FRANCESCO DE LEONARDIS*

COMPETITION AND ENVIRONMENT: CONFLICT OR CONFLUENCE? SOME REFLECTIONS ON SUSTAINABILITY AGREEMENTS UNDER ARTICLE 101(3) OF THE TFEU

ABSTRACT. *The article is based on an analysis of Article 101 of the Treaty on the Functioning of the European Union (TFEU). This provision sets out the general rule of the prohibition of agreements between companies that may distort competition, with an exception for agreements that contribute to improving the production of products. The author, based on international and European provisions, proposes an interpretation of 'production improvement' also in an environmental sense. This interpretation could justify agreements between companies that, while contrary to the application of competition principles, move towards sustainable production (so-called sustainability agreements), even if they do not reflect the application of the competition principle. The competition principle emerges clearly in the Italian Environmental Code and is applied in waste regulation and Extended Producer Responsibility (EPR) systems. The author believes that this principle, on the one hand, is crucial to encourage sustainable production and economic efficiency but, on the other hand, should not be considered an absolute principle. Indeed, sustainable production requires exceptions to the principle itself, but only to the strict extent necessary.*

* Full Professor of Administrative Law at Roma Tre University School of Law.

1. The intersections between competition law and environmental law

Apparently, competition protection (aimed at ensuring the proper functioning of the EU internal market by promoting the competition between undertakings and preventing and deleting restrictions and distortions, such as abuse of a dominant position, anti-competitive agreements, as well as mergers and acquisitions – hereafter 'competition principle')[1] and environmental protection (aimed at keeping the planet within the planetary boundaries, ensuring conditions for the survival of various species, and primarily the human species)[2] are separated worlds.

In recent years several intersections between them seem to exist not only in positive law but also in the activities of administrations and tribunals at various levels of legal systems.

On the one hand, competition law and environmental law could be complementary. For instance, in the Italian legal system the competition principle has been explicitly included in the Environmental Code (Legislative Decree No. 152/2006, hereinafter 'TUA') which is the main source of national environmental law.[3] Article 178, the opening provision of the Fourth Part of the Code, concerning waste, states that waste management (from the collection to the final treatment) must be oriented to the competition principle. It implies that companies – and EPR schemes, as explained below – are free to compete in offering the best options to manage the end-of-life of products. As a consequence, producers and administrations can fulfil their management duties by picking the most suitable solutions from the market up. In other words, competition is a driver for enhancing environmental protection.

[1] On competition law, see among others: Giuliano Lemme (ed), *Diritto ed economia del mercato* (Cedam 2014); Mario Libertini, *Diritto della concorrenza dell'Unione europea* (Giuffrè 2014); Enzo Cardi, *Mercati e istituzioni in Italia. Diritto pubblico dell'economia* (5th edn, Giappichelli 2022); Sabino Cassese (ed), *La nuova Costituzione economica* (Laterza 2021); Marco D'Alberti, 'Concorrenza' in Sabino Cassese (ed), *Dizionario di Diritto Pubblico* (2nd edn, Giuffrè 2006) 1140; Angelo Lalli, 'Concorrenza. Disciplina pubblicistica' (2015) <https://www.treccani.it/enciclopedia/concorrenza-disciplina-pubblicistica_(Diritto-on-line)/> accessed 29 June 2024; Mario Libertini, 'Concorrenza', *Enciclopedia del diritto – Annali III* (Giuffrè 2010) 191.

[2] Francesco de Leonardis, *Lo Stato ecologico* (Giappichelli 2023) 1-50.

[3] On the legal nature of this decree, see: Alfonso Celotto, 'Il codice che non c'è: il diritto ambientale tra codificazione e semplificazione' (2009) Giustizia amministrativa 485; Pasquale Cerbo, 'I "nuovi" principi del codice dell'ambiente' (2008) Urbanistica e appalti 533; Francesco Fonderico, 'La "codificazione" del diritto dell'ambiente in Italia, modelli e questioni' (2006) Rivista Trimestrale di diritto pubblico 613.

On the other hand, competition rules could represent an obstacle for the implementation of environmental protection, especially when the latter requires massive projects that the market cannot implement alone.

