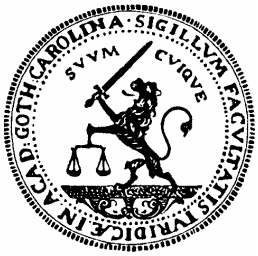

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The EC Integration Principle and Competition.

A genuine change in policy setting and implementation?

Master thesis
10 points

Katarina Olsson

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Contents

Summary

A common feature within the European Union is that the responsibilities for environmental protection are separated from those managing natural resources and the economy. There are strong arguments for the idea that to be able to successfully resolve the many environmental challenges that lay ahead, it is necessary to integrate environmental concern in those sectors of the economy that affect them. The principle that environmental concerns should be integrated into EC sectoral policies was first introduced into the EC primary law in 1987. The integration aim got a boost with the placing of the Integration Principle in Article 6 EC which increased the pressure on the EC competition authorities to integrate environmental protection requirement into its policies. Despite heighten political awareness of the necessity to integrate the environment into other policy areas, it has proved difficult to achieve this in practice.

The thesis aims to analyse how integration of environmental protection requirement has been defined and implemented into the EC competition policy. Having in mind that the Integration Principle offers a process that has great potential for improving the environment in Member States. The main emphasis was on the exploring three areas of the EC competition policy, first, the general aim of the competition policy with emphasis on its objectives. Second, the main methods that the Commission applies to enhance environmental protection requirements regarding horizontal agreements and lastly, the method of giving State Aid for environmental protection.

The thesis explores the debate regarding the Integration Principle's legal meaning and strength at the EC level. The starting point for the argument is that the Integration Principle has little or no legal effect since it is highly improbable that it would amount to a legal test upon which Community acts could be assess and even found unlawful in the event of insufficient integration of environmental concerns. Conversely, the ECJ case law indicates that the Integration Principle can have legal effect and that there is no reason to disregard the Integration Principle as not being compulsory or effective.

It was argued that the main methods used by the Commission to enhance environmental protection requirements regarding horizontal agreements are to restrict the scope of application of Article 81(1) EC, or to widening the scope of Article 81(3) EC. The new Horizontal Guidelines, which include for the first time special sections regarding environmental agreements illustrate this point. Decisions of the Commission and the Horizontal Guidelines indicate the Commission willingness to exempt agreements in accordance with Article 81(3) EC solely on environmental benefits of the agreement. The Horizontal Guidelines also indicate that although the DG Competition emphasises the need for other policy areas to respect competition rules when integrating environmental objectives, it has also integrated environmental protection concerns into the competition policy.

Preface

Looking at environment law from the competition law perspective, or vice versa, at the EC level is an exiting topic. Much growth has been in environmental law the last decade, especially after the relations that the traditional legal methods did not work so well in the environmental sector. Competition law is also in a transformation stage, with the new modernisation plans around the corner. This theses looks at the interaction between those two fields of law within the framework of the Integration Principle in Article 6 EC.

This thesis marks the closing of my studies in European Affairs in Lund's University Sweden. This has been a year of hard studies and making friends from all around the world. First and foremost I thank my supervisor that helped me stay on track all the way. Special thanks should also go to my daughters Nott and Birta for the patience, and to my significant other, for making it possible for me to give this task all my attention the final days before the deadline.

List of Tables and Figures

Abbreviations

EAP	Environmental Action Programme
EC	European Community Treaty
ECJ	European Court of Justice
EEA	European Environmental Agency
EIA	Environmental Impact Assessment
EMAS	Eco-management and audit-scheme
EMS	Environmental Management Systems
EU	European Union
IEM	Integrated environmental management of production
IPPC	Integrated Pollution Prevention and Control
LCA	Life-cycle analysis
OJ	Official Journal of the European Communities
SEA	Single European Act
SEA	Strategic Environmental Assessment
SMEs	Small and medium sized enterprises
TEU	Treaty of the European Union

