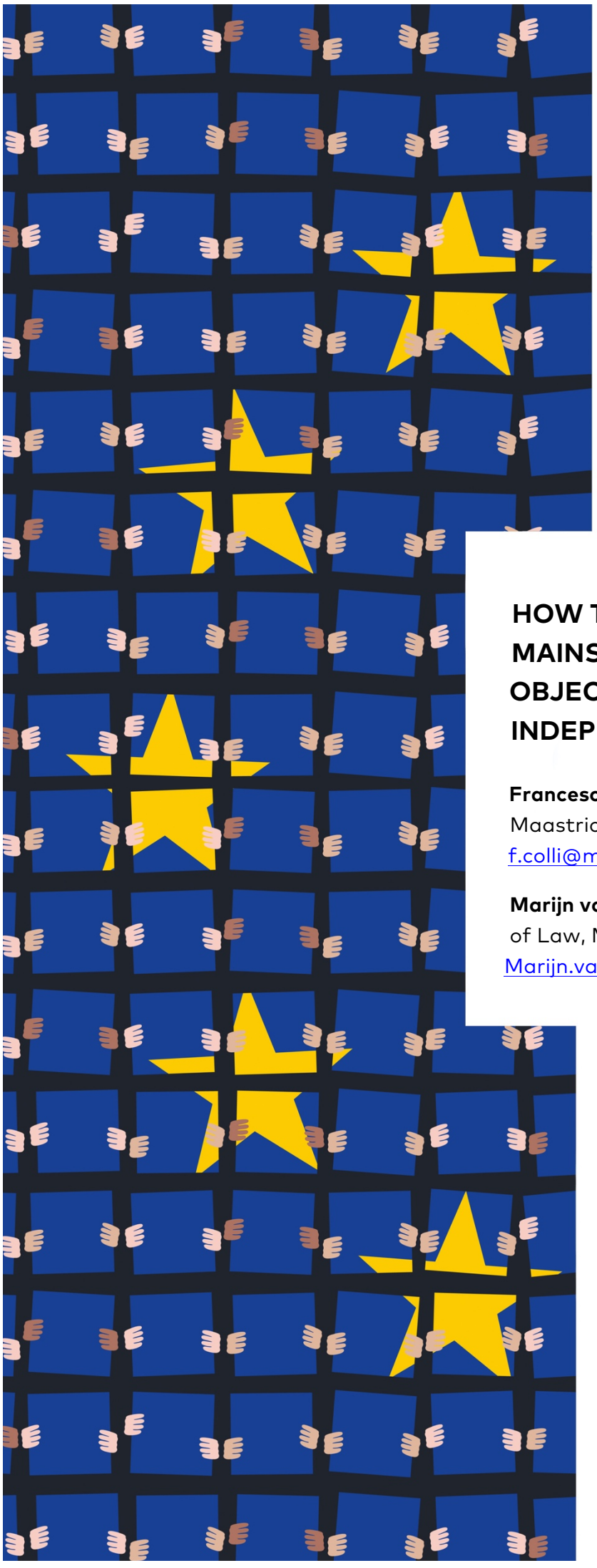

Maastricht University

HOW TO TURN A SUPERTANKER: MAINSTREAMING CLIMATE OBJECTIVES IN THE EU THROUGH INDEPENDENT INSTITUTIONS

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Abstract

This paper analyzes to what extent two independent institutions of the EU, the European Central Bank and the Court of Justice of the European Union, are involved in, and are likely to promote or frustrate, the achievement of the goals of the European Green Deal. The analysis combines legal research into the mandate and tasks of these institutions, and the role these institutions have or are perceived to have in the EU. It finds that there are several (small) steps that these institutions can make that align both with their legal mandate and their own perceived role in the EU. Larger reforms of monetary and competition policy would require sustained transformations of the legal environment in which these institutions operate, and of their self-understanding.

Keywords: European Green Deal, Independent institutions, Role theory, European Central Bank, Court of Justice of the European Union

1. Introduction

Climate change is widely acknowledged as one of the biggest challenges facing humanity today. The EU is often seen to be a leader in climate change policies, with the European Green Deal (EGD) being the most ambitious EU climate and environmental policy strategy proposed to date. Labelled the EU's 'new growth strategy', the EGD aims to decouple economic growth from greenhouse gas emissions and resource use, paving the way for net-zero emissions by 2050. To meet this goal, the EGD requires extensive reforms to mainstream climate objectives and action across the EU's internal and external policies. To this end, in its Communication, the Commission promised to 'review and propose to revise where necessary' a range of policy instruments by June 2021 (European Commission 2019, p. 4), a process that it started with its proposal for the 'Fit for 55' legislative package in July 2021.

This suggestion to revisit old policy proposals and to integrate climate objectives into non-climate policies raises several questions. The challenges of mainstreaming (also known as policy integration) have been frequently discussed (Tosun and Lang, 2017; Runhaar *et al.*, 2020), not the least because political decision-making institutions tend to work in a relatively siloed way, with environment and climate kept separate from other economic or societal goals. This becomes even trickier when policy implementation requires the participation of independent institutions, which are often highly specialised by design and separate from public opinion and political pressure.

In this paper, we ask the question: *To what extent are EU independent institutions willing and able to take on green political roles?* We examine the role of two independent institutions in different policy fields: the European Central Bank (monetary policy) and the European Court of Justice (competition policy and state aid). For each, we combine a

legal analysis of what is expected of these institutions to meet the European Green Deal, and the legal possibilities to integrate climate action into their work, with a role-theoretical analysis of how the institutions present their own role in mainstreaming climate policy.

