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Agreements That Mitigate Climate Change and the Prohibition of Anticompetitive Agreements in Article 101 TFEU

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Table of contents

1 Introduction

1.1 Subject and Purpose

The subject of this thesis is agreements between competing undertakings (horizontal agreements) that mitigate climate change.[1] The thesis's purpose is to explore how Article 101 of the Treaty on the Functioning of the European Union (TFEU) should be interpreted when assessing such agreements.

Article 101(1) TFEU prohibits agreements between undertakings that restrict competition.[2] Agreements that have an anticompetitive objective or effect, are prohibited. Anticompetitive agreements can receive an exemption if they pursue legitimate objectives in the public interest, or if they meet conditions specified in Article 101(3) TFEU.

Agreements between undertakings can mitigate climate change.[3] Climate change refers to the long-term alterations in temperature and weather patterns that predominantly have occurred since the 1800s due to the release of greenhouse gases (GHGs) into the atmosphere.[4] Agreements can mitigate this, for instance when undertakings collectively develop a production method free of emissions or agree to only use renewable energy in their production processes.[5]

Competition law plays a significant role in advancing climate change mitigation.[6] When undertakings must bear the cost of their emissions, competition incentivizes development of climate-friendly products and manufacturing practices.[7] Consequently, competition serves as a mechanism to promote the optimal allocation of societies resources.[8]

Competition law can also have a counterproductive impact on climate change mitigation. Transitioning to more climate-friendly products often means purchasing more expensive resources, investing in costly manufacturing technologies, and potentially reducing profit margins. When

[1] Vertical agreements (agreements between undertakings at different levels of the supply chain) are outside the scope of this thesis.

[2] The equivalent provision is in Article 53 of the EEA agreement. Section 10 of the Norwegian Competition Act closely resembles Article 101 TFEU, but the condition of affect between member states is absent. This provision is in the legislation of all EU Member States. See Hjelmeng (2014) p. 36.

[3] A detailed explanation of climate change mitigation can be found in the EU glossary of summaries, see EU (2024A).

[4] Primarily from the combustion of fossil fuels. See also UN's definition of climate change in UN (2024).

[5] I will use adjectives such as "low-carbon" and "climate-friendly" to describe practices that mitigate climate change.

[6] In addition to benefiting consumers through improved product quality and increased choice, see 2023 Horizontal Guidelines, para. 518.

[7] XXIIIrd Report on Competition Policy 1993, para. 164.

[8] Guidelines on Article 101(3) TFEU, para. 13.

regulations are insufficiently stringent, and consumers do not prioritize climate-friendly products, reducing emissions ceases to be a competitive advantage and instead becomes a burden.[9] Agreements can help undertakings overcome these issues.

The rationale behind agreements between undertakings that mitigate climate change is a subject of debate.[10] Nevertheless, businesses have expressed a need for clearer guidance on such agreements, and both the European Commission and National Competition Authorities (NCAs) have responded to this call.[11] This thesis addresses the most significant questions arising in this context.

1.2 Research Questions

In order to determine how to interpret Article 101 TFEU when assessing agreements that mitigate climate change, an overarching research question is necessary. This thesis's main research question is the following:

> What impact does an objective of climate change mitigation have on the assessment of agreements between undertakings under Article 101 TFEU?

To answer this, three additional sub-questions must be answered.

Article 101(1) TFEU prohibits agreements that have an "object" or "effect" of restricting competition within the internal market. The object and effect conditions are subject to different legal and evidentiary rules.[12] The object condition must be interpreted strictly and only applies to agreements that inherently reveal a "sufficient degree of harm" to competition.[13] On the other hand, the effect condition demands a sufficient demonstration of the agreements actual or potential anticompetitive effect.[14] This thesis's first sub-question is:

> Does an objective of climate change mitigation impact whether an agreement has an object or effect of restricting competition under Article 101 TFEU?

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[9] For instance, the EU Emissions Trading System (ETS) only covers around 40% of the EU's GHG emissions.

[10] Schinkel (2020).

[11] 2023 Horizontal Guidelines, ACM (2023), AFCA (2022), CMA (2023). The Japanese JFTC has also published guidelines on environmental sustainability agreements, demonstrating that the debate has reached far beyond the EU, see JFTC (2023).

[12] Case C-333/21 ESL, para. 160.

[13] Case C-67/13 P CB, paras. 53-58.

[14] Case C-124/21 P ISU, para. 169.

Agreements that pursue legitimate objectives in the public interest, and do not go beyond what is necessary to achieve these, are exempted from the prohibition in Article 101(1) TFEU.[15] I will refer to this exception as the Public Interest Exception hereafter. This exception rule has been developed in case law and has no basis in the wording of Article 101 TFEU. The exception must be interpreted restrictively, and its limits are uncertain.[16] This thesis's second sub-question is:

> Is the Public Interest Exception applicable to agreements that mitigate climate change?

Article 101(3) TFEU has four cumulative conditions that can exempt agreements from Article 101(1) TFEU. Briefly put, the agreement must result in certain improvements, pass on a fair share of benefits to consumers, not go further than necessary for this objective and not eliminate competition.[17] Each of these four conditions can raise issues when assessing agreements that mitigate climate change. This thesis's third sub-question is:

> How must the four conditions of Article 101(3) TFEU be interpreted when assessing agreements that mitigate climate change?

1.3 Methodology and Materials

A clear methodology is necessary to determine what impact an objective of climate change mitigation has on the interpretation of Article 101 TFEU.

The wording of an EU provision is the starting point in its interpretation.[18] This is also known as a *textualist* interpretation. The wording of Article 101 TFEU is therefore essential to this thesis.[19] The Court of Justice of the European Union (CJEU) has consistently stressed that when the language of an EU provision is clear and unambiguous, it cannot be interpreted differently based on other sources.[20] The wording refers to the "ordinary meaning" of the provision in "everyday language".[21]

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[15] Case C-309/99 Wouters. Case C-519/04 P Meca-Medina. Case C-333/21 ESL. This exception rule builds upon a similar exception rule (the Ancillary Restraints Exception), which stems from cases such as 26-76 Metro and 161/84 Pronuptia.

[16] Opinion of Advocate General Rantos on Case C-124/21 P ISU paras. 85 and 90.

[17] 2023 Horizontal Guidelines, para. 556.

[18] This methodology is explicitly described in Case 283/81 CILFIT. For further reading, see Lenaerts (2023).

[19] Arnesen (2022) p. 53.

[20] Case C-220/03 ECB, para. 31. Case C-263/06 Carboni, para. 48.

[21] Case C-286/22 KBC Verzekeringen, para. 25. Interpreting and applying provisions of EU law must be done uniformly, considering all language versions of the provision, see para. 36.

The context is the next step in interpreting an EU provision. This is also known as a *contextual* interpretation. It entails that the "context" in which the provision occurs and "the objectives pursued by the rules of which it is part" must be considered.[22] This means that surrounding provisions, such as Article 102 TFEU, are relevant. EU competition law pursues three main objectives, which are improving economic efficiency, safeguarding consumers, and establishing and maintaining a unified European market.[23] These objectives must therefore also be considered. Whether Article 101 TFEU strives to achieve public interest objectives, such as mitigating climate change, is debatable.[24]

Considering the provisions of the Treaty as a whole is the third step in interpreting an EU provision. This is also known as a *teleological* interpretation.[25] It entails that every EU provision must be interpreted in "light of the provisions of community law as a whole", with "regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."[26] This means that Article 101 TFEU must be read in conjunction with other treaty objectives.[27] Consequently, provisions regarding climate change such as Article 3 TEU, Articles 11 and 191 TFEU must be considered.[28]

Multiple other sources are relevant when interpreting Article 101 TFEU.

Case law from the CJEU is highly relevant for the interpretation of Article 101 TFEU, since the court can be said to be the exclusive interpreter of EU law.[29] Similarly, opinions of the General Advocate and case law from the General Court can be helpful.

Decisional practice from the European Commission (Commission) does not hold the same weight as case law but can also prove beneficial in demonstrating how Article 101 TFEU can be interpreted.

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[22] Case C-286/22 KBC Verzekeringen, para. 32.

[23] Craig (2020) p. 1034. Freedom as an objective has been especially popular in speeches by EU competition commissioners but has not gotten the same traction in decisional practice, see Stylianou (2020) p. 641.

[24] Sauter explains it in this way: It is sometimes claimed that EU competition law has been used to pursue non-competition (or equity-based) public policy goals, however the (limited) case law that would support these claims seems to indicate that instead, such goals were thought to be valid concerns in the context of a balancing exercise between internal competition and external non-competition goals. See Sauter (2016) chapter 3.3.

[25] Barnard (2023) p. 548. Sometimes also referred to as a "holistic" interpretation, see Nowag (2016) p. 15.

[26] Case 283/81 CILFIT, para. 20. Case C-67/96 Albany, para. 60.

[27] Lenaerts (2013) p. 24.

[28] Whether EU competition rules should be interpreted teleologically, has been the subject of debate, see Odudu (2006) p. 160 and Odudu (2010).

[29] Case C-741/19 République de Moldavie, para. 45. Case law can over time significantly influence how an EU provision is interpreted, see Arnesen (2022) p. 53.

Guidelines from the Commission serve as guidance to the courts and authorities of the Member States.[30] Even though they are nonbinding, they hold significant practical importance. In 2023, the Commission published new guidelines for the interpretation of Article 101 TFEU in regard to agreements between competing undertakings, which include a chapter on "sustainability agreements".[31] These guidelines can prove helpful when interpreting Article 101 TFEU in relation to agreements that mitigate climate change.

Guidelines from national competition authorities (NCAs) in Member States are not directly relevant when interpreting EU law, but can nonetheless be valuable where the interpretation of Article 101 TFEU is uncertain.[32] National competition law in Member States and EU competition law are substantially the same.[33] Several NCAs have published guidelines on the interpretation of their equivalent to Article 101 TFEU in relation to agreements that mitigate climate change.[34] These guidelines can prove helpful in answering the questions that arise in this thesis.

Each of the three sub-questions in this thesis follow the same interpretation methodology. Since their relevant sources differ, each question has its unique nuances.

The condition that an agreement must have either an *object* or *effect* of restricting competition to fall under Article 101(1) TFEU, follows from the provision's wording. Accordingly, the wording is the starting point of the analysis. However, the provision only states that such agreements are prohibited, leaving ample room for interpretation. The European courts have elaborated on the conditions in a vast number of cases. Based on this, it is possible to assess what impact an objective of climate change mitigation has on interpreting these conditions.

The Public Interest Exception is developed by the European Courts and has no basis in the wording of Article 101 TFEU. Consequently, case law is central in answering whether an agreement that mitigates climate change can benefit from this exception rule. When assessing if climate change mitigation can justify deviating from EU competition law, it is also beneficial to draw parallels to other areas of EU law in which such deviations have been accepted.

Article 101(3) TFEU is a codified exception rule that can justify agreements violating Article 101(1) TFEU. The wording of Article 101(3) lays out its conditions, making the wording of the

[30] Case C-226/11 Expedia, paras. 28-29.

[31] 2023 Horizontal Guidelines, chapter 11.

[32] See for instance paras. 80-112 in the Opinion of Advocate General Jacobs on Case C-67/96 Albany, where he in length considered the legal situation in Member States and the US.

[33] Case C-238/05 Asnef-Equifax, para. 5, Whish (2021) p. 77.

[34] ACM (2023), AFCA (2022), While the UK is longer a Member State, it aims to follow EU competition law and has also guidelines on agreements that mitigate climate change, see CMA (2023).

provision central to this thesis. There is also ample case law on its interpretation, in addition to decisions from the Commission. The Commission has published guidelines on general sustainability agreements, and several NCAs have published guidelines specifically for the assessment of agreements that mitigate climate change, which can provide answers to the questions arising in this thesis.

1.4 Outline

In order to illustrate what impact an objective of climate change mitigation has on the assessment of anticompetitive agreements under Article 101 TFEU, the thesis is structured as follows.

Chapter 2 delves into the factual meaning of agreements that mitigate climate change. The purpose is to identify their shared characteristics and examine their potential impact on competition. The chapter presents a comprehensive compilation of the most prevalent examples of agreements that mitigate climate change. These agreements will serve as the backdrop for the analyses in chapters 4-6.

Chapter 3 provides an overview of the legal framework surrounding agreements that mitigate climate change. It presents Article 101 TFEU and the relevant EU law pertaining to climate change. It addresses the key legal considerations and provides the necessary foundation for the analyses in chapters 4-6.

Chapter 4 provides an analysis and discussion on the classification of agreements that mitigate climate change as either restrictions of competition by object or by effect. Case law has been somewhat unclear regarding the impact of non-competition objectives, such as climate change mitigation, on this assessment. This chapter aims to provide clarification.

Chapter 5 provides an analysis and discussion on whether agreements that mitigate climate change can be exempted under the Public Interest Exception. The chapter explores if climate change mitigation qualifies as a valid justification under this exception and describes the exception's remaining conditions.

Chapter 6 provides an analysis and discussion on the interpretation of the four cumulative conditions for exempting anticompetitive agreements under Article 101(3) TFEU when assessing agreements that mitigate climate change. Given the significant debate surrounding the use of Article 101(3) TFEU to exempt general sustainability agreements, the analysis is particularly important.

Chapter 7 contains the final remarks.

2 Agreements Between Undertakings That Mitigate Climate Change

The primary purpose of this chapter is to provide a general understanding of agreements between undertakings that mitigate climate change. To achieve this, I will first introduce commonalities between such agreements. Afterwards, I will present a short and generalized compilation of the most prevalent types of agreements that mitigate climate change. These examples demonstrate how agreements between competing undertakings can mitigate climate change, and what the primary concerns related to competition are. They will also serve as a backdrop for the analyses conducted in subsequent chapters.

It can be presumed that many if not most agreements between undertakings that mitigate climate change, do not restrict competition.[35] For instance, agreements concerning the internal conduct of undertakings, industry-wide awareness campaigns, and limited exchanges of information such as databases with information on the climate-friendliness of suppliers, are rarely problematic.[36] The same applies to agreements between undertakings that are not competitors.

This thesis will focus on agreements that *prima facie* raise competition law concerns. Briefly put, such agreements have three commonalities:

Firstly, these agreements have the potential to mitigate climate change in various ways. This can include, amongst others, the reduction of direct emissions from production processes, the production of more durable and long-lasting products, or the mitigation of deforestation.[37]

Secondly, cooperation can prove necessary or beneficial in realizing this potential. There are three distinct reasons for this. *First*, undertakings may lack the resources to undertake measures on their own. *Secondly*, even if undertakings possess the resources, cooperation can expedite and enhance the effectiveness of these efforts. *Lastly*, undertakings may possess the resources but be hesitant to act unilaterally due to concerns of being outcompeted, commonly referred to as the "first-mover disadvantage". The ICC phrases the concern this way:

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[35] A survey conducted by a Norwegian law firm in 2023 reveals that many companies do not view competition law as a curb to their efforts in tackling climate change. When asked whether they had considered implementing a sustainability strategy but refrained due to uncertainty surrounding competition law, only 20% of respondents affirmed. Similarly, when questioned about whether competition law impedes innovation and the adoption of environmentally friendly technology, only 20% responded affirmatively. The survey suggests that, in most cases, competition law does not pose significant challenges to initiatives aimed at mitigating climate change. See Tveit (2023) questions 4 and 5 in appendix 4, see also 2023 Horizontal Guidelines para. 527.

[36] 2023 Horizontal Guidelines para. 531.

[37] For an explanation of the relationship between deforestation and climate change, see Lovejoy (2019).

> "[…] actions taken by businesses to advance their sustainability objectives usually require investments in the short term and possibly higher operating costs that often cannot be passed on in the prices charged to customers. Sometimes, this can go as far as companies challenging consumers' immediate interests […]. A head start may therefore mean unhappy shareholders and unhappy customers in the short term, with the pioneers […] becoming easy prey for competitors. The answer to this puzzle could lie in a collective move: cooperation among competitors."[38]

Lastly, these agreements have the potential to restrict competition. I will now provide five categories of agreements that mitigate climate change and demonstrate how they can raise competition law concerns.

Joint research and development (R&D) agreements are one such type of agreement.[39] R&D agreements can expedite and optimize the development of new technology, encompassing both the creation of new products and new manufacturing processes.[40] Undertakings may lack the specialized expertise required to develop new technologies on their own or be inhibited by financial constraints. Alternatively, they may be reluctant to go ahead on their own if the potential for financial losses outweighs the perceived benefits.

R&D agreements are an effective way to mitigate climate change. For instance, the creation of high-capacity batteries required for electric vehicles can be accelerated and done more effectively through collaboration.[41] Similarly, manufacturers facing obstacles while attempting to develop more energy-efficient appliances may find solutions by collaborating with other manufacturers.[42]

However, R&D agreements also raise competition law concerns. They can hamper innovation, resulting in a decreased number and quality of products introduced to the market. Additionally, such agreements may limit competition among the parties involved beyond the intended scope of the agreement.[43]

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[38] ICC (2022) p. 3.

[39] 2023 Horizontal Guidelines para. 51.

[40] 2023 Horizontal Guidelines para. 54.

[41] BBC Brown Bover.

[42] KSB/Goulds/Lowara/ITT. For further examples, see ICC (2022) business case 5, and JFTC (2023) supposed case 20.

[43] 2023 Horizontal Guidelines para. 54.

Production or purchasing agreements are another such type of agreement. These agreements allow companies to maximize the efficient utilization of their existing resources during the production process and save costs on purchases.

Such agreements can mitigate climate change in several ways. For example, telecommunication companies can significantly reduce their energy usage by sharing networks with competitors.[44] Similarly, if multiple waste collection networks are unnecessary to meet market demand, competitors could avoid duplicate networks and save resources by designating one company as the main operator.[45] In addition, airlines or shipping liners can achieve higher occupancy rates by sharing empty seats or cargo room, thereby reducing the total number of trips required to transport goods or passengers.[46]

Nevertheless, production and purchasing agreements can also raise competition law concerns. They can increase prices, reduce output, diminish product quality, variety, and innovation, and may lead to the foreclosure of other purchasers or producers.[47]

Agreements that limit or control production must also be mentioned. Such agreements can change both how products are made, their characteristics or the amount offered in a given market.

Agreeing to limit or control production can be an effective tool for mitigating climate change. For instance, a trade organization could prohibit its members from producing the least efficient household appliances, forcing consumers to purchase more climate friendly alternatives.[48] Mutually limiting the production of such products puts the competitors at a level playing field and increases the overall climate benefit, as customers can't simply switch to competitors offering the conventional product.[49]

However, agreements that limit or control production are problematic from a competition law perspective. Agreeing to limit production reduces technical diversity and consumer choice, and manufacturers who previously produced products that are now prohibited will face increased production costs.[50]

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[44] ICC (2022) business case 6.

[45] ICC (2022) business case 11.

[46] Exxon/Shell, 2023 Horizontal Guidelines para. 274.

[47] 2023 Horizontal Guidelines paras. 219 and 277.

[48] CECED paras. 8 and 51.

[49] ICC (2022) p. 3, 2023 Horizontal Guidelines para. 586.

[50] 2023 Horizontal Guidelines paras. 32 and 33.

Collective boycotts are a similar type of agreement. Collective boycotts entail that undertakings collectively choose not to deal with undertakings that don't meet certain requirements. They can be *vertical*, meaning undertakings agree to only purchase from certain suppliers.[51] Alternatively, they can be *horizontal*, meaning that the agreement aims to exclude competing undertakings from the market.[52] This can be achieved for instance by forcing suppliers not to deal with competitors that don't meet certain requirements, or by excluding such competitors from trade organizations.[53]

These boycotts can be an effective way to mitigate climate change. By only dealing with suppliers or competitors that meet specific climate criteria, they can effectively urge them to adopt more low-carbon production technologies. For instance, a trade association could prohibit its members from purchasing from suppliers that use environmentally damaging techniques in aluminum mining.[54] Or, a furniture trade association could prohibit its members from sourcing wood from the Amazon.[55]

Nonetheless, collective boycotts can also raise significant concerns. Collective boycotts reduce the number of viable suppliers and competitors in the market, resulting in reduced competition. This can contribute to higher prices and a narrower range of product choice. Moreover, suppliers and competitors that comply with climate standards often face increased production costs, leading to higher selling prices that are ultimately borne by consumers.

Lastly, price-fixing agreements should be mentioned. Agreeing to directly or indirectly fixing the selling prices of products can decrease their demand, similarly to agreements that restrict production.

Price-fixing agreements can effectively mitigate climate change. They decrease demand for products that contribute to climate change while simultaneously increasing demand for more climate-friendly products. For instance, retailers could agree to include a set fee on the price of single-use plastic bags, encouraging customers to reuse their own bags or opt for more climate-friendly alternatives.[56] Such agreements can also generate funds for the development of new,

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[51] Also called "buyers' cartels". See Whish (2021) p. 558.

[52] Also sometimes called an "exclusionary" boycott.

[53] The CMA views vertical boycotts with skepticism, see CMA (2023) point 4.1.2. So does the JFTC, see JFTC (2023) supposed case 52.

[54] ICC (2022) business case 2.

[55] ICC (2022) business case 3.

[56] ICC (2023) p. 3. These types of agreements have gained traction globally and are often voluntarily adopted even without being specified for by law, see for instance the Japanese agreement mentioned in OECD (2016) Box 4.12. The Norwegian Retailers' Environment Fund is another example; however, this agreement can hardly

more climate-friendly products or technologies. For example, the fees collected from plastic bags can be allocated towards the advancement of recycling technologies[57], fees on tires can contribute to finding and promoting new uses for tire-derived products [58], and car wreck disposal fees on the selling price of vehicles can help create a market for recycling[59].

Despite that, price-fixing agreements can be extremely problematic. They reduce competition on price, a central parameter of competition, and consequently force consumers to pay higher prices for products compared to what they would have paid otherwise.

In summary, agreements that mitigate climate change can contribute to reducing GHG emissions in an effective way, but concurrently run the risk of impeding competition. They do not constitute a specific, exclusive category.[60] Accordingly, they must in principle be assessed under Article 101 TFEU, like any other agreement that has the potential to restrict competition. However, climate change mitigation is a key objective in EU law and can play a role in this assessment. In the next chapter, I will present the legal framework applicable to such agreements.

3 The Legal Framework for Agreements That Mitigate Climate Change

3.1 Introduction

The purpose of this chapter is to give an overview of the legal framework surrounding agreements that mitigate climate change. I will begin by presenting the prohibition of anticompetitive agreements in Article 101 TFEU. Afterword, I will present provisions in EU law that address climate change, such as Article 3 TEU and Article 11 TFEU, and demonstrate their connection to Article 101 TFEU.

3.2 The Prohibition of Anticompetitive Agreements in Article 101 TFEU

3.2.1 Article 101(1) TFEU

According to Article 101(1) TFEU, all "agreements" between "undertakings", "decisions" by "associations of undertakings" and "concerted practices" which "may affect trade between

be classified as a voluntary agreement. The largest Norwegian retailers established the fund under the threat of otherwise being legislated.

[57] See the projects sponsored by the Norwegian Retailers' Environment Fund.

[58] Tyre Stewardship Scheme authorized by the ACCC, see ACCC (2018).

[59] See the agreement at the core of the waste disposal system assessed by the EU Commission in Car Wrecks.

[60] 2023 Horizontal Guidelines para. 523.

Member States" and which have as their "object" or "effect" the "prevention, restriction or distortion of competition" within the internal market, are prohibited.

The conditions "agreements", "decisions" and "concerted practices" are alternative, meaning that only one must be satisfied.

Agreements can be defined as "the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention".[61]

Decisions by associations of undertakings entail all "institutionalized" forms of cooperation, meaning situations where economic operators act through a "collective structure or a common body".[62] For instance, professional associations and trade associations meet this condition.

Concerted practices encompass coordination which, without having reached the stage where an agreement is concluded, "knowingly substitutes practical cooperation" between undertakings "for the risks of competition".[63] The condition is beneficial when it is difficult to prove that undertakings entered into an agreement, but evidence suggests that they have had contact that has hampered competition.[64]

The mutual aim of the three conditions is to catch "all forms" of "coordination and collusion between undertakings".[65] In regard to the difference between agreements and concerted practices, the CJEU has said that they only are distinguished "[…] by their intensity and the forms in which they manifest themselves".[66] Briefly put, which condition a cooperation is subsumed under, is not decisive.[67]

Because of this, and for reasons of practicality, I will use the term "agreements" for cooperation that falls under any of the three conditions hereafter.

