

# An Attempt to Merge EU Transport & Climate Legislation: The 2020 Update of the Single European Sky

Master Thesis

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## **Abstract**

The European Commission and the aviation sector consider the current Air Traffic Management (ATM) to be inefficient, as flight routes are longer in distance than necessary. Therefore, the 2020 Single European Sky proposal was initiated by the Commission under the European Green Deal to create one European airspace to enable more direct flight routes. The Commission claims that the proposal will lead to a 10% reduction in CO<sub>2</sub> emissions from the aviation sector from 2025 onwards, which would indirectly contribute to reaching the climate-neutrality objective by 2050 at the latest. This research aims to explore to what extent the Commission has integrated environmental considerations in the proposal and whether this is in line with EU environmental law obligations. By taking an explorative, observative and objective approach and by using the doctrinal legal research method and document analysis, this research aims to explore whether the Commission is in line with Article 5 (4) of the European Climate Law proposal, how the Commission has observed Article 11 TFEU and the Green Oath in the proposal, and whether these features are implemented ambitiously. The Commission did not conduct an assessment of the consistency of the proposal with the climate-neutrality objective and is therefore not in line with Article 5 (4) of the European Climate Law proposal. Article 11 TFEU and the Green Oath have been observed by the Commission in the 2020 Single European Sky proposal to the extent that it creates opportunities to integrate environmental protection requirements in the future, although the execution of these opportunities will only become clear from 1 July 2023 onwards. It was concluded that the Commission did integrate environmental considerations in the proposal to a certain extent, however, this is not fully in line with EU environmental law obligations examined in this thesis.

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# Chapter 1 Introduction

## 1.1 Introduction

The EU aims to reach climate-neutrality by the year 2050 at the latest, along with the ambition to become the first continent that is climate-neutral<sup>1</sup>. Becoming climate neutral means reaching net-zero GHG emissions for the EU as a whole. The European Commission has proposed through the European Climate Law to incorporate the 2050 climate-neutrality target into new EU legislation<sup>2</sup>. The core policy package behind this ambition is the European Green Deal<sup>3</sup>, which contains a plan for many legislative proposals, along with the introduction of the Green Oath; an oath to “do no harm”<sup>4</sup>. Besides the Green Deal, the EU institutions are required to fulfil the objectives codified in primary EU law and the Charter, of which one is the protection of the environment. Article 11 TFEU states that “environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities”. This objective is important because it requires environmental protection to be considered and taken into account of in all EU measures and actions<sup>5</sup>.

The aviation sector is a significant contributor to climate change with its (increasing) GHG emissions<sup>6</sup>. One of the key elements of EU climate legislation is the EU Emissions Trading System (EU ETS), under which aviation

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<sup>1</sup> European Commission, Directorate-General CLIMA, EU Climate Action and the European Green Deal, European Green Deal. Retrieved from: [https://ec.europa.eu/clima/policies/eu-climate-action\\_en](https://ec.europa.eu/clima/policies/eu-climate-action_en) [last visited on 06/02/2021]; Abnett, Kate, Reuters, 20 October 2020, ‘EU ministers to agree to make climate-neutrality by 2050 binding’. Retrieved from: <https://www.reuters.com/Article/us-climate-change-eu-law-idUSKBN2751GI> [last visited on 22-02-2021]; Watson, Frank, 8 October 2020, ‘EU Parliament backs 2050 climate neutral law’. Retrieved from: <https://www.spglobal.com/platts/en/market-insights/latest-news/coal/100820-eu-parliament-backs-2050-climate-neutral-law> [last visited on 22-02-2021]

<sup>2</sup> European Commission, Directorate-General CLIMA, European Climate Law, Key Elements. Retrieved from: [https://ec.europa.eu/clima/policies/eu-climate-action/law\\_en](https://ec.europa.eu/clima/policies/eu-climate-action/law_en) [last visited on 06/02/2021]

<sup>3</sup> European Commission, 11 December 2019, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN> [last visited on 04-02-2021]

<sup>4</sup> Ibid, section 2.2.5.

<sup>5</sup> Krämer, L, ‘Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies’ in ‘European perspectives on environmental law and governance’ Abingdon, Oxon UK; New York: Routledge, 2013. Retrieved from: <https://www.taylorfrancis.com/chapters/edit/10.4324/9780203096567-12/giving-voice-environment-challenging-practice-integrating-environmental-requirements-eu-policies-ludwig-kr%C3%A4mer> [last visited on 16-04-2021]; Sjøfjell, Beate, ‘The Legal Significance of Article 11 TFEU for EU Institutions and Member States’ (November 24, 2014), in ‘The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously’, Beate Sjøfjell and Anja Wiesbrock (eds), Routledge 2015, pp. 51-72. Retrieved from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2530006](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530006) [last visited on 16-04-2021]

<sup>6</sup> ICAO, Gregg, G Fleming, Ivan de Lépinay, 2019, Environmental Trends in Aviation to 2050 in Aviation and Environmental Outlook, p. 23. Retrieved from: [https://www.icao.int/environmental-protection/Documents/EnvironmentalReports/2019/ENVReport2019\\_pg17-23.pdf](https://www.icao.int/environmental-protection/Documents/EnvironmentalReports/2019/ENVReport2019_pg17-23.pdf) [last visited on 31-07-2021]; Transport & Environment, December 2020, Making the aviation ETS fit for purpose. Retrieved from: [https://www.transportenvironment.org/sites/te/files/publications/2020\\_11\\_TE\\_Briefing\\_Making\\_aviation\\_ETS\\_fit\\_for\\_purpose.pdf](https://www.transportenvironment.org/sites/te/files/publications/2020_11_TE_Briefing_Making_aviation_ETS_fit_for_purpose.pdf) [last visited on 06/02/2021]

is regulated<sup>7</sup>. While in the previous phase of the EU ETS, the aviation sector received 85% of their allowances for free<sup>8</sup>, the system has now been revised, meaning that every year from 2021 onwards, the amount of free allowances will be reduced in accordance with Article 28 (a) of the EU ETS Directive.<sup>9</sup> The EU ETS, however, does not regulate *other* climate change effects caused by the aviation sector.<sup>10</sup> The EU ETS is regulated under the environmental competence of the EU, but can other competences also be used to help reduce the environmental footprint of the aviation industry? It could be possible to incorporate environmental aspects into other policy areas when looking at Article 11 TFEU. Furthermore, Article 5(4) of the proposed European Climate Law states that “the Commission shall assess any draft measure or legislative proposal in light of the climate-neutrality objective before adoption and include this analysis in any impact assessment accompanying these measures or proposals and make the result of that assessment public at the time of adoption”. This proposed Article is a more detailed codification of Article 11 TFEU. Indeed, the aviation sector is regulated in other policy areas, an obvious one being transport, which is a shared competence of the EU and Member States. According to the Commission, in addition to the EU ETS, measures on modernising and improving Air Traffic Management (ATM), which falls under the transport competence, also adds to the objective of reducing emissions<sup>11</sup>. A key legislative proposal in the field of Air Traffic Management (ATM), is the proposal for the 2020 update of the Single European Sky framework, which aims at creating one European airspace (like the internal market, but only concerning air traffic) and aims to establish a framework for more sustainable flightpaths. This initiative is not solely based on economic interests, as the Commission has stated that through completing the

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<sup>7</sup> European Commission, Directorate-General CLIMA, Emissions Trading System (EU ETS), Transport, Aviation. Retrieved from: [https://ec.europa.eu/clima/policies/transport/aviation\\_en](https://ec.europa.eu/clima/policies/transport/aviation_en) [last visited on 06/02/2021]

<sup>8</sup> European Commission, Directorate-General CLIMA, Emissions Trading System (EU ETS), Free allocation of allowances, allocation to aviation. Retrieved from: [https://ec.europa.eu/clima/policies/ets/allowances/aviation\\_en](https://ec.europa.eu/clima/policies/ets/allowances/aviation_en) [last visited on 03/02/2021]

<sup>9</sup> European Commission, Directorate-General CLIMA, Emissions Trading System (EU ETS), Revision of the EU ETS Directive concerning aviation. Retrieved from: [https://ec.europa.eu/clima/policies/transport/aviation\\_en](https://ec.europa.eu/clima/policies/transport/aviation_en) [last visited on 06/02/2021]; European Commission, January 2018, Frequently Asked Questions Regulation (EU) 2017/2392 amending the EU Emissions Trading System for aviation. Retrieved from: [https://ec.europa.eu/clima/sites/default/files/transport/aviation/docs/faq\\_aviation\\_ets\\_regulation\\_en.pdf](https://ec.europa.eu/clima/sites/default/files/transport/aviation/docs/faq_aviation_ets_regulation_en.pdf) [last visited on 31-07-2021]

<sup>10</sup> European Commission, 23 November 2020, Report from the Commission to the European Parliament and the Council Updated analysis of the non-CO<sub>2</sub> climate impacts of aviation and potential policy measures pursuant to EU Emissions Trading System Directive Article 30(4), COM (2020) 747 final. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:747:FIN> [last visited 04-08-2021]

<sup>11</sup> European Commission, Directorate-General CLIMA, Reducing emissions from aviation, Aviation in EU Emissions Trading System. Retrieved from: [https://ec.europa.eu/clima/policies/transport/aviation\\_en](https://ec.europa.eu/clima/policies/transport/aviation_en) [last visited on 27/01/2021]

Single European Sky, all air transport CO<sub>2</sub> emissions can be reduced by 10%<sup>12</sup> and the timely application of this new system could lead to CO<sub>2</sub> emissions reductions from 2025 already<sup>13</sup>.

## 1.2 Problem Statement

A proposal for a revision of the Single European Sky framework was first introduced in 2013, however, it was never adopted<sup>14</sup>. In September 2020, the Commission adopted an amended version of the 2013 proposal.<sup>15</sup> The main objective is to create a single European airspace and reform Air Traffic Management, in order to improve efficiency of European airspace structures as a whole<sup>16</sup>. This in turn should, according to the Commission, help further reduce emissions, as flightpaths will be shortened, less air congestion will arise and there will be less delays overall. The European Union Aviation Safety Agency's report confirms this as they have found that operational efficiency ensures a slower growth of aviation emissions, although the full potential of the Single European Sky is not always reached due to conflicts in air traffic and navigation services<sup>17</sup>. Relevant actors in Air Traffic Management (ATM) include air traffic service providers, air navigation service providers, terminal air traffic service providers and national supervisory authorities. As the Commission has adopted the Green Deal Communication, in which it proposed to reduce 90% of transport emissions by 2050 (compared to 1990 levels)<sup>18</sup>, it had no other chance than to observe environmental protection in the 2020 Single European Sky proposal. The main issue lies with the current Air Traffic Management, which the Commission and the aviation sector consider to be inefficient<sup>19</sup>. Currently, flight routes are longer (more kilometres) than necessary, meaning that (more) direct flight routes will solve the issue of inefficiency. The main legal concern here is where and

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<sup>12</sup> European Commission, 22 September, Single European Sky: for a more sustainable and resilient air traffic, press release. Retrieved from: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_1708](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1708) [last visited 04-02-2021]

<sup>13</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020], p. 2. Note: the European Commission only refers to CO<sub>2</sub> emissions reductions in the communication surrounding the 2020 Single European Sky proposal. Of course, other effects can be foreseeable, however, the Commission has not focused on those other effects.