Therefore, there are some exemptions that are reshaping competition law in order to enhance environmental protection.

Article 101(1) TFEU prohibits agreements between undertakings that could cause restriction or distortion of competition within the internal market. However, its paragraph 3 lists a number of circumstances under which such 'horizontal agreements' shall be lawful. These circumstances go under the general clause of 'fair share':[4] the cost of the competition distortion must be inferior to the benefits generated by the agreement. In other words, a horizontal agreement is lawful if it 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'.

What does 'improving the production' mean? The environment and its protection seem not to be included among the exceptions of Article 101(3) TFEU. However, However, both in international and EU law a 'push' towards sustainable production is currently taking place. Does it mean that undertakings can make horizontal agreements (also) to reach environmental goals? If so, do they comply with the above mentioned 'fair share' clause?

It is no coincidence that the European Commission in its latest 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' includes among lawful horizontal agreements those pursuing one or more sustainability objectives, under certain conditions.[5] There-

[4] According to Article 101(3) TFEU, an horizontal agreement could be justified if: 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

[5] See Communication from the Commission, 'Approval of the content of a draft for a Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements', published on the Official Journal of the European Union, 19 April 2022, C 164/01. On this topic, see: Alfredo Moliterni, 'Antitrust e ambiente ai tempi del Green Deal: il caso dei "sustainability agreements"' (2021) Giornale di diritto amministrativo 354; Roberto Baratta, 'Aiuti di Stato e fragilità ambientali: i nuovi orientamenti della Commissione' (2022) Diritto e società 517; Mario Libertini, 'Gestione "sostenibile" delle imprese e limiti alla discrezionalità imprenditoriale' (2023) Contratto e impresa 54; Andrea Pezzoli,

fore, the inclusion of so-called 'sustainability agreements' may be the occasion to interpret the clause of 'improving the production' as a 'green exemption' that looks towards 'sustainable production' (i.e. the redesign of the trajectory of the economy within the limits of the planet, the sustainable configuration of business activities or, in short, the ecological transition).

The considerations that follow aim to highlight the connection between competition law and environmental law. As happened in the Italian environmental code, the competition principle could strengthen the level of environmental protection and its flexibility can allow to include 'green exemptions' within its field of application. Thus, this contribution will analyse the influence of the competition principle on environmental law, against the background offered by the Italian environmental code, provisions concerning exclusive rights for municipal waste collection, and Extended Producer Responsibility (EPR) systems. Subsequently, the contribution will focus on 'sustainability agreements': notably, on whether international and European law require the enhancement of production processes through environmental lenses in order to legitimize above described horizontal agreements.

2. The competition principle in the Italian Environmental Code

Regarding environmental law principles at the European level,[6] three fundamental provisions are commonly cited: Article 191, Article 11 of the Treaty on the Functioning of the European Union (TFEU), and Article 3 of the Treaty on European Union (TEU).[7]

'Come era verde il mio cartello' (2022) Analisi Giuridica dell'Economia 327. On the relation between State aid and environmental protection, see also: Ornella Porchia, 'Aiuti di stato in materia ambientale e competenze regionali' (2009) Il diritto dell'Unione europea 865; Silvia Marino, 'La tutela ambientale nella politica dell'Unione europea in materia di aiuti di Stato' (2021) Il diritto dell'Unione europea 43.

[6] As known, environmental law principles have been affirmed in the international law declarations and agreements (see in particular principles 3, 4, 6, 10, 14, 15 and 16 of the Rio Declaration).

[7] See among numerous contributions of the Italian doctrine: Maurizio Cafagno, *Principi e strumenti di tutela dell'ambiente. Come sistema complesso, adattivo, comune* (Giappichelli 2007); Paolo Dell'Anno and Eugenio Picozza (eds), *Trattato di diritto dell'ambiente,* I, Padova, 2012; Rosario Ferrara and Maria Alessandra Sandulli (eds), *Trattato di diritto dell'ambiente,* vol 1 (Cedam 2014); Giampaolo Rossi (ed), *Diritto dell'ambiente* (5th edn, Giappichelli

In national law, there are four fundamental provisions on environmental law principles: Articles 3-ter, 3-quater, 3-quinquies, and 3-sexies of the Environmental Code (TUA).