1. Introduction

A common feature within the European Union is that the responsibilities for environmental protection are separated from those managing natural resources and the economy. The idea has gained force in the last decade that to be able to successfully resolve the many environmental challenges that lay ahead, it is necessary to implement change in those sectors of the economy that affect them. It is now widely acknowledged that an effective environmental policy is the one that is fully integrated in the mainstream economic, social and competition policies.[1]

Reports show that even after having environmental protection on the agenda for 20 years the state of the environment in the Member States of the European Union has not improved, and in some areas deteriorated.[2] This fact has lead many to draw the conclusion that the European Communities (EC) regulatory framework has failed to bring about sufficient positive environmental change.[3] The principle that environmental concerns should be integrated into EC sectoral policies was first introduced into the EC primary law in 1987 but the integration aim got a boost with the placing of the Integration Principle in Article 6 EC. The new Integration Principle, provides that: "environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development."[4]

The co-ordination of liberation of trade and protection of the environment is considered one of the biggest challenges for the European Union. The European Union has as one of its original and most important objectives the creation of a common market without internal borders or trade barriers in form of custom duties, quantities restrictions or any measure having equivalent effect. The common market relies mainly on the four freedoms; a system to ensure undistorted competition and the approximation of laws to the extent required for the functioning of the Common market. It has therefore been apparent that for a meaningful integration of environmental protection requirements into the EC policies it would be necessary to integrate then into EC competition policies as well as other economic policies. Despite heighten political awareness of the necessity to integrate the environment into other policy areas it has proved difficult to achieve this in practice.

[1] Hamblin, Paul. (1999)
[2] Environment in the European Union at the turn of the century EEA, Copenhagen 1999
[3] Fifth environmental programme. Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development.
[4] Article 6 EC was introduced by the Treaty of Amsterdam which was signed on 2 October 1997 and entered into force 1 May 1999.

The aim of the thesis is to analyse how environmental concerns have been integrated into the competition field. Emphasis is on three areas, first, how environmental concerns have been integrated in the general policy setting of the competition policy. Then attention will be turned to Article 81 EC and the new Horizontal Guidelines. EC rules on State Aid for environmental protection is the third area, there the main emphasis is on the evolution of the guidelines issued by the Commission for environmental protection and the interaction between the willingness of Member States to give aid and the Polluters-Pay principle.

It will be argued that the Integration Principle has the potential to influence the EC competition rules in a significant way. There will however be difficulties in differentiating if the EC competition policy has truly integrated environmental protection requirement into its policy, or if environmental protection requirements are only integrated into the competition policy, to ensure that when other sectors integrates environmental objectives it is done within the framework of the competition rules.

To do this I will start by putting forward theoretical perspectives and methodology. A chapter will follow this on the Integration Principle, its components, different integration approaches and the manifestation of it in Article 6 EC. An overview of the general objectives of the EC competition policy is given in chapter 4. In chapter 5 the main areas where environmental concerns were integrated into the EC competition field are described, starting with Article 81 EC and finishing with an overview of the State Aid rules. Chapter 6 looks at the influence the Integration Principle has had on the EC competition policy with emphasis on the double agenda of the EC competition authorities in regards to integrating environmental concerns into EC competition policy. Finally conclusions are presented.

2. Theoretical perspectives and methodology

Two of the main theories regarding competition originate from American schools. Firstly, the Harvard school represents the structuralist approach; secondly, the Chicago school examines monopoly and competition. The origin of the Harvard school of thought can be traced back to 1930, starting with economic justification for the horizontal price and market-sharing cartels that operated in the USA in the first years of the 20th century. According to this theory public intervention is essential and justified in response to the structure of the structure-conduct-performance correlation. It can be viewed as 'interventionist'.[5]

[5] Kirkebride James and Scholes, Jeramy. (1996).

