approach focused on market structure and presumptions about several market practices' unlawfulness, and on the other on the rejection of consumer welfare as standard for assessing conducts' anti-competitiveness. In this context, while the ECJ judgement in *Intel* certainly represents a step forward to a more effect-based approach, it does not contain any clear reference to a revised goal of competition law based on the notion of consumer welfare.

The Court of Justice in fact has generally given less weight to the CW criterion, affirming that to find an infringement of article 101 or 102 TFEU[185] it is not always necessary to prove that the practice at stake has negative impact on consumers, because such provisions are "designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such"[186]. Accordingly, in its *Post Danmark*, the ECJ referred to "consumer welfare" and the elements that influence consumers' choices (price, choice, quality, or innovation) but it did not go far

[182] O' Donoghue and Padilla (n.25).
[183] Victoria Daskalova, "Consumer Welfare in EU Competition Law: What is It (Not) About?" [2015] 11 The Competition Law Review, 131, 160 noting that the most recent statements from the Commission put less emphasis on CW, focusing on consumer benefits in terms of price quality and choice.
[184] Akman (n.149).
[185] Case C-468/06 to C-478/06, *Sot. Lelos kai Sia EE and others v GlaxoSmithKline AEVE*, 16 September 2008, ECR, 2008, p. I-7139, para 68.
[186] *See* Case C-8/08*, T-Mobile Netherlands and others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*, 4 June 2009, ECR, 2009, p. I-4529, paras 38-39.

enough to state that CW represents the definitive standard through which assessing market behaviors' legality[187].

6. Conclusions

In conclusion, as the idea competition as an end was soon neglected, competition in Europe has been commonly considered as a value worth of protection as long as it works as a means to achieve other socially desirable ends. As mentioned at the beginning of this chapter, European competition law is indeed both political and cyclical. The analysis of the EU Commission and Courts' practice testifies that competition rules in Europe have been interpreted according to a multitude of purposes, generally consistently with the Union's changing priorities. Even the recent shift towards an efficiency-based theory, although to some extent disrupting, has not completely dispelled other interests, especially market integration and fairness.

If this attention to economic freedom and market structure may reflect some residues of the ordoliberal inspiration, the neoliberal turn that occurred since the late 80s had a more profound impact on European policy making and legal reasoning. The most impactful mark concerns the conception of the individual and its well-being exclusively in economic terms. In the context of competition policy, this shift is well reflected in the adoption of the consumer welfare standard, grounded on the idea that legal norms, including competition ones, must allow the maximization of the individual's satisfaction as it results from the utility he gets as an economic agent. As a consequence, this new paradigm, besides disregarding the possible conflicting preferences that exist among and within consumers, brought a devaluation of the other aspects of human life beyond wealth[188]. Conversely, European Courts have been more reluctant to a full endorsement of this new approach, in consideration of their more comprehensive view on the law of the Union.

[187] Ibid paras 22 and 42.
[188] Denozza (n.5).

In fact, the reconstruction above mentioned seems at odds with the general framework established by Article 3 and the fundamental aims thereby established, which have both an economic and social dimension. In a social market economy, as the one enunciated by the European Treaties, all the economic policies find their legitimation if implemented in accordance with the overall Union's objectives, not only the economic ones. Article 7 of the Treaty on the Functioning of the European Union (TFEU) indeed establishes that 'the Union shall ensure consistency between its policies and activities, taking all of its objectives into account". This doesn't mean that economic welfare must be disregarded, but it represents only one of the aspects to be considered to ensure that competitive markets contribute to the well-being of European citizens and eventually to a sustainable development of the Union.

CHAPTER IV

THE INTEGRATION OF NON-ECONOMIC GOALS INTO THE ENFORCEMENT OF ARTICLE 101 TFEU. A FOCUS ON ENVIRONMENTAL BENEFITS

1. Introduction

As it emerges from the previous chapters, European institutions have constantly struggled to find a clear set of objectives to guide the implementation of competition rules. However, the discussion has mainly focused on goals such as economic freedom, fairness, efficiency, which, despite of the different political and social implications, have an intrinsic economic rationale. In other words, all these objectives are anyhow pursued as a means for achieving economic growth and prosperity. In this sense, also the realization of a common market, which obviously has a strong political and cultural meaning, was promoted to foster European economies thanks to the advantages of free trade and market openness.

Notwithstanding that, and besides the clear economic rationale of competition rules, the wording of the Treaties leaves room for the inclusion of public interest considerations. The European Union is based on a complex normative and institutional structure, whose purpose is not (anymore) merely economic. Indeed, the European Treaties set a variety of objectives to be pursued through the Union's policies, which after the Lisbon Treaty can be identified with those listed in Article 3 TEU. The Treaty, however, does not establish a hierarchy between these goals, which of course cannot be promoted all at the same time and with the same force, and sometimes might also conflict with each other[1]. Therefore, it is a task of the competent institutions to reconcile such array of aims when implementing the Unions' policies in line with the principle of consistency established by article 7 TEU.

[1] For an analysis of the possible mechanisms to solve these conflicts see Christopher Townley, "Is There (Still) Room for Non-Economic Arguments in Article 101 TFEU Cases?", [2012] The Conference on Aims and Values in Competition Law, Copenhagen, 1.

A form of guidance, in this sense, is provided by the several policy linking clauses included within the Treaties, which expressly provide that some policy goals, such as health policy (article 9 TFEU) or environmental protection (Article 11 TFEU), must be considered when implementing polices and activities not directly aimed at pursuing those goals[2]. On other occasions, the Treaty explicitly excludes the application of some provisions when specific values are involved, such as the special security exemption laid down by article 346 TFEU (ex 296 EC). Yet, most of the time, the Treaties do not provide any specific tools to solve the conflicts among the Unions' aims, while their substantive provisions are often broad enough to allow compromises. If we look at the text of the Treaties, both the principles and substantive norms that shape European competition rules admit that non-competition-related objectives[3] connected to the protection of other public interests may influence the enforcement of competition rules. Since the very beginning, the European Commission has used such discretion to pursue a broad set of aims, mainly related to the Community's industrial policy, the protection of employment, the environment or the promotion of culture[4].

With this respect, the inclusion of public interest considerations within competition rules' enforcement has also been endorsed by European Courts. In the famous *Metro I* judgment, the ECJ interestingly used the concept of *workable competition* to describe the benchmark to use when assessing the legality of market behaviors and, in the context of the application of Article 101(3) TFEU, it affirmed that the maintenance of such aspirational level of competition "may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market" [5]. This broad

[2] See Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws*, (Oxford University Press, 2017), 215-224.
[3] For an interesting definition of non-competition interests, from a legal and economic perspective see Barbara Baarsma and Nicole Rosenboom, "A veritable tower of Babel: on the confusion between the legal and economic interpretations of Article 101(3) of the Treaty on the Functioning of the European Union" [2015] 11(2-3) European Competition Journal, 402.
[4] Giorgio Monti, *EC Competition Law. Law in Context.* (Cambridge: Cambridge University Press, 2007), 10-20. See also Vincenzo Meli, "Il public interest nel diritto della concorrenza UE", in *Mercato Concorrenza Regole,* 2020(3), p. 439 ss.
[5] ECJ Case C 26/76 *Metro v. Commission*, [1977] ECR 1875, paras 20-21. See Or Brook, "Struggling With Article 101(3) TFEU: Diverging Approaches Of The Commission, Eu Courts, And Five Competition

interpretation of the norms was confirmed on several other occasions, as in *Metropole Television SA*[6], where the General Court held that "in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemptions under Art. 81(3)[7]". If these judgments paved the way for a broader reading of competition norms, they left unclear which objectives may be taken into account and how to carry out such integration. The dominant view was that the European Commission could only exempt an agreement or justify an abusive conduct in light of attaining the objectives established by the Treaties[8]. As a matter of fact, however, the ECJ case law was used to allow several exemptions based on concerns, like the protection of employment, which at that time did not constitute an explicit aim of the Treaties. As a result of this ambiguity, the Commission's approach has not always been consistent with regards to the goals to be considered, and which beneficiaries and markets to look at. Anyway, as we are going to see, the modernization process had a major impact on the extent to which such non-economic goals have been considered, as a consequence of both the procedural and substantial innovations that it brought[9].

In the context of the present research, the following paragraphs will address the circumstances in which European institutions have adopted a broad interpretation of competition rules allowing for non-economic interests by focusing on the law on agreements. The analysis will then proceed by exploring the specific case of environmental benefits. The aim is to understand how the Commission's approach has evolved over time and the extent to which the current interpretation of competition rules might represent an obstacle to private initiatives driven by such aims.

Authorities" [2019] 56 (1) Common Market Law Review, 121, who argues that when the Court stated that workable competition is the degree of competition necessary to achieve the Community's objectives, it implied that non-economic interests may justify an Article 101(3) exemption only if they are listed as an EU objective.
1. Edition 2015,

[6] Case T-112/99, *Métropole television* [2001] ECR II-2459.

[7] *Ibid.* para 118.

[8] Monti, (n.4).

[9] See Lorenzo Pace, *I fondamenti del diritto antitrust europeo. Norme di competenza e sistema applicativo: dalle origini al Trattato di Lisbona*, (Giuffrè, 2018), 80-82.

2. The law on agreements

The debate about the goals of competition law, and the extent to which non-economic factors may be part of its implementation, historically focused on mergers and the law on agreements[10]. With respect to the latter, an explanation can be found by looking at the provision's structure, which first sets the prohibition and then provides the conditions to allow an exemption, thus offering the parties the opportunity to justify their restrictive practice by pointing out its positive effects. More recently, a similar debate has emerged also in the context of unilateral practices, although for very different reasons, i.e. the new challenges brought by digital markets[11] and the need to reconsider crucial notions of competition rules such as those of consumers, relevant markets or consumer welfare in a context where other values might be at risk, including the protection of personal data.

The text of Article 101 TFEU offers a two-pronged opportunity for extending/reducing the scope of competition rules' intervention based on public interest considerations[12]. Non-economic concerns have been integrated both under paragraph 1, by adjusting the notion of *undertaking* and/or *agreement* to exclude/encompass market actors and/or practices from the scope of competition law, but mostly under the exemption provided by paragraph 3, which expressly identifies the conditions under which an anti-competitive agreement may be saved:

- the agreement must improve the production or the distribution of goods or promote technical or economic progress,
- consumers must receive a fair share of the resulting benefit,
- the agreement should not impose restrictions which are not indispensable to the attainment of these objectives,
- and it should not eliminate competition in respect of a substantial part of the products in question.

[10] For a more extensive analysis see Christopher Townley C., *Article 81 EC and Public Policy*, (Hart Publishing, 2009); Giorgio Monti, "Article 81 EC and Public Policy", [2002] 39, Common Market Law Review, 1057.
[11] Ariel Ezrachi, "EU Competition Law Goals and the Digital Economy" [2018] Oxford Legal Studies Research Paper, 1.
[12] Article 101(1) states that: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (…)".

Requirements that, according to Article 2 of Regulation 1/2003, must be proven by the parties claiming the benefit.

Yet, in describing how non-economic interests have been integrated through either paragraph 1 and paragraph 3, there is inevitably a *pre and post modernization narrative*, especially in relation to the European Commission's practice, but eventually also on Courts' case law[13]. European institutions have endorsed for a long time a broad interpretation of competition rules, and in particular of the conditions laid down under paragraph 3 as to include non-competition related concerns (i.e., industrial policy, environmental protection, employment, pluralism in the publishing media sector), meaning that these values have been considered in establishing the legality of market practices that could harm the competitive process[14]. To this respect, the absence of a clear hierarchy among the Union's objectives has allowed the European Institutions to set over time the priorities to foster the European project and to shape their activities accordingly.

Conversely, since 2004 the Commission committed itself to promote a narrower idea of competition and to evaluate market behaviors only based on their impact on market functioning, using consumer welfare as a benchmark. Consequently, the balancing mechanism under article 101(3) has been re-interpreted to include consumer welfare improvements only[15]. As already described in the previous chapter, since the beginning of the 2000s, the European Commission has adopted a mono-dimensional approach by focusing on the "protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"[16]. This transition inevitably reduced the space for considerations not strictly related to allocative efficiency and consumer welfare: as clearly stated in the White Paper on the modernization of competition rules, provisions like Article 101(3) TFEU were interpreted as "legal framework for the economic assessment of

[13] Massimo Merola and Jacques Derenne, *The role of the Court of Justice of the European Union in Competition law* cases, (Bruylant, 2012), 21–72.
[14] See n.4.
[15] For a different interpretation see Or Brook, "Priority-Setting as a Double-Edged Sword: How Modernisation Strengthened the Role of Public Policy" [2020] Journal of Competition Law and Economics, 1.
[16] Commission Notice: Guidelines on the application of Article 81(3) of the Treaty, OJ C 101/97, 27.4.2004, para 13.

restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations"[17]. With the Guidelines on the application of Article 101(3) TFEU, the Commission clarified its interpretation of the conditions of exemption. It stated that the provision was meant to consider efficiency gains only, and that "goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 101(3)"[18]. A similar view emerges from paragraph 20 of the Commission's Guidelines on horizontal cooperation agreements, which states that Article 101(3) requires to consider the pro-competitive effects that may outweigh an agreement's restrictive effects on competition[19].

Thus, although the traditional (and more flexible) approach was more consistent with the Treaties' wording for the reasons above mentioned, the lack of clarity regarding the public interests that could be considered, and the methods through which addressing and solving conflicts among values, generated significant concerns in terms of legal certainty and legitimacy[20]. On the other hand, however, the new purely efficiency-based approach may still show some inconsistency with the text of the Treaties and, in particular, with the structure of Article 101. It could be argued that if the market well-functioning must be assessed using CW as benchmark, any net reduction of it should represent a restriction of competition, thus falling under the prohibition of paragraph 1, which thus would absorb the assessment of an agreement's impact on CW. The balancing mechanism set out by paragraph 3 should then concern something different than CW improvements, like non-economic benefits[21]. The Commission, however, expressed a different view, affirming that the balancing of anti-

[17] EU Commission White Paper on Modernisation of the Rules Implementing Articles [81] and [82] of the Treaty OJ C 51, 55, para 57.
[18] *Ibid*. para 42.
[19] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 11/1, para 20.
[20] See also Richard Wish David Bailey, *Competition Law, Ninth Edition*, (Oxford 2018), 167. Anna Gerbrandy, "Addressing the Legitimacy Problem for Competition Authorities Taking into Account Non-Economic Values: the Position of the Dutch Competition Authority" [2015] 5 European Law Review, 769.
[21] Okeoghene Odudu, *The boundaries of EC Competition Law: the Scope of Article 81*, (Oxford University Press, 2012), Ch. 6, from the same author "The Wider Concerns of Competition law" [2010] 30 Oxford Journal of Legal Studies, 1, suggesting that the analysis should consider factors that increase other aspects of consumers' well-being. The author suggests that the analysis under paragraph 1should concern the agreement's impact on allocative efficiency whereas paragraph 3 on productive efficiency.

competitive and pro-competitive effects must be conducted exclusively within the framework laid down by Article 101(3).

In any case, the Commission's Guidelines explain that the first condition laid down under paragraph 3, "the improvement of the production or the distribution of goods", refers to both cost efficiencies and efficiencies of a qualitative nature, whereby value is created in the form of new or higher quality products, greater product variety, etc. The Commission identifies as relevant sources of cost savings the development of new production technologies and methods, as well as synergies, economies of scale, economies of scope created by the combination of assets, cooperation agreements, etc. But efficiencies can also be of qualitative nature, as for instance, in the case of R&D, license or distribution agreements that lead to the production of higher quality products or improved goods or services. The Guidelines are less specific in explaining what can or cannot be considered a qualitative efficiency gain and how to balance these qualitative factors with adverse economic effects, as higher prices for consumers or lower output.

The vagueness about this crucial component of the analysis could indeed pave the way for a broad interpretation of "efficiencies of qualitative nature". As Monti observed, even the positive effects on employment produced by a stabilization of production can be considered an economic benefit, as it results in lower costs of training and loss of valuable skills[22]. However, a broad interpretation of the types of efficiency gains that can be subsumed under paragraph 3 of Article 101 TFEU would jeopardize the Commission's attempt to provide clarity and predictability with respect to the exemption conditions.

Another crucial aspect concerning the application of paragraph 3 of Article 101 TFEU relates to the interpretation of the second condition laid down by such provision, i.e., that consumers must receive a fair share of the benefits generated by the restrictive agreement. To allow an exemption, the provision requires a compensation for the anti-competitive effects produced by the restrictive practice, whose beneficiaries cannot be the parties of the

[22] Monti, (n.4), 121. For a critical assessment of the Commission's Guidelines, see Nicolas Petit, "The Guidelines on the Application of Article 81(3) EC - A Critical Review" [2009] IEJE Working Paper No. 4/2009.

agreement. Contrary to its previous practice[23], with the Guidelines on the application of 81(3), the Commission adopted a narrow interpretation of this condition, not only with respect to the categories of benefits to be considered but also by restricting the group of beneficiaries that can be considered when assessing the advantages brought by the agreement.

First, according to the Guidelines, the notion of "consumer" encompasses not only final consumers but "all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers"[24]. However, the Commission goes on to explain that the efficiencies generated by the restrictive agreement must be searched within the same relevant market where the anti-competitive effects occur. More precisely, "negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market" [25]. A partial exception can be made in the case of two separate but related markets, as long as the group of consumers that receive the anti-competitive and pro-competitive effects are substantially the same[26].

Again, this narrow approach is based on economic theory, and in particular on the notion of partial equilibrium used in welfare economics by focusing on the condition of consumers and producers in a given market, by neglecting what happens in other markets[27]. Moreover, also the temporal factor is considered: whereas the pass-on might regard future consumers belonging to the same relevant market, the compensation mechanism works differently as future gains do not fully compensate present losses. And therefore, "the greater

[23] See for instance See Commission Decision 2000/ 475/ EC CECED (Case IV.F.1/ 36.718) [1999] OJ L 187/ 47, paras 55–57.
[24] Commission's Guidelines on the application of Article 81(3), para 84. A similar rule is present on Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/3, 79.
[25] Ibid. para 43.
[26] The Guidelines on horizontal cooperation agreement provide a similar interpretation, whereby they state that "the efficiency gains, including qualitative efficiency gains, attained by the indispensable restrictions must be sufficiently passed on to consumers so that they are at least compensated for the restrictive effects of the agreement", Guidelines on Horizontal Cooperation agreements, para 49.
[27] The theoretical roots belongs to Marshall, A. in Principles of Economics: An Introductory Analysis. 8th ed. London: Macmillan (1922).

the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on"[28].

However, European Courts, have generally adopted a more flexible interpretation, recognizing that the benefits of an agreement may occur in a market which is different from that on which the anti-competitive effects arise. In *GlaxoSmithKline* the ECJ in fact affirmed that "it being understood that these advantages may arise not only on the relevant market but also on other markets"[29]. Similarly, in *Asnef-Equifax* it stated that "it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers"[30]. It is worth noting that in the recent *Mastercard* judgment[31], this issue was addressed in the specific context of two-sided markets, and both the AG Mengozzi[32] and the ECJ took a more restrictive approach[33]. The ECJ did not take an exact position on whether only the advantages that occur on the relevant market can be considered, but it stated that the advantages brought in a separate but connected market can be contemplated only as long as also the consumers directly affected by the agreement receive a share of the benefits[34].

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[28] Ibid. para 87.

[29] In *GlaxoSmithKline Services v Commission* [2006] E.C.R. II-2969, para 248 , citing Case T-86/95 *Compagnie générale maritime and Others v Commission* [2002] ECR II-1011, para 343 which reads "For the purposes of examining the merits of the Commission's findings as to the various requirements of Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68, regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market (…) but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement". See also, *Piau v Commission of the European Communities* (T-193/02) [2005] E.C.R.-II 209; paras 100-106. For a critical assessment, see Nicolas Petit, (n.21), 10.

[30] Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito SL v Asociación de Usuarios de ServiciosBancarios (Ausbanc)* [2006] E.C.R. I-11125, para 70.

[31] AG Opinion Case C-382/12 P *MasterCard and Others v European Commission*, 30 January 2014, para 156.

[32] The Advocate General observed that the consumers referred to in the second condition of Article 101(3) are the direct or indirect consumers of the goods or services covered by the agreement, because those who suffer the harm caused by the anti-competitive practices must receive a compensation in the form of a fair share of the benefits resulting agreement. The argument goes on saying that "if it were possible to take into consideration the advantages resulting from an agreement for one category of consumers of certain services in order to counterbalance the negative effects on another category of consumers of other services on a different market, that would amount to allowing the former category of consumers to be favored to the detriment of the latter category", A distributive mechanism that has "no connection with the practical scope of competition law". Ibid. para 158.

[33] Case C-382/12 P *MasterCard and Others v European Commission*, 11 September 2014.

[34] To use the Court's words, where "restrictive effects have been found on only one market of a two-sided system, the advantages flowing from the restrictive measure on a separate but connected market also associated with that system cannot, in themselves, be of such a character as to compensate for the disadvantages resulting

AG Mengozzi raised one of the most problematic issues resulting from a broad interpretation of the second condition of paragraph 3, in addition to that of quantifying and compare the costs and benefits for different sets of consumers, which relates to its distributional effects[35]. Deciding that a restrictive practice can be saved even though the consumers who benefit from it are different from those who suffer its negative impact means that the competition authority can establish that one group of individuals should pay or could pay for the benefits of others or the society as whole[36]. Moreover, this approach raises some concerns about the democratic legitimacy of competition authorities to take such decisions[37]. As we are going to see in the following paragraphs, this issue is crucial for an effective integration of environmental benefits under Article 101, as they are generally spread over a wide range of individuals, and not only a specific group of consumers.

Alongside the renovated economic interpretation of competition rules' objectives and content, also the new institutional and procedural system contributed to weaken the role of non-economic goals within the assessment carried out by authorities and Courts. Since 2004, the Commission, which does not have to assess anymore all the notifications under article 101(3), has shaped its enforcing activities and priorities to focus only on the most important cases, as hard-core cartels. As a result, it discussed very few cases on which the conditions of article 101(3) were invoked and, more importantly, it has never discussed a case in which the parties raised non-economic benefits to justify an agreement[38]. Nonetheless, although the modernization process had a crucial impact on the scope for public interest considerations within the enforcement of competition rules, the substantive transition mainly occurred on

from that measure in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the relevant market", Ibid, §242.

[35] Christopher Townley, "The Relevant Market: An Acceptable Limit to Competition Analysis?" [2011] European Competition Law Review, 10. For a different interpretation see Faull and Nikpay (eds), The EC Law of Competition, 2007, §.3.411. See also M Merola and D Waelbroeck (eds), Towards an Optimal Enforcement of Competition Rules in Europe. Time for a Review of Regulation 1/2003?, Global Competition Law Centre, 2010.

[36] Distributional issues are discussed also in the discussion paper of the OFT, Article 101(3)—A Discussion of Narrow versus Broad Definition of Benefits: discussion note for an OFT breakfast roundtable (London, Office of Fair Trading, May 12, 2010), paras.2.4, 4.1 and A10, which worries that: "[A]ggregating benefits and costs across markets for different sets of consumers raises issues of distributional equity (that is, one set of consumers pays for benefits to another group of consumers)... Arguably it may be unfair for consumers in one market to pay for benefits for consumers in another".

[37] See Gerbrandy, (n.19).

[38] Brook (n.5), 132.

the Commission's official documents and declarations. The absence of decisions in this sense makes it difficult to assess whether the Commission has actually changed its interpretation of the benefits that can be accepted under paragraph 3 of Article 101, beyond what is declared in its self-binding measures[39].

2.1. The traditional (and holistic) interpretation of Article 101(3) TFEU

If we take a step back, during the pre-modernization era, when the European institutions' approach to competition was more flexible as to take account of the overall Unions' objectives and priorities, the Commission has often considered both economic and non-economic goals when interpreting the provisions above cited, and it often let public interests to prevail over strict competition-related values[40].

With respect to the methods, as we already noted, the interpretation of both paragraphs 1 and 3 of Article 101 TFEU has been adjusted to encompass non-competition concerns. In this paragraph, contrary to its natural order of assessment, we will first examine the exemption conditions under Article 101(3) TFEU, because this is when the European Commission actually applies Article 101's prohibition balancing the negative effects on competition with other beneficial factors. The evaluation of such interests under 101(1) TFEU instead does not lead to a balancing activity *stricto sensu*, because in such circumstance, the necessity to pursue non-competition interests induces the enforcer to consider competition law as out of scope. Moreover, among the two routes, the exemption under paragraph 3 represents the most natural if not easiest one for companies trying to save

[39] See n. 18.