<sup>14</sup> Proposal for a regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2013) 410 final [published on 11 June 2013].

<sup>15</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020]

<sup>16</sup> Ibid, p. 1-2.

<sup>17</sup> European Union Aviation Safety Agency, 2019, European Aviation Environmental Report 2019, section Air Traffic Management and Operations, p. 8. Retrieved from: [https://www.easa.europa.eu/eaer/system/files/usr\\_uploaded/219473\\_EASA\\_EAER\\_2019\\_WEB\\_LOW-RES\\_190311.pdf](https://www.easa.europa.eu/eaer/system/files/usr_uploaded/219473_EASA_EAER_2019_WEB_LOW-RES_190311.pdf) [last visited on 18-06-2021]

<sup>18</sup> European Commission, 11 December 2019, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640, section 2.1.5., p. 10. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN> [last visited on 04-02-2021]

<sup>19</sup> Commission Staff Working Document, A fresh look at the Single European Sky, SWD (2020) 187 final, section 1.3. Rationale for amending the SES2+ proposal and the EASA Basic Regulation, p. 3. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2020:187:FIN> [last visited on 12-02-2021]

how in the 2020 Single European Sky proposal policy objectives and obligations under EU environmental law are taken into account, since the Commission has claimed that the proposal will lead to a 10% reduction in CO<sub>2</sub> emissions from the aviation sector. Even though the explanatory memorandum mentions the environment as one of the main reasons why the Single European Sky should be updated<sup>20</sup>, a preliminary analysis of the legislative proposal demonstrates that the provisions of the proposal do not necessarily reflect this core reason of protecting the environment as much as the Commission claims.

### 1.3 Research Questions

The 2020 Single European Sky proposal aims to reform Air Traffic Management (ATM) and this indirectly is expected to contribute to the now needed action to establish steps to meet the EU's 2050 climate-neutrality target and its accompanying ambitions. It is important to note the legal basis of the proposal, namely Article 100(2) TFEU, which is the EU's competence to adopt provisions for sea and air transport. Even though the Commission is acting within the scope of the transport competence, obligations under EU environmental law should still be taken into account. More specifically, the Commission should take into account Article 11 TFEU and the Green Oath to do no harm. Furthermore, although not yet into force, the Commission itself has proposed a European Climate Law and particularly Article 5 (4) of that proposal should be taken into account by the Commission.<sup>21</sup> This thesis therefore aims to conduct explorative research by examining the afore-mentioned EU environmental law obligations.

Taking into consideration the foregoing, the main research question of this thesis is as follows. **To what extent has the European Commission integrated environmental considerations in the 2020 Single European Sky proposal, and is this in line with EU environmental law obligations?** This research question specifically focuses on the integration and finetuning of environmental objectives into non-environmental legislation.

The main research question of this thesis is accompanied by two relevant sub questions. The first sub question aims to tackle the procedural side of the 2020 Single European Sky proposal in light of the climate-neutrality objective; *has the European Commission drafted the 2020 Single European Sky proposal in line with its proposed Article 5(4) of the European Climate Law?* Climate change is an extremely pressing matter, to which the contribution of the aviation sector is widely known, and therefore completely ignoring the finetuning under Article 5 (4) would be striking and unacceptable. While it is argued that Article 5 (4) is simply a codification of

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<sup>20</sup> Ibid, p. 2.

<sup>21</sup> The European Parliament adopted on 24 June 2021 the text of the European Climate Law. Article 5 (4) has now become Article 6 (4); European Parliament, 24 June 2021, Texts Adopted, European Parliament legislative resolution of 24 June 2021 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080 – COM(2020)0563 – C9-0077/2020 – 2020/0036(COD)). Retrieved from: [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0309\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0309_EN.html) [last visited on 31-07-2021]

Article 11 TFEU, a separate chapter for examining Article 5 (4) is merited as different terms are used. Article 5 (4) is specifically about climate and climate-neutrality, while Article 11 TFEU is about the environment and environmental protection.

The second sub question aims to tackle two main elements of EU environmental law, namely Article 11 TFEU and the Green Oath. The Green Oath does not have a set definition or interpretation and has not been thoroughly examined yet by legal scholars.<sup>22</sup> Article 11 TFEU, on the other hand, has been examined thoroughly by legal scholars. However, what this Article precisely entails remains unclear and there is quite some room for different interpretations. For the purpose of this thesis, they are therefore put together in one question; *how has the European Commission observed Article 11 TFEU and the Green Oath in the 2020 Single European Sky proposal, and have these features been implemented ambitiously?*

## 1.4 Methodology

There are different approaches and issues to discuss for this topic, however, this thesis will provide a legal analysis of the legislative developments. The thesis will take an explorative, observative and objective approach, and the results will be based on data available up to May 2021, as the developments surrounding the Single European Sky and the European Climate Law are many and fast due to the proposals being initiated under the Green Deal, which is a policy priority of the European Commission. To answer the main research question and sub questions, the doctrinal legal research method and document analysis will be used, in which relevant applicable law, case law and literature will be analysed. Core legal concepts, such as competences and principles, will be researched. The justifications behind these methodological decisions are as follows. Thus far, no scholarly Article has examined to what extent EU aviation legislation in the field of EU transport legislation incorporates environmental objectives and provisions.<sup>23</sup> Furthermore, there have been little to no scholars who have tested specifically the Single European Sky in view of Article 11 TFEU, Article 5(4) of the European Climate Law and the Green Oath. There are scholarly Articles available on the Single European Sky, but mostly from non-legal disciplines, such as social sciences, political sciences and economics<sup>24</sup>. This literature

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<sup>22</sup> Though, Ludwig Krämer has established a link with Article 11 TFEU in Ludwig Krämer, July 2020, Planning for Climate and the Environment: the EU Green Deal, *Journal for European Environmental Law and Planning Law* 17 (3), p. 267-306. Retrieved from:

[https://www.researchgate.net/publication/342979179\\_Planning\\_for\\_Climate\\_and\\_the\\_Environment\\_the\\_EU\\_Green\\_Deal](https://www.researchgate.net/publication/342979179_Planning_for_Climate_and_the_Environment_the_EU_Green_Deal) [last visited on 12-02-2021]

<sup>23</sup> A search through Maastricht University's database, Google Scholar and Google using keywords such as "EU", "Aviation", "Legislation", "Environmental", "Aspects", "Incorporation", "Obligations" has only delivered results on the environmental impact of the aviation industry and how to tackle that impact. The search did not deliver results of Articles on EU aviation legislation (which falls under transport legislation) that contain findings on the actual incorporation of environmental objectives.

<sup>24</sup> Pertti Alasuutari, Hanna Rautajoki, Petra Auvinen and Marjaana Rautalin (2019), Shattering the Single European Sky: Argument from authorities in dealing with the SES initiative, *European Journal of Cultural and Political Sociology* 2019, vol. 6, no. 1, 68–94. Retrieved from: <https://www.tandfonline.com/doi/abs/10.1080/23254823.2018.1449661> [last visited on 02-02-2021]; Constantin-Daniel Stănescu (2017), Single European Sky – The Solution for an Air Traffic Management



is still relevant to sketch a background, but not for the core of this thesis. Hence, this thesis attempts to make a start in filling the gap in legal literature.

There are limitations to the research in this thesis. Firstly, this thesis aims to do research on three elements in EU environmental law only, namely Article 11 TFEU, the European Climate Law proposal and the Green Oath. These elements have been chosen as they relate the most to the circumstances of the case study of this thesis; the 2020 Single European Sky proposal. Therefore, the findings are limited to the case study. Secondly, the thesis is focused on exploring whether and how the Commission has observed Article 11 TFEU, the European Climate Law proposal and the Green Oath, and does not focus on issues related to access to judicial actions and access to courts in case the findings of this thesis show that the Commission has not fully integrated environmental considerations and is not (fully) in line with EU environmental law policy objectives and obligations. Thirdly, the European Climate Law proposal has not yet been adopted, the Green Oath is still a relatively new concept in EU environmental law, and on the contrary, Article 11 TFEU has been researched thoroughly but common consensus on the meaning and interpretation is also still lacking.

## 1.5 Structure

This thesis is structured as follows. Chapter 2 focuses on the first sub-question; *has the European Commission drafted the 2020 Single European Sky proposal in line with its proposed Article 5(4) of the European Climate Law?* Firstly, the aim of the European Climate Law proposal is examined. Secondly, the specific proposed provisions of the European Climate Law proposal are set out and observations are made on the implications for the 2020 Single European Sky proposal. In the third section, the 2020 Single European Sky proposal is taken as a case study. An explorative analysis is conducted on whether the Commission has followed its own proposed procedures under the European Climate Law proposal and whether it has been applied during the preparation of the 2020 Single European Sky proposal.

Chapter 3 focuses on the second sub-question; *how has the European Commission observed Article 11 TFEU and the Green Oath in the 2020 Single European Sky proposal, and have these features been implemented ambitiously?* Firstly, interpretations of Article 11 TFEU are discussed as well as its application and different views of scholars. Secondly, different views and interpretations are examined of the Green Oath and its (future) application is

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adapted to the challenges of this century, Review of the Airforce Academy No.1 (33)/201. Retrieved from: [https://www.afahc.ro/ro/revista/2017\\_1/18-ConstantinDanielStanescu.pdf](https://www.afahc.ro/ro/revista/2017_1/18-ConstantinDanielStanescu.pdf) [last visited on 04-02-2021]; Motyka A, Njoya ET (2020) Single European Sky: The progress so far. J Aerosp Technol Manag, 12 e3920. Retrieved from: [https://www.researchgate.net/publication/343957577\\_Single\\_European\\_Sky\\_The\\_progress\\_so\\_Far](https://www.researchgate.net/publication/343957577_Single_European_Sky_The_progress_so_Far) [last visited on 02-02-2021]; Natalia Hartman (2015), Single European Sky – the transformation of the aviation industry based on the dynamic capabilities, Incas Bulletin, Volume 7, Issue1/2015, pp. 97-109. Retrieved from: [https://www.researchgate.net/publication/276841889\\_Single\\_European\\_Sky\\_-\\_the\\_transformation\\_of\\_the\\_aviation\\_industry\\_based\\_on\\_the\\_dynamic\\_capabilities](https://www.researchgate.net/publication/276841889_Single_European_Sky_-_the_transformation_of_the_aviation_industry_based_on_the_dynamic_capabilities) [last visited on 02-02-2021]

discussed. In the third section, the provisions of the 2020 Single European Sky proposal are taken as a case study. Here, an explorative analysis is conducted on whether the provisions integrate requirements under Article 11 TFEU and under the Green Oath (or rather if the provisions provide for opportunities to integrate such requirements, as will be explained in chapter 3).

Finally, chapter 4 aims to answer the research question **to what extent has the European Commission integrated environmental considerations in the Single European Sky proposal, and is this in line with EU environmental law obligations?** Conclusions are drawn from the findings in chapter 2 and 3. Subsequently, the sub-questions are answered, and a final conclusion is drawn.