Undertakings can be defined as "every entity engaged in an economic activity, regardless of its legal status and the way in which it is financed."[68] The key is, therefore, that the undertaking is

[61] Case C-2/01 P BAI and Commission v Bayer, para. 97. Whish (2021) p. 104.
[62] Case C-382/12 P MasterCard, para. 64.
[63] Case 48-69 Dyestuffs, para. 64.
[64] Case C-40/73 Suiker Unie, para. 174.
[65] Case C-49/92 P Anic Partecipazioni, para. 112.
[66] Case C-49/92 P Anic Partecipazioni, paras. 131-132.
[67] Case C-238/05 Asnef-Equifax, para. 32.
[68] Case C-41/90 Höfner, para. 21.

engaged in an "economic activity".[69] Any activity consisting in "offering goods or services on a given market" is an economic activity.[70] The line is drawn at activities that by their nature, aim and the rules to which they are subject, do not belong to the "sphere of economic activity", or relate to the exercise of the "powers of a public authority".[71]

The "prevention, restriction or distortion" of competition can be defined as conduct that is "liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of the goods or services."[72] Distinguishing between these terms is not decisive, and I will only use the term "restriction" of competition hereafter.[73]

Article 101(1) TFEU lists several types of agreements that generally restrict competition, such as agreements that a) fix prices, b) limit or control production, markets, technical development, or investment, c) share markets or sources of supply, d) apply dissimilar conditions trading parties or e) make the conclusion of contracts subject to acceptance of supplementary and unnecessary obligations.

Only agreements that have an "object" or "effect" of restricting competition are prohibited. The "object" condition can be defined as agreements that "[…] reveal a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects."[74]

Whether an agreement has an anticompetitive "effect" depends on how competition would operate in the absence of the agreement in question.[75] The effects need to be "appreciable", in other words, more than "insignificant".[76]

Finally, the agreement must "may affect trade between Member States". This condition is satisfied if the agreement is "[…] capable of constituting a threat to freedom of trade between

[69] Climate change mitigation does in itself does not affect the interpretation of "economic activity". The EFTA Court has made this expressly clear, see Case E-29/15 Sorpa, para. 57. In addition, a profit-motive is not a prerequisite for an economic activity, see Case C-67/96 Albany, para. 85.

[70] Case C-180/98 Pavlov, para. 75, Case C-475/99 Ambulanz Glöckner, para. 19.

[71] C-309/99 Wouters, para. 57. This approach does however not apply to an entity in its entirety, but rather to its individual activities. See C-49/07 MOTOE, para. 25.

[72] Case C 382/12 P MasterCard, paras. 93 and 180.

[73] Alternatively, "anticompetitive".

[74] Case C-333/21 ESL, paras. 162-163.

[75] Case C-333/21 ESL, para. 170, Case C-228/18 Budapest Bank, para. 55.

[76] Case C-226/11 Expedia, paras. 16 and 17. This condition does not apply to agreements that have an object of restricting competition, see para. 37.

Member States in a manner which might harm the attainment on the objectives of a single market between the Member States […]."[77]

The notion that the agreement "may affect" trade, entails that it must be possible to foresee "with a sufficient degree of probability", that it may have an influence, "direct or indirect, actual or potential" on trade between Member States.[78] Similarly to the effect on competition, the effect on trade must be appreciable.[79]

All EU Member States have competition laws based on Articles 101 and 102 TFEU. This means that an agreement in violation of EU competition law will usually also be considered illegal under national competition rules. However, national legislators or enforcement authorities can deviate from how EU competition law is interpreted if interstate trade is not impacted. For this reason, among others, the condition is highly relevant.

3.2.2 Article 101(3) TFEU

Article 101(3) TFEU provides a codified "legal exception" to agreements that are in violation of Article 101(1) TFEU.[80] For an agreement to benefit from this exception rule, the participating undertakings must demonstrate that four cumulative conditions are satisfied.[81]

The *first* condition requires that the agreement "contributes to improving the production or distribution of goods or to promoting technical or economic progress". The *second* condition requires that "consumers" receive a "fair share" of the agreement's "benefits".[82] The *third* condition of Article 101(3) TFEU requires that the agreement does not impose restrictions on the undertakings concerned that are not "indispensable" to the attainment of the benefits that the agreement creates. The *fourth* and final condition of Article 101(3) TFEU requires that the agreement does not afford the undertakings the possibility of "eliminating competition" in respect of a "substantial part of the products in question".

I will give a more detailed description of these conditions in chapter 6, where I also address the possibility of using Article 101(3) TFEU to exempt agreements that mitigate climate change from Article 101(1) TFEU.

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[77] In particular by sealing off national markets or by affecting the structure of competition within the common market, see Case C-475/99 Ambulanz Glöckner, para. 47.

[78] Case C-475/99 Ambulanz Glöckner, para. 48.

[79] Case C-475/99 Ambulanz Glöckner, para. 48.

[80] Whish (2021) p. 155.

[81] Case C-333/21 ESL, para. 191.

[82] Guidelines on Article 101(3) TFEU, para. 39.

3.3 EU Law Relating to Climate Change

3.3.1 Introduction

Agreements that mitigate climate change must be assessed under Article 101 TFEU. However, Article 101 TFEU must also be interpreted in light of general EU objectives. Climate change mitigation is underpinned by numerous provisions in EU law. This chapter provides a brief overview of the provisions that come into play when assessing agreements that mitigate climate change, and what they could mean for the interpretation of Article 101 TFEU. I will begin by presenting Article 3 TEU, before I move on to Article 11 TFEU.

3.3.2 Article 3 TEU

Article 3 of the Treaty on European Union (TEU) is a central provision in EU law, consisting of six parts that outline various objectives which the EU pursues.[83] Articles 3(3) and 3(5) TEU are particularly relevant for climate change. According to Article 3(3) TEU:

> "The Union […] shall work for 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 protection and improvement of the quality of the environment*. It shall promote *scientific* and technological advance [emphasis added]."

Furthermore, Article 3(5) TEU states:

> "In its relations with the *wider world*, the Union shall uphold and promote its values and interests and contribute to the protection of *its citizens*. It shall contribute to peace, security, the *sustainable development of the Earth* […] [emphasis added]".

Sustainable development can be defined as "development that meets current needs without compromising the ability of future generations to meet their own needs".[84] It involves various activities to promote economic, environmental, and social development, such as reducing pollution, conserving natural resources, upholding human rights, and ensuring fair incomes.[85]

[83] HCC (2020) para. 10.

[84] EU (2024B). Same definition as in the Brundtland Report (1987)

[85] 2023 Horizontal Guidelines para. 518.

However, climate change mitigation is at the core of sustainable development because, without effectively addressing climate change, achieving other sustainability goals becomes challenging.[86]

To judge the impact of Article 3 TEU, it is necessary to consider whether it has direct effect.[87] For a clause to have direct effect, it must be clear and unconditional.[88] This is unlikely to be the case for clauses that merely state objectives, which tend to be ambiguous and lack specific consequences on their own.[89]

Regarding Article 3 TEU, the CJEU has stated that it "cannot have the effect either of imposing legal obligations on the Member States or of conferring rights on individuals."[90] Consequently, Article 3 TEU does not have direct effect. Therefore, it can hardly on its own serve as a basis for claiming that climate change must be taken into account when interpreting Article 101 TFEU.[91] However, that does not imply that Article 3 TEU has no significance.

For one, the CJEU has stated that the implementation of the objectives of Article 3 TEU "[…] must be the result of the policies and actions of the Community and also of the Member States."[92] Policies and actions are usually implemented through directives, regulations and decisions, but also through guidelines.[93] Therefore, Article 3 TEU is relevant for competition authorities in the EU, such as the Commission and NCAs, but also for EU and Member State courts.[94]

Secondly, the CJEU has stated that the objectives in Article 3 TEU "[…] must be read in conjunction with the provisions of the Treaty designed to implement those objectives […]."[95] The provision that implements these objectives is Article 11 TFEU. Consequently, Article 3 TEU strengthens the impact of Article 11 TFEU and must be read in conjunction it.[96]

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[86] 2009 Review of the EU Strategy for Sustainable Development.

[87] If an EU clause has direct effect, it means that it imposes obligations on EU member states and grants rights to individuals, see Case 26/62 Van Gend en Loos.

[88] Case 26/62 Van Gend en Loos, II B.

[89] Odudu (2006) p. 167.

[90] Case C-339/89 Alsthom, para. 9. Case C-9/99 Échirolles Distribution para. 25.

[91] Case 126/86 Zaera, para. 11, Odudu (2006) p. 167.

[92] Case C-149/96 Portugal v Council, para. 86.

[93] Nowag (2016) p. 23.

[94] 2023 Horizontal Guidelines para. 516.

[95] Case C-9/99 Échirolles Distribution, para. 24. Case C-484/08, para. 47.

[96] Lenaerts (2021) 5.007.

The next question is therefore how Article 11 implements the objective of climate change mitigation, and what this might mean for the interpretation of Article 101 TFEU.

3.3.3 Article 11 TFEU

Article 11 TFEU is inserted in Part One of the treaty, which contains provisions of principle, under Title II, "provisions having general application". It reads as follows:

> "*Environmental protection requirements must be integrated* into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development [emphasis added]."[97]

For the purpose of interpreting Article 101 TFEU, it is especially important to clarify what is meant by "environmental protection requirements", and "must be intergrated".[98]

The meaning of environmental protection in everyday language refers to actions designed to "avoid, minimize, eliminate, or reverse damage to the environment".[99] As follows from the provisions wording, pursuing this is especially important for sustainable development, which at its core is concerned with mitigating climate change. The CJEU has also confirmed this to be the case.[100] A remaining question is precisely what kind of environmental protection requirements the provisions refer to. To elaborate on this, it is necessary to look at Article 191 TFEU.

Article 191 TFEU is inserted in Part Three of the treaty, which is devoted to "Union policies and internal actions", under Title XX "environment".

Article 11 TFEU and Article 191 TFEU were previously combined into a single provision.[101] In 1999, the part that is now in Article 11 TFEU was separated from Article 191 TFEU. The purpose of separating them was not to diminish the significance of Article 191 TFEU, but rather

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[97] The provision is similar to Article 37 of the EU Charter of Fundamental Rights, which states 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".

[98] As mentioned previously, the definition and implementation of the Union's policies and activities also includes actions from the EU Commission and EU Courts.

[99] Park (2017).

[100] The Court describes this well in Case C-379/98 PreussenElektra, para. 73: "The use of renewable energy sources for producing electricity […] is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change […].

[101] Before the Treaty of Amsterdam, which amended the Maastricht Treaty, the integration principle was part of Article 130r. The Treaty of Amsterdam revised the principle, giving it a dedicated provision in Article 3r.

to strengthen it by raising what is now in Article 11 TFEU, to a level of "principle".[102] Consequently, is safe to assume that they must be read in combination.[103]

Combating climate change is a main objective of Article 191(1) TFEU – making it one as well in Article 11 TFEU.[104] The provision states that Union policy on the environment inter alia shall contribute the quality of the environment, protecting human health, prudent and rational utilization of natural resources and promoting measures at international level to deal with regional or "worldwide environmental problems", in particular "combating climate change".

Article 191(2) TFEU mentions several principles that are relevant for Article 11 TFEU.[105] The provision states that EU policy shall aim at a "high level" of environmental protection. In addition, it sets out four specific principles which EU policy shall be based on: 1. The precautionary principle, 2. The principle that preventive action should be taken, 3. The principle that environmental damage should be rectified at source and 4. The polluter pays principle.

The European Climate Law must also be mentioned. This regulation sets out a binding objective of climate neutrality in the EU by 2050.[106] This means that GHG emissions must be reduced to net-zero by this date.[107] Both EU institutions and Member States are bound to take the necessary measures to achieve this objective.[108] In addition, it sets out an intermediate target of GHG reduction by at least 55% compared to 1990 levels by 2030.[109] These requirements are binding, which makes it even more important to include them in Article 11 TFEU.

In summary, when interpreting the term "environmental protection requirements" in Article 11 TFEU, regard should be given to the objectives and principles in Article 191 TFEU, as well as the net-zero target established in the EU Climate Law.

The meaning of "integration" in everyday language is the process of combining two or more things into one.[110] For Article 11 TFEU, this indicates that environmental protection requirements need to be combined with other areas of EU law. The wording of Article 11 is also

[102] A primary goal of the Amsterdam Treaty was to promote sustainable development, see Barnard (2023) p. 699.

[103] Barnard (2023) p. 705.

[104] For a more detailed explanation of the connection between Article 191(1) TFEU and Article 11 TFEU, see Dhondt (2003) p. 74.

[105] The provision in Article 11 TFEU was previously part of what is now Article 191(2) TFEU, Nowag (2016) p. 25, Dhondt (2003) p. 76.

[106] European Climate Law Articles 1 and 2(1).

[107] European Climate Law Article 1.

[108] European Climate Law Article 2(2).

[109] European Climate Law Article 4.

[110] Cambridge Dictionary (2024C)

stronger than that used in the other provisions of principle in TFEU, indicating that it is given special weight.[111]

The purpose of Article 11 TFEU underpins that environmental objectives must be considered when interpreting other EU provisions. The rationale for the provision is that environmental regulation in itself is not enough to combat climate change.[112] The Commission has described the provision as recognizing that "environmental policy alone cannot achieve the environmental improvements needed as part of sustainable development".[113] The provision does not give environmental concerns priority over other objectives – but demands that they are in balance.[114]

This equally applies to the interpretation of Article 101 TFEU. The CJEU has made this abundantly clear, stating that Article 11 TFEU is a "cross-cutting provision having general application",[115] and indicated that it must be taken into account in a "binding manner" when interpreting Article 101 TFEU.[116] Consequently, the question of whether Article 11 TFEU has direct effect, is of less importance.[117] In any event, Article 11 TFEU and the objectives and principles it pursues, must be integrated into the interpretation of Article 101 TFEU – which is why it often is referred to as the "integration principle".[118]

4 Object and Effect Restrictions and Agreements That Mitigate Climate Change

4.1 Introduction

The previous chapter demonstrated that an objective of climate change mitigation must be considered when interpreting Article 101 TFEU. Building on these findings, the purpose of this chapter is to determine how climate change mitigation can impact whether an agreement has an *object* or *effect* of restricting competition under Article 101 TFEU.[119]

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[111] Out of the eleven provisions, only Article 11 TFEU uses the phrase "must be integrated". The remaining provisions use "shall ensure", "shall aim", "shall take into account" and "shall pay full regard". The wording is not stronger by mistake, in fact, the predecessor to Article 11 TFEU used "shall" – which was changed to "must" with the Maastricht Treaty in 1992, in which environmental concerns were central.

[112] Marín Durán (2012) pp. 28-29.

[113] Integrating environmental considerations into other policy areas, p. 1, Marín Durán (2012) p. 165.

[114] Barnard (2023) p. 705.

[115] Case C-333/21 ESL, para. 100.

[116] Case C-333/21 ESL, para. 101.

[117] Nowag (2016) p. 36, Odudu (2006) p. 167.

[118] Barnard (2023) p. 705.

[119] Case C-124/21 P ISU, para. 98.

I will begin by considering the assessment of restrictions by object, before moving on to the effect condition.[120]

4.2 Object Restrictions and Climate Change Mitigation

4.2.1 Introduction

In order to demonstrate how an objective of climate change mitigation impacts the by object assessment, I will first present a brief overview of the general assessment of object restrictions. This will show that two factors, namely the agreement's "objectives", and its "economic and legal context", are at the center of finding an object restriction. Accordingly, I will analyze how these factors are impacted by climate change mitigation.

4.2.2 Object Restrictions in Brief

The essential legal criterion for determining if an agreement restricts competition by object, is that it reveals "in itself a sufficient degree of harm to competition".[121] This necessitates a three-step analysis of the agreement, as described in *ISU*: *First*, regard must be had to the "content of its provisions", *secondly* its "economic and legal context of which it forms a part", and *lastly* its "objectives".[122] When finally considering these three aspects in combination, it is necessary to show "the precise reasons" why the agreement reveals a sufficient degree of harm to competition.[123]

Regarding the content of its *provisions*, this entails reviewing the agreement at face value. Based on this, one can often conclude whether there are provisions that might lead to price fixing, excluding competitors, or sharing markets. This could indicate that the agreement restricts competition by object.

Regarding the *economic and legal context*, this entails taking into consideration "the nature of the goods or services affected", as well as "the real conditions of the functioning and structure of the market or markets in question".[124] The contextual examination allows for the consideration of whether there could be a plausible alternative explanation for the agreement, aside from

[120] Case 56/65 Maschinenbau Ulm, p. 249.

[121] Case C-67/13 P CB, para. 57, Whish (2021) p. 129.

[122] Case C-124/21 P ISU, para. 105. Described in the same way in ISU and Royal Antwerp.

[123] Case C-124/21 P ISU, para. 168, Case C-67/13 P CB, para. 69.

[124] Case C-32/11 Allianz Hungária, para. 36.

the pursuit of an anticompetitive objective.[125] If the agreement produces procompetitive effects, it most likely has an explanation that is not anticompetitive.[126]

Regarding the *objectives*, this entails finding out what the agreement seeks to achieve from a "competition standpoint".[127] The goal is to determine the agreement's "precise purpose".[128] Proving subjective intent to restrict competition is not necessary.[129]

This clear description of the *three-step* analysis distinguishes itself from previous case law, which in practice has involved a *two-step* analysis: In the first step, the contents and objectives of the agreement are examined in combination, to determine if the agreement falls into a category that from an economic analysis or in previous case law has been established to have an anticompetitive object.[130] The second step is then to consider the agreement within its economic and legal context, to verify if the conclusion from the first step holds true.[131] This analysis may be limited to "what is strictly necessary" to establish the existence of the anticompetitive object.[132]

There are several types of agreements previously established to restrict competition by object.[133] These primarily include those mentioned explicitly in Article 101(1) TFEU, although the list is not exhaustive.[134] Both price fixing, limiting output or sale of products and collectively boycotting competitors or suppliers have been considered to restrict competition by object.[135] However, joint research and development (R&D) agreements and production or purchasing agreements have rarely been considered in this manner.

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[125] Case C-307/18 Generics, para. 89, Opinion of Advocate General Saugmandsgaard Øe on Case C-179/16 F, Hoffmann-La Roche para. 148.

[126] Case C-307/18 Generics, para. 103, Case C-211/22 Super Bock para. 39.

[127] Case C-124/21 P ISU, para. 107.

[128] Case 56/65 Maschinenbau Ulm, p. 249.

[129] Case C-124/21 P ISU, para. 107.

[130] Opinion of Advocate General Bobek on Case C-228/18 Budapest Bank para. 41.

[131] AG Bobek refers to this as a "basic reality check", see Opinion of Advocate General Bobek on Case C-228/18 Budapest Bank para. 48.

[132] Case C-373/14 P Toshiba, para. 29. It should be noted that the three-step analysis has its roots in older case law, such as in Case C-501/06 P GlaxoSmithKline para. 58, and even C-96/82 IAZ, para. 25, with slightly different words. However, the description in ISU is much clearer and more unconditional. Contrary to previous case law, the factors are no longer only "inter alia" to be "regarded", but "necessary to examine".

[133] See Whish's "object box", Whish (2021) pp. 125, 132-136.

[134] Case C-209/07 BIDS, para. 23.

[135] Case C-8/08 T-Mobile, Case T-587/08 Bananas, Case C-209/07 BIDS, CECED, Case C-68/12 Slovenská sporiteľňa.

Both the two-step and three-step analyses have support in newer case law. In *Em akaunt BG*, concerning a horizontal price fixing agreement, the CJEU applied the two-step analysis.[136] However, in *Super Bock*[137], concerning a vertical price fixing agreement, the CJEU applied the three-step analysis.[138] The Court explicitly stated that even if an agreement is considered as a "hardcore restriction", it is necessary to carry out the three-steps.[139]

The findings so far suggest the following: If the contents of an agreement indicates that it falls into a category that from an economic analysis or in previous case law has been established to restrict competition by object, it can be presumed to do so. However, both the agreement's objectives and its economic and legal context can rebut this presumption. Therefore, two questions need to be further analyzed.

The *first* is what impact non-competition objectives, such as climate change mitigation, has on the agreement's "objectives". The *second* is whether such agreement's "economic and legal context" can draw their degree of harm to competition into question.[140]

4.2.3 The Objectives and Climate Change Mitigation

The purpose of this chapter is to determine if and to what extent non-competition objectives, such as climate change mitigation, can affect whether an agreement is deemed to restrict competition by object.

The wording of Article 101(1) TFEU supports considering non-competition objectives. Agreements that have "as their object" the restriction of competition are prohibited. The "object" condition must be interpreted as "objective". This is also in line with other language versions of the provision, such as the German, Danish and Swedish, which use the direct equivalent of "objective".[141] The goal of the condition is to find the agreements "precise purpose". If the

[136] Case C-438/22 Em akaunt BG.

[137] Case C-211/22 Super Bock.

[138] While vertical agreements usually are considered less harmful for competition than horizontal agreements, the essential legal criterion is the same, suggesting that the assessment method should be so as well. See Case C-211/22 Super Bock, para. 34.

[139] Case C-211/22 Super Bock para. 35-39.

[140] It should be noted that the Court lists the assessment of an agreement's "context" as the second step, and of its "objectives" as the last. In previous case law the order was the opposite, see Case C-67/13 P CB, para. 53, Case C-32/11 Allianz Hungária, para. 36, and Case 85/76 Hoffmann-La Roche, para. 79. The order does not have an impact on the outcome, since both factors must be considered together before reaching a conclusion. For practical reasons, I have chosen to first consider the "objectives".

[141] The German uses "bezwecken", the Danish "formal" and the Swedish "syfte".

agreement genuinely pursues an objective such as mitigating climate change, this can be considered to be the agreement's "precise purpose".[142]

This interpretation is also supported by the notion that Article 101(1) TFEU should be read in light of other EU objectives. Agreements that genuinely mitigate climate change, an objective found both in Article 3 TEU and Article 11 TFEU, should in principle not be compared to classic cartels that only produce profit for the participating undertakings, at the expense of competition and consumers.[143]

Case law also demonstrates that non-competition objectives influence whether an agreement restricts competition by object, though the CJEU has not always been consistent on this point. For example, the Court has repeatedly stated that pursuing certain legitimate objectives[144] is "not decisive" for the application of Article 101(1) TFEU, suggesting that such objectives are at least somewhat relevant.[145] However, it has also referred to these objectives as "irrelevant".[146]

The remaining question is, therefore, whether and how such objectives are relevant when determining if an agreement restricts competition by object. Although the Court's statements may appear contradictory, its practical assessments are not.

As a starting point, if an agreement *clearly has an anticompetitive objective*, other objectives are *irrelevant*. Numerous cases demonstrate this.

For instance, in *IAZ*, the appellants claimed that the agreement pursued the objective of safeguarding public health.[147] This case involved an agreement on conformity labels for washing machines and dishwashers, with the purpose of ensuring compliance with water quality requirements in Belgian law.[148] The agreement granted exclusive authorization to a trade organization to issue conformity labels and obliged it to only supply official manufacturers and importers.[149]

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[142] Case 56/65 Maschinenbau Ulm, p. 249. As Colomo puts it: "The plain meaning of the word object (that is, the objective purpose or aim of an restraint) takes us a long way when evaluating whether an agreement is caught by Article 101(1) TFEU by its very nature. It is, by some distance, the single more reliable indicator." See Colomo (2024A).

[143] Wouters (2021) p. 261.

[144] It has not provided a specific definition for "legitimate objectives" in this context, but case law suggests that it refers to non-competition objectives, including public interest objectives. I will hereafter use "non-competition objectives".

[145] Case C-124/21 P ISU, para. 107, Case C-333/21 ESL, para. 167 and 176.

[146] Case C-124/21 P ISU, para. 156. Case C-209/07 BIDS, para. 21.

[147] Case C-96/82 IAZ.

[148] Case C-96/82 IAZ, para. 3.

[149] Case C-96/82 IAZ, para. 5.

The CJEU found that the agreement first and foremost had an anticompetitive objective. It "clearly" aimed to treat parallel imports less favorably than official imports.[150] Accordingly, the Court concluded that the agreement restricted competition by object.[151]

This was unsurprising since the agreement hardly safeguarded public health. It restricted competition further than what was necessary to ensure compliance with Belgian law, with no additional benefits to public health.[152] This rendered parallel imports nearly impossible. Consequently, it was only a "disguised cartel".[153] The Court's conclusion and rapid dismissal of the claimed objective were predictable.

The same follows from *BIDS.*[154] This case concerned agreements between Irish beef processors that coordinated a reduction in the number of meat processors. Under these agreements, some meat processors would leave the market and receive compensation from those who remained.[155]

BIDS claimed that the purpose of the agreements was to address overcapacity and achieve economies of scale, in essence remedying the effects of a crisis in their sector.[156] They argued that the agreed-on restrictions were justified to meet these goals. However, regarding such objectives, the CJEU went on to state the following:

> "[…] an agreement may be regarded as having a restrictive object *even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives* […] [emphasis added]."[157]

The agreement's main objective was clearly anticompetitive. Reducing overcapacity is an objective that primarily benefits and protects the undertakings. Instead of letting competition sort out which undertakings would survive, they took the task into their own hands. Consequently, even the claimed "legitimate" objective was arguably anticompetitive.[158]

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[150] Case C-96/82 IAZ, paras. 7 and 24.
[151] Case C-96/82 IAZ, para. 25.
[152] Case C-96/82 IAZ, para. 27.
[153] Kingston (2012) p. 245.
[154] Case C-209/07 BIDS,
[155] Case C-209/07 BIDS, para. 8.
[156] Case C-209/07 BIDS, para. 21.
[157] Case C-209/07 BIDS, para. 21.
[158] Whish (2021) p. 642.