[40] The debate about the opportunity to adopt a narrow/broad interpretation of Article 101(3) is intense: See Ben Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?: Non-efficiency Consideration under Article 101 TFEU*, (Kluwer Law International, 2012); Baarsma B., Rosenboom (n.3); Brenda Sufrin, "The Evolution of Article 81(3) of the EC Treaty" [2006] 51(4) The Antitrust Bulletin 915; Heike Schweitzer, "Competition Law and Public Policy: Reconsidering an Uneasy Relationship – The Example of Article 81" [2009] ELECD, 198 in Drexl, Josef; Idot, Laurence; Monéger, Joël (eds), *Economic Theory and Competition Law* (Edward Elgar Publishing, 2009); The question has been extensively debated, for instance see Wolfgang Kirchhoff, Juliane Kokott, Daniel Dittert, Heike Schweitzer, "Podiumsdiskussion: Außerwettbewerbliche Aspekte bei Entscheidungen nach Art. 101 AEUV, insbesondere im Licht der Querschnittsklauseln des AEUV", in *Monopolkommission* (ed.) Politischer Einfluss auf Wettbewerbsentscheidungen Wissenschaftliches Symposium anlässlich des 40-jährigen Bestehens der Monopolkommission am 11. September 2014; Townley, (n.4); Monti (n.4)

their agreement or cooperation from the 101's prohibition, at least in the absence of an indication in this sense by European Courts.

The types of benefits considered under 101(3) TFEU are various: leaving aside environmental benefits, which we will be further discussed in the following paragraphs, three are the most common non-competition interests considered by the European Commission: industrial policy, social/employment concerns, and cultural values. The next paragraph will provide a summary of some of the decisions in which the Commission integrated such interests while assessing the fulfillment of the four cumulative conditions set out by paragraph 3. To this respect, it is worth noting that few are the occasions in which European Courts had the opportunity to scrutinize decisions applying Article 101(3) TFEU, and most of them were discussed in the pre-modernization phase. Moreover, as already noted, until 2004 national authorities did not have the power to implement Article 101(3) TFEU and thus national courts could not review these cases or use the preliminary rulings tool[41].

2.1.1. Which goals?

One of the most relevant categories of non-competition interests that have been historically discussed under Article 101 TFEU relates to industrial policy. Such expression generally encompasses all the governmental interventions aimed at fostering the economy's growth and competitiveness or at supporting and protecting a specific industry[42]. Examples of industrial policy interventions are subsidies or tax incentives for specific economic sectors, the protection of national firms from foreign takeovers, golden power legislation and so on. These activities often come at the expense of maintaining competitive and free markets' rules and principles, which explains why they are often perceived as being at odds with the spirit of competition laws, and even as unconcealable.

However, European countries have a long tradition of state interventionism to support their economies and promote national champions, even when it leads to "picking winners"

[41] Brook (n.5), 150.
[42] For definition of Industrial Policy see Lawrence J. White, , "Antitrust Policy and Industrial Policy: A View from the U.S" [2008] NYU Law and Economics Research Paper No. 08-05.

or "saving losers". The European Union has developed its own industrial strategy, whose aims are set out by Article 173 of the TFEU[43]. However, the development of an effective European industrial strategy encounters several obstacles, from the difficulty to reach a broad consensus on very sensible issues, given the fragmentation of Member States' interests, to the conflict with other crucial EU's areas of activity, including competition policy, and in particular, state aid rules[44].

The potential counter-effects of industrial policy initiatives on competition emerge also from the text of the Treaty, where Article 173(3) TFEU expressly provides that industrial policy "shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition". However, this preference awarded to competition principles only refers to the Union's legislative action, and not to the interpretation/enforcement of Treaties' provisions. The consequence, from our perspective, is that the provision does not prevent the European Commission from integrating industrial policy considerations within the assessment carried out under article 101 TFEU, and in fact, it did often take them into account in deciding whether to grant an exemption under Article 101(3). However, there is disagreement on whether industrial policy considerations, as well as other non-competition concerns, could be a sufficient condition for granting an exemption, in the absence of efficiency or other economic benefits[45].

An important series of decisions relate to restructuring agreements or "crisis cartels" occurred in several European countries in the 1980s, a period of economic recession when

[43] Namely, "speeding up the adjustment of industry to structural changes, encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings, encouraging an environment favourable to cooperation between undertakings, fostering better exploitation of the industrial potential of policies of innovation, research and technological development". With this respect, the Union has recently promoted several initiatives to promote investments in smart, innovative and sustainable industries, like "Horizon 2020" or the program for the Competitiveness of Enterprises and Small and Medium-sized Enterprises (COSME). For a brief description of the general principles of Eu Industrial Policy, see <https://www.europarl.europa.eu/factsheets/en/sheet/61/general-principles-of-eu-industrial-policy>, last accessed in August 2020.

[44] Michael Landesmann and Roman Stöllinger, "The European Union's Industrial Policy: what are the main challenges?" [2020] Policy Notes and Reports, 26.

[45] Monti, (n.4), 96, who argues that non-competition concerns should be used to exempt an agreement only when this does not conflict with the objectives of article 81, and therefore if it is inefficient it could not be exempted.

some industries were suffering from structural overcapacity[46]. This was the subject of the *ENI/Montedison* (1987) decision[47], where the Commission exempted an agreement among the two companies to reduce production capacity and share the markets in which they operated. Notwithstanding the substantial elimination of the competition that previously existed between the two companies, the Commission stated that the conditions for exemptions under Article 81(3) where fulfilled. It valued as objective benefits the reduction of excess capacity that characterized the chemical industry, and the positive impact on employment level. This approach was adopted in several other cases, to name some, *BPCL/ICI* and *Enichem/ICI* and[48] *Syntethic fibres*.

Similarly, in 1981 seventeen non-profit-making associations (*P&I Clubs*), providing certain types of marine insurance, entered into an agreement aimed at maintaining a system of mutual insurance, which had the effect of reducing the competition between the parties. The system, among other things, imposed limitations on each club's rights to establish the premiums both for vessels already insured with another club and for new or newly acquired vessels, thus limiting also the insured's freedom of choice. However, the Commission in assessing the agreement's compatibility with Article 101 of the Treaty stated that the conditions under paragraph 3 were fulfilled and the agreement could be exempted: the Commission took into account the possible harmful effects of a prohibition decision on the mutual insurance system as operated for over a century, since without the agreement, a large portion of members of the club could have decided to establish other clubs outside the Community. Thus, according to the Commission, putting at risk the functioning of the pooling arrangement would have been eventually detrimental for both shipowners and consumers[49].

[46] For a good summary of the Commission's approach towards crisis cartels See OECD Global Forum on Competition Law – Contribution from the European Union, [2011], DAF/COMP/GF/WD(2011)20.
[47] Commission decision of 4 December 1986 (IV/31.055 – *ENI/Montedison*), OJ [1987] L5/13.
[48] Commission decisions of 19 July 1984 (IV/30.863 – *BPCL/ICI*) OJ [1984] L212/1, Commission decision of 22 December 1987 (IV/31.846 – *Enichem/ICI*), OJ [1988] L50/18; Commission decision of 4 July 1984 (IV / 30.810 – *Synthetic fibres*), OJ [1984] L 207/17.
[49] Commission Decision *P & I CLUBS* (IV/30.373), O.J. 1985, L 376/2, para 56.

On other circumstances, although the Commission examined similar non-competition factors, like the agreement's impact on the economy or a specific industry, it did not consider them a sufficient justification for granting an exemption under paragraph 3. For instance, in *Grohe's distribution system* the parties argued that a selective distribution system should have been exempted in consideration of its importance for the survival of the traditional specialist plumbing trade[50]. However, the Commission, following the *Metro* Judgment's reasoning, stated that while the preservation of an existent specialist channel of distribution in the interests of consumers was a legitimate objective that could be pursued, "traditional form of distribution may not be secured by shielding it from other forms which are able to offer lower prices"[51], and therefore this objective could not justify a selective distribution system that prevented all the other distributors from competing.

Another objective that the Commission has occasionally considered in its decisions under Article 101 concerns the strengthening of the Community industry's competitiveness in global markets. For instance, in the *GEC–Siemens/Plessey*[52], the Commission assessed the validity of an agreement among GEC and Siemens aimed at acquiring Plessey's assets via a joint company and running that company jointly thereafter. In that circumstance, the Commission pointed out how the characteristics of the telecommunication sector, i.e., the continuing liberalization of national markets to foreign competition and the standardization of telecommunications equipment imposed to operators massive investments on research and development to compete effectively. As a result, the Commission exempted the agreement between the two companies maintaining that it would have allowed them to combine their research programmes, "thereby enabling them to maintain the level of leading-edge technology necessary to compete internationally"[53].

[50] Commission Decision *Grohe's distribution system* ((IV /30.299), O.J. 1985, L 19/17. See also *Ideal-Standard's distribution system* (IV/30.261), O.J. 1985, L 20/38.
[51] Ibid. para 26.
[52] Commission Decision *GEC–Siemens/Plessey* [1990] OJ C239/2; See also *Optical Fibres* [1986] OJ L236/30, *Olivetti/Canon* [1988] OJ L52/60, *PT-MCI* (IV/34.857), O.J. 1994, L 223/36, §§ 53–54. In *BBC Brown Boveri* (IV/32.368), O.J. 1988, L 301/68, para 23, the Commission considered as an objective benefit resulting from an agreement the reduction of dependence on oil imports from third countries
[53] Ibid. para 21.

All the cases mentioned date back to the 1980s and 90s, a very convoluted period from economic and social aspects. In the following years, this kind of decision became less frequent and, from what emerges by the few occasions in which restructuring agreements were discussed, the Commission's approach seemed changed as well. In 2001, six French federations agreed to set a minimum purchase price for certain categories of cattle and suspend imports of beef into France. After discovering new cases of mad cow disease, the beef sector was undergoing a serious crisis, with a sharp drop in beef consumption and import/export. The Commission in that event recognized the difficult situation but affirmed that the existence of a crisis in the market could not in itself justify anti-competitive agreements. In that circumstances, the parties did not seek an exemption under Article 101(3), but the Commission anyway stated that "even if this agreement had been notified, it most likely would not have qualified for exemption", because the agreement did not satisfy the first two conditions of paragraph 3, (…) it did not contribute to improving the production or distribution of goods or to promoting technical or economic progress, nor does it allow consumers a fair share of the resulting benefits"[54].

The possibility to consider the socio-economic context in which the concerned undertakings operate arises also with respect to the Commission's practice in setting fines. Whereas the risk that the payment of fines could cause a company's insolvency or financial distress should not generally be a Commission's matter of concern, in some specific circumstances, the firm's inability to pay can be taken into consideration in granting a fine reduction. The objective is in fact to prevent or mitigate the negative social and economic consequences resulting from a firm's exit from the market, including an increase in unemployment[55]. After 2006, and particularly in the context of the economic downturn

[54] Commission Decision 2003/600 *French Beef* [2003] OJ L209/12, para 130. See also Commission's observation to the High Court of Ireland of March 30, 2010, Beef Industry Development Society Ltd (BIDS).
[55] More specifically, point 35 of the 2006 Commission Guidelines, clarifies that only in specific social and economic context, and upon request, the Commission can take account of a firm's ability to pay and that "a reduction could be granted solely on the basis of objective evidence that imposition of the fine (..) would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value". See Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C-210/2, September 1, 2006.

following the financial crisis, several companies have benefited from a reduction of fines of this kind[56].

When implementing competition rules, European institutions have also allowed for another critical category of non-competition values, i.e., social concerns and the protection of an adequate level of employment. In addition to the text of article 3 TEU, a direct legal basis for the inclusion of such kind of interests is offered by the policy linking provided by Article 9 TFEU, which states that "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion (…)". On several occasions, the positive impact on social and employment conditions, although not the only beneficial factor of the agreement under scrutiny, played a crucial role in allowing an exemption. For instance in the case of restructuring agreements addressing overcapacity situations, which often encompassed also social or employment concerns. In the already mentioned *Synthetic fibres* case, the Commission exempted a restructuring agreement pointing out how that form of coordination would have made it easier "to cushion the social effects of the restructuring by making suitable arrangements for the retraining and redeployment of workers made redundant"[57], in addition to restore companies' competitiveness. Moreover, the Court of Justice endorsed such Commission's broad interpretation of the conditions set out by paragraph 3: in *Remia VB*, the Court stated that "the provision of employment comes within the framework of the objectives to which reference may be had pursuant to article 101(3) because it improves the general conditions of production, especially when market conditions are unfavorable"[58] .

An additional example emerges from the Commission's decision on the *Ford/Volkswagen* case, concerning an agreement between two motor vehicle manufacturers on the creation of a joint venture company for the development and production of a

[56] See for instance, Commission decision of 11 November 2009, *Heat Stabiliser* (Case COMP/38.589); Commission Decision of 23 June 2010, *Bathroom Fittings* (Case COMP/39092) and Commission decision of 20 July 2010, *Animal Feed Phosphates* (Case COMP/38866).
[57] *Synthetic fibres*, para 37.
[58] Case C-42/84 *Remia v Commission*, EU:C:1985:327, para 42

multi-purpose vehicle in Portugal. The agreement clearly fell under article 101(1)'s prohibition, since the two companies wanted to develop a new product that they would have been able to produce by themselves. Therefore, the new joint venture eliminated any incentives to compete among the two firms, also leading to a substantial exchange of information and technical know-how. However, the Commission affirmed that paragraph 3's conditions were fulfilled, in consideration of a multitude of factors. In addition to the environmental benefits, the Commission attributed great value to the nature of the investment, the largest single foreign investment in Portugal. An investment that would have brought more up to 10.000 jobs, reduced regional disparities and fostered market integration within the Community[59].

With respect to the extent to which non-competition concerns alone could motivate an exemption under 101(3), the Commission' position here was clear: the positive impact on employment or market integration would not have been enough to exempt the agreement if the other conditions of Article 101(3) were not fulfilled, but still, it was an element which the Commission believed as worth to consider. In this occasion, the General Court was more cautious in defining the scope for employment considerations under paragraph 3, by affirming that the Commission was correct in considering the impact on employment levels as part of its assessment "only supererogatorily", i.e. *ad abundantiam*, because this factor "would not be enough to make an exemption possible unless the conditions of Article 85(3) were fulfilled"[60].

Furthermore, the European Commission and Courts showed particular attention also to cultural values and diversity[61]. As in the case of the protection of employment level and

[59] Commission Decision *Ford/Volkswagen* (IV/33.814), O.J. 1993 L 20/14, para 36. A similar analysis was carried out in *Stichting Baksteen* (IV/34.456), O.J. 1994, L 131/15, para 27.
[60] See Case T-17/93 of 15 July 1994, *Matra Hachette SA v Commission of the European Communities*, para 139.
[61] See Parliamentary Answer by Commissioner Monti to Written Question E-1401/99, OJ 2000 C 27E/46, where Commissioner Monti stated: "Article 151(4) of the EC Treaty stipulate that the Commission is to take cultural aspects into account in its action under other provisions of the Treaty, with a view to ensuring respect and encouragement for the diversity of cultures within the European Community. When applying the competition rules laid down in the EC Treaty, the Commission therefore assesses in a constructive manner whether an agreement or practice pursues cultural aims and comprises cultural arrangements which are actually put into practice and could justify restrictions on competition proportional to the aims pursued". See also Evangelia

environmental protection, the Treaty uses a policy- linking clause to assign a distinguished prominence to cultural aspects: Article 167(4) TFEU expressly provides that "the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures". To this respect, in *Stim v. Commission* the ECJ confirmed that according to such provision (then article 151(4) EC) "in the application of Article 81 EC, the Commission is required to take into consideration the objective of respecting and promoting cultural diversity, in particular where the application of that article concerns an activity linked to culture"[62]. On that occasion, the Court did not disregard the parties' arguments, according to whom as the system censured by the Commission was promoting cultural diversity, implying that cultural interests can be considered when applying article 101(3) TFEU. However, it dismissed the claims on different grounds[63].

2.2. The other options for integrating public interests: the "ancillary restraints" doctrine and the Albany exemption

As mentioned before, although the discussion about the possible integration of public policy concerns within the implementation of Article 101 TFEU generally focuses on paragraph 3 of the same article, the European Commission and Courts have sometimes considered non-economic interests also in assessing whether the requirements provided by paragraph 1 were fulfilled, and in particular if a restriction of competition occurred. Article 101(1) TFEU, in fact, prohibits some specific conducts, i.e., agreements between undertakings, decisions by associations of undertakings and concerted practices, when they "may affect trade between Member States and which have as their *object* or *effect* the prevention, restriction or distortion of competition within the internal market". The structure

Psychogiopoulou, "EC Competition Law and Cultural Diversity: The Case of the Cinema, Music and Book Publishing Industries" [2005] 30(6) European Law Review, 838.

[62] Case T-451/08 *Stim v Commission* , para73. The Commission scrutinized the intersection with cultural values also in previous cases, see Commission Decision, IV/428 - *VBBB/VBVB*, [1982] 25.11.1981, OJ L 54, 25.2.1982, paras 36– 50, Commission Decision 89/44/EEC *Publishers' Association - Net Book Agreements* OJ L 22, 2. See also Case T-193/02, *Laurent Piau v. Commission*; Case C-171/05 P, *Laurent Piau v. Commission*, EU:C:2006:149.

[63] The Court found that one of the four cumulative conditions was not fulfilled, as the restriction of competition was "not indispensable for the maintenance of the national one-stop-shops, the collapse of which, according to the applicant, would harm cultural diversity", *Ibid.* paras 98-108.

of the provision is quite complex: to fall under the prohibition a market practice must meet both a subjective element by satisfying the conditions required to be considered an "undertaking" or an "association of undertakings" [64], and a structural one, attaining to the object pursued by the parties or the effects caused on competition.

It follows that, to verify this second requirement, it is crucial to understand what a restriction or distortion of competition is, to see theen if the conduct at stake has the object or the effects to produce such a result. The interpretation of this expression has been much debated. European courts have not always provided a single and consistent definition of what is a restriction of competition. And the analysis has been further complicated by the introduction of the Commission's more economic approach, which required a re-definition of many concepts, including the one we are discussing. To this respect, the Guidelines on the interpretation of Article 81(3) EC explicitly state that the balancing between pro-competitive and anticompetitive effects must carried out under Article 81(3)[65], suggesting that such analysis does not take place under paragraph 1[66].

In this context, with the aim of defining the scope of the prohibition, the ECJ has often acknowledged that not every restriction of economic or contractual freedom represents a restriction of competition under paragraph 1 of Article 101 TFEU. With a series of judgement, European Courts have developed what is often titled the "ancillary restraints doctrine". In other words, it emerges from the EU case law that when a restriction of undertakings' economic or commercial freedom is necessary and proportionate to achieving of a legitimate purpose, such restriction falls outside the scope of article 101(1) [67]. This

[64] According to settled case law, the notion of undertaking encompasses "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed", inter alia see Case C-41/90, *Klaus Höfner e Fritz Elser c. Macrotron GmbH*, ECLI:EU:C:1991:161, para 21.
[65] Guidelines on the interpretation of Article 81(3) EC, para 30.
[66] For an interesting opinion on this issues, as well as a summary of the main views on the matter, see Renato Nazzini, "Article 81 EC between time present and time past: A normative critique of "restriction of competition" in EU law", [2006] 43(2) Common Market Law Review, 497; and Assimakis Komninos, "Non-competition concerns: Resolution of Conflicts in the Integrated Article 81 EC" [2005] Working Paper (l) 08/05, 10–14.
[67] The ancillary restraint theory is well-known in the Common law tradition. For an application in the context of U.S. antitrust law see *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) and *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp*., 456 U.S. 556 (1982).

principle has been first developed in the context of non-compete clauses[68], selective distribution agreements[69], or restriction imposed by purchasing cooperatives to their members[70], where legitimate business purposes as the protection of know-how, product's quality or brand-image or the profitable conclusion of a transaction justified the imposition of restrictive clauses, because necessary and proportionate for the achievement those objectives.

With the landmark *Wouters*[71] case, and other decisions concerning some restrictions imposed by collective bodies' self-regulations, the ancillary doctrine was extended to cover more general public interests. In *Wouters* the Court examined a decision of the Bar Association of the Netherlands to prohibit all multi-disciplinary partnerships, including those between accountants and lawyers. After Mr. Wouters, a member of the Amsterdam Bar, brought an action claiming an infringement of Article 101, the Netherlands Council of State referred the case to the ECJ under then Article 234 EC. The Court first confirmed that a professional body constitutes an association of undertakings under paragraph 1 of Article 101(1) even when exercising regulatory powers mandated by the law and in the public interests. Then, the analysis moved to the effects of the restriction on competition, and the Court actually found an adverse impact. Multi-partnerships between members of the Bar and accountants could have provided higher quality services for clients, offering wider range of services at lower costs, thanks to the increased economies of scale[72]. At this point however, and in line with the previous case law on ancillary restraints, the Court held that "not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty"[73]. It was indeed necessary to take account of the context in which the decision was taken, as well as its objectives, to then consider "whether the consequential effects restrictive of competition are inherent in the

[68] Case 42/84, *Remia*, (n.44)
[69] Case 31/85, *ETA Fabriques d'Ebauches v. DK Investments SA* [1985] ECR 3933.
[70] Case T-61/89 *Dansk Pelsdyravlerforening v. Commission*, [1992] ECR II-193.1
[71] Case C-309/99, *JCJ Wouters, JW Savelbergh and Price Waterhouse Belasting-adviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577.
[72] Ibid. paras 87-89.
[73] Ibid. para 97.

pursuit of those objectives"[74]. To this respect, the Court considered the legal framework of the Netherlands, which demanded for specific guarantees from those exercising the legal profession, such as the duty to act in complete independence without conflict of interests and the duty to observe strict professional secrecy, which could not be ensured by multi-disciplinary firms. As a result, it concluded that the restriction did not infringe Article 85(1) because "necessary for the proper practice of the legal profession, as organized in the Member State concerned"[75].

Thus, *Wouters* represents a very important precedent in allowing the integration of public interests under paragraph 1 of article 101, as it expressly admitted that the protection of legitimate interests, when pursued through necessary and proportionate means can justify a restriction of economic freedom. A reasoning that some commentators considered similar to the one developed in the context of the public interest exception in free movement laws[76].

In the same line of cases we find the *Meca Medina* judgment[77], where the ECJ had to decide whether some anti-doping rules introduced by the International Swimming Federation (FINA) constituted a violation of article 101 TFEU. On such occasion, the Commission applied the *Wouters* test arguing that those provisions did not represent a restriction of competition because the prohibition of doping was inherent to protecting the organization and proper conduct of sport competition. The Court upheld the Commission's view stating that "in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport"[78], and that in the specific case the measure did not go beyond what necessary to meet such objective.

Another set of cases concerning the integration of public policy interests under paragraph 1 of Article 101 TFEU relates to collective agreements aimed at improving

[74] Ibid.
[75] Ibid para 110.
[76] See Nazzini, (n. 67) 499; See also Julio Baquero Cruz, *Between Competition and Free Movement, The Economic Constitutional Law of the European Community* (Oxford/Portland, 2002), 151-153.
[77] Case C-519/04 *Meca-Medina and Majcen v Commission* [2006] ECR I-06991.
[78] *Ibid.* para 47.

employees' working conditions. The so-called *Albany* or *Brentjens* exemption refers to the reasoning followed by European Courts to exclude the application of competition law, and in particular Article 101(1) TFEU, to collective agreements between associations representing employers and workers[79]. In assessing the compatibility with Article 101 of some decisions taken by collective bodies to set up supplementary pension funds compulsory for all workers, the ECJ took account also of the mandate provided by the Treaties to promote an high level of employment and social protection (Article 3(1)(j) EC) as well as a close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers (Article 118 EC) [80]. With this in mind it held that: "it is beyond question that certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labor were subject to Article 85(1) of the Treaty [now Article 101(1) of the Treaty on the Functioning of the European Union (TFEU)] when seeking jointly to adopt measures to improve conditions of work and employment"[81]. Then, the Court argued that "agreements concluded in the context of collective negotiations between management and labor in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty" [82].

The differences with the approach followed in *Wouters* are evident. As Monti observes[83], in *Albany* and *Brentjens'* the Court did not apply any proportionality test to see whether the measure was necessary a proportionate to achieve a legitimate aim, while, instead, it excluded the application of competition law in consideration of the greater importance given to social policies, whose achievement could not have been jeopardized by

[79] Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751, paras 52–60, Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV* [1999] ECR I-6025.
[80]These arguments have been further developed in Case C-413/13, *FNV Kunsten*, [2014] ECLI:EU:C:2014:2411, para 29 and Case C-180/98 e C-184/98, *Pavlov*, ECLI:EU:C:2000:428. For a comment on collective bargaining and antitrust in the context of sharing economy see Mariateresa Maggiolino, "La nozione antitrust di impresa ai tempi della sharing economy e la tutela dei lavoratori: per l'arretramento del diritto antitrust" [2019] 5 Riv. Soc., 1200.
[81] *Albany*, para59.
[82] Ibid. para 60.
[83] Monti, (n.4) 113.

the application of article 101 TFEU. An approach that could be followed whenever policy objectives superior to competition come into play.