## Chapter 2 Assessing Consistency with Climate-Neutrality Objective

This chapter attempts to answer the first sub question; has the European Commission drafted the 2020 Single European Sky proposal in line with its proposed Article 5(4) of the European Climate Law? Firstly, the aim of the European Climate Law proposal is examined, the specific proposed provisions of the European Climate Law proposal are explained, and observations are made on the implications for the 2020 Single European Sky proposal. Subsequently, the 2020 Single European Sky proposal is taken as a case study, and it is explored whether the Commission has followed its own proposed procedures under the European Climate Law proposal during the preparation of the 2020 Single European Sky proposal.

The goal of the EU to reach climate-neutrality by the year 2050 (at the latest) is at the core of the European Green Deal, in which all sectors of the economy and society itself will have to play a role in. The mobility and transport sector is one of those sectors where ambitious plans for reducing GHG emissions are urgently needed.<sup>25</sup> Of the entire transport sector, the aviation sector created 13.9% of direct emissions in 2017.<sup>26</sup> After road transport, aviation is the second-biggest emitter of transport GHG emissions.<sup>27</sup> In order to achieve the climate-neutrality objective by 2050, the European Green Deal has set out the reduction target for transport emissions at -90% by 2050, compared to 1990-levels.<sup>28</sup> The aviation sector will have to contribute to reaching this target. Several regulatory and policy actions already have as its aim to contribute to achieving this target.<sup>29</sup> Examples include the EU ETS, which core is to reduce GHG emissions in a cost-effective manner by using a cap and trade system under which the aviation sector falls, the Renewable Energy Directive, providing a framework for the production of Sustainable Aviation Fuels (SAF), the European Advanced Biofuels Flightpath, accelerating the speed at which SAF is being produced and brought onto the market, national schemes for airport charges which could be used to reduce the environmental footprint in different ways, the Clean Sky Joint Technology Initiative, a six-year plan (2014-2020) previously enabled by Horizon 2020, and of course the Single European

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<sup>25</sup> European Commission, 11 December 2019, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640, p. 10 (section 2.1.5.). Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN> [last visited on 04-02-2021];

<sup>26</sup> European Commission, Directorate-General Climate Action, Energy, Climate change, Environment, Climate Action, EU Action, Transport Emissions, Reducing emissions from aviation. Retrieved from: [https://ec.europa.eu/clima/policies/transport/aviation\\_en](https://ec.europa.eu/clima/policies/transport/aviation_en) [last visited 12-04-201]

<sup>27</sup> Ibidem.

<sup>28</sup> European Commission, 11 December 2019, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640, p. 10 (section 2.1.5.). Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN> [last visited on 04-02-2021]; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0562&from=en>

<sup>29</sup> European Commission, Directorate-General Mobility and Transport, Air; Environment. Retrieved from: [https://ec.europa.eu/transport/modes/air/environment\\_en](https://ec.europa.eu/transport/modes/air/environment_en) [last visited on 5-04-2021]

Sky.<sup>30</sup> But besides these policy documents, the Commission has initiated a proposal for a European Climate Law, which calls for the enshrining of the 2050 climate-neutrality target into EU law as a whole.<sup>31</sup> Its legal basis is Article 192 (1) TFEU.<sup>32</sup> It will be seen below that this European Climate Law may have significant repercussions for the aviation sector.

## 2.1 The Newly Proposed European Climate Law

The aim of this new law is to ensure the effective contribution of all Union policies to the goal of becoming climate neutral by 2050.<sup>33</sup> Amongst other aspects, it creates a common framework for the Commission to monitor progress of both Member States and Union policies in regard to the objective. It also provides for the possibility of the Commission to adopt delegated acts,<sup>34</sup> should further action be needed after the results of the monitoring of progress. Another main aim of the new law is to ensure the irreversibility of climate-neutrality. The explanatory memorandum refers to the proposal as a complementary framework to the already existing policy framework.<sup>35</sup> The Commission has also put much emphasis on the fact that this legislative proposal is strongly linked to many other policy areas (outside the environmental framework), including the external policies of the EU.<sup>36</sup> Interesting to note here, is that the European Parliament in its motion for a resolution on the European Green Deal criticised the Commission's concept of climate-neutrality, because it excludes GHG emissions from sectors that operate beyond EU borders, such as emissions from international aviation.<sup>37</sup>

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<sup>30</sup> European Union Aviation Safety Agency, Environment; policy actions; European Union. Retrieved from: <https://www.easa.europa.eu/eaer/topics/sustainable-aviation-fuels/policy-actions> [last visited on 15-04-2021]

<sup>31</sup> Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final, published on 04-03-2020. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0080> [last visited on 14-04-2021]

<sup>32</sup> Doubts are raised that this is the correct legal basis. See Ludwig Krämer, 10 July 2020, Planning for Climate and the Environment: the EU Green Deal, *Journal for European Environmental Law & Planning Law*, Volume 17, Issue 3, p. 267-306. Retrieved from: [https://brill.com/view/journals/jeep/17/3/Article-p267\\_267.xml?body=contentSummary-44180](https://brill.com/view/journals/jeep/17/3/Article-p267_267.xml?body=contentSummary-44180) [last visited 18-06-2021]

<sup>33</sup> *“This means achieving net zero greenhouse gas emissions for EU countries as a whole, mainly by cutting emissions, investing in green technologies and protecting the natural environment. The law aims to ensure that all EU policies contribute to this goal and that all sectors of the economy and society play their part.”* European Commission, Directorate-General Climate Action, Energy, Climate change, Environment, Climate Action, EU Action, European Climate Law. Retrieved from: [https://ec.europa.eu/clima/policies/eu-climate-action/law\\_en](https://ec.europa.eu/clima/policies/eu-climate-action/law_en) [last visited on 21-06-2021]

<sup>34</sup> Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final, published on 04-03-2020, Article 3 (1).

<sup>35</sup> *Ibid.*, p. 3.

<sup>36</sup> *Ibid.*, p. 4.

<sup>37</sup> Motion for a Resolution to wind up the debate on the statement by the Commission pursuant to Rule 132(2) of the Rules of Procedure on the European Green Deal (2019/2956(RSP)), published on 10-01-2020. Paragraph 15. Retrieved from: [https://www.europarl.europa.eu/doceo/document/B-9-2020-0044\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2020-0044_EN.html) [last visited on 15-04-2021]

Furthermore, the legislative proposal for a European Climate Law calls for the improvement of the Better Regulation Guidelines to address sustainability issues, in order for all EU initiatives to adhere to a Green Oath to 'do no harm'.<sup>38</sup> Chapter three further analyses the meaning and importance of this oath.<sup>39</sup> Regarding the necessary action at Member State level, this proposal adds to the already existing framework of the Commission issuing recommendations through the European Semester. The Commission will have to issue recommendations under the European Climate Law which will fully focus on inconsistency of policy measures with the climate-neutrality objective.<sup>40</sup> Should the 2020 Single European Sky proposal in practice give more environmental weight to the restructuring of Air Traffic Management, the issuing of recommendations to the Member States by the Commission through the European Climate Law framework could potentially contribute to a greener aviation sector.<sup>41</sup> It is, however, not clear whether the Commission can address issues that are not directly related to climate-neutrality into these recommendations. It seems that this proposal for a European Climate Law makes a distinction between the Commission's assessment of the Member States' policies, and the Union's policies. Regarding national measures, the Commission will enact a regular assessment based on information provided in the National Energy and Climate Plans under the Governance Regulation<sup>42</sup>. While for the assessment of Union measures and actions, it seems to be based on structural assessments of all Union measures every five years in parallel with the timeline of the Paris Agreement.<sup>43</sup> However, the European Climate Law proposal does not contain clear wording on these points and these points will not be further considered in this thesis.

## 2.2 Obligations for Assessment of (draft) Union Measures

Specifically relevant for the assessment of the 2020 Single European Sky proposal, are Articles 5 and 7 of the European Climate Law. Article 5 (2) (a) states that by 30 September 2023, and following that date, every five years, the Commission shall review "the consistency of Union measures with the climate-neutrality objective

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<sup>38</sup> Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final, published on 04-03-2020, p 4.

<sup>39</sup> See from page 20 onwards.

<sup>40</sup> Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final, published on 04-03-2020, p 8.

<sup>41</sup> As Air Traffic Management is still mostly subject to the rules of national legislative frameworks.

<sup>42</sup> Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, L 328/1.

<sup>43</sup> Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final, published on 04-03-2020, p 7.

set out in Article 2 (1) as expressed by the trajectory referred to in Article 3 (1)".<sup>44</sup> The trajectory will be created through the adoption of delegated acts to supplement the European Climate Law, which after each global stocktake under the Paris Agreement will be reviewed by the Commission.<sup>45</sup> Should the Commission find a certain Union measure to be insufficiently contributing to reaching climate-neutrality through its assessment in accordance with Article 5 (2) (a), the Commission "shall take the necessary measures in accordance with the Treaties at the same time as the review of the trajectory referred to in Article 3 (1)".<sup>46</sup> This stipulates that every five years, the Commission will execute an assessment of Union measures, should there be insufficient alignment or progress with reaching climate-neutrality, the Commission then proposes legislative or non-legislative acts as a supplementing measure, at the very latest within six months after the global stocktakes under the Paris Agreement. Should Article 5 be left untouched by the Council and Parliament during negotiations, this would mean for the 2020 Single European Sky proposal, that in 2023, the first assessment will be made on the consistency with the climate-neutrality objective.

Article 5 (4) states that the Commission shall assess "any draft measure or legislative proposal in light of the climate-neutrality objective set out in Article 2(1) as expressed by the trajectory referred to in Article 3(1) *before adoption*, and include this analysis in any impact assessment accompanying these measures or proposals, and make the result of that assessment public at the time of adoption".<sup>47</sup> The wording "in light of" is rather interesting, seeing that Article 5 (2) (a) mentions the assessment of "consistency", making it unclear what is meant by assessing a draft measure "in light of" the climate-neutrality objective.<sup>48</sup> Fortunately, the Council

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<sup>44</sup> Ibid, Article 5 (2). This Article is now Article 6 (2), which reads as follows: "By 30 September 2023, and every five years thereafter, the Commission shall review: (a) the consistency of Union measures with the climate-neutrality objective set out in Article 2(1)". The Article, thus, does no longer refer to the trajectory in Article 3 (1), meaning that for the Commission's review, the timeline of the Paris Agreement will not be used. European Parliament, 24 June 2021, Texts Adopted, European Parliament legislative resolution of 24 June 2021 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080 – COM(2020)0563 – C9-0077/2020 – 2020/0036(COD)). Retrieved from: [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0309\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0309_EN.html) [last visited on 31-07-2021]

<sup>45</sup> The provisions of the *proposal* were examined. Several provisions have changed with the adoption of the *official text*.

<sup>46</sup> Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final, published on 04-03-2020, Article 5 (2) (a).

<sup>47</sup> Ibid, Article 5 (4).