The Chicago school of thought, developed as a response to the structuralist theory, questioned the identity and substance of the trade barriers that the structuralists identified. This theory is 'abstentionist', based on the belief that "intervention is less effective than the market's own corrective force: that the market enjoys self-correction properties which contributes to consumer welfare, and that one should thus in general allow market forces to operate freely."[6] This conservative economic theory claims that, in general, regulation of the market is always contrary to the public interests, which is defined as achieving economic efficiency[7] and that economic efficiency is the main goal of the antitrust policy[8]. This theory has dominated in recent years, but it has been noted that in regards to the EC competition policy that "the overall approach of DGIV is somewhat schizophrenic in terms of its roots in the Harvard v Chicago debate".[9] From the beginning the EU has had aims other than efficiency with its competition policy, this will be further discussed in chapter 4. This theoretical struggle within the EU regarding the aim and purpose of competition rules is in the background of this thesis. The theoretical perspective followed in this thesis is based on structuralism and the interventionist approach.

Material used in this thesis is primary material such as communications from the different institutions of the EU, decisions taken by the Commission, primary and secondary legislation of the EC and judgements of the Court of First Instance and the European Court of Justice. Peer-reviewed literature and other secondary literature are employed within the analysis.

3. The integration principle

This chapter starts by giving a general description of what integration is and examples of different integration approaches. Attention will then be turned onto the integration principle in Article 6 EC, its origin and intended aim.

3.1. Integration and integration approaches

Integration and integration approaches are increasingly viewed as a new and superior way to consider the environment in policy and decision-making. The meaning of the term "integrated" has been defined as "assemble, and to make coherent, information from a broader set of domains than would be typically be provided by good research from a single discipline"[10] also that problems should be tackled were their source is.[11] The notion of integration

[6] Kirkebride James and Scholes, Jeramy. (1996)
[7] Tiemstra John P. (1992)
[8] Audresch David B. (1998)
[9] Burton J. (1994)
[10] Parson, Edward A. (1995)
[11] The Sixth Environmental Programme of the European Community.

has incorporated the idea of completeness and impartiality[12] but also involves a choice of what to include and what to exclude. Such choices generally involve trade-offs regarding assessment of credibility and legitimacy of particular users.[13] Owens & Cowell complain that "…while the rhetoric of integration is pervasive, its precise meaning and its implication for policy practice are often unclear."[14] They point out that there is a need to examine "…who is being asked to integrate what, with whom and how, and what conceptions of sustainable development are different parties being invited to share?"[15] An overview will be given of different integration methods to better understand what the demand for further integration of environmental concerns into policies and decisions means.

Different methods have been used to reach the goal of further integration of environmental concerns into different policy areas and decision-making processes. A short description of the different integration methods will be presented. The method used here to categorized the integration methods is based on the work of Scrase J.I. and Sheate W. R.[16] They analysed 14 different methods of integration approaches and systemised them into three categories. Methods in Category I, as shown in Table 1, are believed to promote positive environmental change; methods in Category II have the potential to be environmentally positive, especially if they are reinforced and supported with methods in Category I. Category II methods are the ones least likely to be environmentally supportive.

Table 1 Integration methods and meanings[17]

Meaning	Category
1. Integration of environmental concerns into governance	Category I promotes environmental positive changes
2. Integration across environmental media	
3. Integrated environmental management (regions)	
1. Integrated information resources	Category II potential to be environmentally positive, e.g. if reinforced and support Category I.
2. Vertically integrated planning and management	
3. Integrated environmental management (production)	
4. The environment, economy and society	
5. Integration across policy domains	
6 Integrated environmental-economic modelling	
7 Integration of stakeholders into governance	
8 Integration among assessment tools	
9 Integration of assessment into governance	
1. Integration of business concerns into governance	Category III is least likely to be environmentally supportive
2. Integration of equity concerns into governance	

[12] Scrase, Ivan J. and Sheate, William R. (2002)
[13] Eckley, N (2001)
[14] Owens S, and Cowell R. (2002)
[15] Owens S, and Cowell R. (2002)
[16] Scrase, Ivan J. and Sheate, William R. (2002)
[17] Scrase, Ivan J. and Sheate, William R. (2002)

Short descriptions will be given of the different integration methods mentioned in Table 1 with emphasises on methods that could potentially be used in connection with the integration of environmental concerns into the EC competition field.