Similarly, the CJEU was unconvinced by the claimed objectives in *Slovenská sporiteľňa*.[159] In this case, several banks collectively decided to exclude a competitor from the market. They claimed that this was necessary because the competitor was operating illegally.[160] Despite that, the Court stated that "it is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements".[161] The fact that the competitor was operating illegally, was of "no relevance" to the question of whether the agreement had an anticompetitive objective.[162]

However, the decisive fact was that the agreement hardly pursued the claimed objective. None of the banks had challenged the legality of the competitor's business with the national regulator or courts.[163] The assessment necessary to determine whether the competitor was operating illegally, was also far more complex than the banks asserted.[164] Reading between the lines, the Court was not convinced that the banks boycotted the competitor purely out of goodwill.

In summary, if an agreement obviously has an anticompetitive objective, any other potential objectives are irrelevant.[165]

On the other hand, if an agreement *genuinely and convincingly pursues non-competition objectives*, they are most certainly relevant.

One case that demonstrates this is *Cartes Bancaires (CB)*. This case concerned a payment card system, which the General Court (GC) determined to have an objective of reducing competition and increase market concentration.[166] Consequently, the CG concluded that the system restricted competition by object.[167]

However, the CJEU viewed this differently.[168] The system included fees that could restrict competition by encouraging the participants to limit card issuance, but the objective was not to

[159] Case C-68/12 Slovenská sporiteľňa.
[160] Case C-68/12 Slovenská sporiteľňa, para. 14.
[161] Case C-68/12 Slovenská sporiteľňa, paras. 20-21.
[162] Case C-68/12 Slovenská sporiteľňa, paras. 20-21.
[163] Case C-68/12 Slovenská sporiteľňa, para. 19.
[164] Case C-68/12 Slovenská sporiteľňa, para. 20.
[165] Opinion of Advocate General Tizzano on Case C-551/03 P General Motors para. 68.
[166] Similar to the situation in BIDS, see Case C-67/13 P CB paras. 83-84.
[167] Case C-67/13 P CB, paras. 5, 8, 11-12, Whish (2021) p. 129.
[168] Case C-67/13 P CB, para. 92.

address overcapacity in the payment card market. Rather, the fees would promote the development of the system and combat free riding.[169] Accordingly, it did not have an anticompetitive objective.

Similarly, the CJEU indicated that the agreement pursued non-competition objectives in *Budapest Bank*.[170] This case concerned a payment card system akin to that in *CB*. The Court stated that it was up to the referring court to determine which objective or objectives were "actually" established, indicating it could be justified by objectives such as those in *CB*.[171]

The Court was ever more specific in giving non-competition objectives relevance in *OTOC*. This case concerned a dispute between a professional accountancy organization and the Portuguese Competition Authority.[172] When considering whether the disputed regulations had an anticompetitive objective, the Court was content with finding that it had an objective of ensuring the quality of services provided by chartered accountants – and because of this, it did not have an anticompetitive objective.[173]

However, *if an agreement's anticompetitive harm is likely to be too great, non-competition objectives become irrelevant*. This is the case even if the objectives genuinely are pursued.

This is demonstrated by *ESL*. One of the questions in *ESL* was whether FIFA's and UEFA's rules on approval of football competitions and on the participation in those competitions had an anticompetitive objective.[174] The Court found that the rules by their nature made it possible to exclude any competing undertaking, even an equally efficient one, and to restrict the creation and marketing of alternative or new competitions.[175] Therefore, it restricted competition by object. Regarding the relevance of non-competition objectives, the Court stated:

> "[T]he adoption of those rules on prior approval may include the pursuit of *legitimate objectives*, such as ensuring observance of the principles, values and rules of the game underpinning professional football."[176]

The Court also said that:

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[169] Case C-67/13 P CB, para. 86.
[170] Case C-228/18 Budapest Bank.
[171] Case C-228/18 Budapest Bank, para. 69.
[172] Case C-1/12 OTOC.
[173] Case C-1/12 OTOC, paras. 68-69.
[174] Case C-333/21 ESL, para. 171.
[175] Case C-333/21 ESL, para. 176.
[176] Case C-333/21 ESL, para. 176.

> "[…] although the specific nature of international football competitions […] *lend credence to the idea that it is legitimate*, […] those contextual elements nevertheless are *not capable of legitimising the absence of substantive criteria and detailed procedural rules* suitable for ensuring that those rules are *transparent, objective, precise and non-discriminatory*."[177]

Therefore, the non-competition objectives *could* have justified the rules. However, this could not be the case in the absence of transparent, objective, precise, and non-discriminatory rules. Rules that do not meet such criteria inevitably have a detrimental impact on competition.[178] Genuinely pursuing non-competition objectives cannot deviate from this conclusion.[179]

The same follows from *General Motors*. In this case, Opel Nederland was the exclusive national sales company for the Opel brand in the Netherlands and had dealership agreements with around other Opel dealers in Europe.[180] The CJEU found that these agreements had the objective of restricting exports of vehicles to other EU Member States.[181] The appellants claimed that the agreements pursued legitimate *commercial policy objectives*, such as promoting Opel sales in the Netherlands.[182]

However, the Court disagreed, stating the agreement clearly manifested "the will to treat export sales less favourably than national sales and thus leads to a partitioning of the market in question".[183] Even if it pursued non-competition objectives, the agreement had a detrimental impact on competition that could not deviate from the preliminary conclusion that it restricted competition by object.

Similarly, *EM akaunt BG* concerned a set of rules that set a minimum amount of fees that lawyers had to charge their clients.[184] The objective of these rules was to ensure the quality of services provided by lawyers.[185] Nonetheless, the CJEU found that the rules essentially would

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[177] Case C-333/21 ESL, para. 175.

[178] This type of reasoning is similar to that used in the assessment of selective distribution systems, which usually are deemed to constitute by object restrictions unless they pursue legitimate objectives and meet certain conditions. See Case 26-76 Metro, Case C-439/09 Pierre Fabre and Case C-230/16 Coty.

[179] It can also be argued that the Court was not convinced that the rules first and foremost pursued the claimed objectives.

[180] Case C-551/03 P General Motors, para. 3.

[181] Case C-551/03 P General Motors, paras. 16 and 80.

[182] Case C-551/03 P General Motors, para. 60.

[183] Case C-551/03 P General Motors, para. 67.

[184] Case C-438/22 Em akaunt BG, para. 42.

[185] Case C-438/22 Em akaunt BG, para. 43.

result in straightforward horizontal price-fixing, a type of conduct that must be classified as a restriction by object due to the significant harm it causes to competition.[186] The fact that the rules perhaps pursued legitimate objectives could not be decisive.

Consequently, non-competition objectives, including climate change mitigation, are *relevant but not decisive if the agreement is obviously detrimental to competition*.

The Commission supports these findings in its 2023 Horizontal Guidelines. Here, it states that when an agreement pursues a sustainability objective, this "must be taken into account" for the purpose of "determining whether the agreement restricts competition by object".[187] Additionally, it says:

> "Where the parties to an agreement substantiate that the *main object* of an agreement is the pursuit of a sustainability objective, and where this casts *reasonable doubt* on whether the agreement reveals […] a sufficient degree of harm to competition to be considered a by object restriction, the agreement's effects on competition will have to be assessed."[188]

Accordingly, the pursuit of climate change mitigation must first and foremost be the main objective of the agreement. In addition, the pursuit of the objective must be genuinely convincing. As the Commission puts it, "the evidence demonstrating the pursuit of a sustainability objective should be such as to justify a reasonable doubt as to the anti-competitive object of the agreement".[189]

Several competition authorities have issued guidelines that echo the finding that such objectives are relevant if they can be genuinely and convincingly demonstrated. The Dutch ACM reiterates the Commission, and the Austrian AFCA states that if multiple objectives are pursued concurrently, such as one related to environmental sustainability and another related to anticompetitive behavior, the "actual and provable pursuit of a real sustainability objective is to be assessed".[190]

The British CMA has taken an even more proactive approach, outright *specifying certain agreements as not restricting competition by object*. For instance, the CMA states that agreements to

[186] Case C-438/22 Em akaunt BG, para. 52.
[187] 2023 Horizontal Guidelines para. 533.
[188] 2023 Horizontal Guidelines para. 534.
[189] 2023 Horizontal Guidelines para. 534, n. 372.
[190] ACM (2023) para. 16. AFCA (2022) para. 56.

only purchase from suppliers that sell sustainable products, do not restrict competition by object.[191] Essentially, it categorically excludes vertical boycotts that mitigate climate change. The CMA's reasoning is that unlike traditional collective boycotts, such agreements do not have an objective of harming competitors. However, the objective of harming competitors is not a direct condition in the assessment of object restrictions, and such agreements can still be harmful for other reasons. Similarly, the CMA encourages competing undertakings to agree to switch to exclusively using renewable energy in production processes.[192]

To summarize, the objective of mitigating climate change is relevant if the agreement *genuinely* pursues this. In such cases, an agreement will often not be deemed to have an anticompetitive objective, even if it otherwise fits a category that from an economic analysis or in previous case law has been established to have an anticompetitive object. In principle, this means that agreements that genuinely mitigate climate change should not be considered to have an anticompetitive objective.

However, there is a limit to this, as such objectives cannot be decisive when the agreements competitive harm is *obviously significant* – Article 11 TFEU cannot change this conclusion. This is only sensible. The reason to consider objectives such as climate change mitigation relevant, is not to categorically exclude every such agreement from the object category – only to ensure that the agreement actually is harmful enough to competition to be deemed to restrict competition by object.

For instance, an agreement between competitors to fix prices simply in order to reduce demand without offering any substitute that is more climate friendly, is *obviously detrimental to competition*. Similarly, boycotting undertakings in order to force them to use more climate friendly technologies, if no such technologies exist – or if only a few select undertakings possess the necessary technology and are unwilling to share it - is detrimental to competition.

Therefore, it is also important to assess the agreements economic and legal context, which is the subject of the next subchapter.

[191] CMA (2023) chapter 4.12. It should be kept in mind that the CMAs interpretation over time can diverge from that which is prominent in the EU – this might be such a case.

[192] CMA (2023) chapter 6.3. The CMA also connects this with the first mover disadvantage, writing that the agreements is necessary because using renewable energy is more expensive and therefore puts the engaging business at a disadvantage to its competitors.

4.2.4 The Economic and Legal Context and Climate Change Mitigation

The purpose of this chapter is to determine how the economic and legal context of agreements that mitigate climate change affects whether an agreement restricts competition by object. As with considering the "objectives" of an agreement, considering the economic and legal context of an agreement is necessary to ascertain if there is a plausible explanation that is not anticompetitive.

When considering the economic and legal context of an agreement, any potentially procompetitive effects are central. In *Generics*[193], the Court emphasized that an agreement's procompetitive effects must, "as elements of the context of that agreement" be "duly taken into account" for the purpose of its characterization as a restriction by object.[194] Doing so is especially important in order to comply with Article 11 TFEU.

This is not the same as the so-called "rule of reason" established in US Antitrust law, which requires a balancing of the pro- and anticompetitive effects of an agreement.[195] Rather, the reason for taking into account procompetitive effects is "but merely to appreciate the objective seriousness of the practice concerned".[196] If procompetitive effects are "demonstrated, relevant and specifically related to the agreement concerned", and "sufficiently significant", they create doubt as to whether the agreement actually causes a sufficient degree of harm to competition to be deemed to restrict competition by object.[197]

Briefly put, if the procompetitive effects challenge the overall assessment of the harm to competition caused by the agreement, it should not be classified as a restriction by object.[198]

The connection between the pursuit of non-competition objectives and procompetitive effects is not novel. In *Metro*, concerning a selective distribution system, the Court began by saying:

> "[…] the desire to maintain a certain price level […] in the interests of consumers […] forms *one of the objectives which may be pursued* without necessarily falling under the prohibition contained in [Article 101(1) TFEU] […] [emphasis added]"[199]

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[193] Case C-307/18 Generics.

[194] Case C-307/18 Generics, para. 103.

[195] Case C-307/18 Generics, para. 104. Case T-112/99 Métropole, paras. 72 and 76.

[196] Case C-307/18 Generics, para. 104.

[197] Case C-307/18 Generics, para. 107. It is important to note that the procompetitive effects must be specific to the clause assessed, rather than just generally connected with the agreement. See Case C-331/21 EDP para. 105.

[198] Case C-307/18 Generics, para. 107.

[199] Case 26-76 Metro, para. 21.

The Court then continued with the following statement:

> "This argument is strengthened if, *in addition*, such conditions *promote improved competition* inasmuch as it relates to factors other than prices [emphasis added]."[200]

Accordingly, the following can be observed: If the parties to an agreement can demonstrate that the agreement *genuinely mitigates climate change,* and if the agreement also has *procompetitive effects*, there is reasonable doubt as to whether the agreement reveals a sufficient degree of harm to competition to be considered as a by object restriction.

The assessment of an agreement's procompetitive effect needs to be done on a case-by-case basis. Therefore, it is not possible to definitively say whether agreements that mitigate climate change will have procompetitive effects. However, since these agreements share common features, it is possible to provide a *general indication*. A couple of real-life examples demonstrate that even rather restrictive agreements can be procompetitive.

For instance, *Agreements that limit or control production* can have procompetitive effects. One such prominent case assessed by the Commission is *CECED*.[201]

CECED concerned an agreement that phased out the least energy efficient washing machines on the European market. Members of the trade association CECED agreed to only manufacture or import washing machines that satisfied energy efficiency standards A to C. This eliminated the production and importation of machines in categories D to G.[202] Removing these categories of machines would simultaneously reduce consumer choice and technical diversity.[203]

The Commission determined that the agreement restricted competition by object. The agreement's clause had the objective of "controlling one important product-characteristic on which there is competition in the relevant market" and would inevitably raise production costs.[204] It

[200] Case 26-76 Metro, para. 21, Whish (2021) p. 135. The statements in *Metro* did not strictly concern the assessment of by object restrictions, but the CJEU has in later cases concerning selective distribution systems clarified that it indeed views them as by object restrictions, unless pursuing alternate legitimate objectives. See Case C-439/09 Pierre Fabre para. 39.

[201] CECED.

[202] CECED, para. 30.

[203] CECED, para. 33.

[204] CECED, para. 34.

would eliminate the production and importation of machines in categories D to G, and therefore also the competition in this segment.[205]

When considering the clarifications in *Generics* and following case law, this conclusion must be drawn into question. This is because, as the Commission itself noted in its decision, the agreement had procompetitive effects. The Commission stated:

> "The agreement is also likely to focus future research and development on furthering energy efficiency beyond the current technological limits of category A, thereby allowing for increased product differentiation amongst producers in the long run."[206]

In other words, agreeing to restrict competition for the least energy-efficient machines would likely lead manufacturers to continue improving competition in other parts of the market. Later, the Commission stated:

> "Indeed, *the restriction in one product-dimension*, energy consumption, *may increase competition on other product characteristics*, including price. Therefore, while the minimum price of washing machines is likely to increase, *it cannot be ruled out that products in categories A and B may become available at a lower price* [emphasis added]."[207]

The commission explicitly calls these effects "competition-enhancing".[208] This also falls in line with the procompetitive effects mentioned in *Budapest Bank*. Not only did the agreement in *Budapest Bank* pursue a legitimate objective, but the fees could increase competition in terms of other features, transaction conditions, and pricing.[209]

Therefore, agreeing on one parameter of competition can focus residual competition on other aspects of the products in question. In other words, limiting competition can free up resources to focus on other aspects of competition – which is good for competition.[210]

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[205] CECED, para. 37.

[206] CECED, para. 50. The Commission viewed this as meeting the criteria of technical progress in Article 101(3) TFEU.

[207] CECED, para. 53.

[208] CECED, para. 54.

[209] Case C-228/18 Budapest Bank, para. 74.

[210] The Commission found similar procompetitive effects in Ford/Volkswagen. In addition to "considerably" improving the environment, the joint venture in that case would "stimulate competition through the creation of an additional choice", and that there would be "increased competition concerning price and quality over the next five to ten years with the further penetration of the segment by Japanese producers as well as other new entrants", see para. 37.

One question is then why the Commission treated the agreement's clause that restricted importing and production, as a restriction of competition by object. There might be multiple explanations for this.

One possible explanation is that the procompetitive effects were not certain enough. As stated in *Generics*, the procompetitive effects must be demonstrated, relevant, specifically related to the agreement concerned and sufficiently significant. The effects were most definitely relevant and specifically related to the agreement, but perhaps not demonstrated well enough, or sufficiently significant. However, considering the weight the Commission gave these effects when exempting the agreement via Article 101(3) TFEU, this seems rather unlikely.[211]

Another possibility is that the idea of giving procompetitive effects weight was not as well established as it is now. It was first in *Generics* that the CJEU gave a detailed explanation of this notion.

Lastly, one possibility is that finding a by object restriction simply was the easiest way to assess the agreement. The Commission would anyway find that it satisfied the conditions for an exemption in Article 101(3) TFEU. Consequently, there was no reason to do a full assessment of the agreement's effect on competition. For the Commission and the private parties involved, the simplest solution was to conclude that it was an object restriction.

Collective boycotts can also have procompetitive effects. One such agreement is the Australian Tyre Stewardship Scheme.[212]

This scheme concerns an agreement between a large number of businesses within the Australian tire sector, with the objective of finding new ways to use end of life tires, tire derived products (TDPs). The scheme obliges its participants to only deal with businesses meeting certain conditions and mandates a fee per tire on several participants. In other words, the agreement involves both agreeing to boycott certain suppliers, competitors, or purchasers, and agreeing to pay a fixed fee per tire sold.[213]

The Australian competition authority (ACCC) granted authorization to the scheme for several reasons, but especially because of its procompetitive effect. The ACCC found that the market for TDPs is underdeveloped, and that further development is required. The scheme's investments would assist in developing industry recognition and identify potential markets for

[211] CECED, paras. 47-57.
[212] ACCC (2018).
[213] ACCC (2018), summary.

TDPs.[214] In essence, the scheme's profit would go towards developing and consequently opening new markets for competition.[215]

Accordingly, *agreements that add fees to unsustainable products*, can also have procompetitive effects. In addition to this scheme, a Dutch case on end-of life vehicles (ELVs) demonstrates so as well.

Prior to the former directive on ELVs (End-of-Life Vehicles), Dutch automobile companies collaboratively established a system for recycling vehicles.[216] It was cheaper to shred vehicles than to recycle them, and the agreement therefore stipulated an upfront recycling fee that all participants would charge their customers when first registering vehicles.[217] The fees would then be used to pay the cost of later recycling the ELVs. The Dutch ACM found that the agreement not only would be highly beneficial to the environment, but also create a market for recycling ELVs.[218]

In summary, agreements that mitigate climate change often have procompetitive effects. This applies both to agreements that limit production and to collective boycotts of undertakings that don't meet certain climate criteria. Even agreements that add fees to unsustainable products can have procompetitive effects, provided the fees are actually used for mitigating climate change.

Accordingly, such agreements are unlikely to restrict competition by object. When thoroughly analyzing the economic and legal context of agreements that genuinely mitigate climate change, one will often find procompetitive effects that draw their degree of harm to competition in question.

4.3 Effect Restrictions and Climate Change Mitigation

If the agreement does not have an anticompetitive object, the second step is to examine whether it has such an effect.[219]

The effect condition demands that the agreement is "liable" to have an "appreciable adverse impact" on parameters of competition, such as the price, the quantity and quality of the goods

[214] ACCC (2018), paras. 121 and 161.
[215] ACCC (2018), para. 164.
[216] Directive 2000/53/EC amended by directive (EU) 2018/849.
[217] OECD (2016) p. 146. The agreement is also mentioned in Car Wrecks.
[218] OECD (2016) p. 146.
[219] Case C-124/21 P ISU, paras. 99, 109-110, Case C-228/18 Budapest Bank, paras. 33-36.

or services.[220] To demonstrate this, it is necessary to find what the competitive situation would be without the agreement, also called establishing the "counterfactual".[221] Only then is it possible to compare the two situations and conclude if the agreement actually has an anticompetitive effect. This also follows from the conditions wording.

The effect assessment of agreements that mitigate climate change is in principle the same as with any other type of agreement.[222] The agreements presented in Chapter 2 are, in general, liable to have an anticompetitive effect.

For instance, R&D agreements can reduce competition in several ways. The Commission's decision in *Philips/Osram*, which concerned a joint venture that included R&D for the development of an environmentally friendly product, demonstrates this well.[223] Here, the agreement between Philips and Osram would eliminate competition from Osram, and consequently also reduce choice for companies being supplied by both undertakings.[224]

Production and purchasing agreements can also have an anticompetitive effect. This is demonstrated by the Commission's decision in *Ford/Volkswagen*, which concerned a production agreement that would lead to considerable environmental improvements.[225] The agreement would disincentivize Ford and Volkswagen from pursuing a similar activity on their own, thereby seriously restricting competition.[226]

Agreements that limit or control production can have similar effects. For instance, in *CECED*, the Commission found that the agreement would restrict the parties' autonomy in choosing what machines to produce, and consequently reduce technical diversity and consumer choice.[227]

Collective boycotts will normally also inevitably have an anticompetitive effect. Such agreements either remove competitors and suppliers from the market or force them to meet standards

[220] Case C-382/12 P MasterCard, para. 93.

[221] Case C-333/21 ESL, para. 170, Case C-228/18 Budapest Bank, para. 55, Whish (2021) pp. 121 and 137.

[222] Whish (2021) p. 641, 2023 Horizontal Guidelines, para. 535.

[223] Philips/Osram, para. 11.

[224] Philips/Osram, para. 16.

[225] Ford/Volkswagen, para. 26.

[226] Ford/Volkswagen, para. 20.

[227] CECED, paras. 32-33. While the Commission mentioned these effects under the by object assessment, they must be deemed equally as relevant in the effect assessment. If an agreement is categorized as a by object restriction, it is precisely because its anticompetitive effects are so highly likely that they are unnecessary to demonstrate.

that eventually lead to higher prices for consumers. The Commission has categorized the collective boycott as "one of the most serious infringements of the rules of competition".[228]

Price-fixing usually has anticompetitive effects as well. Such agreements restrict competition on price, a major competition factor. Even if such an agreement in a given case is not considered to restrict competition by object, it usually will have such an effect – as demonstrated by *MasterCard*.[229]

However, the agreements must have an "appreciable" adverse impact on competition.[230] This is also called the "De Minimis Doctrine", and it creates a safe harbor for agreements that have an anticompetitive effect, but only a small impact on the market. In essence, the agreement must "appreciably" restrict competition to fall within the scope of Article 101(1) TFEU.[231] This condition could prove beneficial for agreements that mitigate climate change.

For instance, if the undertakings only have a small market share, the agreement is unlikely to have an appreciable anticompetitive effect.[232] The Commissions Notice on Agreements of Minor Importance sets the threshold at 10% of the aggregated market share.[233]

Another factor is the agreement's market coverage. For instance, if in addition to the climate friendly product, also traditional alternatives are offered by competitors that do not participate in the agreement, the agreement is unlikely to have an appreciable anticompetitive effect.[234]

The undertakings remaining freedom is an additional factor. If the agreement only limits their freedom to a small degree, it is unlikely to have an appreciable anticompetitive effect.[235] For instance, an agreement that leads to the production of a low-carbon product, is unlikely to have an appreciable anticompetitive effect if the participants are still allowed to sell the conventional product.[236]

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[228] Papiers peints de Belgique, III para. 3.

[229] Case C-382/12 P MasterCard.

[230] Case C-226/11 Expedia, para. 16.

[231] Case C-226/11 Expedia, para. 17. This condition does not apply to agreements that have an object of restricting competition, see para. 37.

[232] 2023 Horizontal Guidelines, para. 535, CMA (2023), para. 4.16.

[233] Commission Notice on agreements of minor importance, para. 8, Whish (2021) p. 146.

[234] AFCA (2022) para. 61.

[235] 2023 Horizontal Guidelines, para. 535.

[236] CMA (2023), para. 4.16, 2023 Horizontal Guidelines, para. 535.

In summary, whether agreements that mitigate climate change have anticompetitive effects is normally assessed in the same way as for any other type of agreements. While certain factors can be presumed to be especially relevant, there is no indication that a climate objective in itself can change the assessment's outcome.

4.4 Concluding Remarks

This chapter has demonstrated that an objective of climate change mitigation indeed is relevant when considering whether an agreement restricts competition by object or by effect.

For one, even if an agreement at first glance seems to have an anticompetitive objective, this can be drawn into question if the parties can convincingly demonstrate that the agreement actually pursues an objective of mitigating climate change. Secondly, agreements that mitigate climate change will regularly produce procompetitive effects. If these effects can be demonstrated to a sufficient degree, the agreements competitive harm is drawn into question.

Accordingly, such findings can in combination lead to the conclusion that an agreement which mitigates climate change, does not restrict competition by object. This means that undertakings genuinely interested in mitigating climate change can expect that such an agreement will be considered less harshly, and that competition authorities will need to demonstrate the anticompetitive effects of such agreements.

Whether an agreement has an effect of restricting competition is in principle analyzed in the same way for agreements that mitigate climate change as any other type of agreement. While many agreements that mitigate climate change are not anticompetitive, and therefore entirely fall outside of Article 101(1) TFEU, others can most definitely have an anticompetitive effect.