<sup>48</sup> *The phrasing "as expressed by the trajectory referred to in Article 3 (1)" in both Article 5 (2) (a) and (4) could also mean that, instead of all (draft) Union measures or proposals being assessed in light of the climate-neutrality objective, only the delegated acts supplementing the European Climate Law as set out in Article 3 (1) shall be assessed in light of the climate-neutrality objective. Should this interpretation of Article 5 be adopted by the European Commission, the 2020 Single European Sky proposal would not fall under this particular assessment. Instead, the assessment of proposals similar to the 2020 Single European Sky proposal should be conducted by using Article 11 TFEU and the Green Oath (please see Chapter 3 for more information). However, this interpretation is not widely supported and therefore not included in the main text of this thesis.*

proposed during trilogue meetings in May 2021 to change the wording “in light of” to “the consistency of” any draft measure or legislative proposal with the climate-neutrality objective.<sup>49</sup>

In the explanatory memorandum of the European Climate Law proposal under the sub-heading “detailed explanation of the specific provisions of the proposal”, it states that the Commission will assess the consistency of Union measures with the climate-neutrality objective and the progress in general, every five years in line with the timelines of the Paris Agreement.<sup>50</sup> The Dutch translation of the European Climate Law proposal confirms this view.<sup>51</sup> Furthermore, Commissioner Frans Timmermans stated in a Dutch radio interview that the European Climate Law proposal aims to create a framework within which all new legislative acts that will be adopted from now on, will have to fit into.<sup>52</sup>

In a certain way, both proposals suffer from bad timing, as well as other proposals in different policy areas that have been adopted by the Commission recently. The 2020 Single European Sky proposal could have had more potential of reducing CO<sub>2</sub> emissions, more than the envisioned reduction of 10%, should the European Climate Law proposal have become law already before the adoption of the 2020 Single European Sky proposal in September 2020. The European Climate Law was proposed in March 2020, so in a way, DG Transport and Mobility could have already (voluntarily) taken into account the obligations under Article 5 (4) of the European Climate Law proposal.

The common provisions on the Commission’s assessment can be found in Article 7 of the European Climate Law proposal. In short, the assessment should be based on at least five different criteria, namely, information reported under the Governance Regulation, European Environmental Agency reports, European statistics and data, “best available” scientific evidence (including IPCC reports), and any supplementary information on environmentally sustainable investment (including when available investment consistent with the Taxonomy Regulation).

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<sup>49</sup> Council of the European Union, 5 May 2021, Outcome of proceedings (8440/21) Interinstitutional File 2020/0036 (COD), page 42. Retrieved from: <https://data.consilium.europa.eu/doc/document/ST-8440-2021-INIT/en/pdf> [last visited on 19-06-2021]

<sup>50</sup> Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final, published on 04-03-2020, p 7.

<sup>51</sup> “de Commissie zal een beoordeling maken van en verslag uitbrengen over ... de overeenstemming van de maatregelen van de Unie met de doelstelling inzake klimaatneutraliteit” Voorstel voor een verordening van het Europees Parlement en de Raad tot vaststelling van een kader voor de totstandbrenging van klimaatneutraliteit en tot wijziging van Verordening (EU) 2018/1999 (Europese klimaatwet) COM/2020/80 final, published on 04-03-2020, p. 9.

<sup>52</sup> NPO Radio 1/NOS, Met het Oog op Morgen, 26 April 2021, minute 35:25. Retrieved from: <https://www.radioviainternet.nl/podcasts/nos-met-het-oog-op-morgen/2021/met-het-oog-op-morgen-26-04-2021> [last visited on 18-06-2021]

During a preliminary analysis of the 2020 Single European Sky proposal, it was a surprise to read in the explanatory memorandum that no *new* impact assessment was conducted.<sup>53</sup> The current proposal is an amended version of the 2013 Single European Sky proposal, and the Commission stated that a new impact assessment is deemed unnecessary for a few reasons. It is claimed that the main objectives of the 2013 proposal and the new proposal have not changed significantly and the economic, environmental or social impacts “of the text proposed should not differ significantly from the impacts that were expected to rise” when looking at the 2013 proposed text.<sup>54</sup> The Commission further justifies this decision by citing its Staff Working Document<sup>55</sup>, which presents additional evidence and analysis, a 2017 report from the European Court of Auditors<sup>56</sup> containing recommendations, a follow-up analysis from the European Court of Auditors in 2019<sup>57</sup>, and a 2019 report<sup>58</sup> of the Wise Persons Group (15 experts in the field).<sup>59</sup> The major finding here is that apparently, the Commission sees it sufficient to trust that after seven years (2013-2020) the economic, environmental and social impact should not have significantly changed. Was it the right decision of the Commission to not execute a new impact assessment? Another question then is; how did the Commission calculate the 10% reduction of CO<sub>2</sub> emissions if there was no impact assessment? What is this estimation based on?<sup>60</sup>

The Commission’s own Better Regulation Guidelines and Tools provide for procedural rules when it comes to the execution of impact assessments. It is therefore interesting to briefly explore whether the Commission has followed procedural soft law on this point.<sup>61</sup> The Better Regulation Guidelines on impact assessments and tool #9 could provide the answers.<sup>62</sup> It is stated that a Commission’s proposal should be accompanied by an impact

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<sup>53</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020] p. 4.

<sup>54</sup> Ibidem.

<sup>55</sup> Commission Staff Working Document, A fresh look at the Single European Sky, 22 September 2020, SWD(2020) 187 final. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2020:187:FIN> [last visited on 14-05-2021]

<sup>56</sup> European Court of Auditors, 2017, Special report No 18/2017: Single European Sky: a changed culture but not a single sky. Retrieved from: [Special report No 18/2017: Single European Sky: a changed culture but not a single sky \(europa.eu\)](https://www.eca.europa.eu/Lists/ECAD/Attachments/18/18%20-%20Single%20European%20Sky%20-%20a%20changed%20culture%20but%20not%20a%20single%20sky%20-%202017.pdf). [last visited on 14-05-2021]

<sup>57</sup> European Court of Auditors, 2019, Special report no 11/2019: The EU’s regulation for the modernisation of Air Traffic Management has added value – but the funding was largely unnecessary. Retrieved from: [Special report no 11/2019: The EU’s regulation for the modernisation of Air Traffic Management has added value – but the funding was largely unnecessary \(europa.eu\)](https://www.eca.europa.eu/Lists/ECAD/Attachments/11/11%20-%20The%20EU%27s%20regulation%20for%20the%20modernisation%20of%20Air%20Traffic%20Management%20has%20added%20value%20-%20but%20the%20funding%20was%20largely%20unnecessary%20-%202019.pdf). [last visited on 14-05-2021]

<sup>58</sup> Report of the Wise Persons Group, April 2019, On the Future of the Single European Sky. Retrieved from: [2019-04-report-of-the-wise-persons-group-on-the-future-of-the-single-european-sky.pdf \(europa.eu\)](https://www.wisepersonsgroup.eu/wp-content/uploads/2019/04/report-of-the-wise-persons-group-on-the-future-of-the-single-european-sky.pdf) [last visited on 14-05-2021]

<sup>59</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020] p 4.

<sup>60</sup> One could ask questions to the European Commission or urge the European Parliament to question this issue.

<sup>61</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making. Interinstitutional Agreement of 13 April 2016 on Better Law-Making, L123/1. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016O00512%2801%29> [last visited on 04-08-2021]

<sup>62</sup> European Commission, 7 July 2017, Better Regulation Guidelines, Chapter 3 on impact assessments. Retrieved from: <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-impact-assessment.pdf>. [last visited on 18-05-2021]



assessment if it is likely to have significant economic, environmental or social impacts.<sup>63</sup> In 2013, an impact assessment was conducted for the 2013 Single European Sky proposal (which in the end was never adopted).<sup>64</sup> Even though the 2020 Single European Sky proposal, according to the Commission, retains the main objectives and preferred options of the 2013 proposal and impact assessment, the 2020 proposal is still likely to have significant impacts in the economic, environmental and social spheres.<sup>65</sup> Tool #9 sets out procedural rules on when an impact assessment is necessary.<sup>66</sup> It is important to note that the Better Regulation Toolbox is voluntarily applicable in nature.<sup>67</sup> Tool #9 states that the execution of an impact assessment should be assessed for initiatives that are recasts of existing legal acts.<sup>68</sup> This is the case for the 2020 Single European Sky proposal, as it is a recast version of the 2009 Single European Sky legislative framework. In principle, it can be said that the Commission should have conducted a new impact assessment<sup>69</sup>, although a more extensive analysis of procedural obligations and case law<sup>70</sup> is necessary and including one here would deviate from the focus of this thesis.

### 2.3 Analysis: Assessment “in light of ” and consistency with Climate-neutrality

Since there is no recent impact assessment available and thus the Commission has not made an assessment on the consistency with the climate-neutrality objective, it will be *explored* whether the proposal would be consistent with the climate-neutrality objective, using Article 7. An actual analysis of the impact assessment itself to establish whether the proposal is consistent with the climate-neutrality objective in accordance with Article 5 (4) of the European Climate Law proposal is not possible due to a few reasons.<sup>71</sup> It must be noted that

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<sup>63</sup> European Commission, 7 July 2017, Better Regulation Guidelines, Chapter 3 on impact assessments, p. 15. Retrieved from: <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-impact-assessment.pdf>. [last visited on 18-05-2021]

<sup>64</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020], p. 2.

<sup>65</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020] p. 2.

<sup>66</sup> European Commission, Better Regulation Tool #9. Retrieved from: [https://ec.europa.eu/info/sites/default/files/file\\_import/better-regulation-toolbox-9\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/file_import/better-regulation-toolbox-9_en_0.pdf) [last visited on 16-06-2021]

<sup>67</sup> European Commission, Better regulation “Toolbox” (2017) SWD(2017) 350, p 2. Retrieved from: [better-regulation-toolbox.pdf](https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox.pdf). [last visited on 16-06-2021]

<sup>68</sup> European Commission, Better Regulation Tool #9, p. 49. Retrieved from: [https://ec.europa.eu/info/sites/default/files/file\\_import/better-regulation-toolbox-9\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/file_import/better-regulation-toolbox-9_en_0.pdf) [last visited on 16-06-2021]

<sup>69</sup> This view is confirmed when reading the Better Regulation Communication; the Commission admitted that due to COVID-19, impact assessments were absent and a staff working document had to be published instead, which is exactly what happened with the 2020 Single European Sky proposal. See: European Commission, 29 April 2021, Communication on Better Regulation, section 6.2, p. 14-15. Retrieved from: [https://ec.europa.eu/info/sites/default/files/better\\_regulation\\_joining\\_forces\\_to\\_make\\_better\\_laws\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/better_regulation_joining_forces_to_make_better_laws_en_0.pdf) [last visited on 18-06-2021]

<sup>70</sup> Opinion AG Sharpston, Case C-482/17, Czech Republic v Parliament and Council, §90-100, ECLI:EU:C:2019:321.

<sup>71</sup> However, research by Anne Meuwese could be used for such an analysis. See here for an overview in Google Scholar: [https://scholar.google.nl/citations?user=rqlat\\_sAAAAJ&hl=nl](https://scholar.google.nl/citations?user=rqlat_sAAAAJ&hl=nl) [last visited 18-06-2021]

the Commission has actually only published the *draft* impact assessment from 2013 and an executive summary of the impact assessment.<sup>72</sup> The final version of the impact assessment is not to be found.<sup>73</sup> Another reason is that expert knowledge is needed to present a well-established analysis to test whether the Commission has assessed the consistency of the proposal with the climate-neutrality objective. There are many more relevant elements when testing a draft measure against the climate-neutrality objective, such as what means of judicial actions can be taken (against the Commission) should a draft measure's impact assessment not contain an analysis in accordance with Article 5 (4), presuming that the European Climate Law is applicable to the 2020 Single European Sky proposal. However, such questions and observations do not fit within the scope of this thesis, and therefore it has been decided to delineate to an exploration of what future Commission activities under Article 5 (4) of the European Climate Law proposal would look like.