Nevertheless, this collection of rules does not represent a comprehensive list of environmental law principles. Although they mention the four general principles of precaution, prevention, rectification of damage at source, and the polluter-pays principle (Article 191 TFEU and Article 3-ter TUA), there are additional sectorial principles, equally important, that can be inferred from the legislation.

Among these, the competition principle deserves to be mentioned. It was first included in the Italian Code following the reform carried out by Legislative Decree No. 116/2020, which transposed the first of the 'Circular economy package' directives, specifically Directive 851/2018 on waste.[8]

Thus, the competition principle – explicitly referred to in two recitals of said directive[9] – is incorporated into the Fourth Part of the Code concerning waste management and it is not enshrined in a single norm but rather in a plurality of norms.

The first provision embracing this principle is Article 178 TUA, which lists the principles of waste management. Given its placement at the beginning of the Fourth Part of the Code, it could be interpreted as evidence of the full integration of competition protection into the Code and national environmental legislation.

Furthermore, as explained below, the competition principle is closely linked to the extended producer responsibility principle, established by Articles 178-bis and 178-ter TUA. The competition principle is also relevant with respect to the governance of consortia, which generally represent the legal form of Extended Producer Responsibility

2021).

[8] Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste. This Directive constitute, together with Directives (EU) 2018/849 about end-of-life vehicles, batteries and accumulators and waste batteries and accumulators, (EU) 2018/850 about the landfill of waste and (EU) 2018/852 about packaging and packaging waste, the so-called 'Second Circular Economy Package'. About the Package, see Francesco De Leonardis, 'Economia circolare: saggio sui suoi tre diversi aspetti giuridici. Verso uno Stato circolare?' (2017) Diritto amministrativo 163; Francesco De Leonardis, 'Il diritto dell'economia circolare e l'art. 41 Cost.' (2020) Rivista Quadrimestrale di diritto ambientale 50.

[9] See recital 17, which underlines the importance 'to promote a level playing field' in markets for secondary raw materials, and recital 22, which states that '[t]he general minimum requirements [of the extended producer responsibility] should reduce costs and boost performance, as well as ensure a level playing field, including for small and medium-sized enterprises and e-commerce enterprises […]'.

(EPR) systems, such as Conai (for packaging) and other ones concerning vegetable oils, polyethylene goods, mineral oils, and exhausted batteries.[10]

It is also invoked within the regulation of a specific type of waste, packaging waste, which represents about two-thirds of all urban waste.[11] Article 217(1) TUA states that in managing such waste it is necessary to 'ensure a high level of environmental protection' while also 'guaranteeing the functioning of the market' by preventing obstacles to trade and distortions of competition'.

Then, we face provisions that do not explicitly mention the competition principle but are directly connected to it.[12]

2.1. The competition principle ends the municipal monopoly in waste collection

The competition principle entered the Environmental Code progressively, substantially reforming waste management activities.

To begin with, it must be recalled that urban waste, the remnants of consumption, can be divided into two main categories: separately collected waste and mixed waste. Separately collected waste are further categorized by material type and should be processed into second-generation raw materials or compost via recycling, thereby minimizing landfill disposal. Mixed waste should be used, after a mechanical biological treatment, for energy recovery or disposed of.

One of the main issues concerning waste regulation was the existence of a municipal monopoly on waste collection, whether it applied to both categories of municipal waste, or only to one of them, or whether it did not apply at all.

The Italian transposition of the first waste Directive[13] was ambiguous on this aspect. Article 21(1) of Legislative Decree No. 22/1997 established the principle that solely urban and assimilated waste meant for disposal should fall under the municipal

[10] See respectively: Article 224 TUA, Article 233 TUA, Article 237 TUA, Article 236 TUA and Legislative Decree No. 188/2008.

[11] Roberto Leonardi, 'La natura giuridica dell'imballaggio terziario rotto: rifiuto o sottoprodotto?' (2016) Nuove Autonomie 419. See also ISPRA, 'Rapporto rifiuti urbani' (2023).

[12] Article 183(1), letter b-ter, No. 2, TUA and Article 198(2bis) TUA, both introduced by Legislative Decree No. 116/2020.