3. The evaluation of environmental benefits in the practice of European Institutions

The analysis above portrays the evolution of the European Commission and Courts' practice concerning the integration of non-economic concerns within competition law enforcement[84]. It deliberately left aside the occasions in which such integration concerned environmentally related aspects, such as pollution abatement, the reduction of waste or the transition towards more sustainable energy sources. Therefore, the purpose of this paragraph is to describe the decisions of the European Commission on the application of article 101 to agreements producing environmental benefits. As it will emerge, all these cases occur in the context of Article 101 TFEU paragraph 3.

What is unique about the interplay between environmental concerns and the enforcement of competition law is that the development of the Commission's approach cannot be adequately assessed without considering two defining moments on the evolution of the normative framework in which it has operated. We have already and extensively seen one, which relates to the modernization process of competition rules as defined by the several Commission's notices published since the early 2000 and the shift towards a more economic approach. Within the same period, however, a more fundamental change of the law of the Union occurred. As we have seen in Chapter 1, the Treaties of Maastricht and Amsterdam reinforced the reference to sustainable development as an overarching objective of the Union's policies, as set out by article 3(3) TEU. More importantly, these Treaties strengthened the obligation of integrating environmental consideration in all the areas of EU law established by Article 11 TFEU (ex Article 6 EC)[85].

Therefore one would expect this to be a turning point in the practice of the European Commission, in consideration of this stronger obligation and renewed objectives. In other

[84] For a general view see Hans Vedder, 'Voluntary Agreements and Competition Law' [2000] Fondazione Eni Enrico Mattei, Nota di Lavoro 79.
[85] See Chapter 1, paras 1-3.

words, it would be reasonable to expect in the early years few cases in which the European Commission takes account of the agreements' impact on sustainability when implementing competition rules, and a progressive integration of these concerns from 1999 onward. However, an analysis of the Commission's decisions contradicts this narrative and shows an opposite, and even paradoxical scenario: on the one hand, the Commission's integration of environmental concerns within its competition analysis has begun even before the formal introduction of the new policy objective and the integration obligation; on the other instead, right after the now mentioned reform of the Treaties and the "institutionalization" of the integration principle, this broad approach was abandoned, and the Commission stopped to consider non-competition related considerations, including environmental ones, as part of its more economic interpretation of competition rules.

3.1. The early years (1970-1990)

Since its earliest decisions, the Commission had often mentioned environmental benefits as an additional factor to take into consideration when deciding whether to grant an individual exemption under Article 101 TFEU paragraph 3[86]. The first case in which an environmental improvement was considered evidence of the promotion of technical and economic progress, as required by the first condition of paragraph 3 of Article 101 is *Carbon Gas*[87], decided by the European Commission in 1983. The Commission found that the joint venture under scrutiny favored the transition towards alternative sources of energy, which were more efficient and less harmful for the environment, and reduced the dependence on oil supplies[88]. The Commission mentioned several EU official documents expressing this policy objective and affirmed that even if the parties of the agreement were able on their own to achieve the object of the cooperation, "the coordinated use within the joint subsidiary of the entrepreneurial skills available will simplify and accelerate the transition of the desired coal

[86] See for instance, Decision 75/73 *BMW*, [1974] OJ L29/1, *ACEC/Berliet*, OJ 1968 L 201/7; *United Reprocessors,* OJ 1976 L 51/7. See also Giorgio Monti, "Four Options for a Greener Competition Law," [2020] 11(3-4) Journal of European Competition Law & Practice, 124.
[87] Commission Decision 83/669 *Carbon Gas Technologies*, [1983] OJ L376/17.
[88]Ibid, paras 19-20.

gasification technology in question from the planning and research stage to that of large-scale industrial application"[89].

In *BBC Brown Boveri*, instead, the environmental benefits of the agreement emerged during the assessment of the second condition of paragraph 3**[90]**. The Court found that the development of a new sodium-sulphur battery, object of the cooperation agreement, had already received massive public investment by public authorities, in consideration of the its better performance and its crucial importance for the propulsion of electrically driven vehicles. In the Commission's view the overall benefits resulting from the use of electrically driven vehicles were evident: "an electrically driven vehicle causes no damage to the environment through harmful, exhaust emissions or loud engine noise" [91]. Then it found that consumers received a fair share of the benefits, given that the cooperation agreement favored "an improvement of the quality of life of consumers through the development of batteries for vehicles"[92]. Similarly, in *KSB***[93]**, the Commission provided a broad interpretation of what represents "a fair share of benefits to consumers", affirming that in that case, the advantages arising from the cooperation benefited consumers through the improvement in the quality of the product, including its environmental performance: "two aspects of the new pumps, i.e. energy conservation and the fact that the fluids handled by the pump are not polluted, are environmentally beneficial. This effect is reinforced by the higher performance capacity of the pumps. This constitutes an improvement in operating characteristics"[94].

Further confirmation of the Commission's intention not to disregard the environmental benefits emerges from later decisions. In *ANSAC*[95], although the Commission refused to grant an exemption, it took account of the parties' arguments on the environmental benefits resulting from the use of natural, rather than synthetic soda-ash. However, it contested the casual link between the restrictive practice and the achievement of such

[89]Ibid.
[90] Commission Decision 88/541 *BBC Brown Boveri*, [1988] OJ L301/68.
[91]Ibid, para 23.
[92]Ibid.
[93] Commission Decision 91/38 *KSB/Goulds/Lowara/ITT,* [1991] OJ L19/25.
[94] Ibid. para 27.
[95] Commission Decision 91/301/*EEC ANSAC [*1991] OJ L 152/54.

environmental improvement[96]. Yet, in the already mentioned decision on the *Ford/Volkswagen* joint venture for the development of a multi-purpose vehicle[97], the Commission noted that the new product would have also been "considerably improved with respect to environmental requirements, for example, potentially hazardous materials (e.g. CFCs, PVC) in the final product will be either drastically reduced or totally eliminated. Furthermore, the extent of recyclability will be significantly increased and the MPV is also envisaged to lead the segment with regard to low emissions and fuel consumption"[98].

The reduction in the use of raw materials and plastic waste was considered a significant benefit for consumers in *Exxon/Shell*[99]. The Commission found that these benefits, as well as the avoidance of environmental risks involved in the transport of ethylene, would have been perceived as beneficial "by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern"[100]. Accordingly, in *Philips/Osram*[101], the Commission granted an individual exemption to a JV agreement considering that all the conditions under paragraph 3 of Article 101 were met, as the consumers received a sufficient share of benefits given that "the use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities"[102].

3.2. A further advancement: the *CECED* decision and the Guidelines on horizontal cooperation agreements

During the following years, the Commission confirmed its approach and engaged in more sophisticated cost-benefit analysis to encompass and balance environmental improvements with other economic factors. In 1998, the Commission granted a comfort letter the European Association of Consumer Electronics Manufacturers **(**EACEM) members**,** who

[96]Ibid. para 23.
[97] Commission Decision 93/49 *Ford/Volkswagen*, [1993] OJ L20/14, paras 25-26. Mentioned also in in Commission Decision 92/96 *Assurpol*, [1992] OJ L37/16 para 38.
[98] Ford/Volkswagen, Ibid. para 26.
[99] Commission Decision 94/322 Exxon/Shell, [1994] OJ L144/20.
[100] Ibid. paras 67-68.
[101] Commission Decision 94/986 *Philips/Osram*, [1994] OJ L378/37. Another decision in which environmental considerations were considered was Commission Decision *ZVEI/Arge Bat*, OJ 1998 C 172/13.
[102] Ibid. *Philips/Osram* para 27.

engaged in a voluntary commitment to reduce the electricity consumption of televisions and video recorders in standby mode[103]. The industry was aware that the design of TVs and VRCs could have been improved to reduce the power used in standby mode, but no individual firm was willing to make such an investment by itself. The Commission, in assessing the compatibility of this agreement with competition rules, asked the Commission's DG XVII (Energy) for a Report on the quantification of this power use and the cost savings resulting from a reduction of standby power[104]. Based on these results, the Commission concluded that "the energy saving and environmental benefits of the scheme clearly represented technical and economic progress and, by their nature, would be passed on to consumers"[105], and that also the other two conditions of article 81(3) were met.

In 1999, the Commission delivered its most notorious decision on the application of Article 101 to a practice aimed at achieving environmental improvements. It concerned an agreement signed by the members of an association of manufacturers of domestic appliances and national trade associations (CECED), whose objective was to improve the energy efficiency of washing machines sold in the Community[106]. Many commentators have welcomed this decision as a perfect example of the integration of environmental considerations into article 81(3)[107], both within the definition of economic and technical progress and the identification of what kind of benefits for consumers can be considered in verifying whether the restrictive effects are properly compensated. Moreover, this is the first (and only) case in which the Commission evaluated the reduction of energy use and thus pollution abatement by carrying out a sophisticated cost-benefit analysis based on

[103] EACEM, European Commission, XXVIII Report on Competition Policy (Luxembourg, Office of Official Publications of the European Communities, 1999), 152.
[104] The report showed found that, "simply by reducing average standby power use to 6W, total power use could be reduced by 3.2 TWh18 a year by 2005 and by 4.9 TWh a year by 2010. The maximum cost per unit of reducing the standby power use of a television or video recorder was estimated at ECU 3".
[105] Ibid. EACEM, 152.
[106] Commission Decision IV.F.1/36.718 *CECED,* [2000] OJ L187/47.
[107] See Suzanne Kingston, *Greening EU Competition Law and Policy*, (Cambridge University Press, 2011), 97; Francis Jacobs, "EEC Competition Law and the Protection of the Environment", [1993] Legal Issues of Economic Integration 37; Casey D., "Disintegration: Environmental Protection and Article 81 EC" [2009] 15 European Law Journal, 362.

environmental economics' concepts to balance the overall effects resulting from the agreement[108].

The agreement concerned the market for private washing machines, which, according to a Community Directive, were classified and labeled according to their energy efficiency into seven categories from A to G ("energy categories"). The objects of such agreement were to i) cease producing and/or importing into the Community machines belonging to the least efficient categories, ii) to reach an improved level of energy efficiency for all the machines produced, and iii) to improve the availability of information on the environmentally-conscious use of washing machines.

The Commission offered a long introduction on the relevance of electricity consumption for the operation of washing machines, especially in terms of operating costs during their lifetime, and therefore for consumers' choices. Moreover, it noted that on an aggregate level, the electricity consumption due to the operation of washing machines accounted for 2% of total electricity consumption in the Community. Despite the improvements, there were indeed several obstacles to the development and distribution of more efficient machines. First, such improvements required higher production and purchase costs, whose distribution was also uneven within the Community, because it depended on the composition of production and sales in each Member State. With these premises, the Commission assessed the agreement under Article 101, focusing on the first two elements of it (points i) and ii)). It found a restriction of competition in terms of reduced technical diversity and consumer choice, given that some categories of machines would not have been available as well as higher prices in the short terms [109]. Additionally, the agreement would have reduced electricity demand. The Commission then proceeded with the application of article 101(3) to see whether the conditions for granting an individual exemption were fulfilled. And here, the analysis was basically grounded on the impact on energy consumption of washing machines, which, as result of the agreement, would have registered a reduction by at least of 15 to 20%. Thus, the Commission conceived the concept of technical progress

[108] Ibid. 372.
[109] Ibid. para 34

in terms of better energy consumption and pollution abatement, finding that machines that "consume less electricity are objectively more technically efficient" and that "[R]educed electricity consumption indirectly leads to reduced pollution from electricity generation"[110], which were quantified in 3,5 million tons of carbon dioxide, 17 000 tons of sulphur dioxide and 6 000 tons of nitrous oxide.

This very interesting attempt to integrate environmental considerations within the interpretation of the first condition of paragraph 3, and therefore the notion of economic and technical progress, was followed by an even more remarkable assessment of the second condition. Here the Commission distinguished between individual economic benefits and collective environmental benefits resulting from the agreement: at the economic and individual level, it found that thanks to the savings on electricity bills, the agreement provided a fair return within reasonable pay-back periods for higher short-term prices derived from the more stringent standard set out by CECED. The second part of the reasoning instead concerned the quantification of the economic cost of pollution and the collective environmental benefits resulting from the agreement. In fact, the Commission affirmed that a cost/benefit analysis including such type of costs could lead to a judgment of compatibility with competition rules. With an innovative use of environmental economics, it estimated in Euros the saving in marginal damage from the avoided pollution (external costs) and compared these benefits to society with the increased purchase costs of the more efficient washing machines. It found the former to be more than seven times greater than the latter. Therefore, the EU Commission held that "such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines"[111].

The reasoning followed by the Commission in the CECED decision appears particularly notable and explains why, after almost 20 years, it still represents the leading

[110] Ibid. para 48

[111] Ibid para 56. The Commission also considered the existence of less restrictive means to achieve this objective as eco-labelling, but it concluded that "the agreement and the eco label are complementary and reinforce each other. The parties to the agreement will always have the possibility, in addition to the agreement, of applying for the award of an eco-label, as a supplementary way of enhancing the environmental benefits achieved by their washing machines".

case on this matter. First of all, the Commission emphasized the importance of environmental improvements when assessing the beneficial effects of a conduct, and moreover it showed that an integration of different policy objectives is actually possible without disregarding legal certainty and predictability, as well as the use of economic tools. It also demonstrated that a broader interpretation of the beneficiaries is not only possible but, in certain circumstances, necessary. However, this decision left open some issues, such as whether indirect environmental benefits must be considered only in addition to direct economic benefits, and to what extent efficiencies outside the relevant market may be part of the analysis.

Soon after, in line with this approach, the Commission cleared, in consultation with the Directorate-General Transport and Energy of the Commission, an agreement between the principal European manufacturers of low voltage motors (CEMEP) aimed at reducing their sales of motors with a low energy efficiency by at least 50% by the end of 2003 to cut emissions toxic for the environment[112]. The Commission found that this agreement did not create any concerns under Article 101 considering that it did not impose precise individual obligations, thus leaving considerable discretion to each participant in deciding how to contribute to the common objective. Moreover, the attribution of the monitoring activity to a third actor reduced the risk of information exchange between the parties.

The Commission had the occasion to further expand this reasoning in a case concerning a German waste management system for the collection and recycling of packaging[113]. This system was operated by DSD on the basis of a number of agreements with collecting companies ("Service Agreement") and in the execution of a national Packaging Ordinance and a Community directive, whose objectives were to prevent or reduce "the impact of waste packaging on the environment, thus providing a high level of environmental

[112] Commission Press Release IP/00/58 of 23 May 2000.
[113] See Commission decision Cases COMP/34493 DSD; COMP/37366, *Hofmann and DSD*; COMP/37299, *Edelhoff and DSD*; COMP/37291, *Rethmann and DSD*; COMP/37288, *ARGE and five others and DSD*; COMP/37287, *AWG and five others and DSD*; COMP/37526, *Feldhaus and DSD*; COMP/37254, *Nehlsen and DSD*; COMP/37252, *Schönmackers and DSD*; COMP/37250, *Altvater and DSD*; COMP/37246, *DASS and DSD*; COMP/37245*, Scheele and DSD*; COMP/37244, *SAK and DSD*; COMP/37243, *Fischer and DSD*; COMP/37242, *Trienekens and DSD;* COMP/37267, *Interseroh and DSD.*

protection"[114]. As part of this agreement, DSD committed for the entire lifetime of the agreement to purchase collection and sorting services exclusively from the appointed collector in a designated area. This exclusivity clause was found by the Commission to be a restriction of competition under Article 101(1) in the market of collection and sorting of household packaging waste. In fact, during the lifetime of the agreement, no other collector could have concluded an agreement with DSD, thus being deprived of the possibility of doing business with the leading purchaser. Therefore, the Commission assessed the agreement, and the exclusivity clause in particular, under paragraph 3 of Article 101, finding that the conditions thereby established were met. The reasoning followed by the Commission this time was more traditional compared to the one used in CECED, a circumstance that can be explained by the peculiarity of the conduct under scrutiny and waste management systems in general. First of all, the Commission acknowledged the importance of the collecting system to give direct practical effect to environmental objectives, but then focused on the efficiency gains resulting from the exclusivity clause which allowed the parties "to plan the provision of services on a long-term basis and to organize it reliably"[115], given that that the necessary investment needs a reasonable period of time to be recouped. The Commission also found positive network effects and substantial scale and scope advantages and concluded that the agreement contributed to improving the production of goods and to promoting technical or economic progress[116].

Also with respect to the second condition of paragraph 3, the Commission abandoned, or at least did not used, the distinction between individual economic benefits and collective environmental ones and focused on the direct and indirect benefits passed on to consumers: lower prices as consequence of the cost savings made over the lifetime of the agreement on the one hand, and the benefits resulting from the improvement in environmental quality and the reduction in the volume of packaging on the other. Therefore, the DSD decision, although not covering environmental agreements *stricto sensu*, but a specific provision of a complex system designed to achieve environmental policy's objectives, showed more prudence with

[114] Ibid. 143.
[115] Ibid. 145.
[116] Ibid. 146.

respect to the weight that can be assigned to collective benefits in addition to those received by the narrowest group of consumers[117].

As it emerges from the above decisions, since the 1980s the EU Commission has often decided cases in which environmental issues had some relevance, and this occurred more frequently in the context of joint venture and cooperation agreements. It's not surprising therefore that the Commission's Notice providing Guidance on the application of Article 81 of the EC Treaty to Horizontal Cooperation agreements, published in 2001[118] enclosed a specific section on environmental agreements (section 7). The aim of these Guidelines was to set out the principles for the assessment of horizontal cooperation agreements under Article 81 of the Treaty, and to complement the R & D block exemption[119] and the Specialization block exemption Regulation[120].

Thus, with respect to environmental agreements, the Commission explicitly recognize their importance as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the Treaty as well as in Community environmental action plans[121]. However, it provides a specific definition of environmental agreements, to cover only those expressly aimed at pursuing as their main objective environmental improvements, and more precisely: "[T]hose by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set out in Article 174 of the Treaty. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations. This excludes agreements that trigger pollution abatement as a by-product of other measures. Environmental agreements may set out standards on the environmental performance of products (inputs or outputs) or production processes. Other possible categories may include agreements at the same level of trade, whereby the parties provide for the common attainment

[117] Similar conclusions were reached in Cases COMP D3/35470 — ARA and COMP D3/35473 — *ARGEV, ARO,* although the references to environmental benefits are less evident.
[118] Commission Notice Guidelines on the application of Article 81 of the EC Treaty to Horizontal Cooperation agreements, [2001] OJ C3/2.
[119] Commission Regulation (EEC) No 417/85(1).
[120] Commission Regulation (EEC) No 418/85(3).
[121] Guidelines on Horizontal Cooperation agreements [2001], para 53.

of an environmental target such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency"[122].

The Guidelines then provided some clarity on the circumstances in which these agreements certainly fall under Article 101(1), like for instance if they are used to cover otherwise prohibited cartels. With respect to agreements unlikely to fall under the prohibition, the Commission refers to those where "no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target"[123]. The most significant section, however, is the one in which the Commission explains the type of assessment it would carry out in applying the conditions for exemptions under paragraph 3. An assessment that seems to follow the innovative approached developed in CECED. Indeed, the Guidelines provide that:

> "Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs (55). Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions"[124].

Thus, two years after the CECED decision, the Commission seemed to confirm the approach followed in that circumstance. It recognized the need for considering environmental

[122] Ibid. paras 79-180.
[123] Ibid. paras 185-188.
[124] Ibid. paras 193-194.

objectives in the context of competition rules' enforcement. It affirmed the necessity to assess agreements aimed at achieving such results by carrying out a cost-benefit analysis encompassing not only individual economic benefits but also, where necessary, aggregate environmental benefits.

3.3. An inevitable twist

We already anticipated the peculiar development of the Commission's approach to environmental agreements, and more in general, on the integration of aggregate non-economic considerations. Whereas until 2001 the Commission had progressively increased its attention to the environmental impact of the practices under scrutiny, to eventually adopt the integration mechanism developed in CECED, after just two years from this decision it engaged in a surprising twist.

Although the issue of environmental agreements was not explicitly discussed, the new economic approach to the interpretation of Article 101, as expressed by the White Paper on Modernization of competition rules[125] and the following Guidelines on the application of Article 101(3), left little room for the inclusion of non-economic concerns within the interpretation of competition rules. As we already discussed, the new enforcement mechanism based on the direct application of article 101(3) by NCAs, the abolition of the notification system, as well as the narrower interpretation of crucial notions such as those of "technical or economic progress" and "consumers' benefits", substantially limited the opportunities for applying article 101(3) in a holistic manner. Further confirmation of this new trend emerges from the updated version of the Commission's Guidelines on horizontal cooperation agreements released in 2011[126]. Here, any references to environmental agreements, including the specific section present in the previous version, were omitted. The explanation given by the Commission for such a choice was that environmental agreements did not need a specific treatment because they could fall under the other categories of

[125] European Commission, White Paper on Modernization of Competition rules implementing Article 85 and 86 of the EC Treaty, No 99/027, Brussels 1999.
[126] See, Guidelines on Horizontal Co-operation Agreements (n.118).

agreements disciplined by the guidelines, i.e. standardization, R&D, production and commercialization agreements [127].

However, a crucial passage of the new guidelines, which provides an example of a standard environmental setting agreement and its proposed analysis, testifies a substantial change in the Commission's view about environmental agreements. Although the 2001 Guidelines offered an almost identical example, the legal assessment suggested in the 2011 Guidelines substantially differs from the previous version.

2001 Guidelines	2011 Guidelines
(…) newer products are more technically advanced and by reducing the environmental problem indirectly aimed at (emissions from electricity generation), they will not inevitably create or increase another environmental problem (e.g. water consumption, detergent use). The net contribution to the improvement of the environmental situation overall outweighs increased costs. Furthermore, individual purchasers of more expensive products will also rapidly recoup the cost increase as the more environ- mentally friendly products have lower running costs. (…)[128]	(…) newer, more environmentally friendly products are more technically advanced, offering qualitative efficiencies in the form of more washing machine programmes which can be used by consumers. Furthermore, there are cost efficiencies for the purchasers of the washing machines resulting from lower running costs in the form of reduced consumption of water, electricity and soap. Those cost efficiencies are realized on markets which are different from the relevant market of the agreement. Nevertheless, those efficiencies may be taken into account as the markets on which the restrictive effects on competition and the efficiency gains arise are related and the group of consumers affected by the restriction

[127]Ibid., footnote 1. See also the Commission Press Release (Press Release 10/676) following the introduction of the Guidelines, where it stated that "the removal of the chapter does not imply any downgrading for the assessment of environmental agreements. On the contrary, instead of having a chapter addressing a narrow aspect of environmental standards, the Commission now makes it clear that environmental agreements are to be assessed under the relevant chapter of the Horizontal Guidelines, be it R&D, production, commercialisation or standardisation. Moreover, appropriate examples have been inserted in the R&D and production chapters".
[128] Ibid. para 198.

	and the efficiency gains is substantially the same. The efficiency gains outweigh the restrictive effects on competition in the form of increased costs. (…)[129]

First, they provide two different explanations of why newer and more environmentally friendly products represent a technical advance: the 2001 Guidelines state that this improvement results from the reduction of the environmental problem (emissions from electricity generation), whereas the updated version reframes the concept of technical progress focusing on qualitative and cost efficiencies, affirming that such new products offer qualitative efficiencies in the form of more diversity and cost efficiencies for consumers resulting from lower running costs. Secondly, the 2011 Guidelines do not make any reference to the "contribution to the improvement of the environmental situation overall", but state that only the efficiency gains that occur in the same relevant market in which the restrictive effects arise can be considered. The adaption of the new analysis to the principles and methods introduced with the Guidelines on the Application of Article 101(3) are thus evident.

Therefore, despite the Commission's reassurance about any downgrading in the assessment of environmental agreements as a consequence of the modernization process, it seems that as a result of the Commission's new approach, companies might have little chance to succeed under Article 101 analysis unless they can translate environmental improvements into qualitative and cost efficiencies (having a monetary value), such as product diversity and lower running costs, for the narrow group of consumers affected by the restrictive effects. To this respect, some argued that such new approach is in open contrast with the integration obligation of article 11 TFEU representing an obstacle to the effective achievement of the Union's objectives[130].

[129] Ibid. para 329.
[130] See Rein Wesseling, *The Modernisation of EC Antitrust Law* (Oxford, Hart Publishing, 2000), 105.

4. The NCAs' experience and the Dutch "new wave"

We already anticipated that, as a result of the new multi-level governance introduced by Reg. 3/2001, the Commission has lost its exclusive competence, and that NCAs and national courts have become the primary enforcers of the Treaties' competition provisions, including article 101(3) TFEU[131]. As a consequence, however, although the Treaties provide national authorities with broad discretion when interpreting competition rules, most of the time NCAs follow the Commission's approach[132].