The wording "Commission assessment" in Article 7 entails not only the Commission's assessment under Article 5 (1), but also under Article 5 (4), as it states that "the Commission shall *assess*". Article 5 (2) therefore seems to not fall under the Commission assessment, as the Article states that "the Commission shall *review*". In simple terms, Article 7 applies to the Commission's assessment of the collective progress made by Member States and the Commission's assessment of any draft measure or legislative proposal. From an explorative point of view, the following paragraph will set out an explorative analysis of the 2020 Single European Sky proposal regarding the criteria set out in Article 7 (1) (b) (c) and (d). The criteria mentioned in Article 7 (1) (a) and (e) will not be considered as Regulation (EU) 2018/1999 governs national progress (not Union measures progress) and the Taxonomy Regulation governs the field of environmentally sustainable investment.<sup>74</sup>

With regard to reports of the European Environmental Agency (EEA), many reports on air pollution caused by the air transport sector can be found.<sup>75</sup> One can argue that, on the one hand, completing the Single European

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<sup>72</sup> European Commission, 11 June 2013, Commission Staff Working Document Executive Summary of the Impact Assessment SWD (2013) 207 final. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0207&from=EN> [last visited on 04-08-2021]; European Commission, 11 June 2013, Commission Staff Working Document Draft Impact Assessment SWD (2013) 206 final. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0206&from=EN> [last visited on 04-08-2021]

<sup>73</sup> This goes against CJEU case law, such as the judgement in C-57/16P, and it is argued by Dr Peeters that the Commission may not keep impact assessments confidential as a general practice. Marjan Peeters, 3 June 2020, Judicial Enforcement of Environmental Democracy: a Critical Analysis of Case Law on Access to Environmental Information in the European Union, Chinese Journal of Environmental Law, 4(1), p. 25. Retrieved from: [https://brill.com/view/journals/cjel/4/1/Article-p13\\_2.xml#FN000052](https://brill.com/view/journals/cjel/4/1/Article-p13_2.xml#FN000052) [last visited on 31-07-2021]; Judgement of the Court (CJEU) of 4 September 2018, Case C-57/16P, ClientEarth v European Commission ECLI:EU:C:2018:660.

<sup>74</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, L 198/13.

<sup>75</sup> Most recent EEA reports:

European Environment Agency, 23 November 2020, Air quality in Europe – 2020 Report. Retrieved from: <https://www.eea.europa.eu/publications/air-quality-in-europe-2020-report> [last visited on 18-06-2021];

Sky will lead to more flights as there will be more space for aircraft and thus more emissions, but on the other hand, completing such a framework also provides for many more opportunities to reduce those emissions, such as more direct flights and fewer delays. Ultimately, the 10% reduction of CO<sub>2</sub> emissions claimed by the Commission makes one wonder whether worrying reports of the European Environment Agency can be balanced out by this foreseen reduction. In fact, it remains unclear how the 2020 Single European Sky proposal aims to achieve this. Moreover, according to the Reporting Regulation, emissions from aviation are not taken into account when Member States calculate the total emissions on a national level.<sup>76</sup> Is the 10% reduction and the EU ETS enough for the aviation sector to contribute to the climate-neutrality objective? Would the 2020 Single European Sky proposal receive a positive outcome of the Commission's assessment under Article 5 (4)? From a legal point of view, it could be argued that one should look into the proposed provisions in the proposal to conduct an assessment. However, to what extent will an assessment even be conducted by the Commission? Would it be sufficient if a given proposal only has an estimated percentage of a reduction of emissions, like the 2020 Single European Sky proposal does?

Legal concerns that arise when looking at Article 7 (1) (c) are to what extent European statistics and data should be used, whether these statistics and data should be related to the subject of a draft measure or proposal, how much time should be spent analysing such information and how much the results from that type of research weigh towards the final assessment. The legal issue with Article 7 (1) (d) is the wording. How to determine which scientific evidence is the best available scientific evidence. Furthermore, there is a legal concern on the fact that the latest report of the IPCC is required. For the 2020 Single European Sky proposal, the latest IPCC report that specifically concerns aviation dates back to the year 1999 (thus; a 22-year-old report).<sup>77</sup> Another

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European Environment Agency, 11 May 2021, Indicator Assessment Greenhouse gas emissions from transport in Europe. Retrieved from: <https://www.eea.europa.eu/data-and-maps/indicators/transport-emissions-of-greenhouse-gases-7/assessment> [last visited on 18-06-2021];

European Environment Agency, 8 June 2021, Member States must cut emissions across all sectors to achieve EU climate targets by 2030. Retrieved from: <https://www.eea.europa.eu/highlights/member-states-must-cut-emissions> [last visited on 18-06-2021];

European Environment Agency, 24 March 2021, Transport and environment report 2020 Train or Plane? Retrieved from: <https://www.eea.europa.eu/publications/transport-and-environment-report-2020> [last visited on 18-06-2021];

European Environment Agency, 10 December 2019, Environment and climate impacts of aviation continue growing. Retrieved from: <https://www.eea.europa.eu/highlights/environment-and-climate-impacts-of> [last visited on 18-06-2021]

European Union Aviation Safety Agency, 2019, European Aviation Environmental Report 2019. Retrieved from: [https://www.easa.europa.eu/eaer/system/files/usr\\_uploaded/219473\\_EASA\\_EAER\\_2019\\_WEB\\_LOW-RES\\_190311.pdf](https://www.easa.europa.eu/eaer/system/files/usr_uploaded/219473_EASA_EAER_2019_WEB_LOW-RES_190311.pdf) [last visited on 18-06-2021]

<sup>76</sup> European Environment Agency, 23 November 2020, Air quality in Europe – 2020 Report, p. 23. Retrieved from: <https://www.eea.europa.eu/publications/air-quality-in-europe-2020-report> [last visited on 18-06-2021]

<sup>77</sup> IPCC, 1999 - J.E.Penner, D.H.Lister, D.J.Griggs, D.J.Dokken, M.McFarland (Eds.), Aviation and the Global Atmosphere Report. Retrieved from: <https://www.ipcc.ch/report/aviation-and-the-global-atmosphere-2/> [last visited on 17-06-2021]

relevant IPCC report would be the Special Report on Global Warming of 1.5 Degrees, as this report was used in the Milieudefensie v Shell case.<sup>78</sup>

The 2020 Single European Sky proposal is an example of how conducting such an assessment proves to be difficult; where does one stop when looking for the best available scientific evidence, reports, data and statistics? How will the Commission assess its own proposals and ensure that it is consistent with the climate-neutrality objective? Should a proposal not be accompanied by a (new) impact assessment, like is the case for the 2020 Single European Sky proposal, will there not be an assessment on the consistency with the climate-neutrality objective attached to the proposal? Does this mean that for proposals similar to the 2020 Single European Sky proposal, there will be no monitoring on the consistency with the climate-neutrality objective? Will Article 5 (4) create an obligation to execute impact assessments for all draft measures and legislative proposals?

One can only imagine how the Commission will conduct an analysis for each and every draft Union measure or legislative proposal. Once more, it raises transparency concerns from the outset. It will therefore be interesting to see in the future how the assessments under the European Climate Law will play out. Without any other clarifications, it remains legally uncertain how all draft measures and legislative proposal will be tested on consistency with the climate-neutrality objective. The so-called European Scientific Advisory Board on Climate Change might play an important role in safeguarding transparency of the proposed assessments and shall serve as a reference point for scientific knowledge on climate change.<sup>79</sup>

## Interim Conclusion

No impact assessment was conducted for the 2020 Single European Sky proposal. The Commission is not in line with Article 5 (4) of the European Climate Law proposal as there was no assessment conducted to review the consistency of the 2020 Single European Sky proposal with the climate-neutrality objective. There was an

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<sup>78</sup> IPCC, 2018 - Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.), Global Warming of 1.5°C. An IPCC Special Report. [Retrieved from: [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15\\_Full\\_Report\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf) [last visited on 31-07-2021]; Judgement of the Rechtbank Den Haag of 26 May 2021, Case C/09/571932 / HA ZA 19-379, Milieudefensie v Shell, ECLI:NL:RBDHA:2021:5339

<sup>79</sup> Council of the European Union, 5 May 2021, Outcome of proceedings (8440/21) Interinstitutional File 2020/0036 (COD), page 29-31. Retrieved from: <https://data.consilium.europa.eu/doc/document/ST-8440-2021-INIT/en/pdf> [last visited on 19-06-2021]

Furthermore, A simple control +f search in the 2020 Single European Sky proposal on the following words delivered zero (0) results; "climate", "climate-neutrality objective", "climate-neutral", etc. There is no single Article or provision about reaching climate-neutrality in the 2020 Single European Sky proposal. The objective itself is briefly mentioned in the explanatory memorandum, see Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020] p. 2.

impact assessment conducted for the 2013 Single European Sky proposal, however, only the draft version and an executive summary are available of this impact assessment. It remains unclear how the Commission's assessment of consistency with the climate-neutrality objective under Article 5 (4) of the European Climate proposal will be conducted in practice and how the different sources listed in Article 7 of the European Climate Law proposal will be used.

## Chapter 3 Integrating Environmental Protection Requirements

This chapter attempts to answer the second sub question; how has the European Commission observed Article 11 TFEU and the Green Oath in the 2020 Single European Sky proposal, and have these features been implemented ambitiously? An overview is given of scholarly interpretations of Article 11 TFEU and the Green Oath in section one and two. In the third section, the provisions of the 2020 Single European Sky proposal are taken as a case study. Here, an explorative analysis is conducted on whether the provisions integrate requirements under Article 11 TFEU and under the Green Oath.

### 3.1 Article 11 TFEU: Interpretation, Application & Views

As one of the most fundamentally important provisions in EU Treaty law<sup>80</sup>, Article 11 TFEU has been described by legal scholars as the environmental integration principle (EIP) or environmental policy integration (EPI) and provides that “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”.<sup>81</sup> It is argued that it puts an obligation on the EU legislator to ensure, indirectly, that the Member States and their authorities cannot disregard environmental impacts and concerns *entirely*.<sup>82</sup> Furthermore, Article 11 TFEU also implies that it is an obligation for the EU to use environmentally friendly frameworks in each policy area.<sup>83</sup> Often, there are competing interests, e.g. economic objectives versus protecting the environment. In this case, it is argued that a balancing test should be executed, in which the least restrictive environmental measures posed on the economic interest should be ensured, and vice versa.<sup>84</sup> In the first Environmental Action Programme of the EU in 1973<sup>85</sup>, it was already declared that the meaning of effective environmental protection consists of taking into consideration environmental consequences that follow from “all technical planning and decision-making processes at EU level”.

Article 11 TFEU is now also closely linked to the concept of sustainable development, another term that raises concerns of clarity.<sup>86</sup> Furthermore, environmental policy integration has been considered as a normative

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<sup>80</sup> JH Jans and HHB Vedder, *European Environmental Law* (3rd edn., Groningen: Europa Law Publishing, 2012) 16–23. Retrieved from: <https://research.rug.nl/en/publications/european-environmental-law> [last visited on 16-04-2021]

<sup>81</sup> *Ibidem*.