[13] Council Directive of 15 July 1975 on waste (75/442/EEC).

monopoly. Concurrently, paragraph 7 of the same article stated that this monopoly would not apply for waste meant for recovery if it was the subject of a specific programme agreement.[14]

Thus, the regulation seemed to provide for a sort of a 'dual regime' rule: municipal monopoly for the collection of urban mixed waste (the law reserved to municipalities 'the management of urban waste and assimilated waste destined for disposal under the monopoly forms provided for by Law No. 142 of June 8, 1990, and Article 23') and competition for the collection of waste meant for recovery, provided they were subject to a program agreement. Hence, the monopoly did not apply for separately collected waste: anyone but municipalities can obtain the necessary authorizations to engage in such activities.

The so-called 'dual regime' was further clarified in 2002: Article 23(1) of Law No. 179 of 31 July 2002, amended Article 21(7) of Legislative Decree No. 22/97 to state that 'the monopoly referred to in paragraph 1 does not apply to waste recovery activities for urban and assimilated waste starting from 1 January 2003'. Consequently, the condition of a program agreement was no longer necessary. In subsequent years, Italian administrative tribunals addressed the existence of this dual regime.[15]

However, a few years later, in 2010, the legislator re-handled this issue, stating that 'the organization and management of services related to the collection, disposal, and recovery of urban waste, as well as the collection of related taxes'[16] constitute fundamental functions of municipalities. Thus, this provision seemed to end the dual regime era, extending municipal monopoly to separately collected waste.

Nowadays, administrative tribunals have definitively settled the matter, affirming the existence of the dual regime in accordance with the competition principle.[17]

[14] 'The exclusive right of waste collection does not apply to waste recovery activities covered by the programme agreement referred to in Article 22(11) and to assimilated waste recovery activities' (Article 21(7), Legislative Decree No. 22/97).

[15] See Consiglio di Stato, 5th Section, 16 March 2005, No. 174, according to which it is not applicable to the service of collection and transport of urban waste since 'the privative right referred to in paragraph 1 does not apply to the recovery of urban and assimilated waste, as from 1 January 1 2003'.

[16] Article 14(27), Decree of 31 May 2010, No. 78.

[17] See Consiglio di Giustizia Amministrativa per la Regione Siciliana ('CGA'), 30 March 2022, No. 410 and Consiglio di Stato, 4th Section, 29 May 2023, No. 5257. On the ascending conforming force of the competition principle, see also Consiglio di Stato, 6th Section, 15 December 2022, No. 10993.

The end of the municipal monopoly is also confirmed by a recent reform of the national environmental code. In 2020, the legislator amended the definition of urban waste to include the so-called 'similar waste' or 'assimilated waste'.[18] To this end, the freedom of economic operators to entrust the collection of such type of waste to either the public system or a private one was for the first time recognised, in alignment with the competition principle.[19]

Despite the openness to the application of competition rules, prior to this amendment producers of assimilated waste had to make this choice through a five-year agreement, raising concerns about its compatibility with the competition principle.[20] Furthermore, those producers who had opted for the private system could switch to the public system at any time, even before the expiry of the five-year period, whereas the opposite was not permitted. Thus, producers who had opted for the public system remained bound for five years.

This led to an amendment of the provision in 2022,[21] following a recommendation from the Italian Competition and Market Authority. The duration of the obligation has been shortened to the more reasonable period of two years and producers were guaranteed equal conditions in the case of a reconsideration of the waste management options.

These examples – together with the inclusion of the competition principle among the general principles of the Fourth Part of the Code (see section 1) – show how competition law has become fundamental in environmental legislation. The crucial point is that competition should no longer be seen as an obstacle to environmental pro-

[18] They are 'mixed waste and separately collected waste that come from other sources similar in nature and composition to the household waste listed in Annex L-quater produced and generated by activities listed in Annex L-quinquies' to the Fourth Part of the Code.

[19] 'In order to deliver their municipal waste outside the public service non-households users have to prove that they have sent it for recovery by means of a certificate issued by the entity carrying out the waste recovery activity. This waste counts towards the recycling targets for municipal waste' (Article 198(2bis) TUA, as amended by Legislative Decree No. 116/2020).