With this respect, an interesting empirical analysis on the enforcement of article 101(3) by NCAs and European Courts after the modernization suggests that, despite the harmonization attempt at the basis of the soft-law instruments that preceded the introduction of a decentralized system, Article 101(3) has been subject to different interpretations by NCAs[133]. While most of them have followed the Commission's narrow approach[134], as the German BundesKartellamt, by restricting the nature of benefits and beneficiaries to be considered under Article 101(3), other authorities like the Dutch and the French have developed a more progressive view[135]. For instance, with respect to cultural objectives, the French ADLC held that the promotion of a wide distribution of cinematographic works "in accordance with the general interest could be examined under the heading of economic progress, the cultural objectives being admitted under this heading[136].

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[131] James S. Venit, "Brave new world: The modernization and decentralization of enforcement under articles 81 and 82 of the EC Treaty" [2003] 40(3) Common Market Law Review, 545.
[132] Wolf Sauter, *National Courts, the Commission, and the CJEU." In Coherence in EU Competition Law*, (Oxford: Oxford University Press, 2016), 174.
[133] Brook, (n.5). For a critical assessment of the Commission' "soft" approach see Oana Stefan, "European Competition Soft Law in European Courts: A Matter of Hard Principles?" [2008] 14(6) European Law Journal, 753.
[134] See Saskia A. C. M. Lavrijssen, "The protection of non-competition interests: What role for competition authorities after Lisbon" [2010] (5) European Law Review, 634.
[135] Brook, (n.5), 145. See also the decision of the French ADLC, *Supply of orthotics* (07-D-05), paras 64–65, where the authority, in deciding whether to allow an individual exemption to a pricing recommendation system established by a trade association, took into consideration not only the benefits for direct consumers but also the social security system.
[136] See for instance Avis n° 09-A-50, 8 October 2009, para 94, available at https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//09a50.pdf.

Anyway, the new procedural rules were indeed designed to limit NCAs' discretion and avoid the risk of fragmentation. With respect to the implementation of article 101(3), in fact, Article 5 of Reg. 1/2003 establishes that national authorities are not entitled to take final binding decisions of exemptions, because even if an NCA decides not to proceed based on the fulfillment of the conditions set out by paragraph 3, the Commission can still reach a different conclusion. Therefore, although today most of the cases under article 101 and 102 are scrutinized at the national level, the Commission retains the exclusive competence to take binding decisions about a practice's compatibility with European competition rules.

Yet, NCAs had often the occasion to assess agreements falling under Article 101 having environmental implications. Still, most of these cases concerned recycling and waste management systems provided by the EU law and implemented at the national level and their compatibility with competition rules[137]. These proceedings arise from a conflict between competition rules and environmental policy but of a different nature, i.e., the competition concerns that may arise from environmental regulation[138].

In addition to this line of cases, special attention must be reserved to the Dutch Competition Authority (ACM) practice, which has developed a unique expertise in dealing with environmental agreements, as well as innovative methods of reconciliation between competition and environmental values. As we will see in the next pages, the ACM's activism on the matter has favored a new dialogue among the NCAs, the EU Commission and the relevant stakeholders on the possible reforms of competition rules' interpretation as to allow a more effective integration of environmental concerns. The ACM is not the sole competition authority that has pointed out the necessity to further inquire the relationship between competition and environmental objectives. In 2010, the Nordic Competition Authorities worked on a Joint Report on this issue, to share their experience and approaches and establish

[137] OECD Report on Horizontal Agreements in the Environmental Context [2011].
[138] A detailed description of the Italian context is provided by Michele Grillo, Gustavo Olivieri, Stefano Colombo and Silvia Scalzini, "La gestione dei rifiuti di imballaggio in Italia. Profili e criticità concorrenziali", [2018] Luiss Law Review, 1.

a common background for addressing future challenges[139]. Other recent initiative have been sponsored by the Hellenic Competition Commission (HCC) and the German Bundeskartellamt Staff, which published their discussion papers to discuss the intersection and potential conflicts between sustainable development and competition law[140].

4.1. The Dutch ACM approach *avant-garde*

At the national level, the Netherlands Authority for Consumers and Markets (ACM) has been the most active authority on sustainable initiatives. The Dutch Authority not only decided several cases concerning environmental agreements by developing innovative legal reasonings but in 2014 released its own "Vision Document on Competition and Sustainability"[141] to provide clarity about the test to apply to sustainability initiatives. In the Netherlands, sustainability issues are at the centre of the public discourse also as a result of the *Urgenda* Judgment, through which the Dutch Supreme Court "the strongest climate ruling yet"[142], stating that the Dutch Government has a legal obligation to protect the environment and reduce GHG emissions by at least 25% compared to 1990[143].

Therefore, it is not a surprise that today, as these matters are gaining momentum, the ACM is playing a crucial role in the discussion going on at the European level. In fact, in 2021, it published an updated version of the Guidelines, which influenced both other NCAs

[139] See Nordic Competition Authorities, "Competition Policy and Green Growth, a joint report" [2010], available at https://en.samkeppni.is/media/skyrslur-2010/competition_policy_and_green_growth_final_version.pdf.

[140] HCC, "Staff Discussion Paper on Sustainability Issues and Competition Law" [2020] available at https://www.epant.gr/en/enimerosi/competition-law-sustainability.html. The ACM and HCC also launched a joint initiative on January 2021; see Technical Report on Sustainability and Competition, https://www.epant.gr/en/enimerosi/publications/sustainability/item/1284-technical-report-on-sustainability-and-competition.html. Also the Bundeskartellamt issued a Discussion paper, Offene Märkte und nachhaltiges Wirtschaften—Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis, disponibile su https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf?__blob=publicationFile&v=2, 28 October 2020. Other Member States expressed their (sometimes more skeptical) views on this issues by responding to the public consultation launched by the DG Comp (n. 1) and the OECD Conference (see infra).

[141] ACM, Visiedocument Mededinging & Duurzaamheid, [2014] available at https://www.acm.nl/sites/default/files/old_publication/publicaties/12930_visiedocument-mededinging-en-duurzaamheid-2014-05-09.pdf

[142] Jaap Spier "The "Strongest" Climate Ruling Yet': The Dutch Supreme Court's Urgenda Judgment", [2020] 67 Neth Int Law Rev, 319–391

[143] Supreme Court of the Netherlands, 20 December 2019, ECLI:NL:HR:2019:2006.

(see the Hellenic Authority's Staff Discussion Paper) and the European Commission. The ACM has gained its expertise on sustainability initiatives thanks to a number of cases decided since 2010. More precisely, two are the most relevant (and debated) decisions through which the ACM has developed its original approach for evaluating environmental agreements under competition rules: the "Chicken of Tomorrow" case[144] and the "Energy Deal", both decided under the cartel prohibition set out by Section 6, paragraph 1 of the Dutch Competition Act and Article 101 TFEU[145].

The former is probably the most notorious one**,** given the peculiarity of the factual background and the resonance it received in the public opinion. In fact, the expression "chicken of tomorrow" refers to an industry-wide standard agreed in 2013 by some organizations in the poultry industry, the broiler meat processing industry and the supermarket industry, aimed at replacing from 2020 the chicken meat with a new one meeting more sustainable features. Among other things, this new standard provided slower-growing chicken breed, fewer antibiotics, fewer chickens per square meter in chicken barns, where a natural circadian rhythm is ensured, stricter enforcement of compliance with legal animal welfare standard and a reduction of CO2 emissions. In other words, this new *Chicken of Tomorrow* standard set the minimum requirements that chickens sold by supermarkets had to meet, going further than what was required by statutory laws for commercial poultry farming in the Netherlands. As a consequence of this agreement, "regular" chickens would have been replaced with new, more sustainable and more expensive ones.

The ACM started an investigation against this agreement and, with a decision announced on 26 January 2015[146], found that it constituted an unlawful restriction of competition in the retail market for chicken meat. The Authority affirmed that as a result of the agreement, consumers would not have been able to buy regular chickens in supermarkets – where the highest share of chickens is sold in the Netherlands - so their freedom of choice

[144] ACM Case number: 13.0195.66
[145] See also *Pig castration anaesthesia* (2008), NMa Case 6456 (2008
[146] The ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow' is available at <https://www.acm.nl/sites/default/files/old_publication/publicaties/13789_analysis-chicken-of-tomorrow-acm-2015-01-26.pdf.pdf> last accessed in October 2020.

was restricted. Moreover, it pointed out as the new standard could represent also a restriction of importable goods. At this point, the Authority evaluated the parties' arguments concerning the several improvements and benefits brought by the agreement, namely the increase in animal welfare, positive effects on the environment and public health. The Authority was then very clear in explaining the kind of analysis it intended to carry out to assess and measure environmental benefits. In other words, it stated that "the environment and public health benefit consumers if consumers attach actual value to them. So, this is about the value that consumers attach to the effects, for which no 'market price' necessarily exists"[147]. As a result, to weigh the value that consumers assign to improvements on animal welfare and for the environment, it conducted a "willingness-to-pay" test in the form of an online survey in which over 1600 consumers took part to define how much consumers were willing to pay for such improvements. This quantitative study revealed that consumers would have been willing to pay 82 eurocent per kilo of chicken filet more in exchange of the promised improvements on animal welfare, the environment and public health. However, the authority found that the costs passed on consumers by the agreement's parties could be estimated in EUR 1.46 euro per kilo of chicken filet, thus exceeding the claimed benefits by 64 eurocents. Therefore, tt concluded that consumers' willingness to pay was not enough to justify the increased costs, which outweighed the benefits and, as a result, no economic and technical progress was achieved.

The Authority then followed the same reasoning to exclude the fulfillment of the other exemption conditions, restating that consumers did not receive a sufficient share of the benefits and the sustainability initiative was neither necessary nor proportional to achieve the aimed result. The ACM, in fact, suggested that a regulatory intervention could have been more effective and denied the existence of a "first-mover disadvantage" that could prevent the transition towards more sustainable practices. And lastly, it pointed out that supermarkets covered almost the 95% of the retail market for chicken meat and therefore, the remaining alternative sales channels for regular chickens were limited. Therefore, the ACM's approach in the Chicken of Tomorrow case is unique, if compared with the decisions we already discussed. The Authority did not disregard the parties' arguments on the several positive

[147]Ibid., 5.

effects of the agreement. Still, it affirmed that such effects could assume relevance from a competition law perspective only if translated into economic terms, meaning monetary values that consumers attach to them.

If we compare this decision with the CECED case, the differences in the legal analysis carried out by the two authorities are evident. Although they both concerned with a qualitative supply reduction aimed at improving environmental/animal welfare conditions and adopted a cost-benefit analysis based on quantitative data, the ACM did not follow the Commission's distinction between direct economic benefits and collective environmental benefits, thus suggesting that only consumers belonging to the relevant market can be the beneficiaries of the agreement and that such benefits must necessarily have a monetary value. The ACM's decision was criticized for several reasons, mainly for the very narrow interpretation of Article 101 TFEU and how it used environmental economics[148]. The ACM's analysis indeed failed to consider that the willingness to pay cannot be considered an infallible proxy of consumers' preference in a context of market failures and behavioral bias that might influence both the demand and supply-side[149].

The same year of the Chicken of Tomorrow decision, the ACM prohibited another agreement sponsored by the Dutch Government, i.e. the Dutch Energy Deal (*SER Energieakkoord*), signed by several energy companies and other stakeholders, including regional and local government, unions and other social organizations. The Energy Accord, aimed at making the energy supply in the Netherlands more sustainable by closing down five coal power plants built in the 1980s, which were considered obsolete and inefficient. In assessing the compatibility of the agreement with Section 6 of the Dutch Competition Law and Article 101 TFEU, the ACM found that the agreement would have caused a reduction of the production capacity available in the Netherlands of about 10%, with a subsequent

[148] Giorgio Monti "Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives" [2017] 24(5) European Law Review, 635. For instance, the EU Commission affirmed that "If certain policy goals are considered valuable for society as a whole, while not by the consumers in the relevant market, regulation is the right tool to safeguard them and not competition law. In other words, competition law does not stand in the way of regulation to achieve these goals, but cannot substitute for the absence of such regulation", Kamerstukken II 2015/16, 30196, 463, (translation taken from Monti, 642).
[149] Cristina Volpin, "Sustainability as a quality dimension of competition: protecting our future (selves)", [2020] CPI Antitrust Chronicle, 11.

increase in electricity prices for consumers. It acknowledged that a more sustainable production might promote welfare but stated that to comply with competition rules, these benefits must be enough to offset the drawbacks suffered by the buyers of electricity in the Netherlands. Again, the ACM relied on economic analysis to measure the cost of pollution emissions, and more precisely, their shadow prices[150], to eventually carry out a cost-benefit analysis with the increased electricity prices resulting from the agreement. The ACM decided not to evaluate the claim about CO2 emissions reduction, as in the context of the ETS, an emission reduction would result in a request of fewer emission allowances, but not fewer total emissions, which will merely be produced elsewhere. Moreover, the Authority disregarded as too uncertain the argument about the impact that the agreement could exercise in the following trading period, where fewer emissions allowances could be made available. Conversely, the ACM analyzed the claim about the reduction of NOx and SO2, which are capped at a national level, and quantified the benefits in monetary terms by using the prevention costs method, i.e., the avoided costs of other measures that because of the agreement do not have to be taken. As a result of these calculations, the ACM concluded that the drawbacks for consumers in terms of electricity price annual increase (EUR 75 million) were greater than the value of environmental benefits, expressed in shadow prices (EUR 30 million per year), suggesting that the conditions for exemption under the Dutch Law and Article 101 TFEU were not met.

The strict position taken by the ACM created some tension with Dutch Government which instead pushed for a more flexible approach as to not jeopardize sustainable initiatives from private parties. The Minister of Economic Affairs developed some policy proposals to induce the ACM to revise its narrow interpretation and take account of the benefits for the society as whole, which however encountered the opposition of the EU Commission[151].

[150] For a definition of shadow prices and the ways in which they are estimated see OECD, Estimating Shadow Prices of Pollution in selected OECD countries, [2014], available at https://www.oecd-ilibrary.org/docserver/5jxvd5rnjnxs-en.pdf?expires=1602576302&id=id&accname=guest&checksum=CC55E8E7991944E1D9FFACDA97D05D26.

[151] Monti, (n. 152).

The Dutch Authority has continued to work on sustainability issues and in 2020 issued a new set of Guidelines to explain in detail how competition law is applied to sustainability agreements made between undertakings[152]. The new document shows appreciable efforts in providing options to undertakings that want to carry out sustainable initiatives and have doubts about their compliance with competition rules. The ACM first identifies the categories of sustainable agreements that generally do not fall under the cartel prohibition, such as:

- agreements that incentivize undertakings to make a positive contribution to a sustainability objective without being binding on the individual undertakings, such as sector-wide targets or intentions
- codes of conduct promoting environmentally-conscious or climate-conscious practices, like joint standards and certification labels about the use of raw materials, production methods
- agreements that are aimed at improving product quality, while, at the same time, specific products or services that are produced in a less sustainable manner are no longer sold, as long as they do not appreciably affect price and/or product diversity
- initiatives where new products or markets are created and where a joint initiative is needed for acquiring sufficient production resources, including know-how, or for achieving sufficient scale.

Then ACM's document proceeds explaining how the Authority intends to apply the statutory exemption provided by Section 6(3) of the Dutch Competition Law and article 101(3) TFEU[153]. It is interesting to note that the ACM suggests that it might be useful to start the analysis with the indispensability test since if the agreement is not necessary to achieve the objective, there is no further need to assess the other conditions. With respect to the benefits that may result from sustainability agreements, the ACM clarifies that it will only

[152] A second draft was released in 2021. See ACM's Second Draft Version: Guidelines on Sustainability Agreements, January 2021, available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

[153] Here the document specifies that such interpretation follows the European Commission's guidelines, national and EU case law and the 2016 Policy Rule regarding Competition and Sustainability of the Dutch Minister of Economic Affairs.

consider *objective* benefits, including sustainability ones. *Objective sustainability benefits* are defined as:

> "benefits that are useful not only to the consumers, but, in general, also to society (or parts thereof) in a broader sense. Sustainability benefits are often associated with a reduction of so-called negative externalities, meaning factors that are not included in the costs for the firms but that do represent costs for society. Reducing externalities means that, the production of consumption of products, everyone takes more into account the impact that those externalities have on the environment and on the living conditions of humans. This can produce benefits for society as a whole, including today's users and those in the future. Other sustainability benefits may involve reducing operational costs, increased innovation, quality improvements, or a greater diversity of products on offer, including the introduction of, for example, animal-friendly products or products that guarantee a fair income"[154].

The existence of these benefits can be supported either with quantitative or qualitative data, considering the peculiarities of each case. For instance, improvements on innovation or animal welfare are more difficult to quantify. In describing the assessment of the second condition, the ACM clarifies that the beneficiaries of such enhancements "can be current users as well as future ones. In addition, these can be direct users as well as indirect ones, lower in the production chain, and (finally) the end-user"[155].

With respect to the notion of "fair share of benefits", the ACM points out the necessity to deviate from the EU Commission's interpretation, according to which users should be seen as a group when belonging to the same relevant market. More precisely, a deviation is required if two cumulative criteria are met: (i) the agreement aims to prevent or limit any obvious environmental damage, i.e. agreements aiming at improving production processes that cause harm to humans, the environment, and nature, and (ii) the agreement helps, in an efficient manner, comply with an international or national standard to prevent environmental

[154] Ibid., 11.
[155] Ibid.

damage to which the government is bound. If these two conditions are met the ACM will consider the benefits to the users, and those for the Dutch society, as in the case of a sector-wide agreement to use carbon-neutral energy only[156]. With regard to other sustainability agreements, concerning for instance labor conditions or animal welfare, the ACM would instead follow the principle that the benefits of the agreement must fully compensate users.

Once the categories of benefits and beneficiaries are clearly defined, the Authority explains how it will conduct the balancing activity between positive and negative effects. It clarifies that it is not always necessary to conduct a quantitative analysis, especially if the undertakings involved have a limited combined market share (lower than 30%), and the harm to competition is clearly smaller than the benefits of the agreement. Conversely, when a quantitative assessment is required, sustainability agreements' positive and negative effects must be expressed in monetary terms. Whereas the costs are easily quantifiable in price effects, as they generally consist of higher production costs for the use of more expensive raw materials, higher prices, and lower choices (e.g., pollutive products no more available), environmental benefits must be translated into monetary terms using environmental prices.

Environmental prices, also called *shadow prices*, because not reflected in market prices, express the environmental harm caused by pollution or gas emission. They can be used to determine the prevention costs, i.e., if a specific initiative helps to prevent environmental damages in an efficient manner in accordance with a set policy objective. Environmental prices cannot be used instead when the agreement covers other sustainability issues as animal welfare or improved labor conditions. In this case, the ACM suggests using, as it did in the Chicken of Tomorrow case, a willingness-to-pay analysis to see if the sustainability improvements meet consumers' preferences, maintaining that users must be fully compensated for the harm that they suffer.

We said that with these new Guidelines the ACM offered an useful guidance to companies willing to cooperate for sustainable purposes, which is not limited to the explanation of its interpretation of legal provisions: the ACM indeed invites undertakings

[156] The reason is that the user may not deserve a full compensation because their demand for the specific product object of the agreement is causing the damage, Ibid., 12.

that are not sure about their compliance with competition rules to discuss the agreement with the Authority, which will eventually indicate the grounds of concerns and the possible solutions. Moreover, to incentivize more transparency and a cooperative dialogue with undertakings, it is clarified that if agreements that follow the guidelines in good faith, or those discussed with the ACM in advance, turn out to be problematic from a competition perspective, the Authority will intervene asking for adjustments, without imposing any fines. As a last alternative, if the agreement does not comply with the ACM's indications, undertakings may decide to submit their initiative to the legislator who, according to the Bill on Room for Sustainability Initiatives, can declare the initiative as statutorily binding on the entire sector[157].

As already noted, the Dutch experience on sustainability initiatives is extensive. Its promptness in providing clarification on how it is going to enforce competition rules has been welcomed by companies and other stakeholders, which were complaining about the absence of similar guidance at EU level. As we are going to see in the next chapter, from a substantive perspective, the approach suggested by the ACM is not immune from critiques. It has certainly adopted a more flexible interpretation of crucial concepts like "efficiency gains" and "consumers" admitting that in some circumstances it not possible to overlook societal benefits (although the ACM seems to consider the Dutch society only), however, the quantitative assessment of environmental benefits based on environmental prices, if not assisted by an accurate analysis of the markets' characteristics, might lead to incomplete results and undesirable outcomes. Anyway, the ACM stressed a very crucial factor, which also explains the relevance of sustainability issues for competition authorities, i.e., the existence of national and international commitments that public institutions must promote, whose achievement sometimes requires also private-led initiatives.

5. Conclusions

In this Chapter, we have seen how the text of the Treaties, particularly the principles and substantive norms that shape competition law, admits that non-economic objectives

[157] The full procedure is explained at page 19.

related to the protection of other public interests may affect how competition rules are interpreted and enforced. And indeed, since very beginning, the European Commission has used such power to implement the Union's policies holistically to achieve the overall objectives established by the Treaties. In the context of Competition Policy, it means that the European Commission, without particular objections from European Courts, has often considered other Community's interests, such as industrial policy, the protection of employment, the environment or the promotion of culture, in determining the legality of a market conduct.

However, as a result of the modernization process that took place in the early 2000s, the EU Commission's interpretation of competition rules, and particularly the law on agreements, leaves little room for the integration of non-efficiency considerations. The main obstacles arise from the too narrow interpretation of the first two conditions of paragraph 3 of article 101, which can hardly encompass benefits as sustainability improvements. This strict approach at the EU level has now been called into question both in academic and institutional sites. Some NCAs have pointed out the necessity to deviate, in some circumstances, from the EU Commission's interpretation to take account of environmental benefits. This necessity also emerges from a legal obligation for Member States to pursue environmental protection objectives effectively, an obligation that is gaining increasing priority at the political level, also given the internal pressure from the public opinion. Such new commitments from NCAs to find more effective ways to reconcile sustainability goals and competition law certainly facilitate a productive dialogue among enforcers to reach the most appropriate solution. However, it also bears a risk of fragmentation in the implementation of competition rules, in relation to a specific issue, as sustainability, which instead requires a common response, not only at the European level.

CHAPTER V

THE SEEDS OF TENSION BETWEEN COMPETITION LAW AND ENVIRONMENTAL OBJECTIVES: OPTIONS FOR RECONCILIATION

1. Introduction: new tensions emerging

The debate on the intersection between competition and sustainability has gained momentum in recent times. Besides some forward-looking analyses[1], this issue has been at the margin of academic and public debates for a long time, often confined among the "populist" or "hipster" line of arguments. At least, until today. At the time of writing, no week passes without some alerts on a new seminar, discussion paper or blog article on "Competition and Sustainability" or alike. Given the intensity of the debate, one could imagine that some substantial reform of the legal framework occurred, requiring a prompt debate on its applicative implications, but this is not what actually happened. In fact, in the last few years, and especially few months, much has changed in our society and economy, while the norms, at least those shaping European Competition Policy, stayed the same.

So, what has changed? By all means, the new pandemic of Covid-19 certainly has a role in this, as it pointed out how political and economic institutions, as well as our ordinary life, can be spoiled all at once by perils we could not even imagine (or ingenuously, did not imagine). These events called attention to the natural surroundings because what happens

1 See inter alia Markus W. Gehring,. "Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law", [2006] 15(2) Review of European Community & International Environmental Law 172; Suzanne Kingston, "Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special" [2010] European Law Journal, 801, and "Greening EU Competition Law" and Policy, (Cambridge University Press, 2011); Julian Nowag, Environmental Integration in Competition and Free-Movement Laws, (Oxford University Press, 2016); Donal Casey, "Disintegration: Environmental Protection and Article 81 EC" [2009] 15 European Law Journal, 362; Martin Wasmeier, "The Integration of Environmental Protection as a General Rule for Interpreting Community Law" [2001] 38 Common Market Law Review 159; Hans Vedder, *Competition Law and Environmental Protection in Europe; Towards Sustainability?*, (European Law Publishing, 2003); Giorgio Monti, "Escaping the Clutches of EU Competition Law Pathways to Assess Private Sustainability Initiatives" [2017] 24(5) European Law Review, 635; Thomas Lübbig, "Sustainable Development and Competition Policy" [2013] 4(1) Journal of European Competition Law & Practice, 1; Anatole Boute, "Environmental Protection and EC Anti-Trust Law: The Commission's Approach for Packaging Waste Management Systems" [2006] 15 Review of European, Comparative & International Environmental Law, 146.

within and *to* the environment cannot be decoupled from the management of any human activity, and eventually, from economic growth and prosperity. Moreover, as we discussed in the first two chapters of this work, even before the pandemic, sustainability and climate change were getting unprecedented attention. In this context, the European Green Deal and the several policy initiatives aimed at making the EU the world's first climate-neutral continent by 2050 responded precisely to these concerns[2]. Moreover, since the Commission stated that all the EU actions and policies had to contribute to the European Green Deal's objectives[3], competition policy has also been put under review. Indeed, in a speech delivered in September 2020, Executive Vice-President M. Vestager announced her intention to launch a European debate on how EU competition policy can best support the Green Deal[4], which was followed by a DG Competition's call for contributions on the same issue[5]. However, these very recent initiatives do not fully explain the intensity of the current debate on sustainability and competition, which cannot be limited to the implications of the European Green Deal. The existence of potential frictions among the two disciplines was already known, but the recent events created the right occasion to discuss the extent to which competition rules can adapt to the changing policy priorities.