Category I promotes environmental positive changes according to Scrase J.I. and Sheate W. R. First on the list is Integration of environmental concern into governance. The starting point for this method is Environmental Impact Assessment (EIA)[18] EIA is generally viewed as a framework for considering issues regarding location, design of projects and the environment in parallel, and by producing better designed projects having in mind both the environment and the economy.[19] Strategic Environmental Assessment (SEA)[20] is closely related to EIA. It is an essential tool to help policy makers to achieve greater environmental integration. It can be used for different policy areas at the plan and program level, while EIA is used mainly for individual projects. The European Union has finally accepted a SEA directive that will enter into force in July 2004.[21],[22]

Another example of Integration of environmental concerns into policy-making is the Integration Principle in Article 6 EC, which will be dealt with in further detail in chapter 3.2.[23] Integration across environmental media is the second method in Category I. It focuses on making sure that separate regulations regimes for air, land and water don't risk merely pushing pollutants from one medium to another. A good example of this approach is the EU directive on Integrated Pollution Prevention and Control (IPPC).[24] It is based on the environmental media need's to be understood as connected, and the ecological understanding of the environment in particular places.[25] The third method is Integrated environmental management of regions (IEM) a method closely related to "ecosystem management". The method emphasises that a steering group of stakeholders is formed, a process of negotiation and communication and a planning system is structured so to make it possible to coordinate activities within the designated area. This approach allows a relatively holistic approach of both the environmental and social processes.[26]

The first method in Category II is Integrated information resources. It has come to life because of the need to have accurate picture of large areas or

[18] Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the Environment, and Directive 97/11/EC amending Directive 85/337/EEC
[19] Glasson, John. Therivel, Riki and Chadwick, Andrew (1999)
[20] New Directive has been accepted and will come into force on the 1. of July 2004
[21] Directive on Strategic Environmental Assessment. (SEA directive) 2001/42/EC
[22] Further reading regarding SEA Hamblin, Paul. (1999) and Sheate, William R, Dagg Suzan, Richardson Jeremy, Aschemann Ralf, Palerm Juan and Steen Ulla (2003)
[23] Scrase, Ivan J. and Sheate, William R. (2002)
[24] Council Directive on Integrated Pollution Prevention and Control (IPPC)
[25] Scrase, Ivan J. and Sheate, William R. (2002)
[26] Scrase, Ivan J. and Sheate, William R. (2002)

domains, like in the climate change discussions. There is a need to further coordinate data collection and structure data usage to help in effective policy guidance. This method of integration is concerned with the information base for policymaking and emphasises the need for better coordination and dissemination of data. Vertically integrated planning and Management is number two in Category II; the main tool here is the Environmental Management Systems (EMS). The main object of EMS is to ensure that a specific decision making procedure is adopted in large hierarchical institutions were there are endless possibilities to fail in communication and responsibility. EMS is designed to ensure that decisions made at strategic levels are translated into effective action. The method is a business based and is designed to overcome fragmentation and create continuous improvement in environmental performance through regular assessments and policy reviews.[27]

The third method is Integrated environmental management of production (IEM). IEM examines that energy, water material and waste management in sites, buildings, services, processes and products. A closely related method is Life-Cycle Analysis (LCA), which is based on the "cradle to grave" perspective. It is intended to make the producer think about the whole life-cycle of the product, and not finish his responsibility when the product is in the hand of the buyer. The fourth method is Integration of the environment, economy and society. This method is based on the thought that environment, business and society are the three pillars of sustainable development and therefore should be considered simultaneously in a balanced way; this method is often called Sustainability Assessment. The method is still developing but is based on setting sustainability indicators that can be monitored and assessed.[28] Fifth is Integration across policy domains that emphasises the need to ensure that new policy concerns do not conflict with other areas of policy concerns. This is mainly a political and institutional challenge for "policy makers".[29] Next is Integrated environmental-economic modelling which has been mainly used in national-to-global scale computer modelling of atmospheric and climatic phenomena and their evaluation in a cost benefit analyses, therefore not pertinent to this thesis.