[20] Non-household users producing assimilated municipal waste 'who deliver it outside the public service and prove that they have sent it for recovery […] are excluded from the payment of the tariff component related to the quantity of waste delivered' and 'make the choice to use the public service provider or the market for a period of not less than two years' (Article 238(10) TUA, as amended by Legislative Decree No. 116/2020).

[21] Article 14(1), Law of 5 August 2022, No. 118 (Annual Competition Law), which provides for a two-year permanence.

tection, on the contrary as a tool to strengthen it. Indeed, the choice to open up waste management to competition looks at the increase of the efficiency of the service in line with circular economy targets.

2.2. Competition principle and EPR schemes

Another example of existing possibilities to strengthen environmental protection through the implementation of competition leverage in the waste management is represented by so-called extended producer responsibility (EPR) schemes.

The EPR principle, as a reflection of the 'polluter-pays' principle, forces the producer to financially sustain the disposal cost of its products and contributes to steer production toward sustainable products. This principle is based on competition because 'green' producers would pay less than their 'brown' competitors so their 'green' products would cost less than 'brown' ones.

In fact, environmental costs associated with managing end-of-life products are borne by producers, who internalize these costs into the selling price of the goods. Consequently, producers get an 'incentive' to adopt solutions that reduce waste production, create durable and repairable products, and utilize easily recyclable materials. This approach allows them to incur in lower post-consumer management costs and apply competitive product prices, lower than those of competitors facing higher end-of-life costs.[22] In concrete terms, the greater the chance of a product having a second life – i.e. reusability, recyclability – the lower the cost of its end-of-life management.

[22] The earliest elaborations of the concept of extended producer responsibility date back to studies in the 1990s, in which the thesis of industry responsibility for managing the entire product life cycle was first argued: Thomas Lindhqvist, *Extended Producer Responsibility in Cleaner Production: Policy Principle to Promote Environmental Improvement of Product System* (Doctoral Thesis, The International Institute for Industrial Environmental Economics (IIIEE), Lund University 2000). For an essential legal framework, see: Paolo Dell'Anno, 'Disciplina della gestione dei rifiuti' in Eugenio Picozza and Paolo Dell'Anno (n 7); Sara Benvenuti, 'Raccolta, Gestione e Smaltimento dei rifiuti in Italia. La complessità del quadro normativo e del riparto delle competenze' in Ginevra Cerrina Ferroni (ed), *Produzione, Gestione, Smaltimento dei rifiuti in Italia, Francia e Germania tra Diritto, Tecnologia, Politica* (Giappichelli 2014) 47; Giuseppe Garzia, 'La responsabilità e i costi della gestione dei rifiuti. La responsabilità estesa del produttore', in Franco Giampietro (ed), *La nuova disciplina dei rifiuti* (IPSOA 2011); Maria Chilosi, 'Quali profili di responsabilità per il produttore del bene lungo la filiera di gestione?', *Ambiente&Sicurezza* (Rome, 8 February 2011); Fondazione per lo sviluppo sostenibile – FISE UNIRE, 'L'Italia del Riciclo' (2015) ch 2; Danila Iacovelli, *Rifiuti e mercato nell'economia circolare* (Giappichelli 2021) 93; Nicola Lucifero, 'Economia circolare e prodotti alimentari: l'etichettatura ambientale nel sistema delle fonti del diritto europeo e interno' in Silia Gardini (ed) *Percorsi di circolarità, tra diritto ed economia* (April 2023) Il diritto dell'economia 91.

As highlighted by the Italian antitrust authority (AGCM), 'competition plays a crucial role in the waste sector by ensuring adequate market outlets for production inputs. These inputs, realized through recycling activities, can replace virgin raw materials, resulting in a clear commercial and competitive advantage. On average, the European manufacturing sector allocates about 40% of its expenditure to purchasing production inputs'.[23]

Competition plays a key role also in the functioning of the EPR schemes. An EPR scheme is 'a set of measures taken by Member States to ensure that producers of products bear financial responsibility or financial and organisational responsibility for the management of the waste stage of a product's life cycle'.[24]

Producers can fulfil their obligations by setting up an organization that pays for the collection, transport and recycling of the products once they have become waste. As known, the EPR principle is based on steering production toward sustainable products, so competitive dynamics are helpful because they allow producers to organise or participate in different EPR schemes, selecting those that are the most effective.