In order for such agreements to be permitted, they must be exempted from Article 101(1) TFEU. The next question is if the Public Interest Exception can provide such an exemption.

5 The Public Interest Exception and Agreements That Mitigate Climate Change

5.1 Introduction

The purpose of this chapter is to determine if the Public Interest Exception is applicable to agreements that mitigate climate change.

I will *first* provide a brief overview of the exception's origin and conditions. *Secondly*, I will examine the various objectives that the exception has been applied to and consider if mitigating

climate change can be categorized within these objectives. *Lastly*, I will briefly discuss the remaining conditions of the exception in relation to agreements that mitigate climate change.

5.2 The Public Interest Exception in Brief

The Public Interest Exception originated in *Wouters* from 2002.[237] The CJEU had to decide whether regulation by the Dutch Bar that prohibited partnerships between lawyers and accountants was contrary to Article 101 TFEU. The Court recognized that the regulation had the potential to restrict competition, and therefore prima facie violated Article 101 TFEU. However, it exempted the regulation because it pursued certain public interest objectives and did not go beyond what was necessary to achieve them.[238] Anticompetitive regulations had not been exempted by the Court in this way before, essentially creating a new exception rule.[239]

The Public Interest Exception has been confirmed in multiple cases, as the CJEU states:[240]

> "According to the settled case-law of the Court, not every agreement between undertakings or decision of an association of undertakings which restricts the freedom of action of the undertakings party to that agreement or subject to compliance with that decision necessarily falls within the prohibition laid down in Article 101(1) TFEU."[241]

The Court has described the exception's precise conditions as such:

> "Indeed, the examination of the economic and legal context of which certain of those agreements and certain of those decisions form a part may lead to a finding, *first*, that they are justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature; *second*, that the specific means used to pursue those objectives are genuinely necessary for that purpose; and, *third*, that, even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition [emphasis added]."[242]

[237] Case C-309/99 Wouters.
[238] Case C-309/99 Wouters, para. 97.
[239] Whish (2021) p. 141.
[240] Case C-124/21 P ISU, para. 109.
[241] Case C-124/21 P ISU, para. 111.
[242] Case C-124/21 P ISU, para. 111.

In addition to these three conditions, it must be considered whether there are additional limitations to the exception's scope. The conditions give the exception a broad application, diminishing the significance of Article 101(3) TFEU. Article 101(3) TFEU arguably has a stronger democratic foundation than the Public Interest Exception. I will now address two of the most prevalent limitations put forward in literature.

It has been claimed that *involvement by public authorities* is a necessity for the exception's application.[243] This would exclude its application to most of the agreements presented in Chapter 2.[244]

An element of public authority involvement was present in several cases in which the exception was applied, such as in both *Wouters*, *OTOC*, *CNG*, and *API*.[245] If the regulations had been enacted by the state, they would have been subject to the clauses on the four freedoms in the EU internal market. National legislation that restricts these freedoms can be justified if it is appropriate for achieving a public interest objective and does not exceed what is necessary to attain it.[246] Both the public authority involvement in these cases, and the Public Interest Exception's similarity to the conditions for justifying restrictions on free trade, could support that public authority involvement is a condition.[247]

However, there was no element of public authority involvement in other cases, such as *Meca-Medina, ISU, ESL,* and *Royal Antwerp.*[248] While it is possible to argue that the CJEU initially only had in mind to use the exception for agreements with public authority involvement, this is

[243] Janssen and Kloosterhuis find that public authorities must have been involved for the exception to apply, see Janssen (2016). Germany's national competition agency have also addressed whether this possibly is a limitation, see BKartA (2020). While no longer mentioned in their newest edition, Whish and Bailey discuss it in previous editions of their book, see for instance Whish (2018) p. 140.

[244] Some agreements, like the Norwegian retailer's fund, are supported by the government and would therefore be able to apply the Public Interest Exception, even if public involvement is a necessity. Such agreements could also possibly be exempted through the State Compulsion Exception, however in that case, only simple involvement or support is not enough, see Case C-280/08 P Deutsche Telekom, para. 80.

[245] In *Wouters*, the Dutch Bar had been delegated power to adopt regulations in the interests of the proper practice of the profession. In *OTOC*, the Portuguese Association of chartered accountants had a legal obligation to implement a system of compulsory training for its members. In *CNG*, Italian law conferred to the Italian Council of Geologists the power to determine fee, and in API, Italian law stated that minimum operating costs had to be established.

[246] Case C-662/21 Booky.fi, para. 37, Case C-96/22 CDIL, para. 36.

[247] Whish (2018) p. 139, Arnesen (2022) p. 462.

[248] In the previous editions of their book, Whish and Bailey note that the CJEUs willingness to apply the exception in Meca-Medina could be explained by the fact that the IOC is a "creature of public international law", see for instance Whish (2018) p. 140. However, this explanation is questionable, and the mention is gone in their newest edition, Whish (2021).

evidently no longer the case.[249] Consequently, the exception is equally applicable to agreements pursued by undertakings independently.

Another possible limitation is that the exception only applies to *self-regulation by professional or sporting associations*.[250] This would exclude its application to agreements between undertakings and decisions by trade associations.

The regulations in *Wouters, OTOC,* and *CNG* were adopted by professional associations, and in *Meca-Medina*, *ISU, ESL* and *Royal Antwerp* by sporting associations.[251] The reasoning for such a limitation could be that consumers have difficulty assessing the quality of such services, necessitating associations to regulate their members.[252] Therefore, self-regulating actually benefits consumers, but not enough to meet the conditions in Article 101(3) TFEU, necessitating the Public Interest Exception.

However, the regulations in *API* were adopted by a grouping consisting of private undertakings in addition to professionals,[253] and *STIM (2013)* concerned a model contract created by a trade association.[254] Statements in *ISU*, *ESL*, *Royal Antwerp,* and *Em akaunt BG* give a definitive answer:

> "That case-law applies *in particular* in cases involving agreements or decisions taking the form of rules adopted by an association *such* as a professional association or a sporting association, with a view to pursuing certain ethical or principled objectives […] [emphasis added]."[255]

This demonstrates that the exception is not limited to self-regulation by such associations, only especially practical in these cases.[256] While "in particular" could be understood as "specifically," the wording used in the Danish and Swedish language versions of the cases are more

[249] Faull (2014) para. 3.246. The CJEU also makes clear that these cases belong together with Wouters, thereby invalidating the idea that Meca-Medina is not part of this case law, see Janssen (2016) p. 336.

[250] Supported by Janssen (2016), Rompuy (2024), Loozen (2006).

[251] Case C-309/99 Wouters, para. 3 and 9, Case C-1/12 OTOC, para. 43, Case C-136/12 CNG, para. 3 and 10, Case C-519/04 P Meca-Medina, para. 2, Case C-124/21 P ISU, para. 6, Case C-333/21 ESL, para. 6, Case C-680/21 Royal Antwerp, paras. 3-12.

[252] Janssen (2016) p. 337.

[253] Case C-184/13 API, para. 27.

[254] Case T-451/08 STIM (2013), paras. 52, 86-88.

[255] Case C-124/21 P ISU, para. 111, Case C-333/21 ESL, para. 183, Case C-680/21 Royal Antwerp, para. 113, Case C-438/22 Em akaunt BG, para. 31.

[256] The CJEU typically focuses on the specific facts at hand rather than establishing the precise extent of principles or exception, see Kingston (2012) p. 236.

precisely translated to *especially*.[257] The wording used in the German version, "insbesondere", can only be interpreted as *especially*. Briefly put, the Court, in principle, allows the defense to apply to other situations.[258]

To summarize, three cumulative conditions must be satisfied for an agreement to benefit from the exception rule: Firstly, it must pursue legitimate objectives in the public interest, secondly, be necessary to achieve these, and lastly, not go beyond what is necessary, particularly by eliminating competition. Accordingly, the next question is what constitutes legitimate objectives in the public interest.

5.3 Legitimate Objectives and Climate Change Mitigation

5.3.1 Introduction

The purpose of this chapter is to determine if climate change mitigation is a legitimate objective within the Public Interest Exception. In order to do so, I will begin by analyzing what objectives have been viewed as legitimate in case law, and their commonalities. Next, I will discuss if the objective of climate change mitigation is a comparable objective.

5.3.2 Legitimate Objectives in the Public Interest

The CJEU phrases the first condition of the exception as entailing that the agreement or decision must be:

> "[…] justified by the pursuit of one or more legitimate objectives in the public interest which are not per se anticompetitive in nature […]".

Neither the CJEU nor the General Court have defined what they consider to be legitimate objectives in the public interest. Any objective that is positive for society can be argued to fit the term. However, unlike when interpreting legal provisions, basing a conclusion simply on the general meaning of a word used in case law is not possible. It is therefore necessary to analyze what objectives the EU Courts have recognized as legitimate in previous case law.

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[257] Danish "særligt" and Swedish "särskilt". Rompuy interprets it as "specifically", writing that the Courts statement "can be interpreted as limiting the broader application of the exception to, for instance, agreements setting sustainability standards", see Rompuy (2024).

[258] As Monti puts it, the Court "leaves it open for the defence to apply to other factual settings" and "confirms the view that this is not limited to instances of regulatory ancillarity", see Monti (2024) p. 18. A decision by a trade association to have its members only deal with suppliers that meet net-zero criteria, is comparable to ethical rules set by professional associations.

Starting with the case that can be considered as the inception of the Public Interest Exception, *Wouters*. Here, the "the proper practice of the legal profession" was recognized as legitimate.[259] The Court specified this to include the objective of ensuring that "the ultimate consumers of legal services" and "the sound administration of justice" are provided with the necessary guarantees in relation to "integrity and experience".[260]

The objective of ensuring "high-quality services" within the legal profession was implicitly recognized as legitimate in *Em akaunt BG*.[261] This case concerned regulation by the Bulgarian Bar that set minimum fees lawyers had to charge clients. The referring court found the regulation necessary and proportionate to guarantee "the lawyer sufficient income enabling him or her to live a decent life, provide high-quality services, and continue to develop professionally".[262] The CJEU disagreed with specific evaluation, but also referred to the objectives as "the legitimate objectives allegedly pursued by that national legislation", confirming their legitimacy.[263]

Similarly, the objective of ensuring "the quality of the services" offered by chartered accountants was recognized as legitimate in *OTOC*.[264] The Court specified that this included "further training and continued professional education, thus contributing to the sound administration of undertakings' accounting and taxation matters".[265]

The objective of "providing guarantees to consumers" was recognized as legitimate in *CNG*.[266] This entailed guaranteeing consumers a "genuine choice when exercising their rights and the ability to compare services offered on the market".[267] The National Association of Geologists in Italy (CNG) had adopted regulation that in essence fixed minimum fees.[268] The regulation was therefore prima facie in violation of Article 101(1) TFEU, and it was up to the referring court to assess whether the regulation was necessary in the pursuit of the legitimate objective.[269]

[259] Case C-309/99 Wouters, para. 107.
[260] Case C-309/99 Wouters, para. 97.
[261] Case C-438/22 Em akaunt BG.
[262] Case C-438/22 Em akaunt BG, para. 16.
[263] Case C-438/22 Em akaunt BG, para. 54.
[264] Case C-1/12 OTOC, para. 94.
[265] Case C-1/12 OTOC, para. 95.
[266] Case C-136/12 CNG para. 56.
[267] Case C-136/12 CNG para. 7.
[268] Case C-136/12 CNG para. 38.
[269] Case C-136/12 CNG para. 57.

The ”protection of road safety” was recognized as a potentially legitimate objective in *API.*[270] An organization inter alia tasked with monitoring compliance with Italian provisions on road traffic safety, had adopted regulation that fixed minimum operating costs.[271] The CJEU found the regulation at hand to essentially fix prices, which could not be justified by a legitimate objective.[272] However, the CJEU stated, “it cannot be ruled out that the protection of road safety may constitute a legitimate objective”.[273]

The general objective of “combating doping” was recognized as legitimate in *Meca-Medina.*[274] The IOC had barred two athletes from participating in their events after testing positive for Nandrolone above the permissible limit.[275] The CJEU found that the rules were necessary “in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport”.[276]

Similarly, sports objectives were recognized as legitimate in *ISU, ESL,* and *Royal Antwerp*. In *ESL*, the CJEU specified that this included “ensuring observance of the principles, values and rules of the game underpinning professional football”.[277] The Court also found that it is legitimate to “promote, in a suitable and effective manner, the holding of sporting competitions based on equal opportunities and merit”.[278]

Improving “conditions of work and employment” was recognized as legitimate in *Albany*.[279] The CJEU found that collective agreements[280] in pursuit of such objectives “must, by virtue of their nature and purpose, be regarded as falling outside the scope” of Article 101(1) TFEU.[281] *Albany* does not belong to the Public Interest Exception directly, since the Court did not do an

[270] Case C-184/13 API.

[271] Case C-184/13 API, para. 27.

[272] Case C-184/13 API, para. 49.

[273] Case C-184/13 API, para. 49.

[274] Case C-519/04 P Meca-Medina, para. 43.

[275] Case C-519/04 P Meca-Medina, paras. 2-3.

[276] Case C-519/04 P Meca-Medina, paras. 43, 54-55.

[277] Case C-333/21 ESL, para. 176.

[278] Case C-333/21 ESL, para. 144. While the Court stated this in the context of what can justify otherwise abuse conduct under Article 102 TFEU, it noted this to be equally as relevant for the application of Article 101 TFEU, see para. 175.

[279] Case C-67/96 Albany, para. 59.

[280] Agreements concluded in the context of collective negotiations between management and labor, see Case C-67/96 Albany, para. 60.

[281] Case C-67/96 Albany, para. 60.

assessment of the agreement's necessity. However, the objective must for this purpose be viewed equally as relevant.[282]

Lastly, the General Court recognized both the protection of "copyright" and "cultural diversity" as legitimate objectives in *STIM (2013).*[283] While protection of copyright rather is a commercial objective, the protection of cultural diversity is most definitely a public interest objective.[284]

These cases demonstrate that the Public Interest Exception essentially is an interpretation of Article 101(1) TFEU based on EU competition law objectives, in combination with general EU objectives. Briefly put, it follows a *contextual* and *teleological* interpretation, the traditional methodology for interpretating EU law.

For instance, a primary objective of EU competition law is consumer protection. The General Court has stated that the objective of Article 101 TFEU is "to prevent undertakings […] from reducing the welfare of the final consumer of the products in question".[285] The CJEU has confirmed this to be one of several primary objectives of EU competition law as well.[286]

Several of the objectives recognized as legitimate were essentially for the protection of consumers. For instance, proper practice of the legal profession and ensuring that the services are of high quality, is in the long run beneficial for consumers of legal services. The same can be said about ensuring the quality of the services of accountants. Protecting the health and safety of the users of a product is also, obviously, to their benefit.

General EU objectives were at the core of many other cases in which the exception rule has been applied. In some cases, the objectives were also underpinned explicitly by other EU provision.

For instance, Article 165 (1) TFEU stipulates that the EU must contribute to the promotion of European sporting issues. This objective was pursued in *Meca-Medina, ISU, ESL,* and *Royal Antwerp*.

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[282] The Commission also mentions Case C-67/96 Albany in the chapter on sustainability agreements in 2023 Horizontal Guidelines, when referring to the Public Interest Exception. See 2023 Horizontal Guidelines para. 521, n. 366.

[283] Case T-451/08 STIM (2013), paras. 87-88.

[284] The GCs reasoning in STIM (2013) seems to contrast older cases. For instance, in the context of fixing book prices for cultural objectives, the Commission in 1981 stated that "it is not for undertakings or associations of undertakings to conclude agreements on cultural questions", see *VBBB/VBVB*. The decision was upheld by the CJEU in Case 63/82 VBBB. See also Vedder (2003) p. 338.

[285] Case T-168/01 GlaxoSmithKline, para. 118.

[286] Case C-501/06 P GlaxoSmithKline, para. 63, Case C-8/08 T-Mobile, para. 38.

Similarly, Article 167 (4) TFEU states that the EU "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". This provision was explicitly referred to in *STIM (2013)*.[287]

Additionally, Article 9 TFEU stipulates that the EU must consider employment, social protection and the protection of human health in defining and implementing its policies and activities. This objective was decisive in *Albany*. While not a treaty objective, even road safety is expressed as an objective in a number of EU acts and contributes to the protection of human health, making it possible to interpret *API* in this light as well.[288]

The Public Interest Exception does not demand choosing between EU competition law and general EU objectives. There can be a considerable overlap between these. For instance, fans of competitive sport are often also interested in upholding ethical values in sports, and many participate in them at an amateur level. Similarly, consumers of media can be interested in a diverse range, even if they generally stick to more popular music or movies. Last but not least, many consumers benefit from collective agreements in the role of employees.

The next question is if climate change mitigation is comparable to these objectives, and therefore a legitimate objective in the public interest in this exception rule.

5.3.3 Climate Change Mitigation as a Legitimate Objective

There are several reasons for considering climate change mitigation as a legitimate objective in the public interest within the context of the Public Interest Exception.

For one, the objectives of Article 101 TFEU could suggest so. While climate change mitigation is beneficial for global society and future generations, it is equally as beneficial for the consumers of the product an agreement covers. From this perspective, agreements that mitigate climate change are not in direct conflict with the objective of safeguarding consumers. However, since the conditions in Article 101(3) TFEU can be difficult to satisfy, applying the Public Interest Exception could be useful – which also explains many of the previous cases assessed under the Public Interest Exception.

Additionally, general EU objectives suggest such an interpretation. Climate change mitigation is a primary objective in EU law, underpinned by both Article 3 TEU and Article 11 TFEU,

[287] Case T-451/08 STIM (2013), para. 87.

[288] Case C-184/13 API, para. 7.

and a binding objective in the EU Climate law. Mitigating climate change could be argued to be the EU's most important public interest objective today.

Such an interpretation is also supported by statements in *Albany*, where the Court found that collective agreements fall outside of Article 101(1) TFEU based on "an interpretation of the provisions of the Treaty as a whole".[289] This case is especially relevant, since the social objectives pursued in *Albany* and those pursued by agreements that mitigate climate change, have many similarities.[290]

For instance, Article 3(3) TEU not only addresses climate change mitigation, but also underpins that social protection is a primary EU objective. The provision states that the EU shall promote a "[…] highly competitive social market economy, aiming at full employment and social progress". In addition, like Article 11 TFEU, social protection is also given its own provision in Article 9 TFEU, stating that the EU shall take into account "[…] requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection […]".[291]

Evidently, climate change mitigation and social protection are given similar importance in the hierarchy of general EU objectives.[292] The CJEU also seems to have confirmed implicitly that climate change mitigation is at least equally as important as social protection in *ESL* and *Royal Antwerp*, where it referred to both Articles 9 and 11 TFEU in the same notion.[293]

Climate change mitigation also has a stronger position than many of the objectives so far accepted as legitimate within the Public Interest Exception. For instance, the promotion of European sporting issues and the promotion of cultural diversity are given their own provisions in

[289] Case C-67/96 Albany, para. 60.

[290] Some authors have proposed using the Albany Exception more directly for agreements that mitigate climate change, see Koskela (2021) p. 57-58. The main difference between the Albany Exception and the Public Interest Exception, is that Albany does not contain a "necessity" condition. This difference is crucial. Collective agreements are entered into through collective bargaining between employers and workers, a process that ensures that the agreement does not go beyond what is necessary. This element is missing when competitors enter into agreements. Accordingly, applying the Albany exception directly could have dangerous consequences. In addition, see Wouters (2021) p. 265-266 who also uses Albany as an argument, but does not advocate applying it directly.

[291] Collective agreements are often at odds with competition law and exempting them is not a given. For instance, the US Sherman Antitrust Act of 1890 was initially used against labor unions, since Congress and US courts believed that any anticompetitive behavior that could curb industrial progress was detrimental to society, see Primm (1910) p. 129. Statutory exemptions first came into force with the Clayton Act in 1914, see Section 6 of the act.

[292] Wouters suggests that sustainability objectives have an even stronger foundation than social policy, see Wouters (2021) p. 265.

[293] Case C-333/21 ESL, para. 100, Case C-680/21 Royal Antwerp, para. 68.

Part Three of the TFEU, devoted to 'Union policies and internal actions'. However, the objective of climate change mitigation is found in Article 11 TFEU, which is in Part One of the TFEU, and therefore a "provision of principle".

This difference is important because only the provisions of principle in Part One of the TFEU are "cross-cutting" provisions having "general application".[294] The objective of climate change mitigation bears therefore much larger weight compared to other objectives recognized as legitimate.[295] If sporting and cultural objectives are considered legitimate, even though they are not cross-cutting, climate change mitigation must qualify as such as well.[296]

Environmental objectives, especially the integration principle in Article 11 TFEU, have also justified extraordinary exceptions in other areas of EU law. Some of these areas share commonalities with EU competition law, making it possible to draw parallels between these exceptions and the Public Interest Exception. This is *not* to say that because environmental objectives have justified deviations in one area of law, the same is justified in another; however, it can provide a general indication as to whether the integration principle *could* justify such deviations.

For instance, the principle has justified rules that otherwise would have been deemed incompatible with the *European single market*.[297] For instance in *Danish Bottles*[298], a recycling system which limited foreign manufacturers from entering the Danish market, could be justified by environmental concerns.[299] Similarly, in *Commission v. Belgium*, a ban on waste import was justified based on environmental concerns.[300]

The goal of the internal market is to establish and maintain a unified European market, which also is one of the primary goals of EU competition law. While governmental regulation and

[294] Case C-333/21 ESL, para. 100, Case C-680/21 Royal Antwerp, para. 68.

[295] Nowag (2016) p. 47.

[296] While not strictly a legal argument, it should be noted that the effects of climate change are of larger concern to society than many of the values previously protected by the Public Interest Exception. Ensuring the quality of services or that athletes do not dope, are issues barely comparable to climate change.

[297] Case 240/83 ADBHU, para. 15. Climate change also touches on many of the objectives mentioned in Article 36 TFEU, such as public security, the protection of health and life of humans, animals or plants, and even the protection of national treasures and industrial and commercial property.

[298] Case 302/86 Danish Bottles.

[299] Case 302/86 Danish Bottles, paras. 11 and 17. The Court found that the recycling system in general could be justified, however it also only allowed for a limited number of bottle shapes, which was disproportionate to the pursuit of environmental protection, see paras. 20 and 21.

[300] Case C-2/90 Commission v. Belgium. The Court specifically referred to the principle that environmental harm should be rectified at its source, as now stipulated by Article 191(2) TFEU.

private regulation are two very different things, the general notion that environmental concerns could justify otherwise illegal conduct, is comparable.[301]

The integration principle has also justified deviations in the area of public procurement law. In *Concordia Bus*, the CJEU based on inter alia. Article 11 TFEU integrated environmental protection into an assessment traditionally only concerned with economic efficiency.[302] This case concerned a tender for public transportation, in which additional points were given according to how environmentally friendly the contractor's vehicles were.[303] The central question was whether the procurement directive in force at the time, allowed for the consideration of emissions when assessing what constituted the "economically most advantageous bid".[304]

The Commission had taken the position that each individual award criterion must provide an "economic advantage" that "directly benefits the contracting authority," thereby excluding broader climate benefits from the assessment.[305] However, the CJEU disagreed, finding that environmental conditions that did not provide an economic advantage to the contracting authority could also be considered:[306]

> "In the light of … [Article 11 TFEU] … which lays down that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities, it must be concluded that Article 36(1)(a) of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender."[307]

A primary objective of procurement law is to promote the efficient use of society's resources, which also is an objective of EU competition law.[308] The Court's ruling meant that public procurement could be used not only to strictly achieve economic efficiency, but also to pursue environmental protection.

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[301] Case C-2/90 Commission v. Belgium, para. 34.

[302] Case C-513/99 Concordia Bus.

[303] Case C-513/99 Concordia Bus, paras. 20, 23 and 24.

[304] Case C-513/99 Concordia Bus, para. 35.

[305] COM(2001) 274, para. 3.1.

[306] Case C-513/99 Concordia Bus, para. 55.

[307] Case C-513/99 Concordia Bus, para. 57. The CJEU also relied on other factors but Advocate General Mischo was more precise: "It is beyond dispute that the protection of the environment is likewise a criterion in the public interest. Reference need only be had to Article 6 EC [Article 11 TFEU]", see Opinion of Advocate General on Case C-513/99 Concordia Bus para. 92.

[308] See for instance the first Article in both the Norwegian Competition Act and the Norwegian Procurement Act.

The integration principle has also impacted state aid law. Strictly speaking, the rules on state aid, regulated in Articles 107-109 TFEU, are part of EU competition law. State aid can under certain conditions be justified for protecting the climate and environment.[309] In addition, the integration principle is relevant when considering if otherwise legal state aid should be allowed.