At the same time, even before the recent EU Commission's intervention, in a context of increasing corporate attention to sustainability issues, as well as growing pressure on private entities to contribute to achieving sustainability goals, a new perception has emerged, conceiving competition rules as an obstacle to private sustainable initiatives[6]. A recent survey

[2] See Chapter 1.
[3] Communication from the Commission 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] Brussels, 11.12.2019, 3.
[4] Executive Vice President M. Vestager's speech on 22 September 2020, The Green Deal and Competition Policy.
[5] DG Competition Public Consultation on Competition Policy supporting the Green Deal Call for contributions, published on 14 October, 2020 available at <https://ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf>. On February 2021 a conference on the same topic was organized by the DG Competition, whose programme, as well as the results of the consultation, are available at https://ec.europa.eu/competition/information/green_deal/index_en.html.
[6] Fairtrade Report, "Competition Law and Sustainability: A study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector," January 29, 2019, which reveals "As some of the people interviewed for this report stated, the fear of being sanctioned, led companies and associations to establish clear protocols of conduct during meetings among competitors and that they interrupted conversations that concerned the adoption of a common price for farmers capable of guaranteeing them decent living conditions. Similarly, the adoption of binding sustainability sectorial standards of production is often opposed by companies due to

revealed that while many believe that some form of collaboration among firms is necessary to achieve progress on ESG issues[7], 57% of people interviewed said that many sustainability projects were not carried out because the legal and competition law risks were too high. In this context, the European Parliament, on its Resolution on the Annual Competition Policy Report released by the Commission in 2018, noted that while the European Court of Justice's interpretation of Article 101 of the TFEU takes account of the different aims of the Treaties, "the narrow interpretation of Article 101 of the TFEU by the Commission's horizontal guidelines has increasingly been considered an obstacle to the collaboration of smaller market players for the adoption of higher environmental and social standards" and it urged the Commission to increase legal certainty about the conditions under which these arrangements would be assessed under competition law, as not to discourage them[8].

Similar evidence emerges from the contributions to the EU Commission's public consultation carried out as part of its review of the two Horizontal Block Exemption Regulations, which are due to expire at the end of 2022[9]. The questionnaire also covered sustainability agreements and the adequateness of the current texts to address this area, and many stakeholders and NCAs answered by asking for more guidance or even more structural changes[10]. These answers are not surprising given the increasing importance of ESG issues, and it cannot be overstated that cooperation among firms is certainly a great opportunity for

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the risk of a legal infringement. Because of this, the content of Article 101 has increasingly been considered by some lawyers, companies and civil society organisations as an obstacle to the adoption of higher environmental and social standards by market actors than those required by national and international authorities", 32-33. See also Johnathan H. Adler, "Conservation Cartels" [2004] Regulation 27, 38.

[7] Linklaters Sustainability Series: "Competition law needs to cooperate: companies want clarity to enable climate change initiatives to be pursued" [2020], available at <https://www.linklaters.com/en/insights/blogs/linkingcompetition/2020/esg/competition-and-sustainability> last accessed in November 2020.

[8] European Parliament resolution of 31 January 2019 on the Annual Report on Competition Policy (2018/2102(INI)), para 49.

[9] For more information and all the consultation's material see <https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html>.

[10] Eleven NCAs affirmed that the current texts does not sufficiently deal with sustainability agreements and ask for more guidance on the role of competition law to address climate change issues. See the summary of the contributions of National Competition Authorities to the evaluation of the R&D and the Specialisation Block Exemption Regulations and the Commission Guidelines on Horizontal Cooperation Agreements available at <https://ec.europa.eu/competition/consultations/2019_hbers/NCA_summary.pdf>. Similar answers were given by other stakeholders, which also mentioned sustainability agreements as an area were guidance was lacking.

companies willing to improve their environmental performance[11]. A recent initiative in this sense is the request sent by some agricultural firms to the European Commission, as part of the "Farm to Fork" strategy[12], asking for clarifications about the way they can cooperate to promote sustainability without falling under competition law prohibitions[13]. In the meanwhile, however, competition law's infringement decisions concerning sustainability agreements have not been so frequent, thus casting some doubts on the extent to which competition rules have really worked as an impediment to sustainability cooperation.

The debate on the application of competition rules to environmental or sustainability agreements has come out also outside Europe[14]. Despite much less intensively, a similar debate has emerged in the U.S. as a consequence of an investigation for an infringement of the Sherman Act initiated by the Department of Justice against a four automakers' agreement sided by the State of California to adopt more stringent environmental standards than those in force to reduce vehicles' emissions[15]. The DOJ eventually dropped the case, thus leaving unclear where U.S. antitrust rules stand in similar cases. Conversely, in Australia, where the Trade *Practices Act* of 1974 specifically allows the consideration of public interests in assessing whether a restrictive practice may be authorized, the Australian Competition and Consumer Commission granted several authorizations to cooperation agreements on the basis of their environmental benefits[16].

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[11] Kevin Coates, Dirk Middelschulte, "Getting Consumer Welfare Right : the competition law implications of market-driven sustainability initiatives" [2019] 15 (2-3) European Competition Journal, 318.
[12] For more information, see the EU Commission's relevant website at https://ec.europa.eu/food/farm2fork_en.
[13] The response however, won't be released before 2022, see Commission's communication, "A Farm to Fork Strategy", May 2020 available at <https://ec.europa.eu/info/sites/info/files/communication-annex-farm-fork-green-deal_en.pdf> last accessed in November 2020.
[14] In the U.S. the academic literature on this matter is not as extensive as in the E.U. For an interesting contribution see Inara Scott, "Antitrust and Socially Responsible Collaboration: A Chilling Combination?", [2016] 53(1) American Business Law Journal, 97, and Michael Vandenbergh, "Private Environmental Governance" [2013] 99 Cornell L. Rev. 129.
[15] Coral Davenport, "Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions", *New York Times*, (Feb. 7, 2020). See also Julian Nowag, Alexandra Teorell, "The Antitrust Car Emissions Investigation in the U.S. – Some Thoughts From the Other Side of the Pond" [2020] CPI, 1; Herbert Hovenkamp, "Are Regulatory Agreements to Address Climate Change Anticompetitive?" [2019] The Regulatory Review, 1.
[16] OECD, Horizontal agreements in the environmental context [2011] DAF/COMP(2010)39. For instance, see ACCC - Application for revocation and substitution of authorization A91008 – Authorization A91079 dated 14 May 2008 and Application for authorization A91105 dated 21 January 2009.

As said, the discussion in Europe has reached a more sophisticated level and, in this conclusive Chapter, we will try to put together all the considerations that emerged in the previous pages to answer the main research questions of this work: is the integration of sustainability concerns with competition law compatible with the law of the European Union? And secondly, is there something special about sustainability and environmental protection that mandates a "special treatment" by competition authorities?

2. The European normative framework backing the interaction between competition law and sustainability

In the current debate, a common argument against a broader interpretation of competition rules is that allowing the inclusion of environmental or sustainability considerations into antitrust analysis means paving the way for many other social or public interests that might be touched by competition law cases, such as employment, equality, protection of human rights, etc., also as falling under the sustainability umbrella[17]. In line with this view, environmental objectives cannot receive a special treatment but should be treated by competition authorities as any other public values.

Nevertheless, the discussion we made in the first chapters showed not only that public interests, and not just sustainability ones, may receive some consideration within the enforcement of competition rules[18], but also that the promotion of sustainable development and environmental protection does actually have a special status in the European Union law and policy. Such a distinctive standing has both a normative justification that emerges from the text of the Treaties[19], and a more contingent one. With respect to the law of the Treaties, we already noted as the Treaties of Maastricht and Amsterdam identified the achievement of a sustainable development as an overarching objective of the Union, as now set out by article 3(3) TEU, pointing out the necessity to put economic and social growth on the same footing

[17] Luc Peeperkorn, "Competition and sustainability: What can competition policy do" [2020] Concurrences, 4.
[18] Christopher Townley, *Article 81 EC and Public Policy*, (Hart Publishing, 2009).
[19] In support of this argument see Suzanne Kingston, "Why Environmental Protection Goals Should Play a Role in EU Competition Policy: a Legal Systematic Argument," in *Greening EU Competition Law and Policy*, (Cambridge University Press 2011), 97-125.

of a high level of environmental protection[20]. To our purpose, this provision must be read in combination with the changes brought by Lisbon Treaty, both with respect to the enhanced relevance of the goal of sustainable development and to the diminished role assigned to competition[21]. As a consequence of these changes, the promotion of a sustainable development based on three pillars[22], including a "high level of protection and improvement of the quality of the environment", has recognized as an objective of the Union in its own, not necessarily linked to economic activities[23], and as additional to the aim of promoting people's well-being as stated by Article 3(1) TEU. An objective reiterated in the context of the Union's goals in its external relations, where Article 3(5) and Article 21 explicitly refer to "the sustainable development of the earth" and "the sustainable economic social and environmental development of developing countries"[24].

Moreover, the Maastricht and Amsterdam Treaties brought another fundamental change on the law of the Union, i.e. they strengthened the obligation of integrating environmental considerations in all the areas of EU law, as set out in Article 11 TFEU (ex Article 6 EC)[25], which represents one of the fundamental principles of the European Environmental Policy, as well as a general principle of EU law[26]. With this respect, the

[20] Already the Maastricht Treaty introduced as an objective of the Community the promotion of a "sustainable and non-inflationary growth", a concept that is weaker than the one of sustainable development as defined by the UN. See Nicolas de Sadeleer, "Sustainable development in EU law: still a long way to go", [2015] 6 Jindal Global Law Review, 39.

[21] See Ioannis Lianos, "Competition Law in the European Union after the Treaty of Lisbon", in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon*, (Cambridge University Press, 2012).

[22] De Sadeleer, (n.20).

[23] On the social purpose of the EU see Case C-438/05 *Viking Line*, [2007] ECR I-10779 para 79.

[24] Article 3(5) and Article 21 specify that the EU's external aims include "the sustainable economic social and environmental development of developing countries, with the primary aim of eradicating poverty" and "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development".

[25] See Chapter 1. This is not the sole policy linking clauses provided by the Treaties, as we already saw similar provisions in the field of promotion of cultural and public health. However, reading Article 11 in combination with Article 3 TEU leaves few doubts about the primary relevance of environmental protection and sustainability in the law of the Treaties.

[26] See David Grimeaud, "The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?", [2000] 7 European Environmental Law Review, 207, 216; Julian Nowag, "The Sky Is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and its Intended Reach" in *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously*, Beate Sjåfjell and Anja Wiesbrock (eds) (Routledge, 2015). For an original analysis of the different forms of integration Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws*, (Oxford University Press, 2017), 215-224.

Treaties cannot be clearer in providing special consideration to environmental protection, which must receive at least equal weight compared to other goals in the definition and implementation of EU policies[27]. Moreover, we should not forget that an integration obligation is also mandated by article 37 of the European Charter of Fundamental Rights[28]. Furthermore, on the basis of Article 11 TFEU, the specific principles of EU environmental policy, as set out by article 191(2) TFEU (i.e. the precautionary principle, principle of preventive action, principle of rectification at source and polluter pays principles), have been considered by European Courts as general principles of EU law, to be considered whenever a European activity involves environmental issues[29]. An interpretation that finds also support in the principle of consistency as enshrined in Article 7 TFEU, which requires that Union's policies and activities to be implemented in the light of all European objectives.

On the other hand, the Lisbon Treaty brought meaningful changes also on the constitutional weight of competition policy. Since then, the protection of "a system ensuring that competition in the internal market is not distorted" is not listed anymore among the activities of the Union, as it was provided by former Article 3(1)(g) EC, but it is mentioned in Protocol 27 on the Internal Market and Competition, annexed to the European Treaties, which has anyway equal legal force. Therefore, current article 3 of the Treaty on the European Union, while including sustainable development and environmental protection among the objectives of the Union, does not assign an equal status to competition, suggesting a not explicit hierarchy among these values. Now, a possible interpretation of the revised status of competition law could suggest that, according the combination of article 3 TEU and Protocol 27, a system where competition is not distorted is instrumental to the maintenance of the internal market, which in turn should contribute to "the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of

[27] Casey (n.1), 367.
[28] Charter of Fundamental Rights of the European Union' [2012] OJ C326/391. The Article provides that "a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".
[29] For instance, with respect to the precautionary principle See Joined Cases T-74/00 and T-76/00 *Artegodan v. Commission* [2002] ECR - II-04945.

protection and improvement of the quality of the environment and the promotion of scientific and technological advance" [30]. A similar view was expressed very recently by a resolution approved by the European Parliament, according to which competition rules should be interpreted according to "the wider European values underpinning values underpinning Union legislation regarding social affairs, the social market economy, environmental standards, climate policy and consumer protection" and "that the application of EU competition law should address all market distortions, including those created by negative social and environmental externalities" [31].

On the basis of such textual analysis, as well as a more theoretical one, we concluded in the previous chapters that in the European Union competition is not protected as such, but as an instrument to achieve broader objectives, which have evolved over time to meet the European project's needs[32] and, in line with the features of a social market economy, they do not have an exclusive economic nature[33]. This general background explains the traditional holistic interpretation of competition provisions, which has characterized European competition law for most of its history. Until the beginning of the 2000s in fact, the Commission's action has been guided by a plurality of objectives, mainly market integration, economic freedom and efficiency, while sometimes living room for public interest considerations, including social and employment implications, environmental concerns and so on[34]. Such a multi-purpose approach was then questioned by the neo liberal restructuring that occurred since the 90s, which, in the context of competition law, predicated the adoption of one single goal, i.e., the "protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"[35]. We already discussed the steps of this transition as well as the procedural and institutional reforms that

[30] According to the dominant view the Lisbon Treaty brought little changes to the role of competition, see Ben Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?: Non-efficiency Consideration under Article 101 TFEU*, (Kluwer Law International, 2012).
[31] See European Parliament Resolution (n.8), para 8.
[32] See Ioannis Lianos, "Some reflections on the question of the goals of EU competition law", in *Handbook on European Competition Law* (Cheltenham, UK: Edward Elgar Publishing, 2013), 1.
[33] Anna Gerbrandy, "Rethinking Competition Law within the European Economic Constitution", [2019] 57 JCMS: Journal of Common Market Studies, 127.
[34] See Chapter IV.
[35] Commission Notice: Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, 27.4.2004, para 13.

contributed to reducing enforcers' margin of discretion when applying competition rules[36]. With respect to the law on agreements, the function of Article 101(3) had changed "from being a norm of discretion concerned with the reconciliation of competition rules and other public policies to a pure efficiency defence based on the parties adducing convincing economic evidence"[37]. In spite of this, European Courts have never fully endorsed a mono-dimensional reading of competition rules, as confirmed by the frequently-cited judgments in *Metro*[38] and *Metropole*[39], but also in *Albany*[40], *Wouters*[41] and *Meca-Medina*[42], whose determinations have never been overruled.

Thus, what emerges from the present analysis is that nothing in the text of the Treaties nor in the case law of European Courts prevents an interpretation of competition law allowing for sustainability or environmental considerations while conversely, to some extent, such integration is even mandated.

If the normative and constitutional foundations were not enough, a more contingent argument provides further support to a more effective integration. As revealed by the most recent initiatives, the fight against climate change and the promotion of a sustainable and green growth represents a top priority for the current European Commission, and the new defining missions of the Union, shared by all European Institutions. Indeed, following the Commission's proposal on the European Climate Law aimed at making the scheme contained in the Green Deal legally binding, the European Parliament called for an even more ambitious mandate, by voting for increasing the GHG reduction target from the current 50% to 60%

[36] See Edith Loozen, "Strict competition enforcement and welfare: A constitutional perspective based on Article 101 TFEU and sustainability" [2019] 5 Common Market Law Review, 1265.
[37] David Bailey, "Scope of Judicial Review under Article 81 EC" [2004] 41 Common Market Law Review, 1327, 1338.
[38] Case C-26/76, *Metro v. Commission* [1977] ECR -01875, where it stated that the maintenance of a workable competition "may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market", para 5.
[39] Case T-112/99, *Métropole* [2001] ECR II-2459.
[40] Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textiel- industrie*, [1999] ECR I-5751.
[41] Case C-309/99, *JCJ Wouters, JW Savelbergh and Price Waterhouse Belasting- adviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577.
[42] Case C-519/04 *Meca-Medina and Majcen v Commission* [2006] ECR I-06991.

(compared to 1990 levels)[43], thus sending a clear message to the Commission and the Council[44]. Moreover, the European Union is also playing a leading role in shaping the international response to climate change and environmental deterioration. Both the EU and its Member States are among the signatories of the Paris Agreement, through which they committed to limiting global warming to well below 2°C and pursuing efforts to limit it to 1.5°C in order to avoid the negative impacts of climate change. To this respect, it could be argued that a competition policy that does not ignore environmental and sustainability concerns would help or even be necessary for Member States and the Union itself to comply with international climate commitments. Moreover, the sharp rise of climate litigations, like the already discussed *Urgenda* judgment, might put additional pressure on Member States to implement more effective environmental measures[45]. For these reasons, in light of the growing pressure coming from the general public, the international commitments and the strong political mandate, the fight against climate change and the achievement of a more sustainable model of growth, which both imply greater efforts in the preservation of environmental resources, represent a policy objective of extreme urgency, which cannot be achieved without a pervasive revision of the overall Union' activities.

In this context, it is worth noting that the European environmental toolkit developed to address these issues is quite complex. Although command and control measures still represent the primary tool of most environmental policies, governmental intervention is not always desirable, nor the most effective solution. Sometimes a contribution from private entities appears to be necessary and therefore, in such specific circumstances, i.e., when market initiatives are necessary or indispensable to achieve sustainable or environmental

[43] The Commission proposed to increase it to 55%, see the Commission's Proposal for Regulation of the European Parliament and of the Council on establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law).

[44] Amendments adopted by the European Parliament on 8 October 2020 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080 – COM(2020)0563 – C9-0077/2020 – 2020/0036(COD)). See also, European Parliament resolution of 18 June 2020 on competition policy – annual report 2019 (2019/2131(INI)), 18 June 2020, where it invited "the Commission, in the light of the growing debate, to reconcile the EU competition rules, industrial policy and international trade, which must go hand in hand with sustainability and respect for the environment", para 12.

[45] In addition to the *Urgenda* judgment, (see chapter I, para4.4), a number of climate litigations have been brought under Article 2 (right to life) and Article 8 (right to private and family life) of the ECHR see *Cordella and others v Italy* (Cordella) App nos 54414/13 and 54264/15 ECHR, Judgment, 24 January 2019, paras 71-86.

aims, competition policy should not work as an obstacle but as an additional support towards the same aim.

If this argument may easily find consensus, the real struggle materializes on the operational implications, i.e. in determining i) how to define the specific circumstances in which private initiatives are required and desirable compared to more traditional regulatory instruments, ii) how to carry out a cost-benefit analysis weighing the adverse effects on competition and the positive impacts on sustainability, especially on environmental protection.[46]

3. The inherent conflict between competition and environmental protection

In the previous paragraph, we argued that there is no normative conflict between competition and sustainability in the law of the European Union and that the current substantive norms allow the integration of public interests' considerations, especially if they concern sustainability and environmental issues. However, we also pointed out the perceived tension that today characterizes the intersection between the two disciplines, which must then be explained by looking for other possible reasons. With this respect, from the analysis of the current practice of the EU Commission and most NCAs it emerges that these tensions may be grounded on the conflicting theoretical assumptions on which competition policy and environmental one are based.

A first struggle arises from the protection of competitive markets on one side and the promotion of a high level of environmental protection on the other, giving that the well-functioning market, as protected by competition policy, is not always able to ensure optimal use of environmental resources[47]. And secondly, the specific economic analysis and economic concepts based on neoclassical economics that are currently used to give meaning to European competition substantive norms and goals might oversimplify complex

[46] See Anna Gerbrandy, "The Difficulty of Conversations About Sustainability and European Competition Law" [2020] 1/2 CPI Antitrust Chronicle, 65; Giorgio Monti, "Four Options for a Greener Competition Law", [2020] Journal of European Competition Law & Practice, 124.
[47] For similar considerations see Julian Nowag, "Background Note, Sustainability and Competition Law and Policy", [2020] OECD 134th Meeting of the Competition Committee on 1-3 December 2020, DAF/COMP(2020)3.

phenomena having cross-markets and cross-generations effects, thus leading to inaccurate outcomes[48].

3.1. Competitive markets and the environment

As anticipated, the current struggle for reconciliation between competition rules and environmental objectives may arise from the inherent tension between competitive markets, as commonly conceived, and environmental protection, or sustainability in general, although the latter might have further implications that go beyond the present discussion[49]. The origins of this friction are well-known and relate to markets' inability, in certain circumstances, to deliver optimal and efficient allocations of resources, as individuals' rational and selfish actions may lead to socially undesirable outcomes[50].

These market failures are particularly significant when it comes to the impact of economic activities on environmental amenities and pollution abatement, and the economic literature generally describes them in terms of *negative externalities*, *public goods,* and *tragedy of commons*[51]. Car drivers, for instance, produce, as unwanted byproducts air pollution and smog, without paying for these costs imposed on others. And indeed, greenhouse gas (GHG) emissions produced by economic activities, a typical example of an environmental externality, have been defined as "the biggest market failure the world has seen"[52]. These negative environmental externalities, therefore, lead to a market failure not properly captured by traditional microeconomic tools as supply and demand curves, which

[48] This argument has been developed with respect to the U.S. antitrust law by Richard Markovits, "The Limits to Simplifying the Application of U.S. Antitrust Law" [2010] 6 Journal of Competition Law & Economics, 51.
[49] The relationship with sustainability, as defined in the first Chapter, requires a much more complex analysis, as it encompasses a multitude of other factors as wealth distribution, employment levels, which are difficult to reconduct consider all at once.
[50] Generally speaking, markets' inability to fulfil their proper allocation function occurs for several reasons, including the existence of public goods, natural monopoly and information asymmetries. For a more careful definition of market failures see Francis M. Bator, "The Anatomy of Market Failure", [1958] 72(3) Quarterly J Econ 351, where market failure' is defined as "the failure of a more or less idealized system of price- market institutions to sustain 'desirable' activities or to estop 'undesirable' activities".
[51] Negative externalities indicate economic activities' indirect costs imposed upon consumers and society which are not captured by markets, because external to firms and individuals' decision-making. See Nathaniel Keohane, Sheila Olmstead, *Markets and the Environment*, (Island Press, Washington, DC 2007), 80-98. William Baumol and Wallace E. Oates, *The Theory of Environmental Policy* (New York: Cambridge University Press, 1988) 7- 36.
[52] Nicholas Stern, "The Economics of Climate Change" [2008] 98(2) The American Economic Review 98,1.

describe how competitive markets work to reach efficient outcomes. In fact, the supply curve only catches producers' "internal" marginal costs/benefits (and not social/environmental ones), and therefore, the market equilibrium is reached at the exact point in which these *internal* costs equal marginal benefits. If external costs exist, such as in the case of environmental damages caused by economic activities not properly internalized, this outcome is not efficient from a social welfare perspective because there is a deadweight loss resulting from the additional costs suffered by society and caused by an overproduction of polluting goods and services. In other words, in these circumstances, output is greater, and prices are lower than what is socially desirable.

Secondly, a common market failure in the context of the environmental realm relates to the overexploitation of natural resources as a consequence of the so-called "tragedy of commons".[53] Companies in fact do not have enough incentives to take account of the negative externalities imposed upon others and to cooperate with them to reduce their use of the resource, whereas they maintain to exploit open-access resources as long as their benefits outweigh their costs. The sum of these egoistic decisions however generates a collective action problem, and thus an inefficient and suboptimal allocation of resources[54]. Moreover, a coordination problem leads also to fewer investments in greener products and technologies as a result of the so-called first-mover disadvantages. To provide an example, in 2018 Lidl decided to improve its sustainability performance and to switch to selling only fair-trade bananas in its German and Swiss stores to ameliorate the livelihood of farmers and workers. However, a few months later, it had to interrupt this 100% fair-trade bananas commitment because consumers did not respond positively and because some Lidl's competitors reacted by further cutting their prices on non-certified bananas, thus boosting their sales. In other

[53] This condition occurs because resources available to all without restrictions, where the benefits from their use diminish as more people use them – as in the case of fisheries or forests - tend to be exploited beyond the optimal level.

[54] For the impact of competition in the context of commons see the Nobel prize in economics winner Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, (Cambridge University Press 1990). Yet, a free-riding problem emerges also in the context of international cooperation for environmental action, where this issue is exacerbated by the involvement of a large number of participants.

words, in the absence of coordination, companies might not switch to more sustainable and costly solutions if it results in a short-term loss of market shares[55].