In fact, the legal framework of EPR schemes outlined by the European legislator moves towards this direction: it stimulates competition by opening the market up to new operators, internalizing environmental costs into product prices, encouraging producers to design eco-friendly products, enhancing both industrial competitiveness and environmental protection, and facilitating the shift towards a circular economy.[25]

Within this framework, among a range of other instruments, Extended Producer Responsibility (EPR) systems emerge as one of the effective tools to activate the competitive leverage. These systems foster a cycle where the environmental impact of production processes is minimized (by using fewer natural resources) and efficient post-consumer resource management aims to recover as many resources as possible.

Competition rules 'open' the market to new operators who must compete with

[23] AGCM, 'Segnalazione ai sensi degli artt. 21 e 22 della legge 10 ottobre 1990, n. 287 in merito a proposte di riforma concorrenziale ai fini della Legge annuale per il mercato e la concorrenza' (2021) para 5(B).

[24] Article 3(1), No. 21, Directive 2008/98/EC.

[25] 'The general minimum requirements should reduce costs and boost performance, as well as ensure a level playing field, including for small and medium-sized enterprises and e-commerce enterprises, and avoid obstacles to the smooth functioning of the internal market. They should also contribute to the incorporation of end-of-life costs into product prices and provide incentives for producers, when designing their products, to take better into account recyclability, reusability, reparability and the presence of hazardous substances' (recital 22, Directive EU 2018/851).

existing players. Consequently, they strive to maintain increasingly higher efficiency standards, both economically and environmentally.

EPR systems effectively implement the aforementioned principles by internalizing environmental costs and overseeing post-consumer management. However, since they operate within a competitive market, they must offer competitive conditions, resulting in improved efficiency standards, including environmental efficiency.

3. 'Improving the production': the environmental way

As above mentioned, according to Article 101(3) TFEU – and the Guidelines of the European Commission – horizontal agreements between undertakings comply with Article 101(1) in so far as they 'contribute to improving the production or distribution of products'. Furthermore, the European Commission qualifies 'sustainability agreements' as horizontal agreements that may also comply with paragraph 3. To this end, it is essential to understand what international and European law mean when they look at 'sustainable' goals.

The answer seems to lie in the notion of 'sustainable production': improving the production also encompasses the redesign of the economy within the limits of the planet. Several international and European norms emphasize the need for an environmentally conscious production.

3.1. Sustainable production in the international legal framework

As to the international legal framework, Principle 4 of the Stockholm Declaration (1972) asserts that 'the conservation of nature, including wildlife, must be given special consideration in economic development planning'. For the first time, the connection between economic development and natural resource protection was highlighted.[26]

Similarly, Principle 7 of the World Charter for Nature (1982) argues that 'in the planning and implementation of social and economic development activities, due

[26] Vincenzo Starace, 'Recenti sviluppi della cooperazione internazionale in materia di protezione dell'ambiente' (1974) La Comunità Internazionale 50; Laura Pineschi, 'Tutela dell'ambiente e assistenza allo sviluppo: dalla Conferenza di Stoccolma (1972) alla Conferenza di Rio (1992)' (1994) Rivista giuridica dell'ambiente 493.

account shall be taken of the fact that the conservation of nature is an integral part of those activities'. Article 9 envisages that '[t]he allocation of areas of the earth to various uses shall be planned and due account shall be taken of the physical constraints, the biological productivity and diversity and the natural beauty of the areas concerned'.

The concept of 'redesign' of the economy emerges for the first time within the Brundtland Report (1987). In particular, points 52, 54, 57, and 60 were dedicated to energy consumption, agricultural production, legal instruments, and eco-design.

With this report, the fourth 'R' – economic redesign – powerfully entered international environmental law alongside the classic three R's: recycling, reuse, and reduction.