This working paper builds on a rapidly growing body of literature on EU climate action. Current legal research has focused on what is possible, allowed or required under the EU treaties; we add a focus on the roles of and relations between institutions. We highlight the constitutional dimension of the EGD, in that it dictates new roles for and requirements for institutions in the EU. Theoretically, we add to the literature on organisational implications of environmental mainstreaming, moving beyond a focus on resources and expertise as explanatory factors for the success or failure of mainstreaming to examine how institutions present and fulfil their roles in the process. Finally, this research is also relevant for policy-making, as we provide a comprehensive assessment of the legal possibilities that are open to the EU as it puts the EGD's objectives into practice.

The next sections discuss previous work on the European Green Deal and mainstreaming climate policy, as well as the role of independent institutions in the EU. We then present the analytical framework and method for the article – a combination of role-theoretic and legal analysis – before discussing the two case studies: the ECB and monetary policy, and the CJEU and competition policy.

2. Mainstreaming climate integration in the EU

With the launch of the European Green Deal, EU climate and environmental policy has shifted from protecting specific aspects of the environment to leading to more structural

economic reforms. The Taxonomy Regulation, for example, proposed prior to launch of the EGD but adopted thereafter, aims amongst other things at contributing to a circular economy by designating which (investments in) economic activities are environmentally sustainable. This broadening coincides with a scholarly realisation that 'old' environmental policies are too limited in scope, or even outdated conceptually. According to Biermann, traditional environmental policy fails to engage with questions of global justice and is based on a distinction between human and nature that cannot be maintained (Biermann, 2021; Purdy, 2015), The central issue of this paper is the mainstreaming (or policy integration) of climate change mitigation objectives into all policies of the EU. Tosun and Lang (2017) distinguish between two types of policy integration. The first concerns a set of strategies that seeks to create interdependencies between policy sectors that subsequently require a form of coordination. The second set of strategies uses specific policy instruments that proceduralize the interaction between different sectors. For example, Article 6(4) of the recently adopted European Climate Law requires the Commission to assess the consistency of any draft measure or proposal with the climate-neutrality objective, and to publish that assessment.

Climate policy integration developed as a concept in the shadow of environmental policy integration, which was recognized in the late 1980s as a key component of sustainable development (Biermann *et al.*, 2009). This integration is necessary for at least three reasons. First, given the scale of the challenge of climate mitigation, policy integration is a necessary tool to address it. Second, climate and environmental policy cover a range of issues, which can sometimes be at odds; mainstreaming these objectives can allow for a better coordination of policies to better address multiple facets of the climate crisis at once. Finally, climate change policies can have (re-)distributional effects through their differentiated impact on communities. Mainstreaming can not only ensure equity but also

raise the chances of effective, even implementation of policies by member states, which is a challenge for the EGD (('Editorial Comments', 2021).

On the one hand, the EU seems well suited to mainstream environmental policy. It has often been labelled a climate leader (Kilian and Elgström, 2010) and its reliance on consensus-based decision-making and on expertise in policymaking may allow it to balance different priorities and interests. The EU is, at least on paper, obliged to incorporate environmental objectives into its policies. This integration principle first appeared in the Single European Act, and was modified in the Treaties of Maastricht and Amsterdam (Bär and Kraemer, 1998). Article 11 TFEU now reads: "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." This provision is also restated in Art. 37 of the European Charter of Fundamental Rights, albeit in slightly different terms, leading to some confusion as to the exact content of the obligation (Jans, 2011, p. 1539). It is furthermore not clear what exactly the force of this obligation is: although the Court of Justice has confirmed that it applies to different parts of EU law (Solana, 2019), it is usually used to allow environmental concerns to be integrated into a certain field without changing the legal basis for a measure (e.g. the *Horvath* judgement CJEU Case C-428/07, ECLI:EU:C:2009:458). The integration principle has also been used in the interpretation of other aspects of EU law. Jans calls this the 'guidance function' of the integration principle (Jans, 2011, p. 1541). So far, Art. 11 TFEU has not been used by a court to oblige an institution to incorporate environmental measures into its policies, or as a minimum standard for environmental protection. As Sikora notes: "[f]rom the point of view of judicial application, the principle of integration has primarily contributed to the institutional litigation concern the legal basis of EU acts" (Sikora, 2020, p. 148).

There remain some challenges to environmental mainstreaming in the EU. First is the question of whether the EU can embrace the necessary economic reforms to achieve climate and environmental goals. In the debate between environmentalists who argue that the logic of the market with its objective of GDP growth cannot coincide with environmental objectives (Mastini *et al.*, 2021; Hickel, 2020) and eco-modernists who argue against reducing economic growth through extreme climate measures (Nordhaus, 2013; Nordhaus, 2021) the EU is leaning towards the second approach. The EGD is clearly framed through the lens of 'green growth' that has characterised previous EU climate policy, rather than setting the stage for the broader structural transformation that may be necessary (Fleming and Mauger, 2021; Pianta and Lucchese, 2020). This in turn risks putting economic growth before environmental decisions. Second, the EU's reliance on 'output' legitimacy poses a problem when EU climate policies have only a small effect on the global impacts of climate change, and the benefits of these policies are future-oriented (Majone, 2005, p. 124). Finally, like many countries' governments, policymaking in the EU is often seen to be siloed into different policy fields, with difficult coordination across Directorates-General, although the extent to which this is a problem may often have been exaggerated (Vantaggiato *et al.*, 2020).

3. Independent institutions in the EU

Independent institutions play an important role in European integration. The Court of Justice has, in cooperation with national courts, developed the principles underlying the European legal order, which was in turn crucial for the creation of the internal market (Weiler, 1991). The European Central Bank was created through the Maastricht Treaty of 1993 in order to independently execute the monetary policy of the euro. The Member States have moreover sought to distribute responsibilities for EU policies through the creation of numerous other EU agencies and bodies, with varying levels of independence

(Bickerton *et al.*, 2015, p. 3). Independence in the EU thus comes with different rationales and modalities. For the CJEU, its independence is connected with the proper functioning of the EU legal order and with requirements of the rule of law. For the ECB, its independence was modelled after the German Bundesbank and serves to protect price stability in the euro area. For both the CJEU and the ECB, the independence is enshrined in the EU Treaties, and are thus of a (quasi-)constitutional nature (Van der Sluis, 2014).