However, market failures arise also on the demand side[56]. First, most environmental amenities have the characteristics of public goods, meaning that they are *non-rival* and *non-excludable*. Clean air, for instance, is a public good in the sense that one individual's consumption does not diminish the amount available for others, and individuals cannot be prevented from enjoying it[57]. In these circumstances, a market failure generally occurs because while some people attach great value to such public goods and would be willing to pay for them, others prefer to act as free-riders, enjoying them without paying, but relying on others' efforts, with the ultimate consequence that the public good will be underproduced. From a consumers' perspective, this also means that, even if perfectly informed about the consequence of their consumption choices, they might decide to opt for less environmentally friendly options because convinced that their sacrifice alone would not be worth it or because they rely upon the sacrifice made by someone else[58]. In addition, consumers' decisions might also be distorted by imperfect information about products' or services' environmental qualities and other behavioral biases, such as temporal discounting[59]. Consumers in fact attach greater value to present rewards compared to future ones, which in the context of environmental benefits can lead to an underestimation of the long-run societal costs resulting from individuals' choices[60]. Moreover, it is worth to mention that fierce competition, especially in the context of globalized supply chains, may lead to a depression of wages and products' prices that eventually favors excessive and unsustainable consumption of cheap goods, whose costs of production do not reflect their real social and environmental impact[61].

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[55] See "Lidl backs away from Fairtrade bananas", *Banana Link*, (May 2019), available at https://bananalink.org.uk/news/Lidl-backs-away-from-fairtrade-bananas/.
[56] Maurits Dolmans, "Sustainable Competition Policy", [2020] 4(1) Competition Law and Policy Debate, 8.
[57] The same applies to clean water, biodiversity, green spaces etc.
[58] Matthew Nagler, "Negative Externalities, Competition and Consumer Choice", [2011] 59(3) The Journal of Industrial Economics, 396.
[59] Cristina Volpin, "Sustainability as a quality dimension of competition: protecting our future (selves)", [2020] CPI Antitrust Chronicle, 11.
[60] Dolmans (n.56), 5, citing the NYU Institute of Policy Integrity "Expert Consensus Report" 2015 https://www.edf.org/sites/default/files/expertconsen- susreport.pdf on the appropriate methods to calculate discount rate of carbon costs.
[61] See Juliet Schor, "Prices and Quantities: Unsustainable Consumption and the Global Economy", [2005] Ecological Economics, 309.

As we have seen in the II Chapter, environmental policies are in fact aimed at addressing all these failures. The technical means can be diverse, some relying upon market mechanisms (as those aimed at internalizing environmental costs), other requiring governmental intervention, including direct regulation, such as the ones addressing information asymmetries and consumers' consciousness.

At the same time, competition law can also be described as a form of market supervision aimed at correcting the market functioning when, because of anti-competitive behaviors, it significantly deviates from its spontaneous competitive condition. In other words, competition law addresses one specific type of market failure, which is market power. However, exactly because of its generalized and (mostly) *ex post* intervention[62], it does not represent the adequate tool to address all market failures, which may require specific regulatory interventions[63]. Additionally, competition law's scope is quite precise, as it only prohibits those normatively described conducts (agreements, unilateral conducts, and mergers) that may harm market-well functioning by means of reducing consumer welfare. As a consequence, it defers the solution of any other market failures, not associated with anti-competitive conducts to the market itself or, in alternative, to regulation. In other words, even if multiple market failures exist, competition law's sole concern is to ensure that businesses are free to compete without restrictions, as *this* condition, holding all the other constant, leads to an efficient allocation of resources benefiting consumers with lower prices, higher output, greater choice etc.[64]

In other words, rightly because competition law's aim is to foster *more* competition, despite the acknowledgment that when some conditions occur (e.g. when there is a risk of behavioral exploitation or overexploitation of natural resources) market competition may

[62] Niamh Dunne, "Between Competition Law and Regulation: hybridized approaches to market control", [2014] 2(2) Journal of Antitrust Enforcement, 225.
[63] As it happens in specific markets characterized by natural monopoly components, such as utilities' sector, where competition law's instruments are not always effective.
[64] Maurice Stucke, "Is Competition always good?" [2013] 1(1) Journal of Antitrust Enforcement, 162. For instance, the imperfect information that characterize specific markets such as insurance of financial services is mainly addressed through sectorial regulation, while competition law still challenges conducts that impair the competitive process.

produce suboptimal results[65], a relaxing of competition law's scrutiny has rarely been admitted, relying instead on different kind of governmental intervention[66].

It follows that competitive markets where no undue restrictions of competition occur might still lead to socially inefficient outcomes due to the existence of other market failures[67], like environmental ones[68]. But, as said, the very precise "mission" assigned to competition law and its enforcers prevents them from going beyond its narrow vision of market functioning, especially when consumer welfare is chosen as a benchmark. This explains why with respect to environmental damages, the main argument against a broader scope of competition rules is that while competition authorities must take care of the competitive process, whatever is its ultimate result, other institutions, and the regulator in particular, must intervene to address other shortcomings.

3.2. The limits of economic analysis in measuring (and pursuing) environmental protection

The second potential ground of conflict, which is closely related to the previous one, attains to the employment of economic analysis and economic concepts to provide meaning to competition substantive norms and goals. As we are going to see, the adoption of economic efficiency as a policy goal might not always be consistent with the maximization of the level of environmental protection and pollution abatement. Secondly, given the peculiarities of environmental amenities and the several market failures already discussed, the adoption of a purely economic approach based on neoclassical economics' assumptions and tools, despite its undoubted benefits in terms of easiness, might oversimplify complex phenomena having

[65] See Maarten Pieter Schinkel and Yossi Spiegel, "Can collusion promote sustainable consumption and production?" [2017] 53 International Journal of Industrial Organization, 371, where the authors wonder whether horizontal agreements among competing firms can promote sustainable consumption and production, arguing that coordination on output choices or prices boosts investments in sustainability. See also Maurice Stucke, "Reconsidering Antitrust's Goals", [2012] 53 BC L Rev, 551.

[66] Stucke (n.64), 196.

[67] Or, as Sagoff noted, "a perfectly efficient or competitive market cannot respond to the need of future generations for a stable climate because future generations play no role as market actors". Mark Sagoff, "The Poverty of Economic Reasoning in Climate Change" [2010] 30(3-4) Philosophy and Public Policy Quarterly, 2.

[68] Peter Hammer, "Antitrust beyond Competition: Market Failures, Total Welfare, and the Challenge of Intra-market Second-Best Tradeoffs" [2000] 98(4) Michigan Law Review, 849.

cross-markets and cross-generations effects, thus leading to inaccurate outcomes to the detriment of the many.

The modern interpretation of competition rules, not only in Europe, puts on center stage the concept of economic efficiency. In Chapter III, we discussed the content of this notion, but what we left out is how economic efficiency is reconciled with environmental and sustainability impacts. We have also seen as European Environmental policy significantly relies upon efficiency considerations to identify the optimal choice of policy instrument[69]. However, in an economic efficiency perspective, the optimal level of pollution is never zero as a certain amount of pollution or environmental damages is inevitable. Indeed, using marginal methods, at one point the marginal costs of reducing pollution would exceed the marginal benefits, making the measure inefficient[70]. The takeaway is that while efficiency can help policy makers in identifying policy solutions, it will never suggest pursuing the highest level of environmental protection. The underlying objective of most environmental policies is indeed not the protection of the environment at any costs, giving that not any improvements for the environment is desirable from a social welfare point of view, but only as long as it does not impose unreasonable costs on society[71].

Keeping in mind the inherent consequences of adopting economic efficiency as a benchmark, environmental agencies and political institutions still rely upon economic

[69] With this respect, it is worth recalling that designing a policy measure to pursue economic efficiency means trying to maximize the resulting net benefits (benefits – costs). Any measure aimed at promoting some societal interests has costs, including environmental policies. If the aim is to protect the environment in an efficient way, these costs must be outweighed with the potential benefits resulting from the same measure in order to find the optimal trade off. In other words, when evaluating the goodness of a policy measure, economists would apply a cost-benefit analysis and conclude that the optimal level of environmental protection measures can be found where the difference between costs and benefits is greatest. See Robert Pindyck, "Uncertainty in Environmental Economics" [2007] 1(1) Review of Environmental Economics and Policy, 45. For a list of the economic studies undertaken at EU level on the environmental field and sponsored by the EU Commission see https://ec.europa.eu/environment/enveco/studies.htm, accessed in October 28, 2020.

[70] *Ibid.,* 20-29. From an environmental policy this means that "if the marginal benefits to society of additional environmental improvements are expected to exceed the related marginal costs, economic analysis suggests that the improvements ought to be pursued. On the other hand, if the marginal costs to society outweigh the related marginal benefits – even if the most efficient policy instruments are applied in order to reach the objectives – the economic analysis again indicates that some reconsideration of the policy objective would be appropriate" in OECD, An OECD Framework for Effective and Efficient Environmental Policies, [2008].

[71] On the application of Cost Benefit Analysis on Environmental Regulation see OECD, Cost-Benefit Analysis and the Environment Further Developments and Policy Use [2018].

analysis, and precisely on environmental economics, to carry out cost/benefit analysis of specific policy measures. Indeed, economics provides useful insights about how individuals and companies behave, how they make their decisions, and offers crucial tools to measure the costs and benefits of any interventions. At the same time, economists are fully aware of the uncertainty the surrounds the application of economic tools to environmental issues.[72]

As we know, competition authorities also engage in economic analysis to assess the impact of markets conducts on consumer welfare to ultimately protect competition and the efficient allocation of resources[73]. In particular, economics is used to understand market structure, its characteristics, the possible development, as well as to measure the beneficial/harmful impact of the practices under scrutiny on the competitive process. However, neoclassical economic analysis employed by competition authorities, as described in the previous chapters, shows some limitations when it comes to evaluating the environmental impact of conducts under scrutiny. In other words, assuming that competition authorities would be willing to integrate environmental considerations into their analysis, the maintenance of the economic tools and analysis currently used seems unable to catch most of the peculiarities of environmental amenities which, as it emerges from the environmental economics literature, need specific adaptions. With this respect to the limits of the current economic analysis employed by European competition enforcers to capture sustainability-linked elements, two aspects appear to be the most problematic:

i) The adoption of the consumer welfare standard: the most evident clash arises from the adoption of consumer welfare as a benchmark of market well-functioning. In modern times, competition authorities in fact are concerned with reductions of consumer welfare, measured in terms of higher prices, lower quantity, less variety, and lower quality and innovation[74]. As we have seen, according to the current approach, these welfare reductions

[72] Without going too far, the core difficulties of determining the economic impact of policies aimed at reducing environmental damages concern the determination of cost-benefit functions, which are generally *non-linear*, the instruments through which calculate costs and benefits, also taking into account the impacts that occur over very long time horizons, the identification of the appropriate level of discount rate, as well as the irreversibility of most environmental damages Pindyck (n.69) and Keohane and Olmstead, (n.51).
[73] Guidelines on the application of Article 81(3) of the Treaty (n.35).
[74] For a critical assessment of a narrow interpretation of CW see Barak Orbach, "The Antitrust Consumer Welfare Paradox" [2010] 7(1) Journal of Competition Law & Economics, 133; Eleonor Fox, "The Efficiency

concerning a specific group of consumers cannot be counterbalanced by improvements arising elsewhere in the economy[75], for sure not those occurring on the producers' side, all the more in the society as a whole. To this respect, we have already pointed out the discrepancy with neoclassical models, which instead imply the adoption of a total welfare standard[76], and how consumer welfare, although guaranteeing the promotion of economic efficiency while preventing extraction of surplus in favor of producers, does not necessarily mean protecting the interests of the many, especially if we consider the multiple vests that individuals wear as consumers, employees, citizens etc.[77].

Conversely, since economic efficiency has become the fundamental criterion for evaluating proposed environmental policy measures, and welfare economics the underlying theory, their convenience has been conventionally assessed based on the favorable and unfavorable impacts on social welfare, i.e. the sum of individual's well-being (or welfare)[78], thus not only consumers[79]. For instance, in shaping the cost-benefit analysis that today guide

Paradox", in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008), 77; Joseph Stiglitz, "Towards a Broader View of Competition Policy", in *Competition Policy for the New Era: Insights from the BRICS Countries* (Oxford University Press, 2017), Ch. 2.

[75] See Guidelines on the application of Article 81(3) of the Treaty (n.35) para 43.

[76] See Chapter 3, paragraph 4.

[77] Ioannis Lianos, "Polycentric Competition Law" [2018] Current Legal Problems, 14, citing Mark Sagoff, *The Economy of the Earth: Philosophy, Law, and the Environment*, (CUP, 2nd ed., 2008), 48. Francesco Denozza, "The Future of Antitrust: Concern for the real interests at stake, or Etiquette for oligopolists?" [2017] 1 Orizzonti del diritto commerciale, 1, 4.

[78] Karl-Göran Mäler, "Welfare economics and the environment", in *Handbook of Natural Resource and Energy Economics*, (Elsevier, Volume 1, 1985), 3-60. See also Robert Stavins, "Environmental Economics" [2007] NBER - National Bureau of Economic Research Working, 1. In the OECD Report on CBAs costs and benefits (n.71) are defined as "benefits are defined as increases in human well-being (or "utility") and costs are defined as reductions in that well-being; for a project or policy to qualify on cost-benefit grounds, its social benefits must exceed its social costs" (…) "Benefits and costs are summed across individuals in accordance with the aggregation rule which defines "society" as the sum of all individuals. There are no hard and fast rules for defining the boundaries of the sum of individuals. Typically, CBA studies work with national boundaries so that "society" is equated with the sum of all individuals in (i.e. residents of) a nation state. But there will be cases where the boundaries need to be set more widely", 34.

[79] Environmental policy and regulations usually rely upon cost-benefit analysis to identify the optimal measures, which is generally designed to balance the social welfare costs (changes in producers surplus and consumers surplus), as well as government costs and compliance costs and, with the benefits accruing to all individuals and human well-being. See Eban S. Goodstein, *Economics and the Environment* (7th ed. Hoboken, NJ : Wiley. 2014), 24. Many criticized the adoption of the Kaldor-Hicks criteria in the environmental field. Among others see Marc Sagoff, "Environmental economics: An epitaph" [1993] Resources Spring, 1, or from the same author "Environmental Economics and the Conflation of Value and Benefit" [2000] 34(8) Environmental Science & Technology, 1426.

most environmental policies, among the cost items[80] of climate change mitigation regulations or projects that have an impact on GHG emissions, authorities take account of the "social cost of carbon" (SCC), i.e. "the present value in monetary terms of the damages incurred when an additional ton of carbon (or any other Greenhouse gas) is released into the atmosphere"[81], which generally includes domestic damages if not global ones[82]. In fact, when possible, environmental cost-benefit analysis adopt a general equilibrium approach trying to capture the spillovers occurring cross-markets[83], a framework that in the antitrust field has always been considered as not practical[84].

In summary, whereas European competition authorities aim at protecting the well-functioning of the market and preventing anti-competitive behaviors that result in consumer welfare reductions, regardless the possible total welfare improvements, from an environmental protection perspective, the desirability of any policy intervention is measured using social welfare as a benchmark. In other words, despite both guided by economic efficiency considerations and the fact that both engage in economic analysis, competition policy and environmental policy take different roads in the assessment of the opportunity to allow private/public initiatives. As a result, we could imagine that, in assessing the desirability from a welfare perspective of an industry-wide agreement sponsored by the Government aimed at reducing GHG emissions, competition agencies on the one side, and

[80] In addition to private compliance costs, government costs, social welfare costs.
[81] OECD, Cost-Benefit Analysis (n.71), 335.
[82] Estimating the SCC encounters several difficulties explained by the considerable uncertainties about how the ways in which carbon causes damages, as for instance the impact of emissions on temperatures. However, it is a very common element of CBAs carried out in the context of public policies' evaluations.
[83] Keohane and Olmstead (n. 51), 36-37. As opposed to competition authorities which rely upon partial equilibrium analysis and seek to examine a single well-defined market in isolation, holding the conditions in other markets constant. The partial equilibrium model was developed by Alfred Marshall, *Principles of Economics: An Introductory Analysis* (8th ed. London: Macmillan, 1922), to make economic analysis useful to design public policy. Marshall believed that "the forces to be dealt with are however so numerous, that it is best to take a few at a time: and to work out a number of partial solutions.… Thus, we begin by isolating the primary relations of supply, demand and price in regard to a particular commodity. We reduce to inaction all other forces by the phrase "other things being equal": we do not suppose that they are inert, but for the time being we ignore their activity (…)", xiv–xv.
[84] See Hammer, (n.67), 855. See Guidelines on the application of Article 81(3) of the Treaty (n.35) para 43 where it is affirmed that "negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market".

environmental or other public authorities on the other, would take dissimilar approaches and reach different outcomes[85].

ii) Measures for calculating benefits and costs in a dynamic context: a second observation concerns the methods used to measure the positive/negative impacts of a given measure as well as the relevance assigned to the inter-temporal effect. Most of the studies on environmental economics try to address the difficulties of measuring costs and benefits in a context of uncertainty. Uncertainty about what benefits and costs will result from reduced environmental damages, when they will occur, where, etc..[86] We already mentioned the types of costs resulting from pollution control measures and other environmental policies. With respect to the benefits, both market and non-market ones[87], in line with neoclassical economics, are generally measured using an individualistic and monetary perspective. Indeed, the benefits of environmental policies are generally defined by looking at individuals' willingness to pay (WTP) for the reduction or prevention of environmental deterioration or the value of that individuals would be willingness to accept (WTA) to tolerate such damages[88]. These standards are used to infer human satisfaction or utility and in turn the value of things. However, what distinguish clean air and clean water or preservation of the ecosystem from other "ordinary" goods is that they are not traded in markets so there are no available data on their prices, quantity and purchases. Economists have therefore developed

[85] By all means, decision making in the environmental policy context does not rely exclusively on cost-benefit analysis and economic reasoning, although they play an increasing influence, but is much more dependent upon political and moral considerations.

[86] For instance, on the impact of global warming of 1.5° pre-industrial levels see IPCC Special Report showing as changes may differ from region to region, including the impact on economic growth. Hoegh-Guldberg, O., D. Jacob, M. Taylor, M. Bindi, S. Brown, I. Camilloni, A. Diedhiou, R. Djalante, K.L. Ebi, F. Engelbrecht, J. Guiot, Y. Hijioka, S. Mehrotra, A. Payne, S.I. Seneviratne, A. Thomas, R. Warren, and G. Zhou, Impacts of 1.5ºC Global Warming on Natural and Human Systems. In: Global Warming of 1.5°C. *An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.)]. In Press. [2018].

[87] See Goodstein (n.79) "The benefits of pollution control can be divided into two categories: market benefits and nonmarket benefits. For example, cleaning up a river may lead to increases in commercial fish harvests, greater use of touristic services and fewer medical expenses and days lost at work due to waterborne diseases" (…) whereas non-market benefits may be "increased recreational use of the river (boating, swimming and fishing) the enjoyment of greater species diversity (…)", 64.

[88] The distinction between the two measures depend on how property rights are distributed.

different strategies to infer such information either indirectly from individuals' behaviors (*revealed preferences*) or by asking directly to individuals which is their WTP for specific amenities (*stated preferences*), like through surveys.[89].

Anyway, leaving aside the limits of cost-benefit analysis and the WTP as a measure of value in the environmental realm, including the fact that individuals might have conflicting interests[90], as well as the difficulties of implementing those measurements[91], a crucial aspect which cannot be overlooked is that environmental benefits and costs are spread over time and usually occur in a long-term horizon. As a result, a cost-benefit analysis must be adapted to take account of future effect and their value at the present time. A fundamental concept in environmental economics is indeed the one of discounting, i.e. the translation of all the benefits and costs resulting from a specific measure into their present value[92]. The inter-temporal factor has great relevance in the economic analysis of environmental damages and the measures aimed at reducing or preventing them.

All this discussion seems irrelevant when we move our attention to competition law enforcement. However, what emerges from competition law cases having environmental implications is that competition authorities have rarely relied upon environmental economics

[89] If we take for instance a proposed measure aimed at dismantling a dated coal plant, the benefits of this intervention can be measured by individuals' WTP for cleaner air, more open spaces, better health conditions. However, such information are not available because a market for these goods does not exist. Policy makers therefore may carry out a carefully structured survey to ask a specific group of people how much they would pay for those benefits. A common measure of the benefits resulting from a given initiative is represented by environmental prices, which indicate willingness to pay for less pollution or avoided damages. See CE Delft *Environmental prices Handbook prices* [2017], 19, "Environmental prices are indices expressing the willingness-to-pay for less environmental pollution in Euros per kilo pollutant. Environmental prices thus indicate the loss of economic welfare that occurs when one additional kilo of the pollutant enters the environment. In many cases, they equal external costs. These prices can also be calculated for immaterial forms of pollution like noise nuisance and ionizing radiation, then being expressed in Euros per unit nuisance or exposure".

[90] Lianos (2018) and Denozza (n.77).

[91] For instance, this method may suffer from low level of awareness and information or lead to an inevitable preference awarded to current generations. Moreover, it reflects a clear anthropocentric approach, where the protection of natural resources is justified in terms of the benefits accruing for human activities and efficient allocation of resources.

[92] An efficient policy measure in fact aims at maximizing the *present value* of net benefits. It follows that a determinant role in the outcome is played by *the discount rate*, which reveals the value assigned to future events: higher is the discount rate, lower is the weight of future benefits and costs, There is much disagreement among academics about the most appropriate discount rate. The EU Commission suggests that the recommended social discount rate is 4%. See European Commission, "Better Regulation Guidelines", Strasbourg, 19.5.2015, Toolbox, Tool 61, 503.

to determine the potential costs and benefits arising from the practice under scrutiny[93]. While carrying out some form of balancing activity, competition agencies normally focus on a narrower aspect of welfare, i.e., the one ensured by an effective competition between firms. With respect to the law of agreements, for instance, the analysis concerns the evaluation of the possible anti-competitive consequences resulting from the practice, measured in terms of negative effects on prices, output, innovation or the variety or quality of goods and services on the relevant market. Negative effects that can be counterbalanced by pro-competitive effects, i.e., cost savings, such as those resulting from the development of new production technologies and methods, synergies, economies of scale, or qualitative efficiencies, as for instance higher quality products or improved goods or services. In addition to this, for a matter of practicability, competition authorities generally adopts a partial equilibrium approach, focusing on the economic effects that occur in a defined market and for a specific group of consumers, without considering the positive/negative spillovers arising in all markets in the economy.

Because of this narrow interpretation, environmental benefits may become part of this analysis only if they can be translated into efficiency gains on the relevant market, such as increased products or services' quality, innovation, or cost savings, plus for a limited group of beneficiaries[94]. In conclusion, from a closer look, it seems that the economic approach currently employed by EU Competition authorities might work as an impediment for a full integration of environmental considerations, assuming that this represents a desired outcome[95].

[93] See Chapter IV. In their ordinary enforcement practice, competition agencies do not generally engage cost-benefit analysis, since such tool mainly belongs to regulatory methodologies to assess policies' desirability from a social welfare perspective. Accordingly, cost-benefit analysis is normally used in the context of the general assessment of desirability of antitrust enforcement policy or employment of specific tools.
[94] Kristinn Már Reynisson, "Environmentally Beneficial Agreements and Article 101(3) TFEU: Are Non-Economic Benefits an Option?", [2014], 25(5) European Business Law Review, 727, *contra*, Giancarlo Piscitelli and Anna Gerbrandy, "The Sustainability Dilemma in Competition Law", [2018] 8(1) ECDPM Great Insights, 19.
[95] Nowag (2020) (n.47).

4. Is a restriction of competition that favors sustainability always desirable?

Given that competitive markets cannot always ensure optimal use of environmental resources or the achievement of other sustainability targets, the following question is whether a restriction of competition allowing the achievement of such aims would be actually desirable. To this respect, it is worth noting that competition law and environmental protection do not always struggle with each other. Competition law can help sustainability, especially by fostering innovation and the emergence of new markets responding to consumers' sustainable demands and, more importantly, by preventing firms from engaging in cartels hidden behind sustainability claims and other greenwashing practices harming consumers.