Seventh is Integration of stakeholders into governance, a process that emphasises the need to integrate different stakeholders' views in a decision making process. Stakeholder participation can take on many different forms and is not limited to mediated dispute resolution, negotiation and arbitration.[30] Three main rationales for participation[31] have been identified; normative, substantive and instrumental. The normative rational derives from the principle that government should obtain the consent of those who are governed and that, the citizens have the right to participate meaningfully

[27] Scrase, Ivan J. and Sheate, William R. (2002)
[28] Scrase, Ivan J. and Sheate, William R. (2002)
[29] Scrase, Ivan J. and Sheate, William R. (2002)
[30] Bier. V. M. (2001) Bier. V. M. (2001)
[31] McDaniels, Timothy L., et al. (1999)

in a public decision. Participation is therefore a proper and fair conduct of democratic governance.[32] Substantive rationales for participation are that the relevant wisdom in an EIA processes is not limited to scientific knowledge.[33] The final decision is "better" when local knowledge and values are included and when expert knowledge is publicly examined.[34] The final rational for participation is instrumental, as successful implementation of a project is far more likely with broad public support.[35]

The eighth method is Integration among assessment tools and deals with the problem of the use of multiple separate assessment tools. Different tools like EIA, LCA and CBA are used and developed by different disciplinary so are therefore often incompatible, competing or coming to different conclusions. The last one is Integration of assessment into governance, which aims to ensuring that the assessments will have positive impact on the decision-making progress.[36]

The third category is described as being the least likely to be environmentally supportive. First is Integration of business concerns into governance. It claims that "environmental decision making overlooks business interests, imposes excessive costs on industry and threatens to damage competitiveness."[37] This argument was strong in the 1980s, but today the argument that high-quality environment and strong economic growth are compatible objectives has the wining hand. The last method is the integration of equity concern into governance, but it is not connected to the matter at hand.[38]

Two common threads have been identified in the methods described above; poor communication and cooperation between diverse actors are concerns to address; secondly the relation that "everything is linked to everything else".[39] Not all of the above mentioned methods are suitable for use as integration methods in the EC competition field. It is however important to see that the Integration Principle in Article 6 EC is mentioned as an integration method that promotes environmental positive changes. Other methods of special interest in connection to competition are Integration

[32] McDaniels, Timothy L., et al. (1999), Shepherd, Anne &Bowler, Christi (1997)
[33] Gliken J. argues that there are three kinds of information, cognitive, experimental and value-based. Cognitive knowledge "… is based on technical expertise and is generated by individuals. This is the type of information presented by scientists and other experts, and involves factual arguments about issues such as nature and extent of potential environmental damage and the methodologies for assessing such damage…" Experimental knowledge is "…based on common sense and personal experience and, again, is developed by individuals." This kind of knowledge is comes usually from the residents or users. Value-based knowledge is "… moral or normative, is derived from social interests, and is based on perceptions of social value. Such knowledge engenders debates about the "goodness" of activities." Glicken, Jessica (2000)
[34] Shepherd, Anne &Bowler, Christi. (1997)
[35] McDaniels, Timothy L., Gregory, Robin S. and Fields, Daryl (1999)
[36] Scrase, Ivan J. and Sheate, William R. (2002)
[37] Scrase, Ivan J. and Sheate, William R. (2002)
[38] Scrase, Ivan J. and Sheate, William R. (2002)
[39] Scrase, Ivan J. and Sheate, William R. (2002)

Across environmental media (Category I.2), Sustainability assessment (Category II.4) and Integration of stakeholders into governance (Category II.7). This point will be illustrated further in chapter 6, now let's turn to the meaning of the Integration Principle in Article 6 EC.

3.2. The Integration principle in Article 6 EC

This section will start with a brief overview of the origin of the Integration Principle in Article 6 EC, then attention will be turned to what the Integration Principle is aimed at doing. Ending with how the Integration principle has been used so far in different fields, other than the competition field, which is the topic in chapter 5.