Principles 8 and 16 of the 1992 Rio Declaration are very clear with respect to the notion of so-called sustainable production.[27] Principle 8 states that 'to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies'. Principle 16 emphasizes that '[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment'.

With over 200 references to sustainable production, Agenda 21 (1992) connected to the Rio Declaration, stands out as one of the essential instruments legitimizing the shaping of the economy in a green direction.[28]

Ten years later, paragraph 11 of the Johannesburg Conference (2002) explicitly states that 'changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are overarching objectives of and essential requirements for sustainable development'.

Twenty years after the Rio Declaration, point 220 of the 'Future We Want' declaration during the Rio+20 Conference (2012) explicitly calls for the promotion of sustainable production models. Goal 12 of the United Nations' 2030 Agenda for

[27] Laura Pineschi, 'La Conferenza di Rio de Janeiro su ambiente e sviluppo' (1992) Rivista giuridica dell'ambiente 705; Sergio Marchisio, 'Gli atti di Rio nel diritto internazionale' (1992) Rivista di diritto internazionale 581; Paulo A Lemme Machado, 'Nuove strade dopo Rio e Stoccolma' (2002) Rivista giuridica dell'ambiente 169.

[28] See also the chapter No. 30 dedicated to the enhancement of the industry and the commerce.

Sustainable Development – aptly titled 'Ensure sustainable consumption and production patterns' mentions various tools to achieve sustainable production. These include not only green public procurement but also environmental taxation. This goal further emphasizes the need to rationalize inefficient subsidies for fossil fuels, eliminate market distortions, and progressively phase out harmful existing subsidies.

3.2. Sustainable production in European law

Also European law envisages several legal acts advocating for a shift toward sustainable production.

Briefly, it is possible to systematically categorize them into three main groups: 'soft' European law, such as communications, strategies, and action programs that have been particularly numerous in the last five years; 'hard' European law, in which we could include various directives from the last few years; 'in progress' European law, i.e. a series of legislative acts featuring sustainable production that have recently been approved or are close to adoption.

In the first group, notable examples include: Communication on integrated product policy (2003),[29] Europe 2020 Strategy (2010),[30] Sixth (2002), Seventh (2013), and Eighth Environmental Action Plans (2022),[31] Bioeconomy Strategy (2018),[32] Communication on the Green Deal (2019),[33] Biodiversity Strategy (2020),[34] Circular Econ-

[29] Communication from the Commission to the Council and the European Parliament, 'Integrated Product Policy. Building on Environmental Life-Cycle Thinking', 18 June 2003, COM(2003) 302.

[30] Communication from the Commission, 'Europe 2020: A strategy for smart, sustainable and inclusive growth', 3 March 2010, COM(2020) 2010.

[31] Respectively adopted with Decision No. 1600/2002/CE of the European Parliament and the Council of 22 July 2002, with Decision No. 1386/2013/EU of the European Parliament and the Council of 20 November 2013 and with Decision (EU) 2022/591 of the European Parliament and the Council of 6 April 2022.

[32] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'A sustainable Bioeconomy for Europe: Strengthening the connection between economy, society and the environment', 11 October 2018, COM(2018) 673.

[33] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'The European Green Deal', 11 December 2019, COM(2019) 640.

[34] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'EU Biodiversity Strategy for 2030. Bringing nature back into our lives', 20 May 2020, COM(2020) 380.

omy Action Plan (2020),[35] Critical Raw Materials Action Plan (2020)[36] and European Industrial Strategy (2020).[37]

The second group is composed of: Eco-design Directives (2005 and 2009),[38] Non-Financial Reporting Directive (2014 and 2022),[39] Circular Economy Package (2018),[40] Single-Use Plastics Directive (2019)[41] and Taxonomy Regulation (2020).[42]

The third and last group contains proposals that have recently been approved or close to adoption: Regulation extending eco-design requirements to all products,[43] Packaging Regulation,[44] Due Diligence Directive,[45] Green Claims Directive.[46]

[35] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'A new Circular Economy Action Plan. For a cleaner and more competitive Europe', 11 March 2020, COM(2020) 98.

[36] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability', 3 September 2020, COM(2020) 474.

[37] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'A New Industrial Strategy for Europe', 10 March 2020, COM(2020) 102.