Indeed, we count a number of EU Commissions' decisions finding illegal cartels covered by environmentally motivated initiatives. For instance, in *Consumer Detergents*, the Commission imposed a fine of 315.2 million to Procter & Gamble and Unilever for operating a cartel in the market for household laundry powder detergents[96]. The cartel in fact started when the two companies, together with Henkel, implemented an industry-wide initiative for improving detergents' environmental performance. On this occasion, therefore, the three companies coordinated their prices and carried out anticompetitive practices to make the transition to sustainable products more profitable and to not lose market shares. Similarly, in 2019, the Commission sent a Statement of Objections to BMW, Daimler and VW concerning a collusive scheme among the parties aimed at restricting competition on the development of a technology to clean the emissions of petrol and diesel passenger cars. According to the Commission, this practice harmed consumers by preventing them from purchasing less polluting cars, despite a clean technology was available, and restricted competition for

[96] Commission Decision COMP/39579 – *Consumer Detergents*, 13 April 2011. See EU Commission Press Release Antitrust: Commission fines producers of washing powder € 315.2 million in cartel settlement case, 13 April 2011. See also Laurence Idot, "Competition Law and Environmental Protection" [2012] 3 Concurrence 48129, 13.

innovation on these emission-cleaning technologies[97]. The above-mentioned cases show that competition and environmental objectives do not always conflict with each other, as setting environmental standards or operating in green sectors can never be an excuse for fixing-prices and restricting competition and innovation. The prohibition of such practices, in fact, benefits companies that genuinely adopt sustainable practices and consumers' confidence in these activities, with the ultimate aim of contributing to the green transition.

In addition to this, we should not forget that many types of cooperation among firms can foster sustainability without violating competition rules. In addition to the cases in which sectorial exemptions or mandatory schemes apply, companies can engage in a number of initiatives, both unilaterally and collectively, which do not impair competitive dynamics[98], such as in the case of standard-setting or certifications like the ISO 14001 or the Eco-Management and Audit Scheme (EMAS)[99]. In fact, voluntary agreements and unilateral commitments, together with other market-based instruments, have also been promoted by European policy-makers, as a way to reduce the transaction costs associated with environmental regulation, providing firms with greater flexibility in their pollution abatement activities[100].

Moreover, as seen in the II chapter, spontaneous actions taken by corporations to mitigate the environmental impacts of their own activities, going beyond legal requirements,

[97]Case number AT.40178 – *Car Emissions*, see Commission 'Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology' IP/19/2008 (5 April 2019), see also Case AT.39824—*Trucks* (19 July 2016, provisional version), para 50. Another example of competition and sustainability reinforcing each other can be found in the practice of the French Authority which in 2017 fined a number of companies that agreed to not carry out "competitive marketing practices based on environmental characteristics" and "avoid unnecessary controversy relating to particular products and adopt a consistent marketing approach" in order to prevent "reckless green marketing ". The effect of this practice was the limitation of competition on quality and in particular on products' sustainable characteristic see Autorité de la Concurrence, 2017 – *Cartel floor coverings sector* - https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/19-october-2017-cartel-floor-coverings-sector.

[98] Nowag (2020) (n.47) mentions also the circumstances in which the actors involved are not considered as undertakings under EU law, citing a concerning charitable NGOs, which had been tasked with the management of national environment heritage sites.

[99] Regulation (RC) n. 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organizations in a Community eco-management and audit Scheme (EMAS) [2009] OJ L 342, 1.

[100] See Green Paper on market-based instruments for environment and related policy purposes. Brussels, 28.3.2007 COM(2007) 140 final. See also Chapter II.

a phenomenon that we called corporate environmentalism, are becoming increasingly popular. Firms often take part individually or collectively in initiatives sponsored by industry associations, non-governmental organizations (NGOs) or the government aimed at fostering more sustainable ways of production and consumption. Indeed, we discussed several examples of firms assuming obligations in the absence of any mandatory requirements, but "in the shadow of hierarchy"[101]. We have also seen that different reasons and strategies can drive these activities: despite the few pure altruistic and profit-sacrificing initiatives, some sustainability initiatives might be consistent with companies' self-interested and profit-maximization aspirations. A distinction among market and non-market strategies was made, pointing out as companies often decide to engage in such activities for several "traditional" business reasons, such as to improve their reputation, capture new clusters of green consumers, or to address internal inefficiencies. However, sometimes, voluntary commitments or "self-regulatory" programs can be used as a strategy to preempt more stringent and effective public regulations or to influence ongoing regulatory processes. Therefore, corporate-driven solutions do not always represent the most efficient solution from a social welfare perspective[102].

These are the lens through which we must read the very recent manifestations of concern coming from corporations and other stakeholders complaining about the burden imposed by competition rules to a corporate-driven sustainable development. The frequently cited "first mover disadvantage" that impedes companies to improve their sustainability performance is actually nothing more than a natural reflection of the profit-maximization imperative that inspires business activities. In other words, companies, even if aware of the importance of their contribution to the cause, generally do not want the costs of the transition towards sustainability to impact their margins, which is what happens in competitive markets if a firm passes on consumers the increased costs of more sustainable materials or processes. Therefore, loosening the competitive pressure would allow firms to contribute to sustainability without losing customers, and eventually, profits, also because this scenario

[101] They accept to comply with specific standards and targets, and the regulator commits not to introduce a new legislation (e.g. compulsory standards or environmental taxes), unless the contracting parties fail to comply with the agreed obligations.
[102] See infra, Chapter II, para 4.2.

would be even more convenient for companies compared to the adoption of regulatory measures imposing higher sustainability standards[103]. In the latter case, companies would need to adapt their business to these increased costs by finding compliance mechanisms that are more efficient than those of their competitors, with the risk of losing some profits.

With this in mind, in understanding whether to adjust competition law enforcement to foster sustainability, we must keep in mind that competition law may represent an obstacle for firms that want to improve their sustainability performance without bearing the risks of losing profits. Therefore, relaxing competition enforcement means accepting that companies decide *the extent* to which they will contribute to the transition and *how much of the costs* they will tolerate while shifting the remaining share to consumers. This is not to say that sustainability benefits should never be considered in allowing an exemption from competition law, because from a policy perspective, sometimes it might be desirable to allow such short-term negative effects for consumers if this means bringing long-term benefits for all. When no policy alternatives exist, because of structural or contingent reasons, a restriction of competition against consumers' interests might be the second-best available solution to achieve small but significant improvements towards a more sustainable world.

This view would be consistent with what has been often called "market failure approach" to antitrust, suggesting that a restriction of competition might be tolerated if it alleviates another market failure while increasing overall welfare[104]. Some authors argued that in the context of multiple market failures, antitrust should permit a restriction of trade if such conduct increases social welfare, because counteracting another market failure[105]. Of

[103] Anthony Heyes, "Is Environmental Regulation Bad for Competition? A Survey" [2009] 36 Journal of Regulatory Economics, 1.
[104] John Newman, "Procompetitive Justifications in Antitrust law", [2019] 94(2) Indiana Law Journal, 501, suggesting that alleviating a market failure should qualify as a valid procompetitive justification.
[105]For an interesting development of this theory see Hammer (n. 67) who suggests an intra-market second best analysis, allowing a defense based on an increase of total welfare. In particular, the author argues that to rebut a presumption of illegality defendants could prove "(1) that the challenged conduct is responsive to an identifiable market failure; (2) that the conduct produces a net increase in total welfare (static efficiency); (3) that the conduct will not substantially impair subsequent efforts to address the underlying market failure (dynamic efficiency); and (4) that there is not a less restrictive course of action consistent with the antitrust laws that could achieve the same static efficiency". This approach would imply the adoption of total welfare standard. See also Richard Lipsey and Kelvin Lancaster, "The General Theory of Second Best" [1956] 63 Rev. Econ. Stud., 11.

course, in addition to the operational difficulties, this approach would imply the abandonment of consumer welfare as the sole benchmark of market-functioning. Still its intuition may well explain why in some circumstances, a restriction of competition could be tolerated in favor of other societal benefits. Anyway, only by keeping in mind the inherent motivations for sustainability-related collaborations, and the fact that these practices are not always desirable from a social welfare perspective, we can proceed with a more conscious discussion about the mechanisms for integrating sustainability concerns within article 101 TFEU.

5. Practical options for reconciliation

In the previous paragraphs, we explored the grounds of tensions that may characterize the intersection between competition policy and sustainability. What emerges is that, in the absence of significative normative impediments, the main struggles arise on the operational and, to some extent, ideological dimensions. At the same time, these tensions do not appear so strong as to prevent any forms of integration of sustainability concerns with competition policy enforcement.

To understand which mechanisms of reconciliation would be more consistent with the European normative framework and feasible from a more operational perspective, it seems useful to follow a distinction that frequently emerges in the current debate between i) competition as an instrument to prevent unsustainable practices, and ii) competition as a potential obstacle to sustainable practices[106]. The former, which could be defined as "*positive integration*" would require an extension of competition law's scope of intervention to catch also practices that may negatively affect sustainability. This option, that Monti calls "the deepest green"[107], would imply the development of new theories of harm going beyond the mere impairment of market well-functioning and consumer welfare. For instance, it has been suggested that a new category of exploitative abuse may be conceived to capture those practices resulting in poor working conditions and low wages for workers[108] or that

[106] See also Nowag (2020) (n.47).
[107] Monti (n. 46).
[108] Fair Trade Advocacy Office, *EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links,* (n.6); Marios Iacovides and Christos Vrettos, "Falling Through the Cracks no More? Article 102 TFEU and Sustainability I – the Nexus Between Dominance, Environmental Degradation, and Social Injustice"

competition law could be used to prohibit selective distribution agreements that result in greater demand for transport services and thus pollution[109]. Others suggest that similarly to a conclusion recently reached by the German Bundeskartellamt in the context of data protection laws, a breach of environmental law by a dominant undertaking might give rise to an abuse of dominance under Article 102 TFEU[110].

Conversely, an alternative mechanism of integration may consist of interpreting competition rules in a way that does not impede or discourage the implementation of sustainable or green initiatives by private undertakings. This *"negative integration"* would therefore imply a step back from competition authorities in their enforcement activity, justified by the necessity to pursue sustainable aims. This option would not require a complete revolution of competition law's scope and goals, which would rest on their traditional theories of harm. The difference with the previous option is thus evident since a positive integration would instead require a more pervasive intervention of competition enforcers in the economy by limiting undertakings' economic freedom, not because of their distortive effects on the competitive process but in light of sustainability aims. Whereas this approach may be the most effective in contributing to sustainable development and the preservation of the environment, it seems quite problematic both from a normative and operational perspective. Even by adopting a holistic interpretation, it remains that the immediate aim of competition authorities is to ensure that competition in the market is not distorted, a task that can be more or less adjusted to be reconciled with other public interests and the Union's objectives listed in Article 3(3) TEU. It follows that introducing new theories of harm aimed at addressing other market failures, not connected with market power and anti-competitive behaviors, would result in a distortion of the role and nature of competition law, which does not seem consistent with the European legal framework.

Moreover, assigning this additional task to competition authorities, especially at the national level, might also be problematic from a democratic legitimacy perspective, as they

[2020] Faculty of Law, Stockholm University Research Paper No. 79, Available at SSRN <https://ssrn.com/abstract=3699416 >.

[109] Monti (n. 46), 7.

[110] Iacovides and Vrettos (n 108).

may not be entitled to decide which conducts should be considered undesirable because "unsustainable" and may not have the expertise and means to carry out such assessment[111]. As we have seen in the first chapter of this thesis, European environmental governance and toolkit are quite complex, because environmental measures have several implications on many social and economic aspects and touch different interests that must be considered in the decision-making process. Indeed, such complexity explains why the traditional regulatory approach still represents the most common policy tool to address environmental issues. Thus, it is questionable whether competition agencies and national courts, in the absence of a clear mandate, would be legitimate (and able) to undertake such difficult evaluations[112].

Different considerations can be made with respect to the other option for integration, based on the interpretation of competition law in a way that does not hinder private sustainability initiatives. This would lead to a competition authorities' step back in those circumstances in which a restriction of competition comes with positive effects on sustainability that benefit the society at large. This time, the arguments about the lack of legitimacy are not as strong, giving that there is no risk of undue limitation of economic freedom by competition agencies because, while on the contrary, there would be a more flexible interpretation of antitrust prohibitions in light of sustainable aims. Moreover, this approach seems more consistent with the normative framework, given that the Treaties define pretty clearly the specific market conducts that fall under competition law's scrutiny, whose holistic interpretation had resulted if anything in a narrow interpretation of the prohibitions or an extensive reading of the exemption but never the opposite. In other words, this divergence could be framed using the old distinction between type I or type II errors, where the adoption of negative integration mechanisms would raise the risk of errors of the second type, i.e. an under enforcement of competition law, which would be less dangerous for the functioning of a market economy.

[111] Gerbrandy (2020) (n.46), 67.
[112] A different argument could be made about the European Commission which, at least in theory, has both the competence and expertise to carry out such task.

With these premises, the next pages will focus on the latter option, with the aim of pointing out the circumstances in which competition law does not represent an impediment for sustainability-driven cooperation, to eventually analyze the specific cases in which these initiatives might be problematic under Article 101 TFEU, and the possible options for overcoming these clashes.

5.1. Some procedural improvements towards a more sustainable competition law enforcement

Before starting this analysis, it seems useful to anticipate some general considerations on the broader initiatives that European Competition enforcers may undertake to facilitate the reconciliation with sustainability objectives. As already noted, there is a general perception of uncertainty regarding how European competition rules apply to sustainability-driven collaborations among firms. This lack of guidance may also be explained by the amendments introduced by the 2010 Guidelines on Horizontal cooperation agreements, which repealed the specific section on environmental agreements provided by the previous version of 2004[113]. Moreover, conflicting signals emerge also from competition enforcers, given that the several public declarations stating the necessity to contribute to sustainable development and the Green Deal were not followed by more operational indications[114].

To this respect, recent EU Commission' initiatives, including the public consultation on the role of Competition policy to foster the Green Deal, as well as the review process of the Horizontal block exemption regulations, represents a great occasion to fill the gap and provide the clarifications demanded by many stakeholders. At the same time, further guidance needs to be also ensured at the national level, giving that NCAs (and judges) still work as the primary enforcers of Article 101 TFEU. To date, in fact, only the Dutch ACM moved in this direction by releasing the already discussed Guidelines on Sustainability

[113] Simon Holmes, "Climate Change, sustainability, and competition law" [2020] 8(2) Journal of Antirust Enforcement, 354.
[114] See Commissioner Vestager M. Speech Competition and Sustainability, GCLC Conference on Sustainability and Competition Policy, Brussels, 24 October 2019.

Agreements[115]. Furthermore, coordination among NCAs on this matter, also within the ECN, would not only help businesses in their self-assessment activity, but also generate positive and constructive dialogue among enforcers facilitating the identification of the adequate solutions to tackle such a complex issue, limiting the risk of fragmentation. Moreover, enhanced cooperation would be necessary also at the international level among competition agencies, giving the cross-border dimension of many environmental and sustainability issues.

In addition to the coordination among competition authorities, it would also be useful to strengthen the dialogue with environmental agencies and the other actors having specific competences on sustainability-linked policies in order to favor the exchange of views and expertise on overlapping issues. As we are going to see, this collaboration is crucial to identify the private sustainable initiatives that could fall out the scope of competition law, because indispensable to contribute to societal goals, but also to allow competition authorities to measure sustainability benefits, in particular environmental ones, within article 101 paragraph 3.

In the meanwhile, a useful tool for establishing a direct dialogue with companies willing to engage in such a form of collaboration is the issuance of comfort letters. This mechanism has been recently rediscovered in the context of the Commission's Temporary Framework in response to Covid-19[116] by companies requesting from the European Commission a letter providing comfort under Article 101 TFEU for certain cooperation practices[117]. Although the European framework is mostly based on companies self-assessing the compliance of their practices with competition rules, in a context of uncertainty, as the

[115] The Hellenic Competition Authority published a discussion paper and promoted a conference to discuss these issues.
[116] Communication from the European Commission, Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, Brussels 8 April 2020.
[117]Jacques Buhart, David Henry, "COVID-20: The Comfort Letter Is Dead. Long Live the Comfort Letter?", [2020], 43(3) World Competition, 305. The first Comfort letter under the Temporary Framework was released in April 2020, see European Commission, Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients, Brussels 8 April 2020. For a discussion of the COVID-19 Pandemic's implications on competition policy see Federico Ghezzi and Laura Zoboli, L'antitrust ai tempi del Coronavirus: riflessioni sulle esperienze internazionali e sulle iniziative italiane, [2020] 2/3 Riv soc., 625.

one that today characterized sustainability-driven collaborations, the issuance of comfort letters could contribute to reduce the ambiguity and promote such initiatives[118].

Another more "procedural" way to contribute to sustainability objectives concerns competition authorities' setting of priorities. We have seen that on many occasions, the traditional enforcement of competition rules against cartels or other collusive behaviors that have negative impacts on innovation may be beneficial also from a sustainability perspective. Competition authorities may therefore devote more time and resources to those conducts that may restrict competition while being covered by environmental or sustainability proclaims, thus harming individuals both as consumers and as citizens. A circumstance that could also be evaluated as an aggravating factor justifying higher fines.

5.2. Standardization and R&D agreements

With respect to what competition authorities already do, in the context of the current framework, we should mention the treatment of the most common kind of private multilateral initiatives on sustainability matters, which do not necessarily arise concerns from a competition perspective, i.e. standard setting or certification agreements. More in general, through standardization agreements, companies voluntary cooperate for the definition of technical or quality requirements of current or future products, production processes and services, or the terms of access to a particular quality mark. EU competition law has reserved much attention to this form of cooperation, not only in the context of environmental and sustainability targets. European institutions in fact recognize the beneficial effects of standardization agreements, which may reduce transaction costs, improve supply conditions and limit asymmetric information. However, standard development processes may also result in a restriction of competition among the signatory parties or have exclusionary effects. Standardization agreements in fact can be used to raise barriers and exclude actual or potential market participants, or as an excuse to exchange information and coordinate participants' behaviors on the market.

[118] A similar mechanism is explicitly provided by the Dutch CMA's Guidelines, see Chapter VI.

Therefore, standardization agreements related to environmental or sustainability aims must be designed in a way that does not violate European competition rules. Given the importance of this kind of cooperation for many economic sectors, the EU Commission Guidelines on horizontal cooperation agreements provided a specific section explaining how competition rules apply to standardization agreements[119]. The Guidelines establish a sort of "safe harbor" for standardization agreements that meet certain conditions, as they normally do not restrict competition[120]. In particular: if the standardization agreement provides that i) the participation to the selection of the standard is unrestricted ii) the procedure for adopting the standard in question is transparent, iii) there is no obligation to comply iv) the access to the standard is based on fair, reasonable and non-discriminatory terms, it will normally fall outside the scope of Article 101(1)[121].

When an agreement does not meet these conditions, the Guidelines provide that it must be assessed according to the traditional assessment under Article 101(1) and 101(3), considering the likely effects of the standard on the markets concerned. To carry out this analysis, the Commission considers of particular relevance the assessment of whether the signatories companies are free to develop alternative standards or products that do not comply with the agreed standard because otherwise, the agreement can represent a restriction by object falling under the prohibition set out by paragraph 1. Moreover, with respect to the effects of the standard, in addition to the market shares of the goods or services covered by the agreement, the Commission considers also whether the participation in the standard-setting process is open, thus allowing the parting to choose and elaborate the standard.

Anyway, even if a standardization agreement results in a restriction of competition under article 101(1), the parties can still prove the existence of efficiency gains, which frequently occur in the context of standard setting processes, and the fulfillment of the other conditions of paragraph 3 101(3). In particular, it is important that standardization agreements cover no more than what is necessary to ensure the proposed aims. The guidelines

[119] 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.
[120] Paras 280-286.
[121] See also Case T-432/05 *EMC Development AB v European Commission*, [2010] ECR II-01629, para 65.

provide a couple of examples related to environmental standards. The first one was already discussed in the previous chapter and describes a scenario similar to the facts of the CECED judgment. In that case, the new Guidelines, in explaining the application of Article 101(3) describes the beneficial effects of the agreement in terms of qualitative efficiencies (more washing machines programs) and cost efficiencies (lower running costs) affirming as these efficiency gains, although occurring in a different but related market, outweigh the restrictive effects on competition in the form of increased costs. Moreover, the Commission stresses out that as a result of the agreement, companies may employ different technical means to achieve the agreed environmental targets, and thus competition would still take place for other product characteristics.

Another example concerns a voluntary standard established by the major manufacturers of a fast-moving good in a Member State and the major packaging suppliers aimed at determining a uniformed size and shape of the packaging for that product in order to meet better environmental targets. Such a standard would bring indeed lower transport and packaging costs, reduced packaging waste and recycling costs of producers. In evaluating the standard development process, the Guidelines find unlikely that the agreement would produce restrictive effects on competition within the meaning of Article 101(1), because most of the "safe harbor" conditions above examined seem to be met[122]. In any event, even if an analysis of the effects is necessary, the Commission maintains that the exemption conditions under paragraph 3 are likely to be fulfilled when the agreement brings quantitative efficiencies in terms of lower transport and packaging costs, which are likely to be passed on to consumers; the provided restrictions do not go beyond what is necessary to achieve the packaging standard and are unlikely result in significant foreclosure effects; and finally, competition would not be eliminated in a substantial part of the products in question. The Guidelines also cover R&D agreements, although again they do not specifically address such form of cooperation for environmental and sustainability aims. However, R&D agreements concerning the research, development and marketing of new products are particularly

[122] In particular because "(a) the agreement is voluntary, (b) the standard has been agreed with major importers in an open and transparent manner, (c) switching costs are low, and (d) the technical details of the standard are accessible to new entrants, importers and all packaging suppliers", 331.

important for innovation on more environmentally friendly technologies and products. Therefore, the Guidelines explain the conditions not to fall under 101(1) and the assessment under 101(3).

Therefore, the Guidelines although not containing a specific section on sustainability standards and R&D agreements, define the general principles that the Commission would follow in assessing horizontal cooperation, including those characterized by sustainability aims. In particular, when standardization agreements are designed in compliance with the safe harbor conditions provided by the Guidelines, reconciliation between the two policies already occurs. However, when these conditions are not met, a traditional assessment under article 101(1) and (3) is required and, according to the current restrictive interpretation thereby adopted, sustainability benefits might be part of the analysis only as long as they can be translated into quantitative or qualitative efficiency and occur in the relevant market or a related one.

5.3. The application of the article 101(1) prohibition to sustainability agreements

In light of the discussion about the tensions between sustainability and competition in the European legal framework, and the extent to which a reconciliation would be actually desirable, the following paragraphs will address how the current interpretation of competition rules could be adjusted to integrate sustainability considerations.

To carry out this assessment, we can take as reference some examples of sustainability-related collaborations among firms that may raise concerns from a competition law perspective, because likely to fall under article 101 prohibition. A first case could consist of an agreement between several European car manufacturers, covering a substantial part of the market for medium-size vehicles, to stop producing cars that cause GHG emissions above a certain level, which leads to a reduction of SUV produced, being them the most polluting type of cars. We may also think about an agreement between competitors in the market for soft-drinks to stop using plastics as packaging for their products. A third example, more related to the social aspects of sustainability, could be an industry-wide agreement between

clothing manufacturers through which they establish a minimum price paid to their suppliers for a particular input in order to ensure to all works within their supply-chain a living wage[123]. Despite their sustainability aims, these agreements may have several impacts on competition and ultimately on consumers, sometimes leading to higher prices, lower levels of output or products' variety. And as a result, most of them would likely fall under competition law enforcers' scrutiny.

With respect to the assessment that competition authority would carry out, the first step to consider is the application of paragraph 1 of Article 101, which prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, when they "may affect trade between Member States and which have as their *object* or *effect* the prevention, restriction or distortion of competition within the internal market". According to the EU case law, agreements that "by their very nature have the potential to restrict competition within the meaning of Article 101(1)" represent restrictions *by object*, meaning that they may be considered to be prohibited without the need to assess their effects[124]. Generally, this is the case for collusive practices like price-fixing cartels, which are so likely to harm competition that there is no need to prove their actual effects on the market, but sometimes European Courts applied the same treatment to agreements on the purchase price of raw materials[125]. However, the ECJ held that "the concept of restriction by object must be interpreted restrictively"[126] (…) "as otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be"[127]. It follows that to determine that a practice represents a restriction by object, regard must be had to the content of the agreement, its objectives, and the economic and legal context in which it occurs.

Although the pursuing of a legitimate objective does not preclude the measure from being considered a restriction by object when other illegitimate objectives exist, a careful

[123] This particular example is discussed by Alec Burnside, Marjolein De Backer, Deplphine Strhol, "Living Wages Initiatives: no reason to object" [2020] CPI Antitrust Chronicle, 19.
[124] Case C-373/14 *Toshiba Corporation v Commission*, [2016] EU:C:2016:26, 25.
[125] See Burnside A., De Backer M., Strhol D., (n.123).
[126] Case C-228/18 *Budapest Bank* [2020], ECLI:EU:C:2020:265.
[127] Ibid. para 54.

examination of all the circumstances of the case is required, even when the agreement concerns prices, because European Courts rejected an automatic treatment of as by-object restrictions. Hence, with respect to sustainability initiatives, some authors argued that living wage initiatives, as in the example mentioned above, where companies agree to pay a certain amount to farmers for a particular input, cannot be treated as a restriction by object because even if the agreement concerns prices, it covers only one minor element of costs, which is the price of raw materials[128]. As a result of this (minority) interpretation, this agreement would not be able to produce a sufficient degree of harm to competition. Anyway, in light of the above, it seems reasonable to argue that especially for sustainability or environmental agreements, the concept of "restriction by object" might be interpreted in a particularly restrictive way, as to not automatically prohibit the practice without a full assessment of its effects on the market.