3.2.1. The origin of the EC Integration Principle

The principle that environmental concerns should be integrated into EC sectoral policies is not new. It was introduced into EC primary law in 1987 with the Single European Act in Article 130r(2) EC[40] (now Article 174(2) EC) along with other environmental principles. The call for more emphasis on integration of environmental concerns into other policy areas was stressed in the 1992 Fifth EC environmental Action Programme that lead eventually to the adoption of Article 6 EC.[41] The main reason for this call was the conclusion that the EC regulatory activity had failed to bring about sufficient positive environmental development and the knowledge that environmental problems need to be tackled at their source, which is frequently in other policies. An overview will be given of the integration process at the Community level before going in further details of the system's failure.

The concept of integration of the environment into policy making (first in Article 130 r(2) now in Article 6 EC) is a key principle of sustainable development. The Cardiff Summit in June 1998 was the first Summit of Head of States that focused on the integration of the environment into all EU policies.[42] The Cardiff Summit set off a wider process of developing strategies for environmental integration for the various formations of the Council of Ministers.[43] There was a followed up by the Vienna Summit in December 1998, a best practice workshop that was held in Bonn in 1999[44] as well as meetings of the European Council in Cologne in June 1999,

[40] Article 130R(2) as found in the SEA: "Action by the Community relating to the environment shall be based on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies."
[41] Fifth Environmental programme.
[42] Commission of the European Communities. (1998) *Partnership for Integration – A Strategy for integration Environment into European Union Policies.*
[43] Commission Working Document, From Cardiff to Helsinki and beyond – Report to the European Council on integrating environmental concerns and sustainable development into Community policies.
[44] Sheate W.R. et al. (2003)

Helsinki in 2000[45] and Gothenburg in June 2001. It was hoped at Helsinki that the Gothenburg Summit would result in the conclusion to the process, that hope did not materialize. It was however concluded in Gothenburg that sectoral strategies should be finalised, further developed and implemented as soon as possible to be reported on at the Spring European Council in 2002. The strategy was also given a wider dimension within the framework of the Sustainable Development Strategy, also adopted at Gothenburg in June 2001.[46] This included adding the environmental pillar to the Lisbon process of social and economic reforms. This leads to the question why the integration of environmental concerns got such a boost as demonstrated by it standing in the EC Treaty and the interest the EU institutions have demonstrated in the subject.

3.2.2. The aim of the EC Integration Principle

Despite all the environmental regulations issued by the EC the environmental quality in the Member States remained poor. Why the gigantic flow of environmental regulations has not led to significant favourable environmental change is debated. Some point to the poor implementation of the EU secondary legislation and the lack of adequate enforcement avenues for citizens and environmental groups. Another reason proposed is the inappropriateness of many of the environmental secondary legislation, since EU legislation has mostly been based on "command and control" type of measures. Scholars have pointed out that one of the reasons that the integration principle has gained increased attention is the revelation that improvements of environmental law and new implementing policy instruments are necessary but insufficient on their own. The achievement of the environmental objectives of the EC will not be obtained unless the EC, not only implements environmental measures, but also integrate those measures in all EC policy fields. [47]

Article 6 EC holds within it the vision that classic environmental regulations will not be sufficient on their own since most of the environmental problems facing Member States have their origins in current practices in other sectors, such as agriculture, transport, energy and industry.[48] In an attempt to reverse the trend the Commission called for the reshaping of the EC environmental law by making it more flexible and integrated with a broader range of environmental policy instruments. The new policy instruments are more market-based and tax-related devices, non-compulsory means of regulation like voluntary covenants, eco-labelling and eco-auditing schemes and the integration of environmental concerns into key EC policy sectors. [49] The

[45] Commission Working Document, Report on Environmental and Integration Indicators to Helsinki Summit.
[46] European Council (EC) Presidency Conclusions.2001 Conclusions of the Gothenburg European Council,
[47] Grimeaud, David. (2000)
[48] Commission of the European Communities. (1998) *Partnership for Integration – A Strategy for integration Environment into European Union Policies.*
[49] Pagh, Peter. (1996)

fact that further efforts were needed to improve environmental quality, and even more importantly, the need to reverse worrying trends in many areas, mostly linked to unsustainable economic activity, led to the Amsterdam Treaty giving the integration process a "new impetus by promoting the importance of the integration principle in the Treaty"[50]. Scholars have also pointed out that it is a logical step that environmental law cannot be dealt with in just one closed section, environmental concerns must penetrate other policy areas.[51] This leads to the next topic at hand that; does the Integration Principle have the necessary legal force to penetrate other policy areas?