<sup>82</sup> *Ibidem*.

<sup>83</sup> *Ibidem*.

<sup>84</sup> Anja Wiesbrock, 'An Obligation for Sustainable Procurement? Gauging the Potential Impact of Article 11 TFEU on Public Contracting in the EU', (2013), 40, *Legal Issues of Economic Integration*, Issue 2, pp. 105-132, Retrieved from: <https://kluwerlawonline.com/journalArticle/Legal+Issues+of+Economic+Integration/40.2/LEIE2013007> [last visited on 16-04-2021]

<sup>85</sup> 1st EU Environment Action Programme, 1973 (archived), OJ, 1973, p 6.

<sup>86</sup> Lenschow, Andrea. (2002). *Greening the European Union: an introduction. Environmental Policy Integration: Greening Sectoral Policies in Europe*. p 4. Retrieved from:

principle in the EU acquis, although the principle does lack strength and is at risk of undermining its legitimacy in policy areas that regulate sectors.<sup>87</sup> Environmental policy integration was first actually seen by the EU as a mere procedural principle and a political aspiration. While sustainable development means the mutual compatibility of economic growth, social development and environmental protection in one objective altogether, environmental protection under Article 11 TFEU actually ensures that the tools and resources for economic activities and existence of human life on earth are not destroyed in the first place.<sup>88</sup> Therefore, in order to achieve the concept of sustainable development, it is argued that environmental factors should be taken into account in Union policies first, before truly sustainable developments can be achieved by those policies in the long term.<sup>89</sup>

The first Environmental Action Programme identified the environmental protection principle as an integrated approach. The third action programme in 1983, ten years later, made the principle more concrete, stating that; “the Community should seek to integrate concerns for the environment into the policy and development of certain economic activities as much as possible and thus promote the creation of an overall strategy making environmental policy part of economic and social development. This should result in a greater awareness of the environmental dimension, notably in the fields of agriculture (including forestry and fisheries), energy, industry, *transport* and tourism.”<sup>90</sup> This suggests that the wording “requirements” in the text of Article 11 TFEU should not be read in a very strict sense.

Another interesting legal standpoint on Article 11 TFEU, is that this Article is close to conferring an environmental right in a constitutional setting but is not a self-standing right entirely.<sup>91</sup> What is meant by this is that an individual cannot, solely based on Article 11 TFEU, advance a claim of infringement of Article 11 TFEU. The standing is dependent on other rights first.<sup>92</sup> Case law of the CJEU demonstrates that measures can be annulled where there is an infringement of Article 11 TFEU.

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[https://www.researchgate.net/publication/305113709\\_Greening\\_the\\_European\\_Union\\_an\\_introduction](https://www.researchgate.net/publication/305113709_Greening_the_European_Union_an_introduction) [last visited on 16-04-2021]

<sup>87</sup> Ibidem.

<sup>88</sup> Lenschow, Andrea. (2002). Greening the European Union: an introduction. Environmental Policy Integration: Greening Sectoral Policies in Europe. p 5. Retrieved from:

[https://www.researchgate.net/publication/305113709\\_Greening\\_the\\_European\\_Union\\_an\\_introduction](https://www.researchgate.net/publication/305113709_Greening_the_European_Union_an_introduction) [last visited on 16-04-2021]

<sup>89</sup> Ibid, p. 7.

<sup>90</sup> 3<sup>rd</sup> EU Environment Action Programme, 1983 (archived), OJ, 1983, Section I, 8

<sup>91</sup> Nowag, Julian, Article 11 TFEU and Environmental Rights (January 15, 2018). Forthcoming, Draft Chapter Sanja Bogojević and Rosemary Rayfuse, Environmental Rights in Europe and Beyond (Hart Publishing, 2018), EU Law WP 1/2018, p 2. Retrieved from: SSRN: <https://ssrn.com/abstract=3217194> or <http://dx.doi.org/10.2139/ssrn.3217194> [last visited on 16-04-2021]

<sup>92</sup> Ibid, p. 17.

Firstly, AG Jacobs in the case *PreussenElektra*<sup>93</sup> established that Article 11 TFEU imposes legal obligations and is more than just a programmatic Article.<sup>94</sup> Secondly, in the case *Safety Hi-Tech*<sup>95</sup>, the Court examined the possible infringement of Article 11 TFEU regarding a regulation prohibiting the use of hydro chlorofluorocarbons (HCFCs). The aim of this regulation was to protect the ozone layer. The issue at hand was whether the Council, who adopted the regulation, infringed Article 11 TFEU because the atmospheric lifetime of the substance HCFCs was not assessed nor was the potential global warming effect of the substance considered. The Court ruled that there was no infringement as the Council did not act beyond its discretion solely for the reason that they only took into account the depletion of the ozone layer, and not any other environmental factors. This demonstrates that measures are indeed liable for annulment, though it seems unlikely that an annulment would actually succeed due to the wide discretion of EU institutions regarding the balancing of environmental protection requirements with other (often economic) Union objectives.<sup>96</sup> This stipulates the fact that until the Courts strike down a measure based on an infringement of the integration clause in Article 11 TFEU, the EU institutions might never take seriously the obligations imposed.<sup>97</sup> To bring such cases in front of the Court in Luxembourg (as an unprivileged applicant), the Plaumann criteria need to be fulfilled, to file an application for annulment without further limitations.<sup>98</sup> It could even be argued that the environmental protection requirements enshrined in Article 11 TFEU have been greatly ignored by the EU institutions, Member States, and the Courts.<sup>99</sup> The CJEU has only in very general terms stressed the rule of environmental integration in other policies and has refused to establish detailed implications of such environmental protection requirements on the EU and Member States.<sup>100</sup> When looking at the scope of the EU's

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<sup>93</sup> Judgement of the Court (CJEU) of 13 March 2001, Case C-379/98, *PreussenElektra AG v Schleswag AG*, ECLI:EU:C:2001:160.

<sup>94</sup> Opinion AG Jacobs Case C-379/98 *PreussenElektra v Schleswag* (2001) ECR I-2099 231; see also Opinion AG Mengozzi Case C-487/06P *British Aggregates v Commission* (2008) ECR I-10515 102.

<sup>95</sup> Judgement of the Court (CJEU) of 14 July 1998, Case C- 284/95, *Safety Hi-Tech Srl v S. & T. Srl.*, ECLI:EU:C:1998:352.

<sup>96</sup> Nowag, Julian, *Article 11 TFEU and Environmental Rights* (January 15, 2018). Forthcoming, Draft Chapter Sanja Bogojević and Rosemary Rayfuse, *Environmental Rights in Europe and Beyond* (Hart Publishing, 2018), EU Law WP 1/2018, p 8. Retrieved from: SSRN: <https://ssrn.com/abstract=3217194> or <http://dx.doi.org/10.2139/ssrn.3217194> [last visited on 16-04-2021]

<sup>97</sup> L. Krämer, *EU Environmental Law*, 1 January 2012, (Sweet & Maxwell/Thomson Reuters, 2012), p. 11. Retrieved from: <https://www.amazon.com/Eu-Environmental-Law-Ludwig-Kramer/dp/0414023315> [last visited on 16-04-2021]

<sup>98</sup> However, the standing requirements change according to the type of action that is brought before the Court. In case of regulatory acts without implementing measures, there are possibilities to defend public interests without individual concern. Judgement of the Court (CJEU) of 15 July 1963, Case 25-62, *Plaumann v Commission*, ECLI:EU:C:1963:17.

<sup>99</sup> Wiesbrock, Anja and Sjøfjell, Beate, *The Importance of Article 11 TFEU for Regulating Business in the EU: Securing the Very Basis of Our Existence* (November 24, 2014). Retrieved from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2529955](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2529955) [last visited on 16-04-2021]; Beate Sjøfjell and Anja Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously*, Routledge, 2015, University of Oslo Faculty of Law Research Paper No. 2014-37, Nordic & European Company Law Working Paper No. 14-07. Retrieved from: SSRN: <https://ssrn.com/abstract=2529955>. [last visited on 16-04-2021]

<sup>100</sup> See e.g. Judgement of the Court (CJEU) of 29 March 1990, Case C-62/88, *Hellenic Republic v Council of the European Communities (Chernobyl I)*, ECLI:EU:C:1990:153 and Judgement of the Court (CJEU) of 13 March 2001, Case C-379/98, *PreussenElektra AG v Schleswag AG*, ECLI:EU:C:2001:160.



competences in the environmental field, it can be argued that there is a difference between Union policies which main aim is not the environment, and thus Article 11 TFEU should be taken into account, and policy established through the environmental competence under Article 191 TFEU.<sup>101</sup> The environment is mentioned in other Treaty Articles as well, for example Article 114 TFEU states that “the Commission will take as a base a high level of environmental protection”.

To summarise, Article 11 TFEU means that the interests of climate and the environment should be taken account of in other EU policy areas, even if there are no specific climate or environment related legislative acts, although there is a legally binding climate-neutrality objective. A link could be made, therefore, between Article 11 TFEU and Article 5 (4) of the European Climate Law proposal. If one takes the case study of the 2020 Single European Sky proposal, for which no specific (direct) environmental requirements exist (it just so happens to reduce 10% of emissions of the aviation industry in the EU), it can be argued that in order to be in compliance with Article 11 TFEU, environmental protection requirements shall still have to be adhered to.<sup>102</sup> It remains unclear whether such requirements constitute requirements already laid down in EU environmental law established under Article 191 TFEU, or whether such requirements constitute requirements separate from already existing requirements under Article 191 TFEU. The latter suggests that there is much room for broad environmental protection requirements in other domains that could go beyond existing requirements under EU environmental law when new measures or legislative proposals are drafted (for which the European Climate Law proposal lays down a more concrete framework to accompany the requirements under Article 11 TFEU).

### 3.2 Green Oath: Interpretation, Application & Views

Under section 2.2. of the European Green Deal Communication on the mainstreaming of sustainability in all EU policies, a Green Oath is introduced by the Commission.<sup>103</sup> The basis for this oath is the Commission’s Better Regulation Tools and it may thus be assumed that the Green Oath will become part of the Better Regulation

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<sup>101</sup> Proelss A. (2016) The Scope of the EU’s Competences on the Field of the Environment. In: Nakanishi Y. (eds) Contemporary Issues in Environmental Law. Environmental Protection in the European Union, vol 5. Springer, Tokyo. Retrieved from: [https://doi.org/10.1007/978-4-431-55435-6\\_2](https://doi.org/10.1007/978-4-431-55435-6_2). [last visited on 15-04-2021]

<sup>102</sup> Krämer, L, ‘Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies’ in ‘European perspectives on environmental law and governance’ Abingdon, Oxon UK ; New York : Routledge, 2013. Retrieved from: <https://www.taylorfrancis.com/chapters/edit/10.4324/9780203096567-12/giving-voice-environment-challenging-practice-integrating-environmental-requirements-eu-policies-ludwig-kr%C3%A4mer> [last visited on 16-04-2021]; Sjøfjell, Beate, ‘The Legal Significance of Article 11 TFEU for EU Institutions and Member States’ (November 24, 2014), in ‘The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously’, Beate Sjøfjell and Anja Wiesbrock (eds), Routledge 2015, pp. 51-72. Retrieved from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2530006](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530006) [last visited on 16-04-2021]

<sup>103</sup> European Commission, 11 December 2019, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM(2019) 640, section 2.2. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN> [last visited on 04-02-2021]

Toolbox.<sup>104</sup> An already important aspect of this is the fact that the Better Regulation tools do not have to be complied with, they are advisory in nature and they serve as extra guidance in addition to the Better Regulation guidelines.<sup>105</sup> Of course, the Green Oath has not been added to this toolbox yet, but it will be interesting to observe, whether the Green Oath-tool will become mandatory in application. In the specific section where the Green Oath is introduced (2.2.5.), it states that the objective of the Green Oath is to ‘do no harm’. While it is not explicitly explained in that section what it means to ‘do no harm’, the oath is introduced as a measure to help the EU achieve a just transition to a sustainable future. Furthermore, the last paragraph stipulates that all initiatives introduced under the European Green Deal should achieve the objectives “in the most effective and least burdensome way” and all other Union initiatives should live up to a Green Oath to ‘do no harm’. This includes the Single European Sky proposal, as it was introduced as a Green Deal initiative. This section also states that in the explanatory memoranda of *all* legislative proposals and delegated acts must include a separate section which explains how the specific proposal or act upholds this *principle*.