The independence of these institutions is not considered a good in itself, but is provided in relation to a specific goal(s) and part of a broader construction of an institution that is geared towards their achievement. Hence, the CJEU is dependent on national courts for preliminary references and on the Commission for infringement proceedings, without this dependence infringing upon the legal requirements of the independence of the CJEU.

Independence must moreover be seen in light of legitimacy, more specifically democratic legitimacy. The independence of institutions can become problematic when those institutions overstep, or are seen to overstep, their assigned tasks or mandate. The institution may then be accused of interfering with political (democratic) decision-making. In the context of European integration, independent institutions also run the risk of interfering with national democracy (Beukers, 2013). The difficulty then is that the mandates of institutions are not static, even from a legal perspective. Their precise meaning fluctuates, through a combination of political decision-making, legal developments and broader societal expectations. For example, in 2015, the CJEU found that the task of maintaining price stability for the ECB also included the objective to protect the integrity of the Eurozone (CJEU Case C-62/14, ECLI:EU:C:2015:400).

At the outset, the reliance on independent institutions in European integration thus poses a challenge for a coordinated response to climate change. Even where independent

institutions might be inclined to take strong climate action, the institutional need to preserve independence stands in the way of (being perceived of) coordinating action with other institutions. The Commission's leading role in the European Green Deal then has several consequences for the ECB and the CJEU. On the one hand, the Commission is reshaping the context in which the mandates of the independent institutions are interpreted. Emphasizing climate change mitigation and adaptation as a *core theme* in European integration singles out article 11 TEU as a specific duty on *all* EU institutions to integrate climate concerns in their policies. Moreover, the EGD may affect the context in which the independent institutions seek to achieve their goals, which therefore necessitates a response from independent institutions. On the other hand, the fact that the EGD is subject to ongoing political negotiations between the Commission, the EP and the MS, may prompt independent institutions to act cautiously, lest their intervention be perceived as political.

These conflicting pressures on independent institutions lead to the question of how they perceive and enact the roles that will be necessary for them in mainstreaming climate objectives throughout different fields of EU policy. The following section outlines the approach that we take in this paper, based on role theory.

4. Role theory and institutions

With origins in international relations and foreign policy analysis, role theory has become particularly popular in the EU foreign policy literature, aiming to explain the EU's role in the international system and in specific policy fields (Bengtsson and Elgström, 2012; Delreux and Ohler, 2021; Gurol and Starkmann, 2020). It has increasingly also been applied to lower levels of the political system, examining institutions' or individuals' roles in policymaking (Juncos and Pomorska, 2010; Chappell *et al.*, 2020). In most cases, however,

these applications of role theory are limited to foreign policy, and role theory has rarely if ever been applied to other policy fields. This may be because in many cases, institutions' roles in policymaking are legally defined, with little room for manoeuvre. However, as outlined above, by incorporating climate and environmental considerations in a range of policy fields, the European Green Deal requires a shift in institutional roles, which may lead to a mismatch between role *expectations* and role *perceptions*.

Roles are defined as actors' 'patterns of expected or appropriate behaviour' in a particular context (Elgström and Smith, 2006, p. 5): the norms that they embrace and how they believe they should act in a certain situation. Despite the importance of particular social structures, however, actors usually have some leeway in the roles that they can play and how they play them, meaning that role theory moves away from purely institutional approaches that emphasise the importance of structure and deemphasise individual agency (Elgström and Smith, 2006; Chappell *et al.*, 2020). Role theory generally depends on three interacting concepts: role conceptions, role expectations and role performance, which make up an actor's 'role-set'.

First, role *conceptions* refer to an actor's own perception of its role in a particular system – what it perceives to be appropriate behaviour and how it should fulfil this role. While this originally consisted of policymakers' conceptions of their state's role in foreign policy (Holsti, 1970, p. 246), in our case this refers to an institutions' own perception of the role it should play in environmental policymaking, following previous examinations of institutional roles (Chappell *et al.*, 2020). Second, role *expectations* refer to the role that other actors expect an actor to play (Elgström and Smith, 2006, p. 18). In this research, this refers to the role that the institution is expected to play or assigned based on the European Green Deal and the legislative plans for the EU's transition to net-zero emissions. The two cases that we select are independent institutions whose mandate was

formerly not understood to include strong climate action; however, with the EGD, they are increasingly required or expected to incorporate climate and environmental considerations into their daily functioning, as explained above. Finally, role *performance* refers to the actual execution of a role, or the behaviour of the actor in a particular context (Holsti, 1970, p. 239).

5. Method

In this research we examine the role conflict – mismatch between the role expectations (required or necessary roles for the institution in implementing EGD objectives) and the role conception and performance of each institution. To do so, we use a comparative case study of two independent EU institutions and issues: the European Central Bank (ECB) and monetary policy, and the European Court of Justice (CJEU) and competition policy and state aid. The two institutions have different legal and policy functions in their policy fields (as will be shown in the legal discussion of each policy field), but a comparison can show us the possibilities and limits of independent institutions in mainstreaming climate policy. These policy fields were selected as two ideal-cases of role shift through environmental mainstreaming in the EGD: environmental considerations were not previously included in the policy areas, but will be required in the EGD, as discussed at the beginning of each section.