This is demonstrated in *Hinkley Point C*, in which the UK had provided state aid for a new nuclear power plant. The Commission found the aid to constitute state aid under Article 107(1) TFEU, but lawful because it was compatible with the internal market.[310] Austria objected to the Commission's decision, arguing that the state aid was incompatible with Article 11 TFEU.[311] While the Court did not agree with Austria's claim, if found that the Commission in principle had an obligation to assess whether an activity receiving state aid was in line with the integration principle, even in a politically contested area such as nuclear power.[312]

These cases demonstrate that the integration principle in Article 11 TFEU can justify conduct that otherwise is prohibited, in addition to prohibiting conduct that otherwise is legal. In essence, the provision cuts through the wording of other provisions, in order to achieve an outcome that is compatible with environmental objectives. This is what makes it "cross-cutting" and aligns well with the Public Interest Exception.

The Commission has also indicated that climate change mitigation can be considered as a legitimate objective in the Public Interest Exception, albeit somewhat reserved. In its 2023 Horizontal Guidelines, it finds that anticompetitive agreements cannot escape Article 101(1) TFEU "simply by referring to a sustainability objective",[313] but also that:

> "The Court of Justice has acknowledged that restrictions of competition emanating from agreements or decisions of associations of undertakings may fall outside the scope of Article 101(1) if they are inherent in the pursuit of a legitimate objective and proportionate thereto (see, […] Albany International, […] Wouters and Others, […] Meca-Medina and Majcen v Commission […])."[314]

In the remainder of the guidelines, the Commission only addresses how Article 101(3) TFEU should be interpreted when assessing sustainability agreements. To say that the Commission *supports* applying the Public Interest Exception to agreements that mitigate climate change,

[309] 2022 guidelines on State aid for climate, environmental protection and energy.

[310] Case C-594/18 P Hinkley Point C, paras. 2-4, Articles 107(1) TFEU and 107(3)(c) TFEU.

[311] Case C-594/18 P Hinkley Point C, paras. 34 and 94.

[312] Warning (2021) p. 35.

[313] 2023 Horizontal Guidelines, para. 521.

[314] 2023 Horizontal Guidelines, para. 521, n. 361.

would be a stretch. However, as the citation demonstrates, the Commission is *not inherently opposed* to applying the exception to such agreements.[315] Until the CJEU rules out applying the exception for such agreements, there is little reason to deny the possibility outright.

In summary, there is ample support for considering climate change mitigation as a legitimate objective within the context of the Public Interest Exception. It should be added that the most compelling argument is perhaps the lack of sources speaking against this conclusion. The CJEU has allowed the application of the exception to virtually any agreement pursuing public interest objectives. Until this position changes, climate change mitigation – one of the EU's main objectives – can most certainly be included within the exception. In any event, for the exception rule to apply, two additional conditions must be satisfied. I will now turn to these conditions.

5.4 Necessity and Climate Change Mitigation

The purpose of this chapter is to give a brief overview of the two remaining conditions in the Public Interest Exception.

The *second* condition of the Public Interest Exception is that the specific means used to pursue the legitimate objectives are "genuinely necessary" for that purpose.[316] The Court has on other occasions phrased this as meaning that the anticompetitive effects are "inherent" in the pursuit of the legitimate objectives, which essentially means the same as necessity.[317]

The precise question in this condition, is if the agreement can "reasonably" be considered as necessary for the pursuit of the legitimate objective.[318] To be considered reasonably necessary, it must be "difficult or even impossible" to achieve the objectives without it.[319] Briefly put, if the same objectives can be achieved by the undertakings unilaterally, the agreement is not necessary.

The *third* condition of the Public Interest Exception is that:

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[315] Commissions position also demonstrates that it is not interested in further developing the Public Interest Exception for such agreements, and favors adjusting the traditional interpretation of the conditions in Article 101(3) TFEU instead.

[316] Case C-333/21 ESL, para. 183.

[317] Case C-309/99 Wouters, para. 97.

[318] Case C-309/99 Wouters, para. 107.

[319] Case T-111/08 MasterCard, para. 80. This case concerned the Ancillary Restraints Exception, which inherently has a different purpose than the Public Interest Exception. However, the Ancillary Restraints Exception serves as the foundation for the Public Interest Exception, see also Faull (2014) 3.309 and 3.319. Therefore, case law on conditions that are present in both exception rules is relevant for either of them.

> "[…] even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition […]."[320]

This condition entails that the agreement's duration, material and geographical scope do not go beyond what is necessary to achieve the legitimate objectives.[321] If the agreement leads to the elimination of all competition, it must also be assumed to go beyond what is necessary.

The second and third condition in the Public Interest Exception are therefore both concerned with whether the agreement and its restrictive effect is necessary for the achievement of the legitimate objective – hence, "necessity".[322]

I discuss how these conditions must be applied to agreements that mitigate climate change in Chapter 6. This is because the conditions considerably overlap with those in Article 101(3) TFEU. The necessity condition in Article 101(3) TFEU entails that firstly, the agreement is reasonably necessary, and secondly that the individual restrictions flowing from the agreement are indispensable. In addition, Article 101(3) TFEU has an explicit condition that bars agreements which eliminate all competition. Accordingly, I refer to chapter 6.4 and 6.5 for a detailed discussion of these conditions in relation to agreements that mitigate climate change.

One last question is if the Public Interest Exception includes a balancing of the agreement's benefits and anticompetitive effect. In other words, a test of proportionality *stricto sensu* (in a strict sense).[323] Such a balancing could lead to the finding that even an agreement which pursues legitimate objectives and is necessary to achieve them, should not receive an exemption from Article 101(1) TFEU.[324]

Statements in *Meca-Medina* could indicate the existence of such a test. Here, the Court explained that the second and third conditions only are satisfied if:

> "[…] the consequential effects restrictive of competition are *inherent* in the pursuit of those objectives (Wouters and Others, para. 97) *and* are *proportionate* to them [emphasis added]."[325]

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[320] Case C-333/21 ESL, para. 183.

[321] Case T-111/08 MasterCard, para. 81.

[322] One could also call this "proportionality"; however, this term can be confused with proportionality *stricto sensu* (in a strict sense), which is why I prefer to avoid using it.

[323] Østerud (2010) p. 275.

[324] Østerud (2010) p. 275.

[325] Case C-519/04 P Meca-Medina, para. 42.

It went on to describe how this would need to be done in the specific case:

> "Since the appellants have, moreover, not pleaded that the *penalties* which were applicable and were imposed in the present case are *excessive*, it has not been established that the anti-doping rules at issue are *disproportionate* [emphasis added]."

The notion of proportionality could indicate that agreement's benefits and anticompetitive effect must be balanced. However, the Court has never done such a balancing test in the context of the Public Interest Exception. For instance, in *Wouters*, the Court concluded that the regulations did not go "beyond what is necessary", and therefore fell outside of Article 101(1) TFEU.[326] The Court also hasn't mentioned any such balancing in later case law.[327]

The meaning of "proportionality" in *Meca-Medina* can be explained by comparing it to the Ancillary Restraints Exception. This exception demands considering if a restriction is "objectively necessary" and "proportionate".[328] However, neither of these conditions demand a balancing of the agreement's effects. The General Court explains this in *Métropole (2001)*:

> As regards the objective necessity of a restriction, it must be observed that […] it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article 85(3) of the Treaty [Article 101(3) TFEU].[329]

The General Court went on to explain that "proportionate" in this context means that the restrictions do not "exceed" or "go beyond" what is necessary.[330] The most likely explanation for the wording in *Meca-Medina* is that it is a direct transfer from the case law on the Ancillary Restraints Exception. When the Court in *ESL* phrases the third condition as meaning that the restrictive effects cannot go "beyond" what is necessary, it also clears up any confusion the "proportionality" term could create.[331]

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[326] Case C-309/99 Wouters, para. 109.

[327] A slight element of balancing is inherent in the necessity condition – the stronger an agreement restricts competition, the less likely it will be deemed to be necessary. However, that is not the same as a balancing of the agreement's effects *stricto sensu*.

[328] Case C-382/12 P MasterCard, para. 89.

[329] Case T-112/99 Métropole (2001), para. 107.

[330] Case T-111/08 MasterCard, para. 81, Case T-112/99 Métropole (2001), paras. 123-126.

[331] Case C-333/21 ESL, para. 51, same as in ISU and Royal Antwerp.

To summarize, an agreement that pursues legitimate objectives in the public interest, must also be necessary to achieve the objectives, and cannot restrict competition beyond what is necessary to achieve them. Balancing the agreement's effects is not necessary.

5.5 The Relationship Between the Public Interest Exception and Object Restrictions

One remaining question is how the Public Interest Exception relates to the assessment of restrictions of competition by object, and therefore also to restrictions by effect.

The CJEU has in newer case law stated that the Public Interest Exception:

> "[…] does not apply either in situations involving conduct which, far from merely having the inherent 'effect' of restricting competition, at least potentially, by limiting the freedom of action of certain undertakings, *reveals a degree of harm in relation to that competition that justifies a finding that it has as its very 'object' the prevention, restriction or distortion of competition*."[332]

Accordingly, it appears that the exception is not applicable to agreements that restrict competition by object. This interpretation could be argued to follow from the exception's first condition, which demands that the legitimate objectives are "not per se anticompetitive in nature". However, it would be incorrect to claim that this is clearly the case. For instance, AG Rantos stated that the Public Interest Exception can be applied "without necessarily reaching an express finding of a restriction of competition by object or effect" in his opinion in *ISU*.[333]

The Court's statement could indicate that the assessment of a restriction by object and the evaluation of whether the agreement can be justified by legitimate objectives in the public interest are two entirely separate assessments. AG Szpunar interprets it this way, stating that if "the Court were to find there to be a restriction of competition not by object, but by effect, *the next step* would be to examine the contested provisions in the light of other objectives under the [Public Interest Exception]".[334]

Keeping these assessments separate could have valid reasons. For instance, unlike the Ancillary Restraints Exception, the Public Interest Exception does not require that the agreement has a

[332] Case C-333/21 ESL, para. 186. The statement is reiterated in ISU and Royal Antwerp.

[333] Opinion of Advocate General Rantos on Case C-124/21 P ISU, para. 40. This is also what the CJEU seemed to infer in Case C-83/14 CHEZ, see Monti (2024) p. 18.

[334] Opinion of Advocate General Szpunar on Case C-650/22 FIFA, para. 59. See also Tokić (2024).

neutral or positive effect on competition.[335] Excluding agreements that restrict competition by object ensures that the most harmful agreements cannot be justified by legitimate objectives under any circumstances.

However, since public interest objectives are also relevant in the assessment of whether an agreement restricts competition by object, keeping the assessments separate is illogical.[336] AG Rantos attempts to resolve this confusion by concluding that legitimate objectives are irrelevant when determining if an agreement restricts competition by object.[337] However, as I demonstrated in Chapter 4, this approach is hardly correct.

The apparent dichotomy in the Court's statements in ESL, ISU, and Royal Antwerp can best be explained by the fact that the assessment of whether an agreement restricts competition by object and the first condition in the Public Interest Exception are essentially the same, viewed from different perspectives.[338] An agreement that genuinely pursues legitimate objectives in the public interest does not restrict competition by object. Conversely, an agreement that does not restrict competition by object because it pursues a legitimate objective also satisfies the first condition of the Public Interest Exception. This concept is well described by *Colomo*:

> "This Court's position is only natural: where a restraint escapes Article 101(1) TFEU pursuant to the *Wouters–Meca Medina* doctrine, it also means that it does not restrict competition by object. Since the regulatory aim to which it relates is legitimate, the object of the said restraint must also be legitimate (that is, it does not fall within the scope of Article 101(1) TFEU by its very nature)."[339]

This does not mean that an agreement must pursue such objectives to escape the by-object classification – just that if it pursues such objectives, it also does *not* restrict competition by object. The findings in this chapter and the previous chapter (Chapter 4) therefore complement each other. The previous chapter demonstrated that legitimate objectives can be decisive when

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[335] Case C-382/12 P MasterCard, para. 89. While the two exceptions have many similarities, they pursue different objectives. The CJEU has never directly linked them, even when doing so would have been natural. For instance, in his opinion in ISU, AG Rantos explicitly refers to Wouters and Meca-Medina as the "ancillary restraints exception". However, in the final judgment, the CJEU does not mention the term "ancillary restraints" at any point. In addition, the case law the CJEU refers to, is not the case law that traditionally belongs to the cases on ancillary restraints (as referenced in MasterCard), but rather Wouters, Meca-Medina and OTOC, which were concerned with public interest objectives. For the same conclusion, see *Lydersen* pages 17-20.

[336] Monti (2024) p. 18.

[337] Opinion of Advocate General Rantos on Case C-124/21 P ISU, para. 93.

[338] Monti (2024) p. 18.

[339] Colomo (2024B).

considering if an agreement restricts competition by object. This chapter confirms that climate change mitigation indeed is such a legitimate objective.

5.6 Concluding Remarks

This chapter has demonstrated that agreements that mitigate climate change can, in principle, apply the Public Interest Exception. Climate change mitigation is at the forefront of the EU's general objectives. Reducing GHG emissions is a central public concern and is closely interlinked with many other objectives pursued by the EU. The Public Interest Exception allows for this objective to be pursued, even in cases where an agreement would otherwise infringe Article 101(1) TFEU.

Several competition law systems around the globe have exceptions similar to the Public Interest Exception.[340] The commonality in these exceptions is that they directly use what is best for *society* as the benchmark for exempting anticompetitive agreements. In principle, such an exception could prove equally useful within the EU.

One issue with the Public Interest Exception is that it lacks a proper balancing of the agreement's effects – proportionality *stricto sensu*. Since the exception does not apply to agreements that restrict competition by object or eliminate competition, the most harmful agreements cannot benefit from the exception rule. However, agreements that only slightly benefit the objective of climate change mitigation but are quite harmful to competition could in theory still use the Public Interest Exception.

This would mean that undertakings could choose the intended level of climate protection themselves, without concern for the agreement's negative effects.[341] Whether this is justifiable is questionable.[342] To round up this chapter, I quote *Whish* and *Bailey*:

> "[…] suppose that firms in a particular sector were to adopt rules for the protection of the environment on their own initiative, without any encouragement by the kind cognizable under Article 101(1): it remains to be seen whether *Wouters* could be invoked in such a case."[343]

[340] For instance, Australia, New Zealand, South Africa and Botswana.

[341] Vedder (2003) p. 175-181.

[342] I discuss this in detail in Chapter 6.7, in relation to Article 101(3) TFEU.

[343] Whish (2018), p. 140-141. The section in which this statement appears, is gone from the newest edition, Whish (2021). The reason seems to be a general rewriting and shortening of the chapter on Wouters and the other cases within the Public Interest Exception.

The newest rulings from the CJEU bring us closer to answering this in the affirmative. Nonetheless, the legal ground of the Public Interest Exception is shaky, and its limits are not entirely clear. Therefore, it is necessary to consider how agreements that mitigate climate change can be assessed under Article 101(3) TFEU.

6 Article 101(3) TFEU and Agreements That Mitigate Climate Change

6.1 Introduction

The purpose of this chapter is to determine how the four conditions of Article 101(3) TFEU must be interpreted when assessing agreements that mitigate climate change. I will begin by providing a brief overview of Article 101(3) TFEU. Afterwards, I will go through each of its four conditions, and explore how an objective of climate change mitigation affects their interpretation.

6.2 Article 101(3) TFEU in Brief

Article 101(3) TFEU provides a codified exception rule to agreements that are in breach of Article 101(1) TFEU.[344] In order to take advantage of the exception rule, the undertakings must demonstrate that four cumulative conditions are satisfied:[345]

The *first* condition requires that the agreement "contributes to improving the production or distribution of goods or to promoting technical or economic progress". This is often summarized as meaning that the agreement must achieve "efficiency gains".[346] Only "objective" advantages are relevant.[347] This means that for instance the profit from agreeing to fix prices or share markets is irrelevant.[348] Briefly put, only gains in s*ocial efficiency* meet this condition.[349]

The *second* condition requires that "consumers" receive a "fair share" of the agreement's "benefits". This condition underpins the objective of safeguarding consumers, or "consumer welfare", in EU competition law.[350] Not only does the agreement need to produce efficiency gains,

[344] Whish (2021) p. 155.

[345] Case C-333/21 ESL, para. 191.

[346] Case C-333/21 ESL, para. 190.

[347] Case C-333/21 ESL, para. 190.

[348] Guidelines on Article 101(3) TFEU, para. 49.

[349] This term is rarely used in English, but in my opinion conveys the meaning of efficiency gains in a good way. It is also regularly used in Norwegian, which is "samfunnsøkonomiske effektivitetsgevinster", see Hjelmeng (2014) p. 402 and Arnesen (2022) p. 468-469.

[350] Hjelmeng (2014) p. 402.

but it must also pass on a fair share of them on to the consumers affected by the agreement.[351] This is why it often is called the "pass-on condition".[352]

The *third* condition requires that the agreement does not impose restrictions on the undertakings concerned that are not "indispensable" to the attainment of the agreement's improvements. If the relevant improvements can be attained by less restrictive measures, this condition is not satisfied.[353] Evidently, the condition also is not satisfied if the improvements are achievable without any agreement at all.

The *fourth* and final condition of Article 101(3) TFEU requires that the agreement does not afford the undertakings the possibility of "eliminating competition" in respect of a "substantial part of the products in question". The condition acts as a final safety to ensure that agreements especially destructive for competition, are not permitted.

The primary purpose of Article 101(3) TFEU is to allow agreements that benefit EU competition law objectives, such as economic efficiency, safeguarding consumers, and establishing and maintaining a unified European market.[354] For instance, just as competition, agreements can in some instances make products cheaper, improve their quality or create entirely new products.[355] If an agreement meets the conditions in Article 101(3) TFEU, it means that the agreement in the end result is procompetitive, and therefore not at odds with EU competition law objectives.[356]

I have chosen a slightly different order in discussing the four conditions. I will begin with the first condition in Article 101(3) TFEU on "relevant improvements", since this is the *gatekeeper* for the exception to apply. Next, I will discuss the necessity condition, before moving on to the condition that competition cannot be eliminated. Last but not least, I discuss the condition that consumers must receive a fair share of the agreement's benefits. This condition is liable to create the biggest issues for agreements that mitigate climate change, making it the *make-or-break* condition.

[351] Arnesen (2022) p. 472.

[352] Guidelines on Article 101(3) TFEU, para. 85.

[353] Case C-333/21 ESL, para. 197.

[354] Guidelines on Article 101(3) TFEU, para 33.

[355] Faull (2014) 3.448, Guidelines on Article 101(3) TFEU, para 33.

[356] Case T-168/01 GlaxoSmithKline, para. 118, Faull (2014) 3.448.

6.3 Relevant Improvements and Climate Change Mitigation

6.3.1 Introduction

The purpose of this chapter is to determine if climate change mitigation in itself can be considered as a relevant improvement.

The first condition of Article 101(3) TFEU requires that the agreement "contributes to improving the production or distribution of goods or to promoting technical or economic progress". The open-ended nature of the condition allows for various interpretations of what improvements are relevant. For the purpose of this thesis, two interpretations will be presented.

A narrow interpretation of the condition limits the relevant improvements to those in *economic efficiency*. A broader interpretation views any contributions to *public interest objectives* as relevant. In this context, the five types of agreements presented in the second chapter of this thesis can be divided into two categories.

One category contains R&D agreements, production and purchasing agreements. These types of agreements regularly result in gains in economic efficiency, such as lower costs or higher quality products. These agreements rarely have issues meeting the first condition of Article 101(3) TFEU.

Another category contains the agreements that limit or control production, collective boycotts, and price-fixing agreements. Such agreements rarely result in gains in economic efficiency, at least in the way this term *traditionally* has been interpreted. Consequently, these types of agreements can be especially dependent on a broad interpretation of the first condition in Article 101(3) TFEU.

In order to determine if climate change mitigation in itself can satisfy this condition, I will begin by addressing the notion that Article 101(3) TFEU is only concerned with gains in economic efficiency. Afterwards, I will analyze the support for a broader interpretation, in which public interest objectives in themselves are relevant. Lastly, I will discuss what this means for agreements that mitigate climate change.

6.3.2 Economic Efficiency as an Improvement

The first question that must be addressed is if the relevant improvements in Article 101(3) TFEU are restricted to gains in economic efficiency.

The wording of Article 101(3) TFEU lends some support to limiting the relevant improvements to such gains.[357] Amongst other, it explicitly mentions "economic progress" as an improvement. It also mentions improving production, distribution of goods and promoting technical progress, as improvements. These are separated from each other with the word "or", meaning that they *technically* are alternatives.

However, it can seem logical to read these alternatives in light of economic efficiency, especially considering that economic efficiency is a primary goal in EU competition law. For instance, when undertakings cooperate to save costs in *production*, they improve efficiency. Similarly, when cooperation streamlines the *distribution of goods*, the result is economic efficiency. And lastly, when cooperation *improvises the technology* used in production or the final product, efficiency is also achieved.

The CJEU has also repeatedly referred to the improvements listed Article 101(3) TFEU as gains in economic efficiency. For instance, the CJEU consistency referred to "efficiency gains" in *MasterCard.*[358] In the context of objective justification under Article 102 TFEU in *Post Danmark*, it referred to both "advantages in terms of efficiency", "gains in efficiency" and "efficiency gains".[359]

Crucially, the Court specified in *ESL* and *Royal Antwerp* that although an agreement may pursue legitimate objectives, "however laudable they may be", to meet the first condition in Article 101(3) TFEU, they must translate into "genuine, quantifiable efficiency gains".[360]

However, *what precisely efficiency gains encompass*, is neither answered by the wording of Article 101(3) TFEU, nor in case law from the CJEU. This begs the question to how this term should be understood.

In *economic theory*, economic efficiency is commonly defined as "the economic state of minimizing waste and inefficiency while producing maximum output".[361] Full efficiency is achieved at the point in which "any changes made to increase the welfare of one person would decrease the welfare of another", also known as *Pareto* efficiency.[362] Using this definition, public interest objectives can under certain circumstances be considered as efficiency gains, especially if they can be quantified.

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[357] This interpretation is widely supported in literature as well, see Whish (2021) p. 162.

[358] Case C-382/12 P MasterCard, paras. 224-225.

[359] Case C-209/10 Post Danmark, paras. 41-43.

[360] Case C-333/21 ESL, para. 196. Case C-680/21 Royal Antwerp, para. 129.

[361] Maggino (2023) pp. 1984–1985.

[362] Maggino (2023) p. 1985.

Traditionally, efficiency gains in the context of Article 101(3) TFEU have been sorted into two categories, cost or qualitative efficiencies.[363] While these categories are not exhaustive, they do sum up the types of gains that usually are considered as relevant.[364] The common denominator is that the agreement must either *reduce costs for the undertakings*, which consumers also can benefit from, or *produce higher quality products*, because consumers prefer better products.[365] Meaning, efficiency gains are first and foremost actions that *benefit the undertakings*, while also benefitting society.

Following this interpretation of efficiency, agreements that mitigate climate change only pass the condition if they for instance simultaneously reduce costs for the undertakings or result in higher quality products. This can happen when the agreement reduces emissions which the undertakings otherwise would need to pay taxes for, or when the agreement leads to more durable products and therefore improves customer satisfaction.[366]

To briefly summarize this subchapter, there is ample support for strictly considering gains in economic efficiency as relevant improvements under Article 101(3) TFEU. Depending on how the term "efficiency gains" is interpreted, this can be a major obstacle for agreements that mitigate climate change – or no issue at all. I will discuss this further in chapter 6.3.4.

In any event, since climate change mitigation is a primary EU objective, the next step is to consider the support for considering contributions to public interest objective as relevant improvements.

6.3.3 Public Interest Contributions as an Improvement

The wording of Article 101(3) TFEU does lend support for considering contributions to public interest objectives as relevant. In addition to "economic progress", it also mentions contributions to improvements in "production" and promoting "technical progress". These terms are broad, and in principle fit agreements that not only are concerned with improving economic efficiency.

Such an interpretation would also facilitate for the consideration of general EU objectives. The EU pursues a plethora of objectives, and there is in principle no reason why competition law

[363] Whish (2021) p. 160. Guidelines on Article 101(3) TFEU, para. 64-71. Faull (2014) 3.478.

[364] Guidelines on Article 101(3) TFEU, para. 33 and 63.

[365] Arnesen (2022) p. 472. While the condition that consumers receive a fair share and the condition that the agreement results in improvements slightly overlap in this aspect.

[366] Hjelmeng (2014) p. 406.

objectives always should trump these in cases of conflict. A broad interpretation of the condition would allow for agreements that objectively contribute to other EU objectives.

There is also support for a broader interpretation in case law. For instance, employment policy was recognized as an objective that satisfied the first condition of Article 101(3) TFEU in *Metro.*[367] As previously mentioned, employment and social protection are given special weight in both Article 3(3) TEU and Article 9 TFEU, comparable to climate change mitigation in Article 3(3) TEU and Article 11 TFEU. *Metro* concerned a selective distribution system, which included agreements that required participants to enter into supply contracts.[368] In this context, the CJEU stated that:

> "The establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of *employment* which, *since it improves the general conditions of production*, especially when *market conditions are unfavourable*, comes *within the framework of the objectives* to which reference may be had pursuant to [Article 101(3) TFEU] [emphasis added]."[369]

Literature frequently cites *Metro* as demonstrating that the CJEU has recognized that non-economic efficiencies can meet the first condition of Article 101(3) TFEU.[370] It is important to keep in mind that the Court mentioned the employment objective in connection with the improvement of production. One possible interpretation is that the Court by this referred to higher efficiency in production – and the objective therefore only was relevant because it also improved *efficiency*.[371] In other words, if the agreement had not produced efficiency gains, the outcome might have been different.[372]

However, if this is the case, it is difficult to explain why the CJEU would see the need to mention that such "objectives", referring to employment conditions, come within the framework of Article 101(3) TFEU. In addition, the reference to that "market conditions are unfavorable" clearly points toward that the CJEU considered traditional employment policies – not strictly efficiency gains.[373]

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[367] Case 26-76 Metro.