Questions have been raised already regarding how ‘harm’ will exactly be measured, how to deal with *potential* harms or hazards, will there be exceptions for certain initiatives and to what extent will or should the Council and European Parliament be involved in ensuring the Green Oath.<sup>106</sup> To add more confusion to the topic, the Taxonomy Regulation also contains a principle or test to ‘do no significant harm’, which is supposedly a different principle than the Green Oath.<sup>107</sup> Furthermore, it is unclear whether the Green Oath relies on any EU primary or secondary law bases, as the one mentioned in the Taxonomy Regulation appears to have a different objective.<sup>108</sup> The Green Oath has also been defined by scholars as a new policy principle.<sup>109</sup> It has been described as an ambiguous and rather programmatic principle. The scope and meaning will only become clear as soon as legislative proposals’ explanatory memoranda start adding a specific section on upholding the Green Oath. It also seems to be more of a policy commitment to do no harm to the environment by means of any Union action, and immediately the doubts rise on the enforceability of such a concept.<sup>110</sup> This leads back to similar discussions

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<sup>104</sup> Ibidem.

<sup>105</sup> European Commission, Better regulation “Toolbox” (2017) SWD(2017) 350, p 2. Retrieved from: [better-regulation-toolbox.pdf](#). [last visited on 16-04-2021]

<sup>106</sup> Peter Holdorf, FleishmanHillard, October 26 2020, What’s going to be in the Better Regulation Communication? Retrieved from: <https://fleishmanhillard.eu/2020/10/whats-going-to-be-in-the-better-regulationcommunication/#:~:text=When%20Frans%20Timmermans%20presented%20the,transition%20towards%20a%20sustainable%20future%E2%80%9D>. [last visited on 18-05-2021]

<sup>107</sup> Frédéric Simon, Euractiv, May 27 2020, ‘Do no harm’: EU recovery fund has green strings attached. Retrieved from: <https://www.euractiv.com/section/energy-environment/news/do-no-harm-eu-recovery-fund-has-green-strings-attached/>. [last visited on 18-05-2021]

<sup>108</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, L 198/13, Article 6.

<sup>109</sup> Sikora, A. European Green Deal – legal and financial challenges of the climate change. ERA Forum 21, 681–697 (2021), p 689. Retrieved from: <https://doi.org/10.1007/s12027-020-00637-3>. [last visited on 18-05-2021]

<sup>110</sup> Ibid, p. 690.

on Article 11 TFEU as set out in the previous section. Here, a link could also be seen with the principle of sustainable development which is codified in Article 3 (3) TEU. The relationship with Article 11 TFEU and Article 3 (3) TEU is however not mentioned in the European Green Deal Communication.

Some argue that the Green Oath could have been given a constitutional dimension of environmental protection in the EU legal order, giving it more meaning at national level as well.<sup>111</sup> While the Commission has published a 12-pager on technical guidance on the application of ‘do no significant harm’ for the Recovery and Resilience Facility Regulation<sup>112</sup>, a technical guidance on the Green Oath to ‘do no harm’ is nowhere to be seen. Another interesting finding is that the European Parliament welcomed the Green Oath of doing no harm through its motion for a resolution on the European Green Deal in January 2020.<sup>113</sup>

Furthermore, the Green Oath is, just like Article 11 TFEU, connected to the European Climate Law proposal. The explanatory memorandum of the European Climate Law proposal mentions that the Commission’s objective is that all EU initiatives live up to a Green Oath to do no harm.<sup>114</sup> The oath seems to be linked to the improvement of the Better Regulation Guidelines and Tools (more specifically linked to the UN sustainable development goals and the 2030 sustainable development agenda)<sup>115</sup>, and with the recommendations that the Commission will issue to Member States to address specific policy developments that are not consistent with the trajectory towards climate-neutrality.<sup>116</sup> It is interesting to note that the Green Oath to do no harm can also be found in the proposal for the 8<sup>th</sup> Environment Action Programme, where it is stipulated that the aim is to, in an integrated way, measure progress towards the Union’s objectives in the field of environment and climate and subsequently increase, at all levels of governance, coherence between actions and measures.<sup>117</sup> In the context of the Taxonomy Regulation and the Recovery and Resilience Facility, it is referred to the principle “to

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<sup>111</sup> Ibidem.

<sup>112</sup> Commission Notice, 12 February 2021, Technical guidance on the application of “do no significant harm” under the Recovery and Resilience Facility Regulation, C(2021) 1054 final. Retrieved from: [https://ec.europa.eu/info/sites/info/files/c2021\\_1054\\_en.pdf](https://ec.europa.eu/info/sites/info/files/c2021_1054_en.pdf). [last visited on 15-05-2021]

<sup>113</sup> Motion for a Resolution to wind up the debate on the statement by the Commission pursuant to Rule 132(2) of the Rules of Procedure on the European Green Deal (2019/2956(RSP)), published on 10-01-2020. Paragraph 81. Retrieved from: [https://www.europarl.europa.eu/doceo/document/B-9-2020-0044\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2020-0044_EN.html) [last visited on 15-04-2021]

<sup>114</sup> Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final, published on 04-03-2020, p 4.

<sup>115</sup> European Commission, 29 April 2021, Communication on Better Regulation, section 6.2, p. 1, 15. Retrieved from: [https://ec.europa.eu/info/sites/default/files/better\\_regulation\\_joining\\_forces\\_to\\_make\\_better\\_laws\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/better_regulation_joining_forces_to_make_better_laws_en_0.pdf) [last visited on 18-06-2021]

<sup>116</sup> Proposal for a Regulation of the European Parliament and the Council establishing the framework for achieving climate-neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM/2020/80 final, published on 04-03-2020, p 4.

<sup>117</sup> Delphine Misonne, Marjan Peeters, The European Union and its rule creating force at the European continent for moving to climate-neutrality in 2050, DRAFT PAPER dd 27 January 2021 p. 18; European Commission, 14 October 2020, Proposal for a 8th General Union Environment Action Programme (COM/2020/652) final, p. 3. Retrieved from: <https://ec.europa.eu/environment/pdf/8EAP/2020/10/8EAP-draft.pdf> [last visited on 20-06-2021]

do no significant harm”, meaning to not significantly harm the environment.<sup>118</sup> It is argued that this is already a weakening of the Green Oath.<sup>119</sup> However, as was mentioned above, one can argue that this principle to “do no significant harm” merely relates to ensuring the sustainability of investments and reforms, as the principle was introduced under the Taxonomy Regulation.<sup>120</sup> This suggests that the principle “to do no significant harm” and the Green Oath are two different concepts with different aims, which increases the legal unclarity of the two concepts.

### 3.3 Analysis: Assessment of Integration of Article 11 TFEU and the Green Oath

While there is an overflow of scholarly literature on Article 11 TFEU but a deficiency in scholarly literature on the Green Oath, it is now interesting to see whether one can see the previously examined views on the requirements under Article 11 TFEU and the Green Oath back in the case study of this thesis, the 2020 Single European Sky proposal. As there is little to no guidance available through literature from scholars on how to approach such questions, an explorative research approach is used. For this analysis, it is of importance to examine in an explorative way the content (the proposed Articles) of the 2020 Single European Sky proposal. On the basis of the content of the proposal, it will be explored whether the Commission took into account the requirements under Article 11 TFEU and the Green Oath to do no harm.

The 2020 Single European Sky proposal<sup>121</sup> consists of six chapters; the general provisions, national supervisory authorities, service provision, network management, airspace, interoperability and technological innovation and final provisions. In the recitals more clarity can be found to understand the environmental dimension of the proposal, which are briefly stated in the footnote.<sup>122</sup> The elements of the proposal that focus most on the environment and elements that could be of importance for protecting the environment can be found in the chapters on service provision, network management and final provisions. A preliminary finding is that in the explanatory memorandum of the proposal, it is not explained how the Green Oath to do no harm is upheld, while the Commission requires itself to do so according to section 2.2.5 of the Green Deal Communication, which was published in December 2019 (10 months before the initiation of the 2020 Single European Sky proposal). The Regulatory Scrutiny Board might send the Commission back to the drawing board on this

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<sup>118</sup> European Commission, 18 December 2020, Commission welcomes political agreement on Recovery and Resilience Facility, press release. Retrieved from: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2397](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2397) [last visited on 19-06-2021]

<sup>119</sup> Delphine Misonne, Marjan Peeters, The European Union and its rule creating force at the European continent for moving to climate-neutrality in 2050, DRAFT PAPER dd 27 January 2021, p. 18.

<sup>120</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, L 198/13, Article 6.

<sup>121</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020] p. 4.

<sup>122</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020], Recitals 7, 20, 27, 28, 29, 30.

proposal as the Board recently did this when a draft act did not clarify whether the proposal was aligned with the Green Oath (*mutatis mutandis*).<sup>123</sup>

It must be noted that Articles 10 to 18 govern the performance schemes, including so-called performance plans. Article 2 (45) states that a performance plan aims at improving the performance of network functions and air navigation services in the Single European Sky.<sup>124</sup> Such a plan is adopted by air traffic service providers and the Network Manager.<sup>125</sup> These plans are created on a national level, for each air traffic service provider, and together these plans form the performance scheme. In Article 10 (2) it is set out that this performance scheme shall be implemented over different reference periods, for which the minimum amount of time is two years, and the maximum amount is five years.<sup>126</sup> The following paragraphs will provide an overview of the most important findings.

Firstly, the performance scheme consists of performance targets, which are Union-wide, in the key performance areas of the *environment*, capacity and cost-efficiency, which shall be determined for each reference period.<sup>127</sup> A very important aspect of these Union-wide targets is that they are binding in the key performance areas (thus the environment) and they are included in the national performance plans for each reference period.<sup>128</sup> The performance scheme as a whole is subject to review, monitoring and benchmarking of the performance in the key performance areas, including the environment.<sup>129</sup> Another interesting finding is that the performance scheme and plans are based on multiple criteria.<sup>130</sup> What is relevant about those criteria is that there shall be key performance indicators for setting targets and indicators for monitoring the performance in the key performance area of the environment (amongst others).<sup>131</sup> Moreover, the performance scheme will also contain so-called incentive schemes which sets out financial disincentives in case a certain air traffic service provider is not in compliance with binding performance targets during a certain reference period that is applicable.<sup>132</sup> This stipulates that if an air traffic service provider violates a binding performance target that concerns the environment, the service provider could be disincentivised possibly through financial burdens, e.g. fines.