Given the relative lack of literature on the potential roles of independent institutions in environmental policymaking, we follow recent applications of role theory (Chappell *et al.*, 2020; Delreux and Ohler, 2021) by not pre-identifying potential roles, but developing them from the empirical data. For the ECB we examine external communication through speeches, press releases, working papers, interview transcripts and blog articles posted on the ECB's website. These were collected through a general search for 'climate change',

which yielded 54 texts in the time period. This reflects both role conception (external communication by the ECB as to how it sees its role in implementing the EGD objectives) and role performance (press releases about actual changes in the ECB's working practices). We identify the CJEU's role through the evolution of its rulings and opinions of the Advocates-General, which reflect the Court's role performance in terms of the extent to which climate objectives are incorporated into different areas of competition law.[1]

We thereby combine a legal analysis with a political-scientific one: for each case, we first outline the legal framework governing the institution, the current role of environmental protection in the institution's mandate, and the connection between the institution's activity and the European Green Deal.

This is supplemented by a discussion of the actual role played by the institution while implementing the EGD's objectives. The examination of legal opportunities and obstacles, combined with the role match or mismatch, helps us to explain the potential for the independent institutions to mainstream environmental issues through the EGD. The implications of this are discussed in the final section.

6. The ECB and monetary policy[2]

The potential role of central banks in combatting climate change became a key topic in central banking after a speech by the Governor of the Bank of England, Mark Carney, in 2015, who highlighted the 'tragedy of the horizon': the relevant governmental institutions work with a time horizon that excludes the most severe consequences of climate change, and 'once climate change becomes a defining issue for financial stability, it may already be too late' (Carney, 2015). The 2015 Paris Agreement also foresees a distinct role for the

[1] AG opinions do not necessarily reflect the CJEU itself, as the Court is not obliged to rule according to the AG's opinion. However, AGs do shape the Court's rulings and an opinion is often referred to by the CJEU whether it agrees or not, indicating that these opinions can be used to identify changes in reasoning by the CJEU.
[2] This working paper focuses on the monetary policy tasks of the ECB; for 'green' supervisory policies, see De Arriba-Sellier, 2021. The analysis conducted in this paper was concluded before the ECB announced its Climate Agenda in July 2022.

financial sector in mitigating climate change (Art. 2(1)(c)). And the goal of creating a sustainable economy are unlikely to be met without the support of the financial sector and the central bank (Tooze, 2019). The effects of climate change on monetary policy in the Euro area are mainly the result of the economic effects of climate change and the transition: creating stranded assets, lowering the potential for economic growth and affecting the natural real interest rate (Schnabel, 2021).

The ECB's independence

The independence of the ECB is explicitly guaranteed by article 130 TFEU, with other treaty provisions regulating the personal, financial and institutional independence. The requirement of independence extends to the national central banks of the Member States when they execute EU policies. The wide scope of the independence of the ECB must be seen in connection to the narrow mandate it received. The primary objective of the ECB according to article 127 TFEU is to maintain price stability, and without prejudice to this objective, it must support the general economic policies in the union, in light of the objectives of the EU. The ECB has recently reviewed its interpretation of its primary objective, finding that the objective of price stability can be achieved best by aiming at two percent inflation over the medium term. The strategic review that led to this interpretation also produced a separate document concerning climate change. The mandate of the ECB has been subject to intense debates during and after the euro-crisis, as the ECB allegedly stretched its mandate. In 2015, the CJEU accepted the view that maintaining price stability also encompasses maintaining the integrity of the eurozone. The German Constitutional Court takes a stricter view.

The independence of the ECB has attracted criticism as it would prevent democratic control (for democratic accountability, see Amtenbrink, 1999). The EU Treaties organize

several interactions between the ECB and other EU institutions, for example through the presentation of its annual report at the European Parliament, but the Treaties are straightforward in that these interactions cannot bind the ECB. The ECB also takes part in meetings of the Eurogroup and the 'troika' that helped the negotiation and implementation of financial assistance during the euro-crisis. Particularly noteworthy here is that the institutional position of the ECB is also determined by the overall 'shape' of Economic and Monetary Union, namely the decentralized nature of fiscal and economic policy. Whereas on the national level, a central bank (even an independent one), would seek to influence and be influenced by the economic and fiscal policy-makers, this informal interaction is frustrated on the European level (Majone, 2012; Van der Sluis, 2021a). The ECB is not just an independent, but a 'lonely' institution (Torres, 2013, p. 294).

The ECB and 'going green' in the EGD

The EU Treaties did not specify the involvement of the ECB in climate or environmental policy. On the contrary, the legal rules governing the ECB seem created to prevent the ECB from being distracted by concerns other than price stability (e.g. unemployment). Yet, developments in EU law more generally can also affect the functioning of the legal rules governing the ECB. There are three legal arguments used to support the idea of a 'green ECB', which tie into the ECB's wide discretion in interpreting both the monetary situation and the legal framework.

The first argument concerns the ECB's primary mandate. As climate change threatens the economic conditions necessary for price stability, the ECB would be allowed or even required to intervene. As the ECB sets its own time frame in which it aims to achieve 2% inflation, it can be argued that where climate change threatens to affect price stability in the long term, it is still mandated to intervene using the tools available under the Treaties.

The difficulty with this argument is the lack of specificity and difficulty in predicting the exact effects of climate change on price stability. Also, a strategy of adaptation might be more suitable than mitigation (Van der Sluis, 2021b).

The second argument is based on the ECB's secondary objective, to support the general economic policies of the EU without prejudice to its primary mandate. This leaves significant discretion to the ECB, but also means that any incorporation of environmental criteria under its secondary objective may not affect price stability. The secondary objective is now also discussed as a tool to strengthen the democratic legitimacy of the ECB, whereby the Council would set out the priorities for the ECB to follow under the secondary objective (De Boer and Van 't Klooster, 2021). Any attempt at coordination cannot infringe on the independence of the ECB.

The third argument (A3) is Art. 11 TFEU, discussed above. This is a clear legal obligation that can be used by the ECB to defend pursuing green objectives (Solana, 2019). However, as a tool to *oblige* the ECB to do so, it is less suitable. Not only has the CJEU never used Art. 11 in this way, but doing so would also lead to complications, as it is not clear how the ECB relates to related provisions in Title II of the TFEU. In other words, if the ECB were obliged to pursue environmental objectives under Art. 11 TFEU, it might also be obliged to promote consumer protection (Art. 12 TFEU), gender equality (Art. 8 TFEU) and combat religious discrimination (Art. 10 TFEU).