[38] Directive 2005/32/EC of the European Parliament and the Council of 6 July 2005 and Directive 2009/125/EC of the European Parliament and the Council of 21 October 2009.

[39] Directive 2014/95/EU of the European Parliament and the Council of 22 October 2014 and Directive (EU) 2022/2464 of the European Parliament and the Council of 14 December 2022.

[40] Directives 849, 850, 851 and 852 of 2018 (n 8).

[41] Directive (EU) 2019/904 of the European Parliament and the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment.

[42] Regulation (EU) 2020/852 of the European Parliament and the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. This regulation has been 'completed' with Commission delegated regulation (EU) 2021/2139 and 2023/2486 which establish technical screening criteria for determining the conditions under which a specific economic activity is qualified as eco-sustainable.

[43] Regulation (EU) 2024/1781 of the European Parliament and the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC.

[44] Proposal for a Regulation of the European Parliament and the Council of 30 November 2022, COM(2022) 677 on packaging and packaging waste, amending Regulation (EU) 2019/1020 and Directive (EU) 2019/904, and repealing Directive 94/62/EC, approved by the Parliament in April 2024.

[45] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

All these acts reflect a living European law that strongly leans toward shaping production in an ecologically conscious manner. It implies the need to structurally 'green' EU treaties.[47]

4. Conclusions on sustainability agreements

The analysis conducted in the previous section shows that International and European law contain sufficient indications to conclude that 'sustainable production' is a binding and concrete objective of the European legal order. Thus, this target should impact the way of producing and, as a consequence, the principles rulings of competition, in order to move towards a circular economy model.

To this end, the clause of 'improving the production' – Article 101(3) TFEU – could be read systematically and in conjunction with cited provisions and the finalization of horizontal agreements, especially sustainability agreements, should be implemented. In fact, the improvement could be ecological as well as economic and consumerist. Indeed, international and European law seem to be moving in this direction, i.e. that of not considering competition as an immutable and rigid value.

This 'new' interpretation of Article 101 TFEU will depend deeply on the assessment of national antitrust authorities on horizontal agreements pursuing environmental and sustainable objectives. Many of these authorities have in fact already expanded Article 101 by declaring horizontal sustainability agreements to be in conformity with European antitrust law.[48]

However, if we focus on 'sustainability agreements' as regulated by the Commission, several uncertainties remain on this point. For instance, the Commission considers sustainability agreements to be lawful only if they do not sacrifice the 'fair share'

[46] Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information.

[47] Edoardo Chiti, '*In motu*. L'Unione europea e la trasformazione della costruzione giuridica della sostenibilità' in Aidambiente (ed), *La riforma costituzionale in materia di tutela dell'ambiente. Atti del convegno (28 gennaio 2022)* (Editoriale Scientifica 2022) 183; Dario Bevilacqua, *Il Green New Deal* (Giuffrè 2024).

[48] See Dutch Authority for Competition and the Market (ACM), cases *MSC Shrimp Fishery* and *Energy Deal*.

clause referred to in paragraph 1, which, however, still today has an undeniable economic preponderance. In other words, the conditionality mechanism of Article 101(1) TFEU remains preponderant, by privileging 'quantitative' benefits over 'qualitative' ones. To this end, some authors remarked that this new kind of agreements should not fall within the field of application of Article 101 TFEU because they are not based on a 'traditional' restriction of competition. They try, instead, to prevent the market from failing and generating negative externalities.[49]

Consequently, Article 101 should be amended in order to explicitly include sustainable production. In this light, Article 41 of the Italian Constitution provides is a valid example of the conformation of production and economic activities in favour to sustainability and environmental sustainability.

Anyway, it is possible to conclude that competition is not always a prevailing principle, it can be useful to reach environmental targets, and must be balanced with other primary non-economic interests. Thus, Article 101 and its exceptions should be progressively interpreted in light of the needs of sustainable production.

[49] Maurits Dolmans, 'Sustainable Competition Policy' (2020) 5(4) Competition L & Pol'y Debate 4. Julian Nowag and Alexandra Teorell, 'Beyond Balancing: Sustainability and Competition [2020] (4) Concurrencies 34.