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<sup>123</sup> Frédéric Simon, Euractiv, 11 May 2021, Brussels rebuked over ‘confusing’ draft EU bioenergy rules. Retrieved from: <https://www.euractiv.com/section/climate-environment/news/brussels-rebuked-over-confusing-draft-eu-bioenergy-rules/> [last visited on 19-06-2021]

<sup>124</sup> *Ibid*, p. 20.

<sup>125</sup> *Ibid*, p. 20.

<sup>126</sup> *Ibid*, p. 28

<sup>127</sup> *Ibid*, Article 10 (2) (a), p. 28.

<sup>128</sup> *Ibid*, Article 10 (2) (b), p. 28.

<sup>129</sup> *Ibid*, Article 10 (2) (c), p. 28.

<sup>130</sup> *Ibid*, Article 10 (3) (a-l), p. 28-29.

<sup>131</sup> *Ibid*, Article 10 (3) (b and c), p. 29

<sup>132</sup> *Ibid*, Article 10 (3) (h), p. 29.

Secondly, the procedure for the Commission to adopt the Union-wide performance targets in the key performance area of the environment (amongst others) can be found in Article 37 (2) and in Article 11 (2) (3).<sup>133</sup> One could already guess which procedure the Commission should be in accordance with; the procedure under Article 4 of Regulation 182/2011, which is the advisory procedure of the Comitology Regulation. The Commission may revise the performance targets, should the targets no longer be adequate in a certain reference period.<sup>134</sup> If the situation calls for it (e.g., a sharp increase in CO<sub>2</sub> emissions in a given year from the aviation sector), the Commission could revise the performance targets. The procedure for the implementation of the performance scheme can be found in Article 18, which states that the requirements and procedures for the implementation of the performance scheme shall be set out in an implementing act which should be adopted according to the procedure in Article 4 of Regulation 182/2011.<sup>135</sup>

In the third place, Article 24 of the proposal provides for the possibility to review the compliance of air traffic service providers and Member States with the performance scheme.<sup>136</sup> The Commission shall do such a review regularly, focusing especially on the provisions that govern the procedures and requirements on the performance schemes, plans and Union-wide targets.<sup>137</sup> One or more Member States and/or national supervisory authorities may request investigations for allegations of non-compliance.<sup>138</sup> The Commission may send an opinion to a Member State and/or air traffic service provider, stating whether they are complying.<sup>139</sup> Article 24 can be seen as a tool for the enforcement of the performance scheme under the 2020 Single European Sky proposal. Another tool for the enforcement of the proposed regulation can be found in Article 42 on penalties.<sup>140</sup> This Article requires the Member States to lay down rules on penalties specifically related to infringements of the regulation and the implementing and delegated acts that will be adopted in the future.<sup>141</sup> These are in particular infringements of the regulation by air navigation service providers, airspace users, airport operators, etc.<sup>142</sup> A reassuring finding is that the Commission is of the opinion that the Union-wide performance targets should be subject to judicial review by appeal bodies and the Court of Justice.<sup>143</sup> This aligns with the view of a recent agreement of the European Parliament on the EU's international obligations under the Aarhus Convention, stating that "any administrative act that may contravene EU environmental law may be

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<sup>133</sup> Ibid, Article 11 (1), p. 29.

<sup>134</sup> Ibid, Article 17 (1), p. 42.

<sup>135</sup> Ibid, Article 18, p. 43.

<sup>136</sup> Ibid, p. 30.

<sup>137</sup> Ibid, Article 24 (1), p. 30.

<sup>138</sup> Ibid, Article 24 (2), p. 30.

<sup>139</sup> Ibid, Article 24 (3), p. 31.

<sup>140</sup> Ibid, Article 42, p. 13.

<sup>141</sup> Ibidem

<sup>142</sup> Ibidem

<sup>143</sup> Ibid, recital 25. The standing remains an issue, but that will not be discussed in this thesis.

subject to review regardless of its policy objectives.”<sup>144</sup> This implies that the 2020 Single European Sky proposal could be tested against the Green Oath and the climate-neutrality objective, and maybe even Article 11 TFEU.

Finally, the most important finding is the exact date from which the above-mentioned Articles (10-24) will be applicable; **1 July 2023**.<sup>145</sup> In practice, this means for the protection of the environment that the binding Union-wide performance targets created for the key performance area the environment will only apply in two years’ time but stakeholders have even requested a transitional period of 48 months.<sup>146</sup> The drafting of Article 46 (2) also explains why only in the year 2025, the first major reduction in emissions will be foreseen.<sup>147</sup>

### Interim Conclusion

The Commission has integrated in the 2020 Single European Sky proposal several opportunities to observe Article 11 TFEU and the Green Oath in the future. Namely, through the performance scheme with accompanying binding performance targets in the key area the environment. Furthermore, the proposal provides for the possibility to review the compliance of air traffic service providers and Member States with the performance scheme. The Articles governing these obligations, however, will only become applicable from 1 July 2023, and not from the date of entry into force of the regulation. The question whether these features are ambitiously implemented can only be answered once the first performance scheme is released.

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<sup>144</sup> European Parliament, 20 May 2021, Aarhus Convention: Parliament supports the EUs full compliance, press release. Retrieved from: <https://www.europarl.europa.eu/news/en/press-room/20210517IPR04134/aarhus-convention-parliament-supports-the-eus-full-compliance> [last visited on 19-06-2021]

<sup>145</sup> Amended proposal for a Regulation of the European Parliament and of the Council on the implementation of the Single European Sky (recast), COM (2020) 579 final [published on 22 September 2020], Article 46 (2), p. 48.

<sup>146</sup> *Ibid*, p. 5.

<sup>147</sup> *Ibid*, p. 2.

## Chapter 4 Conclusion

The European Commission claims that the 2020 Single European Sky proposal will contribute to reaching the climate-neutrality objective because a 10% reduction in CO<sub>2</sub> emissions from the aviation industry is foreseen starting from 2025. This claim raises legal questions and this thesis therefore aimed to examine whether the 2020 Single European Sky proposal was drafted by the European Commission in accordance with EU environmental law obligations, notably the obligations under the European Climate Law proposal and the requirements under Article 11 TFEU and the Green Oath. This brings to mind the research question that this thesis set out to explore; **to what extent has the European Commission integrated environmental considerations in the 2020 Single European Sky proposal, and is this in line with EU environmental law obligations?**

### 4.1 Discussion of Results & Answers to Research Questions

With regard to the first sub-question, one can establish that the Commission did not follow its own proposed procedures under the European Climate Law proposal when they initiated the 2020 Single European Sky proposal. According to Article 5 (4) of the European Climate Law proposal, the Commission shall conduct an assessment of a proposal's consistency with the climate-neutrality objective. It can be stated with certainty that the Commission did not conduct such an assessment for the 2020 Single European Sky proposal. One may argue that the European Climate Law proposal was not yet adopted when the Commission initiated the 2020 Single European Sky proposal, and that the Commission was therefore not yet bound by this obligation. However, sooner or later, the European Climate Law proposal will be adopted. The Commission would be inconsistent to not follow its own proposed procedures (moreover, there were six months in between the two proposals; the two responsible DGs could have coordinated their planned proposals). A second striking finding is that there was no impact assessment conducted for the 2020 Single European Sky proposal, even though according to the Better Regulation Guidelines and Tools, an impact assessment was necessary (the Commission even admitted this for several proposals initiated during 2020 and used the lack of time due to COVID-19 to justify it). In 2013, an impact assessment was executed for the 2013 Single European Sky proposal (not adopted); however, the official version is to this day not publicly accessible. Furthermore, difficulty arises when an attempt is made to explore what the Commission's assessment of the consistency of the proposal with the climate-neutrality objective would entail and how it would be conducted. This raises concerns regarding transparency and feasibility of the Commission's plan to assess any draft measure or legislative proposal with the consistency of the climate-neutrality objective. Therefore, it remains to be seen how the Commission will enact its plans under the European Climate Law and how this will affect the drafting of any other measures and legislative proposals.



Regarding the second sub-question, one can establish that the 2020 Single European Sky proposal contains several elements or rather opportunities through which Article 11 TFEU and the Green Oath could be observed. Firstly, it can be stated that the performance scheme of the proposal provides for opportunities to protect the environment and to do no harm to the environment, because the Commission is obligated to adopt binding Union-wide performance targets in the so-called key performance area of the environment. Furthermore, the targets may be adjusted or reviewed during the reference periods, should they no longer adequately reflect the current situation. It can be argued that if not enough emissions from aviation are reduced, the Commission could review the targets to make them more stringent for example. One should, however, not be too optimistic as the proposal only establishes *procedures* on the setting of such targets, plans and schemes in the area of the environment (and others), and does not contain the scheme nor targets themselves. Fortunately, the performance plans in the performance scheme are not only applicable to the Member States, but also to specific relevant actors that participate in the Single European Sky, namely air traffic service providers, and categories falling under those providers, such as air navigation service providers, terminal service providers, etc. This shows that the Commission is rather serious about making sure that the Union-wide performance targets will be upheld. Moreover, the proposal also provides for opportunities to enforce the regulation in the future. The Commission shall review regularly if air traffic service providers are complying with the performance scheme (and thus also the performance targets on the environment), it may send an opinion to Member States or the service providers, and the Member States must adopt rules on penalties, should the obligations in the regulation be infringed. While these enforcement tools are meant to govern infringements of the regulation itself, the Commission's actions under the regulation (adoption of implementing and delegated acts) could be subject to judicial review by the Court of Justice (inserted in the recitals). So, a legal person with standing, technically, can bring judicial actions against the Commission if the Union-wide binding performance targets in the area of the environment do not comply with EU environmental law obligations, e.g. Article 11 TFEU and the Green Oath (although there are strict standing rules to be adhered to). To conclude, while the findings for the second sub-question may show a relatively positive and ambitious image of the Commission observing requirements under Article 11 TFEU and the Green Oath in its drafting of the proposal, it must be kept in mind that the performance scheme, plans, Union-wide targets and the possibility of review of compliance with the provisions, will only become applicable from 1 July 2023.

As can be observed, there is no clear-cut answer to the question to what extent the European Commission has integrated environmental considerations in the 2020 Single European Sky proposal and whether this is in line with EU environmental law obligations. To conclude, it can be said that the Commission did integrate environmental considerations in the proposal to the extent that the *claim* of a reduction of 10% in CO<sub>2</sub> emissions can be understood. However, this is not fully in line with EU environmental law obligations as 1) the

Commission did not act in line with Article 5 (4) of the European Climate Law proposal, 2) it is unclear as to how the environment is protected as is required under Article 11 TFEU, and 3) it is unclear how the proposal does not harm the environment as is required under the Green Oath to do no harm. Conclusion points 2) and 3) could change as soon as the Commission has adopted the first performance scheme and the Union-wide binding targets.

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