The question then arises in what manner the ECB could integrate green objectives into its policies - and what connection there is to the Green Deal. The Network for Greening the Financial System, of which the ECB is a member, recently reviewed the options for central banks to adjust their policies, focusing on three areas: credit operations, collateral and asset purchases (Network for Greening the Financial System, 2021).

First, credit operations are a standard element of monetary policy through which the ECB lends to banks against collateral. The suggestion here is that banks could be offered lower or higher interest rates based on the lending portfolio of the bank: those that invest heavily in fossil fuels could then be placed at a disadvantage. The difficulty of such an approach lies in distinguishing between banks based on their lending; this will require improvements in reporting requirements and the establishment of benchmarks for green investments through the Taxonomy Regulation. Second is the evaluation of collateral offered by borrowing banks, particularly bonds. Central banks may price climate risks into their evaluation of the collateral that banks offer, evaluating bonds from emissions-intensive companies differently to account for the climate risk; the step further would be disfavouring this type of collateral. However, here too, better reporting and benchmarks are necessary to be able to evaluate the collateral. Moreover, climate risks will not be evenly distributed throughout Europe, but will affect regions and industries differently; central bank intervention must therefore be harmonised with other redistributive efforts. Third, the ECB could also change its asset purchasing criteria. For example, it currently purchases bonds from oil and fossil fuel companies, one of the major criticisms of the ECB and a policy that is currently being challenged before the Belgian national court. The ECB could either start to favour 'green' bonds, or disfavour 'brown' ones, thereby tilting its portfolio towards lower-carbon emitting companies or industries (Schoenmaker, 2021).

Arguments used by the ECB

The analysis of ECB press releases and blog posts indicates that the ECB draws upon many of the above arguments when discussing the integration of climate and environmental policies into its activity. The ECB clearly aligns itself with the EU's own framing of climate change as an urgent issue, with numerous references to the 'major

challenge' posed by climate change prefacing its discussion of central banks' and its own role in climate policy.

Given that the notion of green monetary policy is relatively new, we see that the ECB discusses the fit between climate objectives and its mandate in quite some detail. The ECB uses both the first and second arguments: climate change threatens price stability (the ECB's primary mandate) and is also one of the EU's objectives (the ECB's secondary mandate) (docs 28, 33, 34, 37, 39). Art. 11 TFEU is not mentioned, perhaps because of the questions of how many other objectives would need to be incorporated in the ECB's activity. In monetary policy, the ECB's potential role is mostly outlined in terms of its asset purchasing programme, through a somewhat convoluted argument: usually, the ECB is required to purchase assets that are representative of the market as a whole. However, the ECB argues that climate change should be seen as a market failure that favours emissions-intensive industries; therefore, the ECB should purchase substantially more 'green' bonds to rectify this market failure. This argument does not appear at once; it develops from a brief mention in January 2021 of financial risks 'not correctly priced by the markets' (doc 33) to a more explicit explanation of the argument in May 2021 (doc 53, p. 14).

Yet, these arguments are also nuanced by highlighting the specific role of central banks and the requirement to remain within its primary mandate of price stability, both to reassure economic observers and temper public expectations about the action that the ECB can take. It is important to highlight that this is used not as a strategy to reject action by the ECB, but rather to justify climate action at all levels, as appropriate: indeed, this code frequently co-occurs with the urgency or requirement for action (9 codes). It may also be used as a way to temper public expectations about what the ECB is *able* to do: '*Central bankers will not eliminate climate risk on their own. They can participate in the*

process and for my money, I'll do the best I can to participate, but it's not a business of central banks.' (doc 5).

This is emphasised through a second set of arguments that highlight the ECB's ongoing organisational changes: a strategy review (the first in 17 years) starting in January 2020; a climate change centre established in early 2021 to centralise the ECB's climate activity and the development of methodologies for climate risk assessment. This discussion of organisational changes frequently co-occur with discussions about the changing role of central banks (10 times) and the above arguments about the ECB's mandate (13 times), highlighting the process by which the ECB worked to define its own role in tackling climate change.

Three sub-arguments are also used to back up the case for action by the ECB. First, the changing role of central banks around the world and citizens' expectations are highlighted: e.g. citizens' consultations conducted as part of the strategic review (docs 38, 53) or Twitter Q&As where ECB directors reply directly to citizens (docs 16, 43, 47). Second, the ECB frames the COVID-19 recovery as an opportunity for more stringent climate action, in line with the EU's framing of a 'green recovery'. Finally, the ECB refers to international networks of central banks and financial actors, including the Network for Greening the Financial System, the Basel Committee's Taskforce on Climate-Related Issues and the G20 and G7 sustainable finance initiatives (docs 33, 34, 36, 48, 51). This reference to existing programmes may be a strategy to legitimise work by the ECB.

In conclusion, we do see the ECB accepting a new role as part of the EGD, emphasising the changing role of central banks, drawing upon existing legal arguments for integrating climate policy into its activities and developing its own arguments – particularly regarding

asset purchasing. This is accompanied by real organisational change, including restructuring and developing new methodologies to assess climate risk.