[368] Case 26-76 Metro, para. 41.

[369] Case 26-76 Metro, para. 43.

[370] Arnesen (2022) p. 467, Whish (2021) p. 164.

[371] Also mentioned in Øhrn (2021) p. 18.

[372] Faull (2014) 3.459. The authors find that the agreement's "stabilizing effect" on employment "may thus translate into cost savings and other efficiency gains", and therefore could be subsumed under the condition of improvements.

[373] See also the CJEUs statement on "objectives of a different nature", Case 26-76 Metro, para. 21.

This is even more apparent in *Remia*. Here, the CJEU added that employment comes within the framework of Article 101(3) TFEU in the context of "the survival of the undertaking and the preservation of jobs".[374] Ensuring the survival of undertakings and preserving jobs is most definitely not an efficiency gain – but rather the opposite.

The General Court interpreted the condition similarly in *STIM (2013)*.[375] Here, the GC considered the impact of protecting cultural diversity – an objective codified in Article 167 TFEU – in the interpretation of Article 101(3) TFEU.[376] The GC found that the provision implies that "it is necessary to bear in mind the requirements relating to the respect for and promotion of cultural diversity when considering the four conditions for the application of [Article 101(3) TFEU]".[377] Cultural diversity can hardly be considered to improve economic efficiency, no matter how the term is interpreted. The case demonstrates that public interest objectives, if underpinned by EU provisions, in themselves can be considered relevant improvements.

The General Court also interpreted the condition broadly in *Metropole (1996)*.[378] This case concerned a trade association's statutes, which effectively led to the exclusion of competing undertakings.[379] The Commission found that the statutes pursued cultural, educational and similar objectives, and therefore granted the statutes an exemption.[380] The General Court annulled the Commission decision since the Commission had failed to check whether the restrictions were necessary to achieve the objectives.[381] However, *the GC did not object to considering public interest contributions as improvements*.

The General Court went so far as to state that the Commission is "entitled" to base itself on "considerations connected with the pursuit of the public interest" in order to grant exemptions under Article 101(3) TFEU.[382] At face value, the GC's statement means that any contribution

[374] Case 42/84 Remia, para. 42.

[375] Case T-451/08 STIM (2013).

[376] Article 151(4) EC when the decision was handed down.

[377] Case T-451/08 STIM (2013), para. 103.

[378] Case T-528/93 Métropole (1996).

[379] Case T-528/93 Métropole (1996), para. 75.

[380] Objectives of providing "varied programming including cultural, educational, scientific and minority programmes without any commercial appeal and to cover the entire national population irrespective of the costs", Case T-528/93 Métropole (1996), para. 116.

[381] Case T-528/93 Métropole (1996), para. 123 and 125.

[382] Case T-528/93 Métropole (1996), para. 118.

to a public interest objective is relevant.[383] Nonetheless, the statement should be read in its context, which is that it concerned what objectives *the Commission* could choose to consider.

Prior to the adoption of Regulation 1/2003, the Commission had a monopoly over what agreements could receive exemptions based on Article 101 (3) TFEU.[384] Therefore, interpreting the condition broadly was unproblematic. The Commission could apply the condition consistently and in line with the trajectory and policies that the EU at any point in time pursued.[385] And even though the CJEU could overturn Commission decisions, it gave the Commission a wide margin of discretion, as *Metropole (1996)* demonstrates. Whether it is possible to infer from this judgment that undertakings should have the same unconditional freedom, is debatable.

Nevertheless, the Commission's decisional practice can illustrate how the condition *could* be interpreted. For instance, the Commission found a restructuring agreement in *Stichting baksteen* to produce improvements, inter alia, because it could be "carried out in acceptable social conditions", which included "the redeployment of employees".[386] Similarly, the Commission found "financial solidarity" in football relevant in *UEFA*, specifically citing *Metro* and *Remia*.[387] It also noted the agreement's positive effects on "the infrastructure and employment in one of the poorest regions in the Community" as relevant in *Ford/Volkswagen*, although these improvements in themselves could not lead to an exemption.[388]

The Commission narrowed the interpretation Article 101(3) TFEU after the adoption of Regulation 1/2003, which seems to be the main reason for why the provision now is assumed to strictly be concerned with economic efficiencies.[389] Sticking to traditional efficiency gains makes it easy for NCAs to apply the provision and reduces the risk that the provision is interpreted inconsistently between Member States.[390] However, the fact that one interpretation is more *practical* than another, cannot be decisive for what the correct interpretation is.

In summary, there is ample support for considering public interest objectives as relevant in Article 101(3) TFEU, at least under some circumstances. There is in principle nothing in the wording of the condition that would exclude such an interpretation, and even though a strict

[383] If this were the case, undertakings could simply refer to this case when arguing that their agreement that mitigates climate change meets the first condition of Article 101(3) TFEU.

[384] Whish (2021) p. 162.

[385] Whish (2021) p. 162 and 165.

[386] Stichting Baksteen, para 27.

[387] UEFA, para 164 n. 71.

[388] Ford/Volkswagen, paras. 23 and 36.

[389] Whish (2021) p. 162.

[390] Whish (2021) p. 162.

contextual interpretation could suggest that only efficiency gains are relevant, this would overlook that the condition also must be interpreted in light of other EU objectives. Both case law from the CJEU and the General Court demonstrate precisely this to be the case. While the reference to "efficiency gains" in newer case law could indicate a narrowing of the condition, the CJEU has never explicitly stated that other improvements are excluded, and certain statements in *ISU* and *Royal Antwerp* could indicate that public interest objectives indeed are relevant.

6.3.4 Climate Change Mitigation as an Improvement

Finally, the question is whether climate change mitigation can be considered a relevant improvement in the context of Article 101(3) TFEU. This discussion builds upon the findings in the two previous subchapters.

First and foremost, the wording of Article 101(3) TFEU does not preclude climate change mitigation from being considered as a relevant improvement. The list of improvements mentioned in the condition are broad, and in principle fit many agreements that mitigate climate change.

For instance, implementing a new technology that is less polluting could be deemed to promote "technical progress". Agreements that reduce pollution during production or distribution could be considered to improve the "production or distribution of goods". An agreement that mitigates climate change and therefore saves costs for society in the long term, could be said to promote "economic progress".

Accordingly, mitigating climate change can also be argued to produce gains in economic efficiency. For this purpose, it is beneficial to consider two concepts of economic efficiency, and the causes of inefficiency.

Beginning with *allocative* efficiency, also called *Pareto* efficiency. This concept entails that resources are allocated in such a way that it is not possible to make anyone better off, without making someone else worse off.[391] Similarly, the concept of *productive* efficiency entails that goods or services are produced at the lowest price possible for society.[392] An inefficient allocation of goods (market failures) can have several reasons, but a prominent issue are *negative externalities*, which occur when the production or consumption of goods harms third parties.[393] One way to put it, is that efficiency is "violated in the presence of externalities that lead to market failures".[394]

[391] Whish (2021) p. 7.
[392] Whish (2021) p. 7.
[393] Whish (2021) p. 8.
[394] Maggino (2023) p. 1985.

Climate change is a negative externality, and therefore a source of *economic inefficiency*.[395] Human emissions of GHG objectively harm both the global society and future generations.[396] One could say that climate change is the "ultimate negative externality".[397] The reason for why climate change even can occur, is because the true cost of emissions is not reflected in the price of goods. If it were – climate change would not occur.

Mitigating climate change, for instance by limiting GHG emissions, internalizes otherwise negative externalities. This means that a market failure is, at least partially, corrected. *Colomo* has argued so as well, finding that:

> "Very often, intervention allegedly based on non-economic grounds is in fact a response to a market failure and thus not necessarily in conflict with (allocative) efficiency. For instance, environmental protection measures are by and large a reaction to the negative externalities generated by some economic activities."[398]

Accordingly, there is ample support to consider climate change mitigation as an *efficiency gain*. Removing or reducing emissions minimizes the negative externality that emissions present, bringing the market closer to a situation that is *Pareto optimal*.[399] *Faull* and *Nikpay* go as far as to suggest that agreements that internalize negative externalities should be kept outside of Article 101 TFEU altogether:

> "The environment is a resource which is used by polluters but which, in the absence of a tax or other instrument, is not factored into the price of a product. It can be argued that agreements which internalize genuine externalities in a proportionate manner are not restrictive of competition in the first place."[400]

This also sets agreements that mitigate climate change apart from agreements that pursue other, general EU objectives. For instance, collective agreements, or agreements that pursue employment objectives in other ways, are rarely reactions to market failures.[401] The same goes for

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[395] Armon (2012) p. 350.

[396] Armon (2012) pp. 329-330.

[397] Greenstone (2014).

[398] Colomo (2012).

[399] Whish (2021) p. 8, Pigou (1946) p. 118.

[400] Faull (2014) p. 312 n. 839. Their wording, especially the reference to "proportionality" could imply that they consider the Public Interest Exception to apply to such agreements. However, they do not say so explicitly.

[401] An exception are agreements that bring salaries to a level at which employees are not dependent on government benefits, an issue in many low paying jobs.

agreements that protect cultural diversity or promote sports objectives. While these agreements are well intended, they can hardly be considered to improve economic efficiency.

Consequently, even a narrow interpretation of Article 101(3) TFEU, that limits the relevant improvements to those in economic efficiency, suggests that climate change mitigation in itself is a relevant improvement.

In addition, the integration principle in Article 11 also supports such an interpretation. While some agreements that mitigate climate change also reduce costs for undertakings, or improve the quality of products, many do not. Agreements that remove unsustainable products from the market, either by collectively boycotting undertakings, limiting production or introducing fees, can be highly beneficial for the climate. Excluding such effects from Article 101(3) TFEU simply because they don't fit a traditional understanding of what this exemption rule is concerned with, is hardly justifiable.

Case law also underpins that Article 11 TFEU must be considered in a binding manner when interpreting the conditions of Article 101(3) TFEU. This is demonstrated by *ESL* and *Royal Antwerp*. A central question in these cases was what relevance Article 165 TFEU had in the interpretation of Article 101 TFEU. Article 165 TFEU is a provision concerning sporting objectives.[402] The CJEU found that:

> "[…] such specific characteristics [relating to sporting activities] may potentially be taken into account along with other elements and provided they are relevant in the application of Articles 45 and *101 TFEU*, although they may be so *only in the context of and in compliance with the conditions and criteria of application provided for in each of those articles*".[403]

In addition, the Court found that Article 165 TFEU did not need be integrated or considered in a binding manner in the application of Article 101 TFEU.[404] The court explained the reason for this to be that Article 165 TFEU is in Part Three of the TFEU, devoted to 'Union policies and internal actions', and not in Part One of the TFEU, which contains provisions of principle. Only the provisions of principle are "cross-cutting provision having general application".[405]

[402] Case C-333/21 ESL, paras. 95-101.
[403] Case C-333/21 ESL, para. 101.
[404] Case C-333/21 ESL, para. 101.
[405] Case C-333/21 ESL, para. 100.

However, Article 11 TFEU is a "cross cutting provision having general application" precisely because it is in Part One of the TFEU. The Court also mentioned the provision explicitly.[406] Evidently, *a contrario*, this would mean that Article 11 TFEU must:

> "be integrated or taken into account in a binding manner in the application of […] the competition rules (Articles 101 and 102 TFEU)."[407]

A *logical way to meet this demand for integration*, seems to be an interpretation of Article 101(3) TFEU in which climate change mitigation in itself is an improvement. In this way, the objectives and principles pursued by Article 11 TFEU are integrated into Article 101 TFEU, and through the remaining conditions of Article 101(3) TFEU balanced against competition objectives.

The Commission has also considered climate change mitigation as a relevant improvement in decisions prior to the adoption of Regulation 1/2003. One such prominent example is the aforementioned case *CECED*.[408] Not only would the agreement in CECED save costs for consumers in the long-term, but the agreement could also be justified by "environmental benefits".[409]

The Commission took into account that the agreement both saved damages from emissions of CO2, Sulphur dioxide, and nitrous oxide.[410] Even if the agreement had not created traditional efficiency gains, the commission stated that its "environmental results for society" would be enough of an improvement on their own to meet the first condition of Article 101(3) TFEU.[411]

Both climate and general environmental improvements were deemed relevant in the aforementioned case *Ford/Volkswagen*. The Commission found that the agreement would result in a segment-leading product "with regard to low emissions and fuel consumption", and also lead to considerable improvements in "environmental requirements", increasing the "extent of recyclability".[412] All these improvements mitigate climate change.[413] The Commission subsumed

[406] As the Court says, "Environmental protection", see Case C-333/21 ESL, para. 100.

[407] Case C-333/21 ESL, para. 101, see also Monti (2024) p. 4-5.

[408] CECED.

[409] CECED, para. 42, 55-56.

[410] CECED, para. 56.

[411] CECED, para. 56.

[412] Ford/Volkswagen, para. 26.

[413] Recycling plays a crucial role in mitigating climate change because it typically requires less energy to create new products from recycled materials than to produce them from scratch.

this under the condition of promoting technical progress – demonstrating that climate change mitigation is not in conflict with the wording of Article 101(3) TFEU.[414]

The Commission also seems to consider climate change mitigation in itself is an improvement in its 2023 Horizontal Guidelines, even though it does not say so explicitly.

Here, the Commission finds that the first condition in Article 101(3) TFEU allows for a "broad range of sustainability benefits resulting from the use of particular ingredients, technologies and production processes to be taken into account".[415] At face value, this could indicate that the Commission only finds climate improvements relevant if they simultaneously produce traditional efficiency gains.

However, the Commission explicitly mentions "the use of less polluting production or distribution technologies" as an example of what such improvements could be.[416] The idea that less polluting technologies in themselves are a relevant improvement under Article 101(3), can only be interpreted as meaning that the Commission considers climate change mitigation as a relevant improvement.

The Commission also provides an example-case that it finds to satisfy the conditions of Article 101(3). There, it finds that a "reduction in electricity consumption leads to less pollution from electricity production".[417] This seems to confirm that the commission indeed views a reduction in GHG emissions – climate change mitigation – as a relevant improvement.[418]

> The improvements would in any event need to be substantiated. In order to do so, the participating undertakings need to provide "factual arguments and evidence" that genuinely demonstrate that the agreement will produce the claimed improvements.[419] This ensures that the agreement in fact results in the claimed improvements, and therefore excludes agreements that in reality only are classic anticompetitive cartels.

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[414] Ford/Volkswagen, para. 26. Similarly, the Commission took general environmental benefits into account in DSD. This case concerned service agreements for the collection and sorting of waste, which included exclusivity clauses that restricted competition. Not only would the exclusivity clause lead to positive network effects and scale and scope advantages, but the agreement would also be beneficial for preventing or reducing the "impact of waste packaging on the environment", and thus providing a "high level of environmental protection", see DSD, para. 124, 143-145. Unlike in CECED, the Commission did not make clear whether the environmental benefits in themselves could satisfy the first condition of Article 101(3) TFEU. Nonetheless, the fact that it mentioned them so clearly and before addressing the other improvements, indicates that they at least were relevant to a certain degree.

[415] Guidelines on Article 101(3) TFEU, para. 557.

[416] Guidelines on Article 101(3) TFEU, para. 558.

[417] Guidelines on Article 101(3) TFEU, para. 603.

[418] However, it should be kept in mind that the Commission does not explicitly state this.

[419] Case C-501/06 P GlaxoSmithKline, para. 102.

> A Dutch case on the closing of coal power plants illustrates this well.[420] Several undertakings planned to agree on closing five coal power plants from the 1980s.[421] While this in theory could lead to a large reduction of CO2, the Dutch competition authority found no reason to do a specific assessment. Rather, it pointed out that the CO2 emissions were covered by the EU emissions trading system (ETS). Therefore, the agreement would only free up the allowances, which then other undertakings could use.[422] For the agreement to have the claimed effect, the allowances would simultaneously have to be removed from the system, for instance by purchasing the allowances but not using them. The participants could therefore not substantiate that the agreement in fact mitigated climate change.[423]

In summary, there is ample support for considering climate change mitigation as a relevant improvement in Article 101(3) TFEU. There is in principle nothing in the wording of the condition that would exclude this interpretation. Such improvements could be considered as efficiency gains, and the integration principle in Article 11 TFEU seems to demand such an interpretation as well. The Commission has in its decisional practice demonstrated that such an interpretation is possible, and while it for a long time has had a more purely economic approach, its newest guidelines indicate that it again is open to considering climate change mitigation as a relevant improvement.

Much ink has been spilled on the question of whether contributions to environmental sustainability satisfy the first condition of Article 101(3) TFEU.[424] However, as demonstrated, there is substantial evidence supporting the conclusion that *at least climate change mitigation* can meet this condition. In any event, the agreement in question needs to pass three more conditions to receive an exemption. These conditions can prove hard to satisfy. The next chapter focuses on the condition that the agreement must be "indispensable" to achieve the improvements.

6.4 Indispensability and Climate Change Mitigation

6.4.1 Introduction

The third condition of Article 101(3) TFEU requires that the agreement only imposes restrictions on the participating undertakings that are "indispensable" to the attainment of the relevant improvements. I will begin by describing the general meaning of this condition and demonstrate that an objective of climate change mitigation does not challenge this interpreta-

[420] ACM (2013).

[421] ACM (2013), p. 1.

[422] ACM (2013), p. 4.

[423] It can be argued that the participants' true intention was not to benefit the environment, but rather to shut down old and burdensome power plants without competitive risk.

[424] For instance, two out of the three master theses on the topic of sustainability and competition law at the University of Bergen solely focus on whether improvements in environmental sustainability are or should be considered as relevant improvements under Article 101(3) TFEU, see Øhrn (2021) and Henriksen (2022).

tion. However, satisfying the condition can still prove difficult in agreements that mitigate climate change, and in this context, I will consider both the impact of legislation and the so called "first-mover disadvantage".

6.4.2 Indispensability in General

The general meaning of the word "indispensability" is that something is absolutely necessary. In the context of Article 101(3) TFEU, the CJEU has described the condition in this way:

> "[…] [I]t involves an assessment and comparison of the respective impact of that conduct and of the alternative measures which might genuinely be envisaged, with a view to determining whether the efficiency gains expected from that conduct may be attained by measures which are less restrictive of competition."[425]

The key question is if the improvements could be achieved more efficiently without the agreement, or with one that is less restrictive.[426] Verifying so entails a two-fold test, firstly if the agreement is necessary to achieve the improvements, and secondly if its individual restrictions are so as well.[427]

The indispensability condition is often referred to as a "proportionality" assessment.[428] In this context, it means that the agreement must be necessary, and not go beyond what is necessary, to achieve the claimed improvements.[429] Whether the agreement is *suitable* to achieve the improvements, is already assessed under the first condition of Article 101(3) TFEU, in which they must be substantiated.

In older literature, some authors proposed that the necessity condition also includes a balancing of the agreements effects – a test of proportionality *stricto sensu*.[430] However, this seems to merely be a creation in literature, and neither the EU Courts nor the Commission have interpreted the condition this way.[431] There is a slight element of balancing in the condition – the more restrictive an agreement is, the stricter the condition is interpreted.[432] However, this is not

[425] Case C-124/21 P ISU, para. 197.
[426] Case T-472/13 Lundbeck, para. 719.
[427] Guidelines on Article 101(3) TFEU, para. 73.
[428] Hjelmeng (2014) p. 403, Kingston (2012) p. 282, Vedder (2013) p. 176.
[429] Hjelmeng (2014) p. 403.
[430] See Vedder (2003) p. 176 for further references.
[431] See also Vedder (2003) p. 180-181.
[432] Case T-86/95 Compagnie Générale Maritime paras. 392-395, Faull (2014) para. 3.494.

the same as a balancing of the agreements effects. Such a balancing is only present in the condition that consumers receive a fair share of the agreement's benefits, which I discuss in Chapter 6.6.5.

For an agreement that mitigates climate change to be indispensable, it must be necessary, and not impose restrictions beyond what is necessary to achieve the objective of mitigating climate change.[433] This assessment is in principle done the same way as when considering other types of agreements. A couple agreements with general environmental improvements demonstrate this.

For instance, the agreement in *ANSAC* was beneficial for the environment but simultaneously unnecessary. In this case, several US producers of natural soda-ash wished to create a joint venture to export their product into the EU.[434] Soda-ash in the EU was at the time exclusively created synthetically, which was more environmentally harmful than the natural counterpart created in the US.[435] However, the Commission found that the US natural soda-ash would reach the European market without the agreement. Therefore, the agreement was not indispensable.[436]

Another case, *VOTOB*, illustrates an agreement that although necessary, included restrictions that went beyond what was necessary.[437] In this case, an association of tank storage companies required its members to charge a uniform and fixed fee to their customers. The fee was meant to cover costs for reducing emissions from storage tanks.[438] The Commission determined that a uniform and fixed fee ignored that each of the members had invested different amounts, meaning that some would pocket parts of the fee as profit.[439] In addition, the fee was invoiced in a way that could suggest it to be a governmental fee, therefore disincentivizing customers from negotiating it.[440] Therefore, the agreement went beyond what was necessary to achieve the environmental objective.

[433] 2023 Horizontal Guidelines, para. 568

[434] *Ansac*, para. 23.

[435] *Ansac*, para. 5 and 23.

[436] Vedder (2003) p. 177. Kingston (2012) p. 283.

[437] XXIInd Report on Competition Policy 1992 para. 177-86.

[438] XXIInd Report on Competition Policy 1992 para. 179.

[439] XXIInd Report on Competition Policy 1992 para. 182.

[440] XXIInd Report on Competition Policy 1992 para. 180 and 185, Vedder (2003) p. 178, Kingston (2012) p. 283-285.

This demonstrates that the "indispensability" condition is well suited to ensure that the agreement not only is necessary to mitigate climate change, but also that it does not restrict competition further than what is necessary – which is the case if the agreement increases profits for the participating undertakings.

In addition, there are two situations that especially can cause issues for agreements that mitigate climate. One is where legislation, at least to some degree, addresses climate change. The other is a situation in which undertakings theoretically could act alone but avoid doing so because they fear a "first-mover disadvantage". I will now discuss what impact these situations have on the indispensability condition.

6.4.3 Indispensability, Legislation, and Climate Change Mitigation

The first question is how governmental regulation of GHG emissions affects whether an agreement can be deemed to be indispensable.

Regulating emissions is primarily role of the public regulator, not private undertakings.[441] However, the fact that legislation in theory can address environmental issues better than private regulation in almost every scenario, is not decisive.[442] Such a position would in essence make any environmental agreement impossible to meet the necessity condition. In addition, such a position omits the reality of environmental regulation, which often is slow to come and ineffective.[443]

For instance, only approximately 40% of GHG emissions in the EU are covered by the ETS. Only a few developed nations outside of the EU have similar systems, and in emerging markets, where many European undertakings produce their goods, such systems are not yet present.[444] Though, it should be noted that lobbying by undertakings (regulatory capture) often is a significant reason for why environmental regulation is lacking.[445]

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[441] Hjelmeng (2014) p. 406.

[442] Hjelmeng (2014) p. 407. Hjelmeng and Sørgård also write that "cooperation that pursues the solving of environmental issues will in many cases anyway not pass the condition of indispensability. In such cases, it will be up to the legislator to protect the environment through regulation, instead of undertakings entering anti-competitive cooperation" (translated from Norwegian). However, the question of necessity is not if reaching the environmental goal is necessary, but rather if the agreement at hand is necessary to reach the intended goal. The statement must therefore be read in the context the environmental issue already is sufficiently regulated, which the authors seem to confirm later on the same page.

[443] 2023 Horizontal Guidelines, para. 565.

[444] EU Commission (2024B).

[445] See for instance Apple's opposition to Directive (EU) 2022/2380, which mandates the use of USB-C as a universal charger, thereby reducing e-waste.

If the emissions that the agreement reduces are covered by a cap-and-trade system, the agreement will most likely not meet the necessity condition. Reducing emissions will in such cases simply free up allowances to be emitted elsewhere.[446] The aforementioned case on closing of coal power plants in the Netherlands demonstrates this.[447] The result of such an agreement is a zero-net benefit on emissions (the waterbed effect).[448] In these cases, the participants need to show that the emissions allowances simultaneously are removed from the cap-and-trade system.

However, since 60% of GHG emissions in the EU, and most other emissions outside the EU are not yet covered by similar systems, many potential agreements that mitigate climate change do not face this issue.

Similarly, if the emissions are regulated within a sector by for instance by placing a certain limit of emissions within a certain period, an agreement to meet these criteria will most likely not be necessary.[449] In these cases, undertakings already unilaterally need to meet the conditions stipulated by the regulation – there is in principle no reason to enter into an agreement to do so.