Secondly, in the previous Chapter we pointed out as the European Commission and Courts have sometimes considered public interests also in assessing whether the requirements provided by paragraph 1 of article 101 were fulfilled, and in particular if a restriction of competition occurred. European courts have not always provided a single and consistent definition of what is a restriction of competition which, according to the Guidelines on the interpretation of Article 101(3) EC does not imply any balancing between pro-competitive and anticompetitive effects because such analysis occurs under Article 101(3)[129].

With this respect, two lines of cases offer a potential route for excluding the application of competition rules to sustainability agreements. In *Wouters* and *Meca-Medina* the Court of Justice affirmed that when a restriction of undertakings' economic or commercial freedom is necessary and proportionate for the achievement of a legitimate purpose, and "the consequential effects restrictive of competition are inherent in the pursuit of those objectives"[130], such restriction falls outside the scope of Article 101(1). In these

[128] Burnside A., De Backer M., Strhol D., (n.123).
[129] Guidelines on the application of Article 81(3) of the Treaty (n.35) para 30.
[130] See Judgment in *Wouters*, para 97.

cases, the Court considered legitimate objectives the maintenance of certain guarantees in the legal profession and sport competitions and applied a sort of proportionality test to see whether the restriction of economic freedom imposed by those agreements did not go beyond what was necessary to meet such objective.

Yet, in *Albany* and *Brentjens*, concerning collective agreements between associations representing employers and workers[131]the ECJ, despite reaching similar conclusions to the one now mentioned, followed a different reasoning. The Court based its analysis on the mandate provided by the Treaties (Article 3(1)(j) and Article 118) to promote a high level of employment and social protection and affirmed that such social policy objectives "would be seriously undermined if management and labor were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment"[132]. Thus, in these decisions, the Court did not apply a proportionality test but excluded the application of article 101 in consideration of the fact that the enforcement of competition rules could have worked as an impediment to the achievement of a goal of primary importance.

This reasoning seems quite appropriate to the case of sustainability or environmental collaborations, given what we said about the role of environmental protection and sustainable development as fundamental Union's objectives. Conversely, the *Wouters* route appears more complex, as it would be difficult to argue that the pursuit of a sustainability objective, although certainly representing a legitimate objective, is indispensable for the functioning of a specific industry or organization, or that the same objective cannot be pursued without restricting parties' economic freedom. Conversely, an approach similar to the one developed by European Courts in *Albany,* which is based on the acknowledgement of the importance that the European Treaties assign to some social policy objectives, may be used to argue that when the application of article 101 undermines the Union's objectives on sustainability, which have equal weight of the promotion of a high level of employment, it should be

[131] Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751, paras 52–60, Joined Cases C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV* [1999] ECR I-6025.
[132] Ibid. para 59.

avoided. However, to use *Albany*'s reasoning in the context of sustainability agreements, it should be proved to a reasonable extent that the prohibition of an agreement producing some sustainability benefits actually undermines the achievement of the Union's objectives. Hence, whereas the prohibition of collective bargaining between employers and workers actually prevents an effective social protection of employees[133], it is not so easy to prove that prohibiting some private collective initiatives has a similar impact on sustainable development and environmental protection. And the reasons can be found in the arguments previously made, i.e. the fact that not every sustainability initiative is desirable from a social welfare perspective.

To this respect, leaving aside for a moment the operational implications, competition law enforcers, before excluding the application of article 101 prohibition for such agreements using the *Albany* route, should carry out an indispensability test to assess whether the agreement is actually necessary to achieve sustainability objectives. Private initiatives might be considered as indispensable when for instance there are no alternative and feasible measures that policy-makers can undertake in the short term, such as in the case of state failures and territoriality issues. Therefore, only in these circumstances, one could reasonably argue that an application of Article 101, preventing the realization of a sustainability agreement would undermine a Union's objective.

The Cocoa Agreement, reached in the Netherlands in 2010, can work as a useful example of the reasoning now presented**.** With the "Cocoa Covenant" the Dutch government, some NGO's, retailers and chocolate processors and producers agreed to use by 2025 only cacao certified as sustainable. Although the agreement had several competition implications, also given the high market shares of the involved parties, it was not formally investigated by the Dutch ACM, as opposed to already discussed the Energy Accord, which was eventually

[133] Very recently the Executive Vice-President Margrethe Vestager recalled the Commission's commitment to improving the working conditions of platform workers and stated that "competition rules are not there to stop workers forming a union but in today's labour market the concept "worker" and "self-employed" have become blurred. As a result, many individuals have no other choice than to accept a contract as self-employed. We therefore need to provide clarity to those who need to negotiate collectively in order to improve their working conditions" , see EU Commission Press Release of 30 June 2020, "Competition: The European Commission launches a process to address the issue of collective bargaining for the self-employed".

blocked[134]. The reasons why the Cocoa Covenant had been saved by an antitrust scrutiny can be diverse. The Cocoa sector is indeed characterized by complex issues concerning the poor working conditions of farmers in Cocoa plants (mostly in Africa), their low profitability and productivity, as well as the risks of cocoa shortage on the long run, problems that both the government and private parties wanted to address. Despite the general public's growing attention, these issues appeared too complex to be addressed through traditional regulatory measures, given the cross-jurisdictional nature of the matter and the obstacles imposed by EU law on free movement. The Cocoa Covenant, to which a vast array of stakeholders voluntarily took part, represented therefore the only feasible and effective way to tackle the mentioned concerns.

Of course, we do not know the reasons why the Dutch ACM decided not to intervene, but we can assume that agreements like the Cocoa Covenant, which may represent the sole feasible solution to address specific sustainability issues, could pass the indispensability test under the "revised" *Albany* route and be considered as out of competition law's scope.

This example also offers the opportunity to address, although briefly, another important component of the competition law assessment of sustainability initiatives, which is the relevance of State support. We have seen many times as industry-wide or multilateral environmental agreements or other standardization programs often seek some forms of governmental approval or imply a collaboration with public authorities. However, according to the Guidelines on horizontal cooperation, the presence of support from the State is irrelevant for the analysis on agreements' compliance with competition rules. Moreover, State measures directly mandating specific behaviors could give rise to a State's responsibility for breaching European competition rules[135], according to Article 4 TEU, as well as free movement law.

[134] See Chapter IV.
[135] According to the State Doctrine developed in Europe when the mandate behavior does not leave room for autonomous undertakings' autonomous conducts the State can be responsible for allowing or promoting anti-competitive practices.

However, with respect to the non-application of article 101 in cases of indispensability, some procedural safeguards, like a ministerial approval of the agreement, although not necessary, could reinforce the judgment about the initiative's utility and relevance for achieving a public sustainability interest.

5.3.1. Prospects for a sustainability defense under article 101 paragraph 3

When the conditions now mentioned do not occur, and an agreement does fall under the paragraph 1 prohibition because it restricts competition by harming consumers' welfare, companies can still seek an exemption under article 101 paragraph 3 by demonstrating that the four conditions thereby set are fulfilled.

Now, we already discussed the content of these conditions and the current "mono-dimensional" approach developed by the EU Commission[136] (as well as its rationale). We also pointed out as the economic analysis currently recommended by the EU Commission to carry out the balancing activity under paragraph 3[137], represents the main operational obstacle to an effective integration of sustainability concerns into article 101. In synthesis, according to the current interpretation of Article 101(3), as suggested by the soft-law instruments released by the EU Commission, the first condition requiring a contribution to the improvement of production or distribution of goods or the promotion of technical or economic progress is interpreted as admitting only efficiency gains, either of quantitative or qualitative nature[138] because the "goals pursued by other Treaty provisions can be taken into account – *only* - to the extent that they can be subsumed under the four conditions of Article 81(3)"[139]. Therefore, any other positive benefit that cannot be translated into efficiency terms falls outside the scope of paragraph 3, and thus cannot be counted to evaluate the overall effects of the conduct under scrutiny. Yet, as required by the second condition, a *fair share*

[136] Or "monocentric", as argued by Lianos, (2018) (n.77).
[137] Kingston, (2011), 263. See also Barbara Baarsma and Nicole Rosenboom, "A veritable tower of Babel: on the confusion between the legal and economic interpretations of Article 101(3) of the Treaty on the Functioning of the European Union" [2015] 11(2-3) European Competition Journal, 402.
[138] The Guidelines distinguish among cost efficiencies, resulting from new technologies, economies of scale and scope or synergies, and qualitative efficiencies, which generally result in new or improved goods and services.
[139] Guidelines on the application of Article 81(3) of the Treaty (n.35) para 42; "only" added.

of such efficiency gains must be passed on to consumers, whose notion is interpreted restrictively, meaning that the analysis can only include the *economic* benefits received by the same group of consumers that suffer from anti-competitive effects. As a result, both the non-economic benefits to consumers and the positive external effects on non-users are ignored.

The other two conditions[140], although equally important, do not seem to work as impediments when it comes to the integration of sustainability benefits, while they actually represent a crucial filter for otherwise disproportionate restrictions. As we have seen with respect to standardization agreements, the establishment of an environmental standard or certification can and should be designed in a way that does not prevent competition *tout court*, while defining a playing field that enhances environmental protection or sustainability. In other words, it seems reasonable to require that, once the environmental target has been set, companies still have different means to achieve such aim or other products' or services' characteristics on which they can compete.

Anyway, the reasons why the current interpretation of the first two conditions of paragraph 3 prevents an effective integration of sustainability and environmental benefits are evident. Given the peculiarity of environmental amenities and sustainability improvements, their value cannot always be translated into quantitative or qualitative efficiencies and economic benefits for consumers. And more importantly, for their very nature, they are generally spread among an undistinguished number of beneficiaries that very often includes, but goes beyond, the specific group of customers that might immediately suffer from the restrictive effect of the agreement, to affect in an even more impactful way also future generations of individuals and consumers.

Therefore, when framing the possible adjustments to the way in which the conditions set out in paragraph 3 could be applied to sustainability agreements, the first step should

[140] Article 101(3) requires that the agreement does not impose restrictions which are not indispensable to the attainment of the claimed objectives, and does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

concern the rejection of the idea according to which only benefits occurring in the same relevant where the restriction takes place can be considered. And this is in consideration of the specific characteristics of sustainability and environmental improvements that impact a wide range of individuals and aspects of human life[141].

i) The first condition:

The following issue concerns the nature of the benefits to be considered under the first condition of paragraph 3, requiring the agreement to result in an "improvement of production or distribution of goods" or "technical or economic progress". Today, the dominant interpretation suggests that only efficiency gains, i.e. cost savings and qualitative efficiencies, fulfill this requirement. However, in light of the Commission's and Courts' practice in the pre-modernization era and the legal framework discussed in the first paragraphs of this chapter, including the integration obligation ex Art. 11 TFEU, it seems reasonable to argue that also environmental or sustainability improvements that contribute to the achievement of Union's aims on sustainability and environmental protection, could still be part of the assessment along with other potential efficiency gains. As a consequence, the reduction of social and environmental costs of production and distribution that would be achieved through the agreement, resulting, for instance, from reduced negative environmental externalities, could be considered an "improvement of production or distribution of goods" according to paragraph 3. Yet, also an increased environmental and sustainable performance of products and services resulting from the agreement can be presented as a "technical progress"[142].

This assessment can take the form of a value judgment where economic effects are subject to a comprehensive analysis with other non-economic but still relevant benefits, in accordance with the traditional legal interpretation principles, including proportionality[143].

[141] We should not forget that in some old cases, like *CECED (*Decision IV.F.1/36.718 [2000]) and *Philips Osram* (Decision 94/986 [1994] the Commission followed a similar reasoning. For a revised interpretation of article 101(3) to sustainable initiatives see also Coates K. and Middelschulte D. (n.11). See also Eva van der Zee, Overcoming False Choices and Distorted Decisions. Estimating Human Well-Being under Art. 101 TFEU, [2019] Conference Paper 22th Ius Commune Conference.
[142] Reynisson (n.95), 743.
[143] Boute, (n.1) 157, who argues that NCAs "could switch to the same standard of assessment as for exceptions to free trade under Article 30. Applying a similar necessity and proportionality test would lead to proper

In this case, the integration process would take a traditional route without putting into question the objectives and principles of competition law, while recognizing that paragraph 3 mandates a broader array of interests that can be considered in granting an exemption. Legal uncertainty might increase but this approach would allow more room for sustainability measures into competition cases, especially those focusing on a social dimension, whose benefits are not easily measurable.

A second more ambitious option starts from the assumption that integrating environmental concerns into competition law analysis does not necessarily imply a departure from economics[144], but only a more sophisticated application of it, to integrate the adequate concepts and tools for understanding and measuring environmental phenomena. In particular, with respect to environmental benefits, which often result in reduced negative externalities, it seems possible to extend the categories of interests to be considered under paragraph 3 to grant an exemption without disregarding the use of economic analysis. As demonstrated by the Commission's decision in CECED and the few cases decided by the ACM, environmental economics can provide the necessary tools to determine the monetary value of reduced externalities and including them into competition analysis. Of course, also for practicability reasons, the calculation of environmental benefits should concern at most European Union area and its residents.[145]

In fact, environmental and climate change economics have developed several tools to support cost-benefit analysis of measures having an environmental impact by also considering inter-generational effects. As we have seen in the paragraphs above, the methodologies are diverse and might lead to different outcomes. It is therefore essential that competition authorities willing to integrate environmental economics methodologies into

consideration of the environment". A value judgment that Courts could annul only if they find that the assessment constitute a manifest error of appraisal.

[144] For a different view see Piscitelli G. and Gerbrandy, (n. 95)

[145] Moreover, a more far-reaching approach allowing also for more social considerations would require the adoption of a social cost-benefit analysis, such as those employed in regulatory processes. However, the practical difficulties seem much higher than the integration of the sole environmental benefits through environmental economics, also because as opposed to latter, sustainability aims and objectives are way less defined at the political level and therefore competition authorities may struggle to identify the necessary targets. A similar approach was suggested by Baarsma B and Rosenboom N., (n. 137).

competition analysis identify the specific methods and data they are going to accept, like the discount rate to apply, in order to provide clarity to business in their self-assessment activities. In this sense, an enhanced cooperation among NCAs and the EU Commission on one side, and with Environmental agencies on the other, is crucial both for promoting exchange of knowledge and expertise and avoiding divergent applications of the law.

ii) The second condition: a fair share of benefits to consumers

Once we extend the array of benefits that may be considered to fulfill the first condition of paragraph 3, also the second requirement, according to which consumers must receive a fair share of the benefits generated by the restrictive agreement, should be adjusted accordingly. We already mentioned that the Commission interprets the concept of "fair share", requiring that "the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement"[146]. Thus, an assessment of consumer welfare's variations, measured in terms of prices, quality, quantity, variety and innovation, needs to be carried out to verify whether the anti-competitive effects are at least compensated by pro-competitive ones and consumer welfare increases.

First, one could argue that environmental performance and sustainability are features of products' quality, to which consumers attach a value, and that can be measured as any other quality improvements. Alternatively, a more sustainable production that results from new production processes or standards can be conceived in terms of increased innovation, which is already a component of consumer welfare assessment. However, this approach based on the subsumption of sustainability benefits under quality and innovation components reveals significant shortcomings. First of all, it is well-known that quality and innovation improvements, although key non-price elements of dynamic efficiency, are very difficult to measure[147]. The perception of products' quality may vary among consumers, and sometimes it is "immeasurable in objective terms"[148]. The ultimate consequence is that qualitative

[146] Guidelines, para 85.
[147] OECD, The Role and Measurement of Quality in Competition Analysis, Policy Roundtable [2013], according to which "few agencies have as yet succeeded in incorporating systematically the assessment of quality within their competition analytical processes", 5.
[148] Ibid. 77-8, Contribution submitted by the European Union. The EU Commission indeed often relies upon data collected during market investigations or documentary evidence, but given the absence of reliable

improvements, *a fortiori* sustainability ones, even if supported by adequate evidence, are unlikely to be sufficient to outweigh the competitive harm like price increases.

Secondly, this approach does not represent an effective integration of environmental benefits into competition analysis because increased products' quality or processes' efficiency are not environmental benefits, while at most a positive side effect. Measuring environmental benefits only in terms of increased monetary value that consumers attach to them when purchasing products means conceiving sustainability and environmental protection in a perspective that is not just anthropocentric but merely consumeristic, thus disregarding the fact that consumption is just a tiny aspect of human life. A perspective that would be consistent with a rigorist approach to competition law but that certainly is at odds with the basic principles of sustainable development and environmental protection. Therefore, following a traditional consumer welfare analysis, it is likely that the benefits generated by the agreement would not fully compensate the costs that consumers must bear. A possible solution to overcome this impediment is to abandon the notion of consumer welfare in favor of a *"citizen welfare"* standard, which includes not only prices, quantity, quality, variety and innovation but also a sixth element, which is sustainability.

In other words, if we allow the integration of environmental or sustainability improvements, as they result from a qualitative or economic assessment, we should also take account of *how* these benefits can be passed on to consumers. Indeed, given their characteristics already discussed, environmental and sustainability improvements benefit individuals not only as consumers (e.g. in terms of increased quality and innovation) but also as citizens. Thus, a citizen welfare standard would reflect the idea that the benefits individuals receive as citizens, like those resulting from reduced GHG emissions, cannot be ignored. Again, this value, i.e. the increased benefits individuals receive from improved

quantitative tools, it generally carries out the balancing of competitive effects on price and quality using a value judgment. For the same reasons, also measuring qualitative improvements through a WTP analysis is not flawless and might lead to distorted outcomes: the mechanism of revealed preference may be distorted when individuals have conflicting interests or their consumption choices are subject to behavioral bias or imperfect information. See Sagoff (n.77).

environmental conditions and sustainability, can be expressed either in monetary terms using environmental economic tools and through a qualitative assessment.

In CECED, for instance, the Commission considered not only the individual economic benefits resulting from savings on electricity bills and the competition enhancing effects but also estimated the savings in marginal damage from avoided emissions (the "external costs") and thus the benefits brought by the agreement to society. These benefits were compared to increased purchase costs of more energy-efficient washing machines and appeared to be much greater.[149].

As seen in the previous chapter, a more sophisticated approach was developed by the Dutch ACM, first with the two leading decisions on the matter ("the Chicken of Tomorrow" and "the Energy Deal") and then further detailed in the recent Guidelines on Sustainability Agreements. With respect to the specific economic analysis carried out by the ACM, in the Chicken of Tomorrow case, the Authority, with the help of environmental and animal welfare experts, carried out an economic study on the effects of the agreement on the environment, animal welfare and public health[150]. The study was based on a WTP analysis, with the assumption that benefits' value results from the value consumers attach to them[151]. In addition, a cost-benefit analysis was carried out to compare the benefits resulting from the agreement, translated into monetary values through the WTP analysis, and the additional costs and increased prices brought by the agreement.

Again, in the assessment of the "Energy Deal"[152], the ACM carried out a cost-benefit analysis to assess the extent to which the environmental benefits generated by the agreement were able to offset the drawbacks that buyers of electricity in the Netherlands may have suffered a result of the agreement. In evaluating the economic value of these environmental

[149] As a result of this cost-benefit analysis, the Commission then concluded that "the environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines". See Commission's Decision in *CECED,* para 56. In this case, however, the Commission did not fully explain the methodologies used to make those estimations, an indication that would have certainly provided more clarity and certainty for future applications.
[150] See Economische effecten van de Kip van Morgen', ACM Office of the Chief Economist, (October 2014)
[151] Consumers' preference were inferred through a survey conducted among consumers asking the amount of money they would have been willing to pay for the benefits brought by the measures at stake.
[152] See Chapter IV.

benefits, the Authority referred to the same model used to calculate the impact of the deal by the same parties and used shadow prices, a measure commonly used to evaluate the cost of pollution or the benefits of policy measures[153]. The reasoning followed by the ACM in these two decisions has been confirmed in the recent Guidelines released this year[154]. Moreover, as already noted, the ACM identified the specific circumstances in which it will allow the consideration of benefits occurring for Dutch society at large, even if consumers do not receive a full compensation.

Coming back to our analysis, even if we admit the consideration of individuals' environmental benefits, article 101(3) still requires that *consumers*, and not individuals, receive an amount of benefits. However, such provision does not require consumers to receive a full compensation for the harm produced by the agreement, which can advantage not only undertakings but also other individuals, present and future. Therefore, it seems that the key for broadening the meaning of this condition and reconciling it with a citizen welfare standard is to define what is *fair*, i.e., how much individuals as consumers must receive from an agreement that also benefit the entire society. In this respect, it seems reasonable to argue that in the presence of sustainability improvements that benefit individuals affected by the agreement as citizens, *some form of compensation* in their quality as consumers, i.e., individual economics benefits, is still required. However, such compensation might not be full, from a consumer welfare perspective, because part of the benefits occurs to individuals in their quality as citizens.

In conclusion, despite the methodological suggestions, once we overcome the conceptual obstacles, mainly arising from the current interpretation of the first two conditions of article 101(3), the remaining struggle is an old one, and concerns balancing: should we rely upon economic analysis or upon a qualitative assessment? The limitations of the latter

[153] In particular, by employing the prevention costs method, the value of the agreement's environmental benefits was determined using the costs of other measures that, as a consequence, did not have to be taken (avoided costs). Also, in these circumstances, the ACM concluded that the agreement's benefits were not sufficient to offset the drawbacks to Dutch electricity buyers.

[154] As it emerges from the discussion in the previous chapter, the Authority explained the components of its cost-benefit analysis by distinguishing between sustainability benefits (like those concerning animal welfare), which will be measured using a WTP analysis, and environmental benefits, which instead will be valued though environmental prices and prevention costs methods.

are well-known and attain the high discretion in the hands of authorities and Courts, the lack of predictability and the risk of capture. At the same time, whereas the adoption of a purely economic approach seems more desirable because it mitigates most of these risks, it still shows significant shortcomings. Using sophisticated economic models may raise the burden of proof of companies seeking an exemption, which must provide complex and often contested calculations to prove the positive effects of their practices. In the end, therefore, this approach might produce the same discouraging effect caused by the use of non-economic analysis. In this respect, there few doubts that economics can provide very useful insights for legal analysis, especially in competition law cases, but it cannot totally replace it. Therefore, also in the context of sustainability agreements, economics tools, including those developed by environmental studies, should be considered as important elements to consider but not the only ones.

6. Conclusions

In this final chapter, after an in-depth analysis of the origins of tension between competition and sustainability goals, we explored the different routes to reconciliation. First, we pointed out that competition law and environmental protection do not always conflict with each other: while on the one hand, not every private initiative driven by sustainability motives raises competition law concerns, on the other, the ordinary enforcement of competition law can support sustainability by fostering innovation and, more importantly, by preventing firms from engaging in cartels hidden behind sustainability claims and other greenwashing practices harming consumers.

However, in light of the current demands for enhanced integration of sustainability concerns into competition law enforcement, few conclusions have been reached. From a normative perspective, nothing in the law of the Treaties prevents a holistic reading of competition norms. On the contrary, Article 11 TFEU and art. 37 ECHR set a clear mandate for more robust integration. However, it was argued that the arguments in favor of a "positive integration" seem not convincing, both from a normative and operational perspective. On the other hand, a "negative integration" of sustainability concerns implying a more flexible

interpretation of competition norms appears to be more consistent with the law of the Treaties and less problematic with respect to its implementation.

Nonetheless, a general antitrust exemption for all the restrictive practices producing sustainability benefits seems undesirable. It was argued that not every private sustainability-driven initiative, which implies a restriction of competition, is desirable nor necessary to achieve sustainability aims. Sometimes, other policy measures, including regulation, might be more appropriate than private initiatives, because they allow to consider all the relevant interests and identify the right targets. Therefore, only when more effective policy alternatives do not exist because of structural or contingent reasons, a restriction of competition against consumers' interests might be accepted as the second-best available solution to achieve small but significant improvements towards a more sustainable world.

Therefore, an adjustment of the interpretation of Article 101 should be admitted only in specific circumstances, i.e., when a sustainability agreement is *i)* indispensable to achieve a Union's sustainability goal or to comply with a specific obligation or *ii)* it significantly contributes to the same aim. Whereas in the former scenario, the legal reasoning developed in *Albany* could be extended to consider such agreement as out of competition law's scope, in case of an agreement not indispensable but still beneficial for the achievement of a sustainability aim, the full assessment under article 101(3) must be carried out. It follows that balancing between sustainability benefits and all the other economic effects is required. Such activity can be either accomplished through a traditional qualitative analysis or by relying upon economic analysis, including environmental economics. To make this mechanism of integration work, stronger cooperation between competition and environmental agencies seems crucial, not only to identify the private initiatives that could fall out of the scope of competition law, because essential to contribute to societal goals, but also to support competition authorities in measuring sustainability benefits resulting from the practice under scrutiny.

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