Table 1 European Central Bank arguments (54 documents)

Argument	Codes (relative frequency)	Explanation
Organisational change in progress	54 (25%)	Highlights the ECB's strategic review, setup of the Climate Change centre and other ongoing organisational changes to tackle climate change
Urgency or requirement for action by ECB	48 (22%)	Highlights the urgency of climate change and the need for action at all levels, including the ECB
Mandate: climate change fits the ECB's mandate	46 (21%)	Argument that the ECB's mandate as it currently stands already allows it to incorporate climate change into action
Mandate: emphasising the limitations of the mandate	29 (13%)	Argument that the ECB's mandate is limited in the extent to which climate change can become a priority; highlighting the role of ECB as subordinate to policymakers
Changing role of central banks	21 (10%)	Discussing the changing role of central banks in society and in particular regarding climate change
COVID-19 as an opportunity	11 (5%)	COVID-19 pandemic as an opportunity to take climate action
International networks	8 (4%)	International networks of central banks for climate change

7. The CJEU and Competition policy

In 2013, 47 Dutch organisations concluded an *Energieakkoord voor Duurzame Groei* (Energy Agreement for Sustainable Growth). Among these organisations were several NGOs, industry associations from transport and energy, and regional and national governments. The agreement decided in part to close several older coal-fired power plants. However, the Dutch Competition Authority found the agreement to be in violation

of the cartel prohibitions in Dutch and EU law. Further negotiations between the government and the energy companies were needed to close the power plants, with government support being restricted by EU state aid rules.

This example shows the impact of competition law on the efforts to make the economy more sustainable. Due to its importance for markets and market making, competition law has a long history as part of European integration (Patel&Schweitzer, 2013). Competition law in the EU covers several subfields; this paper only focuses on the aspects that are most relevant for debates around the mitigation of climate change. Within competition law, the Commission and the EU secondary legislator are the primary policy makers. The EU secondary legislator has, for example, set rules on the cooperation between the Commission and national authorities in relation to competition law enforcement. The Commission then has been awarded discretion by the EU Treaties to develop certain elements of competition policy. Key aspects of EU competition policy are nevertheless regulated or circumscribed in the EU Treaties and the CJEU has the responsibility to interpret the EU Treaties. As a result, the CJEU has considerable influence over the conduct of EU competition policy, even though it is not the primary policy maker in the field. Where a paper focused purely on the possible role of competition policy in the EGD would mostly look at the Commission, the goal of this paper is to examine the role of independent institutions in the EGD.

Competition law and non-economic objectives

The Treaties distinguish between rules applying to companies (undertakings) and states. For companies, two sets of rules are especially relevant: those prohibiting agreements between undertakings (Art. 101 TFEU, the 'cartel prohibition') and those prohibiting abuse of a dominant position (Art. 102 TFEU, covering monopolistic behaviour). In both cases,

companies' behaviour is seen as problematic when it affects trade between Member States. States are prohibited from intervening in the internal market by offering state aid, favouring certain companies or the production of certain goods in such a way that it distorts competition and affects trade (Art. 107 TFEU).

The exceptions embedded in the treaties – especially for the cartel prohibition and state aid – are as legally contested as the prohibitions themselves. Agreements between undertakings may be allowed when they contribute to improving the production of goods or promote technical progress, providing consumers receive a 'fair share' of the benefit (Art. 101(3) TFEU). State aid is permitted when it involves 'the execution of an important project of common European interest (Art. 107(3)(b) TFEU) or 'the development of certain economic activities' (Art. 107(3)(c) TFEU), provided that it does not affect trading conditions contrary to the common interest. The Commission can also use block exemptions to disapply competition law requirements to certain categories of agreements.

The 'more-economic' approach to competition law – whereby competition law should only take into account the interest of producers and consumers – has become particularly influential in Europe since the 1980s, leaving its mark on the development of EU competition law (Amato, 1997; Witt, 2019). Yet, competition law may also strive for other objectives: for instance, the ordo-liberalists in Germany viewed competition law as a key tool to prevent domination. Being fearful of domination by the state *and/or* by economic actors, they believed in a strong role for the state in competition law (Deutscher and Makris, 2016). This position is also relevant in current debates about the role of social media companies on democracy, where the argument is made that the oligopoly of these companies may endanger the functioning of democracy. Recent years have also seen several academic contributions on the goals of environmental protection and climate

change mitigation as part of EU competition law (Kingston, 2010; Gerbrandy, 2019; Nowag, 2017). Since the launch of the EGD, the Commission has also started a debate about how competition policy can support the Green Deal and climate policy, launching revisions of various state aid guidelines.[3]

The CJEU and competition policy

EU competition policy is to a large extent the remit of the Commission, which is empowered to set competition law priorities, to impose fines on undertakings and is also charged with defining exemptions to competition law (Council Regulation 1/2003). During the Eurozone crisis, for instance, the Commission used its discretion to determine the conditions under which Member States were allowed to provide state aid to banks under duress (Lastra, 2016, p. 183), and in 2014 the Commission adopted guidelines detailing how state aid may be used in the energy sector to improve sustainability (Guidelines on state aid for environmental protection and energy 2014-2020, 2014). The Commission updated these guidelines in 2021. Yet, like in any policy area, the CJEU is also responsible for interpreting and applying Treaty provisions in cases brought before it (Art. 19 TEU). There is therefore a balance between the Commission, as the predominant competition policymaker, and the CJEU. The CJEU regularly annuls or amends decisions of the Commission due to a different reading of the situation or legal reasoning. Yet, though these rulings are binding, the Court can only speak in the cases before it and is therefore constrained in its ability to shape competition policy. For the EGD, this means that a shift in green policy may first arise in the Commission and not necessarily be acknowledged by the CJEU (if there are no relevant cases that come before it).

[3] https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en

The CJEU's independence is not as such explicitly enshrined in the Treaties, but the principle is crucial for its functioning and inherent in the separation of powers. In recent years, the CJEU has expounded on the importance of judicial independence after salary cutbacks of Portuguese judges during the Eurozone crisis and in response to rule of law infringements in Poland and Hungary (case C-64/14,EU:C:2018:117).[4] The CJEU consists of the Court of Justice and the General Court, which deals with actions for annulment in first instance. Around half of the General Court's decisions in competition law were appealed before the Court of Justice. The CJEU could therefore in general shift competition law to support the goals of the EGD by formulating a new view on the purpose of competition law focused on social or environmental goals. As mentioned above, the EGD has sparked a new debate on how competition law can be used to meet climate objectives, which raises several different possibilities for the CJEU's potential role.