This position must be slightly nuanced. For one, undertakings might want to aim even higher than the regulation demands. If this does not directly contradict the legislations' purpose, there is little reason to deny undertakings from doing so. Secondly, cooperation could achieve the goals of the legislation more quickly and effectively.[450]

This notion is also approved in the Corporate Sustainability Due Diligence Directive.[451] The directive stipulates precise criteria that certain undertakings unilaterally need to meet. However, it also approves that even then, collaboration can be necessary:

> "The company should collaborate with the entity which can most effectively prevent or mitigate potential adverse impacts solely or jointly with the company, or other legal entities, while respecting applicable law, in particular competition law."[452]

[446] 2023 Horizontal Guidelines, para. 564, n. 397.
[447] See Chapter 6.3.4.
[448] AFCA (2022), para. 79.
[449] 2023 Horizontal Guidelines, para. 564.
[450] 2023 Horizontal Guidelines, para. 565. See also CMA (2024), para. 2.44.
[451] CSDDD. Formally adopted by the Council on May 24, 2024.
[452] CSDDD, Recital 35a, and Articles 7 2) e) and 8 3) f).

In these cases, the necessity condition should be interpreted strictly. The regulator normally has had the best knowledge and intentions when creating the regulation at hand.[453] The General Court demonstrates this in Hilti, where it states:

> "[…] [T]here are laws in the United Kingdom attaching penalties to the sale of dangerous products […]. There are also authorities vested with powers to enforce those laws. In those circumstances it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products."[454]

Nonetheless, this issue is of lesser importance when considering agreements that mitigate climate change. The EU climate law sets out a binding objective of climate neutrality in the EU by 2050.[455] Currently, it is likely that the EU will miss this target by a decade.[456] As long as legislation does not sufficiently ensure that this target will be met, it is difficult to argue that private initiatives that objectively help reach this goal, are unnecessary.

6.4.4 Indispensability, The First-Mover Disadvantage, and Climate Change Mitigation

The second question is how the notion of a "first mover disadvantage" impacts the assessment of an agreement's necessity.

As explained in Chapter 2, the first mover disadvantage refers to a situation where undertakings unilaterally could make a move towards reducing their GHG emissions but are afraid to do so as they fear afterward being outcompeted by undertakings still using cheaper, more polluting technologies. This means that the undertakings theoretically could act unilaterally, indicating that an agreement is unnecessary.[457]

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[453] Hjelmeng (2014) p. 407.

[454] Case T-30/89 Hilti, para. 118. See also in the same vein Case C-68/12 Slovenská sporiteľňa, para. 20.

[455] European Climate Law, Articles 1 and 2(1).

[456] Wood Mackenzie (2024).

[457] The Commission accepts that the first-mover disadvantage can be a real issue, see the 2023 Horizontal Guidelines para. 596. However, in another example, the Commission connects it to the issue of free riding, see the 2023 Horizontal Guidelines para. 566. Free riding typically occurs when competing undertakings benefit from the investments from a competitor, for instance by introducing a competing product to the market after a competitor has invested heavily in marketing – initially free-riding on the competitor's investments. Free riding has been recognized by the CJEU as a legitimate concern, and companies will usually overcome this by entering into exclusive agreements with their suppliers (vertical agreements). However, the first-mover disadvantage is different, and the solution for this issue are agreements between competing companies (horizontal agreements). While both the issue of free riding and the first-mover disadvantage are about reducing competition in order to introduce new products to the market, it is questionable if these issues should be directly connected. This could make the first-mover disadvantage appear more legitimate that it actually is.

However, this would overlook the reality of the risk such moves may entail for undertakings. If undertakings can demonstrate that they will be outcompeted in such a case, there is *in theory* no reason why an agreement to overcome this issue would not be necessary. Without an agreement, the undertakings would not implement the less polluting technology, meaning that the improvements wouldn't come to fruition.

It should be noted that the claimed "first-mover disadvantage" is subject to debate, and some scholars do not view this perceived issue as a genuine concern.[458] However, the notion of creating a level playing field in terms of emissions is not novel, as exemplified by Council Directive 92/112/EEC, which aimed to achieve the following objective:[459]

> "[…] *approximate* national rules relating to titanium dioxide production conditions in order to *eliminate the existing distortions of competition between the various producers in the industry* and to ensure a *high level of environmental protection* [emphasis added];"[460]

The first mover disadvantage is also approved as an argument in the Corporate Sustainability Due Diligence Directive, which states that:

> "In some instances, a collaboration with other entities could be the only realistic way of preventing potential adverse impacts caused even by direct business partners if the influence of the company is not sufficient."[461]

The remaining question is how a claimed first-mover disadvantage can be verified. In this context, case law on the necessity condition in the ancillary restraints' exception can be helpful. In *MasterCard*, the CJEU writes on the condition of necessity that "the fact that that operation is simply more difficult to implement" or "even less profitable without the restriction concerned" cannot make the agreement necessary.[462]

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[458] Schinkel (2020).

[459] Directive 92/112/EEC.

[460] Directive 92/112/EEC, para. 9. Approximation of laws in this context means harmonizing legislation across all EU member states. Directive 2010/75/EU, which recast Directive 92/112/EEC, uses the wording "achievement of a level playing field in the Union", see Directive 2010/75/EU para. 3.

[461] CSDDD, Recital 35(a), 36 and 41.

[462] Case C-382/12 P MasterCard, para. 91.

Similarly, the Commission lays this out as meaning that without the agreement, the concentration "could not be implemented" or "could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty".[463]

By analogy, this means that using a first-mover disadvantage as an argument for the necessity of an agreement is not out of the question. However, *simply a reduction in profits is not enough for the agreement to become necessary*. In addition, companies need to prove that there is considerable risk that they will be outcompeted if acting unilaterally. A strict interpretation of the condition in these instances is necessary to avoid attempts at greenwashing.[464]

In summary, the "indispensability" condition must in principle be assessed as usual when considering agreements that mitigate climate change. This assessment must be done strictly, to ensure that only agreements that truly are necessary to achieve claimed reductions in GHG are permitted. While legislation can be an issue for general environmental agreements, it is less of an obstacle for agreements that mitigate climate change. However, if a political decision during the agreement's lifetime forces undertakings to internalize emissions unilaterally, the purpose of the agreement may fall apart. Last but not least, using a first-mover disadvantage as an argument for an agreement's necessity is in principle not ruled out, but can in practice be difficult to convincingly demonstrate.

6.5 No Elimination of Competition and Climate Change Mitigation

The fourth condition of Article 101(3) requires that the agreement does not afford the undertakings the possibility of "eliminating competition in respect of a substantial part of the products in question". The condition acts as a safety to ensure that agreements detrimental to competition are not allowed, even though they in the short-term may be beneficial for the consumers.

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[463] Commission's Notice on restrictions directly related and necessary to concentrations, para. 13, Vodafone/BT/Airtel JV, para. 20, 2023 Horizontal Guidelines, para. 34.

[464] Greenwashing can be defined as "behaviour or activities that make people believe that a company is doing more to protect the environment than it really is", see Cambridge Dictionary (2024B). For instance, the British consumer goods company "Unilever" has been vocal in the debate on sustainability agreements and has responded to public requests from several NCAs in the debate on sustainability agreements. For instance, in reply to DG COMP, the British CMA and the Dutch ACM. As many other companies participating in the debate, Unilever is very positive to broadening the scope of legal cooperation on sustainability and has claimed that the first-mover disadvantage is an issue. However, Unilever also participated in the Consumer detergents-cartel, where the Commission fined Unilever and Procter & Gamble 315.2 million euros for operating a cartel concerning powder detergents used in washing machines. The cartel originated in an initiative through their trade association, that actually could have improved the products environmental performance. However, Unilever and others conspired to stabilize their market positions and coordinate prices. In addition, they agreed that "none of them would use the environmental initiative to gain competitive advantage over the others". In essence, they agreed to not improve environmental performance. See Consumer detergents.

The reasoning for this is the belief that competition long-term is better for consumers, even if that means giving up short-term benefits.[465] An elimination of competition will often result in less innovation, higher prices, and a misallocation of resources.[466] Briefly put, the market will move closer to that of a monopoly, and result in the same detrimental effect for consumers. In addition, eliminating competition is also likely to be harmful to the effort of mitigating climate change in the long run.

To determine whether an agreement eliminates competition, various competitive parameters must be evaluated, such as the impact on price or innovation.[467] Two key factors serve as strong indicators in this assessment, namely a *large market share* and a creation of *barriers to entry*.[468]

In literature, it has been assumed that if the agreement covers more than 80% of the market, it is likely to eliminate competition.[469] However, the CJEU has not commented on this, and the Commission also states that "the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share".[470]

Agreements that mitigate climate change often *need to cover a substantial part of the market to be effective*. If an agreement that aims to overcome the first-mover disadvantage only covers a small part of the market, consumers can simply switch to purchasing from competitors still offering the cheaper and less climate friendly product.[471] Even if no first-mover disadvantage is present, the agreement will be more beneficial for the climate if it covers a larger part of the market.[472] Briefly put, the larger the market coverage, the better the agreement is for mitigating climate change.

If the participating undertakings can continue to *compete on other parameters of competition*, such agreements can still be allowed.[473] For instance, an agreement to switch to only using

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[465] Guidelines on Article 101(3) TFEU, para. 105, Faull (2014) 3.506. Østerud (2010) 8.4.5.

[466] Guidelines on Article 101(3) TFEU, para. 105, Østerud (2010) 8.4.5.

[467] Faull (2014) 2.506, Case C-333/21 ESL, para. 198. Guidelines on Article 101(3) TFEU, para. 110.

[468] Case C-333/21 ESL, para. 198, Guidelines on Article 101(3) TFEU, para. 109.

[469] Hjelmeng (2014) p. 103.

[470] Guidelines on Article 101(3) TFEU, para 109. Hjelmeng (2014) p. 103.

[471] 2023 Horizontal Guidelines, para. 586.

[472] 2023 Horizontal Guidelines, para. 586, n 407. Considering an agreement that only covers a small share of the market, the Commission notes: "However, in this example, it is not only the potential benefit of the agreement that is limited due to insufficient coverage, but also the potential competitive harm (for essentially the same reasons)."

[473] 2023 Horizontal Guidelines, para. 593.

renewable energy in the production process, will not eliminate competition if the undertakings can still compete on price, quality, marketing, and so on.[474]

This was also demonstrated in *CECED*. The agreement in *CECED* covered 95% of the relevant market, which is far more than an assumed limit of 80%.[475] However, this was not an issue, since other factors like "price, brand image, and technical performance" could still be competed on.[476]

In addition, other manufacturers were free to not participate in the agreement, and if they wished to, the agreement was open for new participants – and the technology necessary for meeting the agreements commitments was available to all participants.[477] Therefore, the agreement did not create barriers for entry.[478] Consequently, it did not eliminate competition.

Lastly, a question is whether eliminating competition only for a limited period of time can be justified and therefore not in violation of the condition. Both the Commission, the Austrian AFCA and the British CMA state so in their guidelines.[479] As an example, they find that temporarily reducing the production of a product with a non-sustainable ingredient to introduce a sustainable substitute and raise consumer awareness usually meets the condition.[480]

Whether an agreement that eliminates competition in respect of a substantial part of a product can be justified because it is limited in time, is questionable. However, limiting an agreement's time period can be an argument for finding that competition is *not eliminated*.[481] Agreements can be limited in time, and still mitigate climate change. For instance, the agreement in CECED was only greenlit in the period from 22 October 1997 to 31 December 2001.[482] Prolonging the agreement was not necessary, since it led to a permanent transformation of the market, which was beneficial both for the environment and competition.[483]

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[474] 2023 Horizontal Guidelines, para. 595.
[475] CECED, para. 24.
[476] CECED, para. 64.
[477] CECED, para. 24 and 65.
[478] Case C-333/21 ESL para. 198.
[479] 2023 Horizontal Guidelines para. 596, AFCA (2022) para. 98, CMA (2023) 5.31.
[480] AFCA (2022) para. 98, CMA (2023) 5.31.
[481] 2009/C 45/02, para. 15.
[482] CECED, para. 68.
[483] CECED (2004), p. 5.

6.6 A Fair Share for Consumers and Climate Change Mitigation

6.6.1 Introduction

Last but not least, the second condition in Article 101(3) TFEU must be discussed. This condition is perhaps the most challenging condition for agreements that mitigate climate change to satisfy. According to the condition, the "consumers" must receive a "fair share" of the agreement's benefits. The benefits are the result of the agreement's improvements and must be objectively appreciable.[484]

Agreements that mitigate climate change result in numerous benefits. For instance, climate change mitigation reduces extreme weather events such as heatwaves, droughts, wildfires, flooding, and sea-level rise.[485] This in turn is beneficial both for current and future human and animal health, and saves both infrastructure, private property and other goods. Briefly put, the benefits flowing from agreements that mitigate climate change are global and diverse.

The consumer and fair share requirements limit the scope of relevant benefits. For instance, an agreement may reduce costs for the participating undertakings, and therefore create efficiency gains. However, this improvement alone is not enough to justify an anticompetitive agreement. The agreement must result in benefits for the consumers negatively impacted.

This way, the condition ensures that the agreement's positive effects make up for its anticompetitive effect.[486] Usually, the "consumers" are considered to be the *consumers of the product* covered by the agreement, and they only receive a "fair share" if they are *fully compensated* for competitive harm the agreement causes.[487]

Many agreements aimed at mitigating climate change inherently challenge consumer interests. For instance, customers might be unhappy when products they previously purchased are no longer available on shelves, because they have been removed for being unsustainable. Similarly, if an agreement causes prices to rise due to the adoption of more climate-friendly but expensive production methods, consumers' immediate interests are negatively affected.

In addition to this – since the benefits are global and diverse – third parties receive a large portion of the agreement's benefits. From this perspective, *consumers pay for benefits that they*

[484] Case C-333/21 ESL, para. 192.
[485] EU Commission (2024A).
[486] Arnesen (2022) p. 472.
[487] Guidelines on Article 101(3) TFEU, paras 84-85.

do not receive, either through a price increase, lower product quality, less choice, or other anti-competitive effects.[488] It can be questionable whether this is "fair".

The condition is therefore the *make-or-break* condition for agreements that mitigate climate change. A strict interpretation of the condition can create a deadlock which *de facto* makes it impossible for such agreements to be exempted under Article 101(3) TFEU.

The purpose of this chapter is therefore to determine how the condition that consumers must receive a fair share, should be interpreted in the case of agreements that mitigate climate change. In order to do so, I will first look at the "consumer" and "fair share" parts (requirements) separately and determine how they in general have been interpreted. Afterwards, I will discuss these requirements together against the backdrop of agreements that mitigate climate change.

The consumer and fair share requirements are interlinked, at least in the context of agreements that mitigate climate change. If the consumer requirement leads to the finding that benefits accruing to the global society are relevant – then the consumers are also likely to receive a "fair share". And the other way around: If a small fraction of the resulting benefits is considered to be a "fair share", then the condition will also be satisfied.

6.6.2 Consumers in General

The condition requires that the "consumers" receive a fair share of the agreement's benefits. This means that, in general, the relevant benefits in Article 101(3) TFEU are those that accrue to this group of consumers. The question in this subchapter is who these consumers are, and if this means that benefits accruing to third parties in principle are irrelevant.

The wording of the requirement indicates that only benefits accruing to the consumers of the product covered by the agreement are relevant. Consumers are commonly defined as "a person who buys goods or services for their own use".[489] The person who purchases the goods or services covered by an agreement is naturally considered the consumer. This also aligns with the term "user", which is used in other language versions of Article 101(3) TFEU.[490]

Most often, the benefits flowing to the consumers of the product covered by an agreement, appear within the "relevant market".[491] This term is important, since it reappears in case law on

[488] Faull (2014), 3.461.

[489] Cambridge Dictionary (2024A).

[490] For instance, the French version uses "utilisateurs" and the Dutch "gebruikers", meaning users. Other versions, such as the German, Danish and Swedish, use words equivalent to "consumer".

[491] Faull (2014) 3.461.

the condition. The relevant market comprises "all those products and/or services which are regarded as interchangeable or substitutable by the consumer" in "the area in which the undertakings concerned are involved in the supply and demand of products or services".[492] Briefly put, the "consumers of the product covered by the agreement" and the "consumers in the relevant markets", are synonymous.

Case law supports limiting the benefits to those accruing to this set of consumers. For instance, the Court referred to the consumers as the "consumers in the relevant markets" in *Asnef-Equifax*.[493] In the same vein, but with slightly different words, they were referred to as "all users, be they traders, intermediate consumers or end consumers, in the different sectors or markets concerned" in *ESL* and *Royal Antwerp*.[494]

The Commission interprets the requirement in the same way. It defines the consumers as "all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers".[495] This indicates that the relevant benefits are those that accrue to this group of consumers.

One question in connection to this, is if the relevant benefits are limited to only those appearing *on the relevant market*. This would mean that benefits flowing to the consumers of the product covered by the agreement, but on a different product market, are irrelevant. The Commission has stated that the weighing of the positive and negative effects of an agreement "normally" and "in principle" is done "within the relevant market to which the agreement relates".[496]

However, there is no support for limiting the relevant benefits to only those appearing on the relevant market. Neither the wording of the condition, the context nor case law supports such a limitation. Excluding benefits outside of the relevant market could also exclude benefits that go to the consumers, only outside of the market. This goes against the purpose of Article 101 TFEU. While the benefits *most often* appear on the relevant market, it would be incorrect to say that considering out of market benefits is a slim exception.[497]

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[492] Commission Notice (97/C 372/03), paras 7-8.

[493] Case C-238/05 Asnef-Equifax, para. 70.

[494] Case C-333/21 ESL, para. 193, Case C-680/21 Royal Antwerp, para. 122.

[495] Guidelines on Article 101(3) TFEU, para. 84

[496] 2023 Horizontal Guidelines, para 583. Guidelines on Article 101(3) TFEU, para. 43.

[497] For instance, the Commission took out of market benefits into account because they accrued to the consumers on the relevant market, in *Star Alliance*. While the relevant market was the flight route between Frankfurt and New York, many of the agreement's benefits would appear on other routes, leading to and from these destinations (behind and beyond routes). Since the consumer groups were largely the same, benefits on the behind and beyond routes were relevant. See *Star Alliance*.

The remaining question is if the consumer requirement can be interpreted in a way that also allows for the consideration of benefits that accrue to *others*. Discussing this is important because the benefits flowing from agreements that mitigate climate change reach much further than this consumer group. There are a couple arguments for extending the consumer requirement to encompass these benefits.

For one, the wording of Article 101(3) TFEU does not necessarily exclude such an interpretation. Broadly speaking, everyone in society is a consumer. The wording does *not directly* imply that there must be a connection to the products covered by the agreement.[498]

Considering benefits accruing to others besides the consumers would also allow for agreements that contribute to general EU objectives. The public interest objectives present in Article 3 TEU, and especially the first chapter of the TFEU, reach audiences much further than only the consumers of a specific product. In addition, although benefits in terms of employment and similar social policies, cultural and educational objectives, rarely benefit the consumers to a large degree, they have nonetheless been considered relevant under Article 101(3) TFEU.

Statements from the General Court could also indicate a such an interpretation. In *Compagnie Générale Maritime*, the General Court found that Article 101(3) TFEU envisages:

> "[…] exemption in favour of, amongst others, agreements which contribute to promoting technical or economic progress, *without requiring a specific link with the relevant market* [emphasis added]."[499]

In addition, it stated that:

> "[…] 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* [emphasis added]."[500]

One way to interpret this, is that the GC found any types of objective advantages to be relevant – no matter if they accrued to the consumers of the product, or not.[501] This would essentially

[498] ACM (2021), p. 1.
[499] Case T-86/95 Compagnie Générale Maritime, para. 343, Hjelmeng (2014) p. 406.
[500] Case T-86/95 Compagnie Générale Maritime, para. 343.
[501] Gassler (2021) p. 439.

reduce the consumer term to the bare minimum. On the other hand, the statement "without requiring a specific link with the relevant market" could also indicate that the GC meant to say that benefits flowing to the consumers of the product - but outside of the relevant market – are relevant. The fact that the in-market and out-of-market benefits in this case accrued to the same consumer group – the consumers of the product – supports the latter interpretation.[502] The GC confirmed this in *GlaxoSmithKline*[503] and *MasterCard*.[504]

While the CJEU in *MasterCard*[505] confirms that out-of-market benefits usually only are relevant if they accrue to the harmed consumers, it makes a valuable addition. This case concerned a two-sided market, meaning that there were two distinct groups of consumers, dependent on each other's demand.[506] The CJEU found that:

> "…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 from that measure in the absence of any proof of the existence of appreciable objective advantages attributable to that measure in the relevant market, in particular […] where the consumers on those markets are not *substantially* the same."[507]

Accordingly, *if the consumers substantially overlap with those receiving the further benefits* – the out-of-market benefits are relevant after all. In such cases, it could be considered "appropriate" to take all benefits into account.

6.6.3 Fair Share in General

Determining the precise meaning of the "fair share" requirement, and whether this always entails compensating the consumers fully, is essential in order for agreements that mitigate climate change to be able to apply Article 101(3) TFEU. This subchapter discusses the general interpretation of the condition.

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[502] Because the benefits accrued to the consumers harmed by the agreement, this was an "appropriate case" to include wider benefits. Gassler writes that "[…] in the sustainability context such narrow reading of the statement of the GC may not be justified.", see Gassler (2021) p. 439. However, interpreting a statement by the GC out of its context to suit a new type of issue, even though the GC had entirely different things in mind, is hardly justifiable.

[503] Case T-168/01 GlaxoSmithKline, para. 251, where the GC says: "As those markets correspond to different stages of the value chain, the final consumer likely to benefit from those advantages is the same".

[504] Case T-111/08 MasterCard, para. 228.

[505] Case C-382/12 P MasterCard.

[506] On one hand, card issuing banks that competed for the business of cardholders, and on the other hand acquiring banks competing for the business of merchants

[507] Case C-382/12 P MasterCard, para. 242.

The notion of *full compensation* is supported by the requirements wording. A common definition of "fair" is that something is reasonable and deserved.[508] If an agreement harms the consumers, it is in principle only reasonable that they are fully compensated. Otherwise, consumers are worse off than without the agreement.

The objectives pursued by Article 101 TFEU also support this. Consumer protection is a primary objective in EU competition law. In most cases, partial compensation would mean that the undertakings profit at the expense of the consumers. Therefore, the objective of consumer protection is only achieved if the harmed consumers are *fully compensated*.

This is also in line with how the Commission interprets the requirement. According to the Commission, 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".[509] The effect on consumers is neutral if they are fully compensated.[510]

However, there are also *reasons for interpreting the requirement as only requiring partial compensation* – at least under some circumstances.

For one, the wording of the requirement does not explicitly state that the consumers need to be fully compensated. What a "fair" share is, can be said to depend on who else stands to profit, and whether the agreement reduces harm to other groups of people.

For instance, if the participating undertakings profit, it is only fair that consumers are fully compensated. However, if the undertakings don't profit – because the benefits go towards broader society – it is perhaps not necessary to interpret the requirement as strictly. The same can be said for cases in which the agreement reduces harm to other groups of people, for instance by improving working conditions. In such cases, it can be argued that consumers don't "deserve" full compensation, and that partial compensation is "fair".

The requirement has also been interpreted somewhat more relaxed by the CJEU. The Court has never explicitly stated that full compensation is necessary, or that the agreement's effect must

[508] Cambridge Dictionary (2024D).

[509] Guidelines on Article 101(3) TFEU, para. 85.

[510] Guidelines on Article 101(3) TFEU, para. 85, Faull (2014) 3.498.

be at least neutral. For instance, in *ESL*, the Court began by saying that the benefits must "compensate for the disadvantages caused in competition terms".[511] When specifying what this entails, it only states that the agreement must have a "*favourable impact*" on the consumers.[512] A favorable impact does *not* necessarily mean that its benefits must make up for the entire anti-competitive effect – only that the consumers receive at least *some* benefits.[513]

The Court interpreted the condition similarly in *Asnef-Equifax.* While the Court in this case said that the "overall effect" on the consumers must be favorable, it did not mean that the "net effect" must be at least neutral.[514] Rather, by "overall effect", the Court referred to the fact that *not each consumer individually* must benefit from the agreement.[515] Briefly put, the Court only stated that the agreement must be "favorable" for the consumers as a whole.[516]

To summarize, while there in general are good reasons for interpreting the fair share requirement as demanding full compensation for the consumers, there could be reasons for interpreting it slightly more relaxed – in special circumstances. As the next chapter will demonstrate, agreements that mitigate climate change are precisely such a circumstance.

6.6.4 Climate Change Mitigation as a Fair Share for Consumers

The main conclusions drawn from the previous subchapters were that benefits accruing to broader audiences can be relevant if there is a "substantial" overlap between this group and the consumers negatively affected by the agreement. In addition, in some cases, the fair share requirement can be interpreted slightly more relaxed than demanding full compensation. These findings are beneficial for the assessment of agreements that mitigate climate change.