Regarding the cartel prohibition (Art. 101 TFEU), several options have been put forward (Monti, 2020). A first option is to apply a narrower definition of what constitutes harm to the competitive process when examining agreements between undertakings for environmental purposes. As Holmes (2020, p. 367) also notes, agreements allow producers that have been able to 'internalise' economic harms to level the playing field. As environmental agreements seek to minimise negative environmental externalities, they should not be considered to harm the competitive process. A second option is to include a wider array of environmental benefits under the exemptions to the cartel prohibition. Though this is currently prevented by the CJEU's case law highlighting that an agreement's benefit must fall in the market where the agreement occurs, the CJEU could equally interpret Art. 101(3) TFEU to allow environmental benefits for a specific group or

[4] The Commission is technically also an independent institution: Art. 17 TFEU requires the Commission to carry out its responsibilities in complete independence, and members of the Commission must remain independent from other EU institutions and member states. Yet, the appointment of the Commission by Member State and the European Parliament and its functioning give it a political character that the independent institutions here do not have. The European Parliament can also force the Commission to resign.

society as well. A third option would be to opt for the 'Albany route'. In the *Albany* case, the CJEU found that agreements resulting from collective bargaining between employers and employees do not fall under the cartel prohibition; environmental agreements could be given a similar treatment.[5] This, however, faces the difficulty that such agreements are less easily separated from other agreements between undertakings than in the case of collective bargaining, as environmental aspects may only be one aspect of an agreement. The final option would be to test agreements not only against competitive harm, but also environmental harm; this would mean that agreements that lead to cheaper production methods but produce more greenhouse gas emissions may be prohibited.

Second, regarding monopolies (Art. 102 TFEU), there are two main options as to how environmental or climate protection could be integrated. First, it could again be invoked as a legal defence for economic behaviour that may be necessary for environmental reasons but would otherwise be seen as uncompetitive. Second, it could be used to apply competition law to new situations where environmental harm results from a monopolistic situation (Holmes, 2020). This could be, for example, when an undertaking with a dominant position demands that environmental costs are excluded from the purchase price of a product, in effect increasing the negative externalities of the product.

Third, regarding state aid (Art. 107 TFEU), the Commission has already published its draft proposal for new Climate, Energy and Environmental Aid Guidelines, which propose to allow state aid for environmental purposes when it does not harm the competitive process, as environmental harm would be seen as a market failure (European Commission 2021). This aid would however not be permitted if the market failure is already addressed through regulation. The draft guidelines follow the recent *Hinkley Point* judgement, discussed below. A recent editorial from the Common Market Law Review ('Editorial

[5] Case C-67/96, *Albany*, ECLI:EU:C:1999:430, para. 60

Comments' 2021, p. 1334) even explores (but ultimately dismisses) the possibility that state aid for fossil fuel companies and other project with high emissions may also be checked against the recent European Climate Law (Regulation 2021/1119).

A key point for further clarification by the Court will therefore be how the state aid rules interact with the legislative developments in the EGD. On the one hand, the detailed rules proposed by the 'Fit for 55' legislative package would restrict the application of state aid rules to specific circumstances. On the other hand, in case the legislative measures may be found insufficient to reach the goals of the European Climate Act, the Commission and Court may test the provision of state aid directly against the European Climate Law itself.

Arguments used in the CJEU's judgements

There is limited precedent in the CJEU's judgements for integrating competition law and sustainability, making it difficult to evaluate the extent to which the CJEU's role conception aligns with its required role to meet the EGD targets.

The main ruling – and a positive sign for green competition policy – is in the area of state aid, with the Hinkley Point C ruling (Case C-594/18P, *Austria v. Commission,* ECLI:EU:C:2020:742). In Hinkley Point C, the Grand Chamber repeated previous rulings that state aid must not violate the general principles of EU law, but specified this requirement by ruling that state aid that violates EU environmental law runs contrary to the functioning of the internal market, and that when approving state aid, the Commission must therefore check whether it respects environmental law. This means environmental objectives must, in principle, be considered in all state aid decisions made by the Commission. This ran counter to the reasoning of the General Court. This ruling seems to strengthen the Commission's obligation to incorporate Green Deal principles

into its state aid decisions, while also providing the Commission with a wider scope of how it does this (ClientEarth, 2021). For example, this may also mean that the Commission should include new elements of EU environmental law into its state aid assessments – including the Climate Law, which sets binding emissions reductions targets. This ruling is therefore a strong signal from the CJEU to the Commission, which has subsequently been taken up in the draft Climate, Energy and Environmental Aid Guidelines (European Commission, 2021).

Also regarding state aid, two recent rulings on state support to renewable energy have also provided states with some leeway in designing effective subsidy systems for renewable energy without their support being counted as 'State resources' under Art. 107 TFEU. In numerous past rulings, the Court had examined production-supporting measures taken in the Netherlands (Case C-206/06, *Essent, ECLI:EU:C:2008:413*), Austria (T-251/11, *Austria v. Commission,*), France *(Vent de Colère*) and Germany (*Germany v. Commission T-47/12*) and ruled that these feed-in tariff schemes were state aid. The first of these rulings is the 2017 *ruling ENEA SA w Poznaniu v. Prezes Urzędu Regulacji Energetyki* (C-329/15). Here, the Court ruled that an obligation for ENEA (the Polish state electricity company) to supply energy produced by cogeneration did not count as state aid under Art. 107 TFEU. Both the Advocate-General's opinion and the Court's ruling aligned, arguing that as the Polish state had no direct or indirect control over the resources, State intervention was limited and there was no financing mechanism used to collect compulsory contributions, this did not count as state aid. This ruling was the first time since the 2001 *PreussenElektra* ruling that the Court had ruled that an energy support scheme did not consist of state aid (Alija, 2018, p. 178). This was followed by the 2019 *Germany v. Commission* ruling (C-405/16 P), where the Court ruled that the German system for supporting renewable energy (the EEG) did not entail state aid, as it did not oblige

electricity suppliers to pass on a surcharge to the final consumers. The Court reasoned that although the EEG was initiated by a public policy, initiated by a state to support renewable energy producers, to classify as state aid the advantages to producers had to be gained directly or indirectly through State resources. In this case, public authorities had influence, but no indirect or direct control over the resources. Both these cases – as the first instances where the Court has allowed feed-in tariff schemes for the support of renewable energy production – provide more guidance for future decisions regarding such schemes, which will only become more important with the implementation of the EGD and Fit for 55 objectives.

In terms of cartel prohibition, few to no recent cases have dealt with the issue of sustainability agreements and incorporating green criteria into rulings. Perhaps a chance for the Court will come soon, however: the Commission recently ruled against five car manufacturers (Daimler, BMW, Volkswagen, Audi and Porsche) for colluding to limit the development of technology to limit NOx emissions (case AT.40178).[6] This is the first cartel prohibition decision based solely on a restriction of technological development without price fixing or market sharing, and the Commission has highlighted its importance in showing how EGD objectives are integrated into other policies (Vestager, 2021). The CJEU has not been asked yet to rule on this, but may need to do so if an appeal is brought by one of the manufacturers. This would require determining the line between technical and technological *cooperation* and *collusion*, which will be an important issue in the coming years when developing adequate technological solutions to reach net-zero emissions by 2050.

More concerningly, procedural elements of the litigation process may actually hinder the Court's ability to play an effective role in integrating environmental concerns into

[6] https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40178

competition policy (ClientEarth, 2020). Notably, the legal standing rules, which define parties that can bring state aid cases to the court, define directly concerned individuals in a very narrow way, practically excluding private third parties who are not market operators (i.e. companies and undertakings) (see (Delarue and Bechtel, 2021)). As the CJEU has confirmed that the Commission must include environmental law in its assessment of state aid, it is logical that environmental NGOs should be able to request review of these decisions by the CJEU – which would also align the state aid process better with the EU's international obligations under the Aarhus Convention (ClientEarth, 2020).

In sum, the main rulings in this area indicate that the CJEU is taking the need to incorporate green criteria into competition policy seriously, at least with regards to state aid. Its ruling that environmental objectives must be taken into account for all state aid decisions has now been codified in the Commission's draft Climate, Energy and Environmental Aid Guidelines, indicating that this will continue to be an obligation. It has also provided more leeway or indication to states wishing to design feed-in tariff schemes for supporting renewable energy without violating state aid principles. On other fronts, the Court has not yet made any significant rulings, though a chance may open up with the Commission's recent car manufacturers cartel prohibition decision. However, the Court's (interpretation of) procedural rules in the area of competition policy may be required for it to be able to play an effective role in the integration of climate objectives into competition policy.

8. Conclusion

This working paper analyzed to what extend two independent institutions of the EU, the ECB and the CJEU, are involved in and are likely to promote or frustrate the achievement

of the goals of the EGD. The analysis combined legal research into the mandate and tasks of these institutions, and the role these institutions have or are perceived to have in the EU. As a first step, the paper analyzed what necessitates the involvement of independent institutions in the European Green Deal. Central to the success of the European Green Deal is that all policies of the EU contribute to the achievement of the goal of an economic transformation. Climate objectives would need to be integrated in policies that *a priori* appear to be separated from environmental concerns, but which are nonetheless central to achieve substantive economic reforms. The independence of the several EU institutions and bodies can thus frustrate or slow down the EGD, as they are bound by specific legal mandates and may perceive their own role in the EU to be disconnected from promoting sustainability.

From a legal perspective, it is clear that EU law contains elements that may prompt even independent institutions with specific legal mandates to 'go green'. Article 11 TFEU requires that environmental objectives are included in all of the Union's policies. This at least provides legal cover for any institution that may want to reduce the harm of its policies to the environment. It is unclear, however, what exactly the scope of this legal obligation is. It seems unlikely that it can be used to require institutions to take environmental or climate action that appears undermines its key task. Especially for the monetary policy, the relevance of article 11 TFEU on its own appears minimal. For competition law, the Treaties do not lay down specifically the goals to be achieved, leaving more room for the Commission and the Court to incorporate climate objectives. In both cases, it helps that the EGD is presented in pro-growth (read: pro-markets) terms, which largely aligns with the objectives of monetary and competition policy. The EGD therefore invites legal innovation, but in small steps.

Our role-theoretical analysis showed that the ECB seems to have embraced its required role in implementing the EGD. Both its role conception – general arguments about the role of central banks in climate policy – and role performance – structural and strategic change within the institution – have shifted since the EGD communication. The CJEU is more difficult to judge, given the paucity of relevant rulings. While the Hinkley Point ruling – which pre-empted the Commission's guidelines on environmental and energy state aid – indicates that the Court may be accepting the legal norms required in the enforcement of the EGD, other aspects such as procedural rules may hinder the ability of the Court to rule effectively on EGD issues. This is also partly due to the institutions' differing roles in their policy fields: while the ECB makes monetary policy and can choose how and when to add environmental and climate objectives, the CJEU is limited to interpreting questions brought before it, making it more dependent on the Commission and Member States to bring those cases.

More generally, studying both institutions also highlights the inherently limited role of independent institutions in climate policy. Both institutions are limited by their mandates and the need for independence, meaning that they can only work within a limited set of norms and roles. Environmental mainstreaming must come from elected policymakers first, with independent institutions playing their part within the scope of their constitutionally defined principles.

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HOW TO TURN A SUPERTANKER: MAINSTREAMING CLIMATE OBJECTIVES IN THE EU THROUGH INDEPENDENT INSTITUTIONS

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