For one, agreements that mitigate climate change *always* benefit the consumers of the product covered by the agreement. A reduction in GHG emissions affects both the consumers of the product, as well as the global society.[517] The benefit from a reduction in GHGs is proportional to its reduction – meaning that consumers of the product receive more benefits, the more emissions are reduced. From this perspective, the entire reduction in GHGs should be considered

[511] Case C-124/21 P ISU, paras. 192, 196, 233.

[512] Case C-124/21 P ISU, para. 194-195.

[513] ACM (2021) p. 1.

[514] Case C-238/05 Asnef-Equifax, para. 71-73.

[515] Case C-238/05 Asnef-Equifax, paras. 71-73.

[516] A statement in MasterCard is also interesting in this context. The Court stated that the benefits flowing to others than the consumers, not "in themselves" could compensate the consumers, see para. 241. One way to interpret this, is that such benefits to some degrees are relevant – meaning that full compensation is not necessary, see ACM (2021) p. 4.

[517] Kingston (2012) p. 280.

relevant – demanding no apportioning of the diverse benefits that climate change mitigation has.

This can be contrasted to agreements that benefit the local environment, or agreements that target broader sustainability objectives. For instance, while an agreement that reduces water pollution from factories outside of the EU is noble, it will rarely benefit any of the EU consumers.[518] Likewise, agreements directly targeted at sustainability goals such as eradication of poverty and hunger, providing quality education and reducing gender inequality outside of the EU, will rarely benefit EU consumers.[519] In these cases, consumers only benefit if they subjectively place value on the fact that the agreement makes others better off.[520]

Accordingly, because *the entire consumer group is also part of the group that receives the benefits*, there is a *substantial overlap* between the consumers and the wider beneficiaries of agreements that mitigate climate change. In addition, any agreement that is less effective in reducing emissions also provides fewer benefits for the affected consumers. This speaks for considering all the benefits from agreements that mitigate climate change, as relevant.

However, the fair share requirement could still challenge this assertion. The most severe effects of climate change are not felt by consumers in Europe, but people in other parts of the world, and future generations. Nonetheless, the fair share requirement does not need to create a *deadlock*. There are good reasons for interpreting it less strictly in agreements that mitigate climate change.

As a starting point, the notion that consumers must be fully compensated is mainly crucial in agreements that first and foremost benefit the undertakings. Allowing agreements which profit the undertakings, without ensuring that the harmed consumers are fully compensated, would be incompatible with the objective of safeguarding consumers. In such cases, it is only *fair* if consumers are fully compensated. *Kolstad* describes it this way:

> "It is a requirement that the profit does not remain solely in the hands of the parties, but that parts of the profit are transferred to the consumers."[521]

[518] Blockx (2022).

[519] 2023 Horizontal Guidelines, para. 587.

[520] 2023 Horizontal Guidelines, paras. 576-581.

[521] Arnesen (2022) p. 472. Translated from Norwegian, the original reads as: "Det er et krav at gevinsten ikke blir værende bare på partenes hånd, men at deler av gevinsten veltes over på forbrukerne".

However, agreements that mitigate climate change do not primarily benefit the undertakings – they benefit the global society and future generations. Therefore, the undertakings do not receive a profit that they can "pass on" to the harmed consumers. One could argue that the objective of consumer protection is slightly less relevant when the participating undertakings do not stand to profit.

Secondly, the objective of consumer protection could speak for such an interpretation. The consumers *objectively* benefit from agreements that mitigate climate change. If one were to interpret the requirement in a way that finds it unfair if a large portion of the benefits go towards others than the consumers, one would risk that such agreements never pass the condition.[522] Consequently, agreements that actually benefit the consumers would not come to fruition. This is to the detriment of consumers – especially potentially *future consumers*.

A strict interpretation would also go against the purpose of both Article 3 TEU, Article 11 TFEU and Article 191 TFEU. These provisions are directed at the global society, not only European consumers. For instance, Article 3 TEU stipulates that the EU in its relations with the "wider world" shall contribute to "the sustainable development of the Earth". According to Article 191 TFEU, the EU shall promote measures at to deal with "regional or worldwide environmental problems", and "in particular combating climate change".

Briefly put, a reading of EU competition law that draws a clear line between climate contributions to people inside and outside of the EU, is incompatible with EU law. The purpose of the integration principle in Article 11 TFEU is precisely that such objectives are not overlooked when interpreting other areas of EU law.

In addition, Article 191 TFEU specifies various environmental principles that must be adhered to when interpreting EU law.[523] Two of these are the "polluter pays" principle and the principle that emissions should be "rectified at their source". Both can affect the interpretation of the fair share for consumers' condition.

The *polluter pays principle* supports interpreting the fair share requirement differently.[524] The purpose of this principle is to ensure that the cost of pollution is borne by the party that causes it, not wider society. If an agreement reduces emissions, but also leads to competitive harm, this harm can be justified *if it represents the true cost* of the emissions.[525] As Dolmans puts it,

[522] As Vedder puts it, "environmental benefits, by their very nature, cannot be kept for themselves", see Vedder (2003) p. 173.

[523] Kingston (2014) p. 277.

[524] Loozen (2024), n. 90.

[525] ACM (2021) p. 1.

the consumers "deserve no compensation for having to pay for the climate damage they create".[526] As long as the agreement does not increase profit for the participating undertakings, the polluter pays principle could apply.[527]

The principle that environmental damage should be *rectified at the source* also supports a different interpretation of the fair share requirement. Agreements that mitigate climate change predominantly do so by removing emissions that previously were emitted during the manufacturing of a product. By allowing agreements that cut these emissions, Article 101 TFEU is in line with this principle. The Commission also based its decision on this principle in *CECED*.[528]

The decision in *CECED* demonstrates well that environmental benefits that accrue to all of society, should be relevant. The Commission stated that environmental benefits that accrued to all of society, would "adequately allow consumers a fair share of the benefits", even if "no benefits accrued to individual purchasers of machines".[529] Accordingly, when an agreement results in environmental benefits that accrue to all of society, the consumers can be deemed to receive a fair share even if they are not fully compensated.[530]

The Commission also seems to support such an interpretation in its 2023 Horizontal Guidelines. According to these, "collective benefits" for the environment are relevant.[531] While the guidelines do not mention benefits from climate change mitigation specifically, they do provide an example on cleaner air in general, that demonstrates this:

> "[…] drivers purchasing less polluting fuel are also citizens who would benefit from cleaner air, if less polluting fuel were used. To the extent that a substantial overlap of

[526] Dolmans (2021) p. 2.

[527] Loozen has challenged using the polluter pays principle as an argument for interpreting the fair share condition differently, see Loozen (2024). The main argument is that this principle could be used by undertakings to justify agreements that primarily benefit themselves, at the expense of the consumers. It would mean that the direct polluter, the companies, profit, while the indirect polluter, the consumer, would pay. The true intention behind agreements that mitigate climate change is debatable, but outside the scope of this thesis. Nonetheless, it goes without saying that it would be perverse to let consumer not be fully compensated based on the polluter pays principle, if the agreement increases profit for the participating undertakings. Nonetheless, since the agreements benefits and competitive harm need to be balanced, it should in principle not be possible to justify agreements that benefit the undertakings more than the climate. See chapter 6.6.5.

[528] CECED, para. 55, Kingston (2014) p. 277.

[529] CECED, para. 56.

[530] When assessing the avoided damage from Sulphur dioxide and nitrous oxide, the Commission did so on a "European scale", but it did not mention this when assessing the avoided damage from GHG emissions, see para 56. The likely assumption from this, is that dividing the benefits from a reduction in GHGs to those outside and inside Europe, is in practice impossible.

[531] 2023 Horizontal Guidelines, para. 582.

> consumers (the drivers in this example) and the wider beneficiaries (citizens) can be established, the sustainability benefits of cleaner air can be taken into account […]"[532]

Since the consumers always overlap with the wider beneficiaries of agreements that mitigate climate change, the benefits of GHG emissions should be considered. The affected consumers "form part" of the wider beneficiaries.[533]

The British CMA and the Austrian AFCA interpret the condition in this manner as well. The CMA considers it "appropriate" in the case of climate change agreements:

> "to depart from the general approach and exempt such agreements if the 'fair share to consumers' condition can be satisfied taking into account the totality of the climate change benefits to all UK consumers arising from the agreement, rather than apportioning those climate change benefits between consumers within the market affected by the agreement and those in other markets".[534]

To reflect that the fair share requirement must be interpreted differently in agreements that mitigate climate change, Austria has gone as far as to amend their competition act. While the first part of the Austrian Cartel Act § 2 (1) mirrors Article 101(3) TFEU, the last part of the clause states that:

> "Consumers shall also be deemed to enjoy a fair share of the benefits […] *if those benefits contribute substantially to an* ecologically sustainable or *climate-neutral economy* [emphasis added]."[535]

In summary, all benefits arising from agreements that mitigate climate change should be considered relevant when evaluating these agreements. This approach is not in conflict with the provisions wording, and both the objectives of Article 101 TFEU and environmental objectives support this. In essence, agreements that mitigate climate change are *inherently* beneficial for consumers.

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[532] 2023 Horizontal Guidelines, para. 585. The Commission adds: "provided that they [the collective benefits] compensate the consumers in the relevant market for the harm suffered". This assessment is the subject of chapter 6.6.5.

[533] 2023 Horizontal Guidelines, para. 587.

[534] CMA (2023) 6.4-6.5. As a concrete example, it describes an agreement between delivery companies to switch to electric vehicles. This would benefit all UK consumers through a reduction in carbon dioxide emissions. The delivery companies will in this case be able to consider the totality of the GHG reduction to compensate the harm to consumers of the relevant products.

[535] The Austrian AFCA has published guidelines that demonstrate how this assessment must be done in practice, see AFCA (2022).

However, the agreement's benefits must also make up for the competitive harm which consumers suffer. The remaining question is why and how such a balancing exercise should be conducted.

6.6.5 Balancing the Agreement's Effects

The fair share requirement implies that the agreement's effects must be in balance.[536] Essentially, the benefits flowing from an agreement that mitigates climate change, must make up for its competitive harm. Otherwise, the consequence would be that agreements that are only slightly positive for the environment, but cause great harm to competition, could be permitted.[537] This can hardly be said to be a "fair" outcome.

Balancing the effects would also be in line with the demand set by Article 11 TFEU. The integration principle does not prioritize environmental objectives above other EU objectives – it only demands that the objectives are in balance. Without a balancing of an agreement's climate benefits and its competitive harm, the objective of climate change mitigation would receive priority over EU competition objectives. That is not something which the integration principle demands.[538]

The Commission also implies such a balancing exercise in its 2023 Horizontal Guidelines. Here, it finds that the collective environmental benefits need to be "significant enough" to compensate for the competitive harm.[539] The Commission does not explain how this assessment must be done, however, in its 2001 Horizontal Guidelines, it does:

> "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* [emphasis added]."[540]

In essence, the agreement must be proportional *stricto sensu* (in a strict sense). Both the British CMA and the Austrian AFCA include an assessment of the agreement's proportionality stricto

[536] Faull (2014) 3.505.

[537] Vedder (2003) p. 175-181. Vedder discusses this under the necessity condition, however, his arguments are equally as relevant for the fair share condition.

[538] Barnard (2023) p. 705.

[539] 2023 Horizontal Guidelines, para. 584.

[540] 2001 Horizontal Guidelines, para. 193.

sensu in the fair share requirement.[541] As the ACFA describes it, the agreement's "efficiency gains from ecological benefits" must be "appropriately proportional to the cooperation's anti-competitive effect".[542]

Only if *the benefit's value is the same as or larger than the value of the competitive harm*, the agreement is in balance. This means that the climate benefit and the competitive harm need to be measured, valued and finally compared to each other.

In regard to how the benefits can be valued, there are a plethora of alternatives. For instance, the British CMA uses the HM Treasury's Green Book for valuing a reduction in GHGs.[543] *Kingston* also delves into other ways to value environmental benefits.[544]

Demonstrating valuation methodologies, or how reductions in GHG emissions should be measured, is outside the scope of this thesis. The main take away is that agreements that mitigate climate change *in theory* are well suited for valuing, as long as the parties can prove the amount of greenhouse gas reductions the agreement will achieve. This can be contrasted to agreements that pursue other public interest objectives, which rarely can be assigned precise societal value.

Nonetheless, it cannot be understated that in reality, putting a precise number on climate benefits is difficult. For one, it requires measuring the volume of emissions that the agreement will reduce – doing so can be hard. Secondly, this number must then be assigned a societal value – which in reality requires some type of standard, which undertakings can trust will be used if the agreement is tested by a competition agency or finally the courts.[545] This can make the balancing exercise uncertain, to say the least. However, the Commission demonstrated in CECED that this is not an impossibility.[546]

On the other hand, if an agreement's benefits *obviously* outweigh its competitive harm, and vice versa, a thorough balancing is not required. An informal guidance from the British CMA demonstrates this well.[547] The CMA considered a proposed agreement by the WWF that would

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[541] CMA (2023) 6.6.

[542] AFCA (2022) para 89. Dolmans has attempted to make the assessment more practical. He finds that consumers receive a fair share of the benefits from agreements that mitigate climate change if: "[…] the price increase or incremental cost they bear is less than the sum of (i) the benefit they derive from the sustainability agreement plus (ii) the social costs of greenhouse gas emissions (or other externalities) caused by their consumption", see Dolmans (2021) p. 14.

[543] CMA (2023) 5.27.

[544] Kingston (2012) pp. 176-195.

[545] CMA (2024) 2.38.

[546] CECED, para. 55-56.

[547] CMA (2024).

require UK supermarkets to increase the number of suppliers meeting specific net zero targets, and stated that:[548]

> "*notwithstanding the uncertainty about the precise size of the costs and benefits* that might be attributable to the Proposal, given the CMA's provisional conclusion that *the risk of harm to competition and consumers resulting from the Proposal appears likely to be low* […] the CMA considers that there are *reasonable grounds to expect that the potential relevant benefits would equal, or exceed, any adverse effects* on consumers [emphasis added].[549]

To summarize, in order to satisfy the fair share requirement, the agreements benefits need to make up for its competitive harm. It is only possible through such a balancing to ensure that the consumers are not paying more than the societal value of the agreement's benefits. Measuring and valuating an agreement's effects can prove difficult. As long as there is no agreed-on value assigned to GHG emissions, it is impossible to conclude if an agreement actually is in balance. The Commission could have addressed these issues in its 2023 Horizontal Guidelines; however, it did not.

6.7 The Relationship Between Article 101(3) TFEU and the Public Interest Exception

Both the Public Interest Exception and Article 101(3) TFEU can provide exemptions for agreements that breach Article 101(1) TFEU. This raises a crucial question about the necessity for two exception rules.

An early explanation for the Public Interest Exception was that it acted as a substitute for Article 101(3) TFEU.[550] Until 2004, the Commission could only grant exemptions under Article 101(3) TFEU if it had been notified of the agreement in question.[551] Since the regulation in *Wouters* had not been notified to the Commission, neither the Commission nor the CJEU could use Article 101(3) TFEU to exempt the regulation – even if its conditions otherwise had been satisfied. With the implementation of regulation 1/2003 on May 1, 2004, undertakings no longer are required to notify agreements to the Commission. The EU courts have continued to apply the

[548] CMA (2024) 1.2.

[549] CMA (2024) 2.42. The Dutch ACM came to a similar conclusion in a letter to Shell and TotalEnergies (April 2022) regarding a joint marketing initiative. The ACM found that the fair share requirement demanded quantifying the agreements costs and benefits, since the environmental sustainability benefits clearly outweighed the costs, see ACM (2022).

[550] Arnesen (2022) p. 502. Townley (2009) p. 137.

[551] Regulation No 17, art. 4.

Public Interest Exception, meaning that it has standalone relevance next to Article 101(3) TFEU.

The exception rules are *not mutually exclusive*. In *ISU* and *Royal Antwerp*, the CJEU determined that a single agreement could theoretically meet the conditions of both exception rules within the same case. Consequently, the rules can be applied simultaneously.

The remaining question is *how they overlap and what sets them apart*. Additionally, in the context of agreements that mitigate climate change, it is important to determine which rule is preferable and why.

Beginning with their similarities, both exceptions demand that the agreement and its restrictions are *indispensable/necessary*, and that the agreement does *not eliminate all competition*, see Chapter 5.4.[552] These conditions must, for all intents and purposes, be interpreted in the same way in both exceptions.[553]

The remaining conditions set the rules apart, starting with the *objectives* for which the exceptions can provide justifications. Article 101(3) TFEU requires that the agreement produces improvements that objectively benefit society. On the other hand, the Public Interest Exception demands that the agreement contributes to legitimate objectives in the public interest.

These objectives often overlap. For instance, any type of relevant improvement is a contribution to the public interest because societal resources are saved. However, not all public interest objectives are relevant in Article 101(3) TFEU. For example, rules prohibiting and sanctioning athletes who use PEDs are beneficial from a societal perspective but are not relevant improvements in Article 101(3) TFEU. The same goes for other ethical rules within the sports sector and rules for professionals. While they can benefit society, they also aim to uphold integrity within the professions, which primarily is to the professional's own benefit.

In the case of agreements that mitigate climate change, this condition can be argued to fully overlap. Reducing GHG emissions and thereby mitigating climate change is most definitely a

[552] Rompuy (2024).

[553] The CJEU stated the opposite in MasterCard in the context of the Ancillary Restraints Exception, see para. 92. The CJEU based this on that Article 101(3) TFEU, and the Ancillary Restraints Exception pursue "different objectives" since the former is about justifying anticompetitive conduct due to positive economic effects, while the latter is about whether a main operation without the restrictions would not be implemented, see para. 93. However, as demonstrated, the public interest objectives often overlap with the improvements justifiable by Article 101(3). Accordingly, the statement in MasterCard does not apply Public Interest Exception.

public interest objective. In addition, it is a relevant improvement in Article 101(3) TFEU because it saves resources for society. Nonetheless, it does challenge the way this condition in Article 101(3) TFEU has been interpreted.

The other major difference is the *balancing exercise*. While Article 101(3) TFEU contains a test of proportionality *stricto sensu*, the Public Interest Exception does not. For most types of public interest objectives, this omission of proportionality *stricto sensu* is sensible. Valuing the benefits from ethical rules for lawyers and other professions, or the benefits from rules that prohibit athletes from doping, is in practice impossible. A test of proportionality *stricto sensu* would in these instances be futile.

However, such a test is *in theory* possible in the case of agreements that mitigate climate change. These agreements do so by reducing GHG emissions, which can be measured and valued. Doing so puts an estimated number on the benefits flowing from an agreement that mitigates climate change, which in turn can be compared to the agreement's competitive harm. Consequently, such agreements could just as well be considered under Article 101(3) TFEU, as under the Public Interest Exception.

The question is then which rule is preferable for agreements that mitigate climate change. While the CJEU has left the possibility for applying the Public Interest Exception to climate change mitigation open, it is reasonable to ask if there is reason to do so.

It can be assumed that a major reason for the Public Interest Exception, is that public interest objectives *in general* cannot be valued, and not always are to the benefit of the *affected consumers*. Therefore, in order for agreements that pursue such objectives to be exempted from competition law, applying Article 101(3) TFEU is not possible.

These issues are less relevant in agreements that mitigate climate change. For one, such agreements objectively are to the benefit of consumers. In addition, reductions in GHGs can both be measured and valued. Consequently, applying Article 101(3) TFEU to assess these agreements is possible. A test of proportionality *stricto sensu* is important to ensure that agreement's actually make up for their competitive harm. This would also be in line with the integration principle in Article 11 TFEU, which AG Geelhoed has noted "at most" requires balancing "*stricto sensu*".[554]

[554] Opinion of Advocate General Geelhoed on Case C-161/04, para. 59.

This reduces the necessity and justification for applying the Public Interest Exception to agreements that mitigate climate change. Deviating from the wording of Article 101 TFEU and applying an exception rule purely created in case law, should in principle only be justifiable if there otherwise is a risk of breaching other provisions of EU law, such as Article 11 TFEU. Given that satisfying the conditions of Article 101(3) TFEU in practice is possible, it arguably is the preferable choice.

6.8 Concluding Remarks

This chapter has demonstrated how the four conditions of Article 101(3) TFEU should be interpreted when assessing agreements that mitigate climate change. A few remarks can be added regarding each of the four conditions.

First and foremost, mitigating climate change should be considered a relevant improvement. This is especially the case because it corrects a negative externality and thus improves economic efficiency. This means that not only agreements providing traditional efficiency gains, such as reducing costs or improving product quality, can meet the first condition of Article 101(3) TFEU, but also, in principle, any agreement that mitigates climate change. Agreements pursuing general sustainability objectives may have difficulties satisfying this condition, but agreements that mitigate climate change do not face the same issue.

Similarly, agreements that mitigate climate change can often be deemed indispensable for this effort. General environmental agreements frequently encounter the issue that the environment is already regulated, making further improvements unnecessary. However, to achieve net-zero emissions by 2050, there is theoretically no upper limit to the ambitions that undertakings can set. The condition is also well suited to exclude attempts at greenwashing from receiving exemptions.

The condition that not all competition must be eliminated does not pose a significant issue, even for industry-wide agreements. However, this condition is valuable for preventing undertakings from creating agreements that, while beneficial for the climate in the short term, ultimately strengthen the market power of a few players and, in the long run, harm both competition and the climate.

Last but not least, agreements that mitigate climate change can pass a fair share of benefits on to the affected consumers. These agreements are objectively beneficial to consumers, and the condition requires that the agreement's effects are balanced (*stricto sensu*). This balancing ensures that only agreements that are at least as beneficial for the climate as they are harmful to competition are permitted.

If undertakings are genuinely committed to improving the climate without prioritizing profit, they should be able to satisfy the conditions of Article 101(3) TFEU.

7 Final Remarks

The purpose of this thesis was to explore the interpretation of Article 101 TFEU when assessing agreements aimed at mitigating climate change. The central research question was to determine the impact an objective of mitigating climate change has on this assessment. To address this, I first examined how such an objective affects the evaluation of whether an agreement has the object or effect of restricting competition. Secondly, I considered the applicability of the Public Interest Exception to climate change mitigation agreements. Finally, I analyzed how the four conditions of the exception rule in Article 101(3) TFEU should be interpreted in the context of these agreements.

The findings in Chapter Four demonstrate that objective of mitigating climate change is relevant when determining whether an agreement restricts competition by object or by effect. When participants can convincingly demonstrate that their agreement mitigates climate change, it should not be classified as restricting competition by object, except in cases where the potential competitive harm is detrimental.

Chapter Five illustrates that the Public Interest Exception is applicable to agreements mitigating climate change. This exception permits the pursuit of climate change mitigation objectives, even in cases that would otherwise infringe Article 101(1) TFEU. Mitigating climate change is arguably the most crucial public interest objective, making the exception's application to such agreements natural.

Chapter Six shows that agreements aimed at mitigating climate change can meet the four conditions in Article 101(3) TFEU, even if a reduction in greenhouse gases is the sole improvement. However, proving that such agreements are truly indispensable for reducing emissions can be tricky. Additionally, while these agreements can be deemed to pass a fair share of benefits to consumers, this interpretation challenges the traditional understanding of the condition. Undertakings will also need to calculate and value the emissions reductions and balance these against the agreement's competitive harm, a complex task.

The analyses have also revealed a connection between the three sub-questions. The assessment of whether an agreement restricts competition overlaps significantly with the first condition of the Public Interest Exception. If an agreement mitigates climate change, it typically will not be considered to restrict competition by object. Consequently, if an agreement is not deemed to

restrict competition due to its climate change mitigation, it will also be regarded as pursuing a legitimate public interest objective.

There is also a connection between the Public Interest Exception and Article 101(3) TFEU. Both exception rules apply to agreements that mitigate climate change but can potentially lead to different outcomes. The Public Interest Exception is holistic and does not balance the agreement's negative and positive effects. In contrast, Article 101(3) TFEU is more stringent, requiring a balancing of effects, making the Public Interest Exception easier to apply. However, since Article 101(3) can be interpreted to allow climate change mitigation agreements to satisfy its conditions, the justification for applying the Public Interest Exception is questionable.

In conclusion, this thesis has demonstrated that the objective of climate change mitigation significantly influences how agreements are assessed under Article 101 TFEU. Over the past few decades, climate change mitigation has become one of the EU's primary objectives, benefiting all EU consumers. Therefore, agreements that mitigate climate change should be distinguished from the broader category of "sustainability agreements". While many uncertainties remain, undertakings have significant opportunities to cooperate for the benefit of the climate, global society, and future generations. Time will tell if they choose to seize this opportunity.

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TFEU	Treaty on the Functioning of the European Union, consolidated version 2020, (2016/C 202/01)
The Amsterdam Treaty	Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. (11997D/TXT)
The Maastricht Treaty	Treaty on European Union. (11992M/TXT)
EEA Agreement	Agreement on the European Economic Area. (32018L0849)
EU charter	Charter of Fundamental Rights of the European Union. (12012P/TXT)

Directives and Regulations

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Directive 92/112/EEC	Council Directive 92/112/EEC of 15 December 1992 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry. (31992L0112)
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CSDDD	Procedure 2022/0051/COD (ongoing). Formally adopted by the Council of the EU on 24th of May 2024. (52022PC0071)
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