3.2.3. The implementation of the Integration Principle

Article 6 EC demands that the environmental protection requirement be integrated into both the definition and implementation of the Community policies and activities that fall under Article 3 EC. The Commission, as the guardian of the Treaty and as the EC body that proposes legislation, has taken on the duty to implement environmental integration within its own work and consequently called for all its Directorate-Generals (DGs) to take into consideration environmental issues when preparing general policies and legislation. The main responsibility for the integration process within the DGs is with Directorate-General Environment (DG XI) who has no power to impose on other DGs a systematic integration of environmental concerns in Community Policies and legislation. Specific measures were, however, adopted in 1993 and 1997[52] regarding the Commission internal decision making process.[53] The Commission, with that, recognised that the Integration Principle puts legal obligations on the Community to equip itself with the necessary tools. That compliance with the rule is in principle subjected to judicial control by the European Court of Justice and that it is no longer an option to integrate environmental considerations into other policy areas but an obligation[54]. Now attention must be given to the wording of Article 6 EC and its connection to Article 174 (1)(2)(3) EC and Article 3 EC.

The wording of Article 6 EC implies that the objectives set out in Article 174 (1)(2) and (3) EC has to be integrated into the entirety of Article 3 EC. Among the objectives set out are the Polluters-pay principle and the need to take account of the economic and social development as a whole.[55] Article 3 EC consists of the Community policies and activities, including binding and

[50] Commission of the European Communities. (1998) *Partnership for Integration – A Strategy for integration Environment into European Union Policies.*
[51] Pagh, Peter. (1996)
[52] See Press Release IP/97/636, *The Commission renews its commitment to integrate the environment in its policy-making.*
[53] Grimeaud, David. (2000)
[54] In the Cardiff Summit the Commission put forward Guidelines for A Partnership for Integration of Environment into other policies. Commission of the European Communities. (1998) *Partnership for Integration – A Strategy for integration Environment into European Union Policies.*
[55] See C-379/98 PreussenElektra v Schleswag Para.76

non-binding Community acts.[56] As discussed in chapter 3.1 many different integration approaches and methods are available to integrate environmental concerns into Community policies.

3.2.4. The EC Integration Principle in different policy domains.

Article 6 EC demands that environmental protection requirement should be integrated into both the definition and implementation of the Community policies and activities that fall under Article 3 EC. The Commission as the guardian of the Treaty and as the EC body that proposes legislation has taken on the duty to implement environmental integration within its own work. Consequently, it called for all Directors Generals (DGs) to take into consideration environmental issues when preparing general policies and legislation. The DGs have responded to this by taken on the Commission Green housekeeping scheme[57] and its intentions to participate in EMAS (Eco-management and audit-scheme Category II.3 Table 1).[58] Additionally to ensure that environmental integration does actually occur, "environmental integration correspondents" within each DG are designated. Having the task to guarantee that all policy proposals will take into account the Integration Principle.[59] As mentioned before the main responsibility for the integration process within the DGs is within Directorate-General Environment (DG XI). General instruments that have been proposed to monitor the integration into sectoral policies are indicators, including environmental indicators (integration of the environment, economy and society Category II, 4 Table 1.).[60] The aim of the indicators is to provide a basis upon which policy-makers are involved in greening their policies, define and implement integration plans. "They are essential tools for ensuring accountability, transparency, the dissemination of information among all stakeholders, regular monitoring and policy adjusting."[61]

In the Cardiff meting in June 1998 it was decided to make two important policy packages a priority in the integration process, Agenda 2000 and the implementation of the Kyoto Protocol. The Agenda 2000 package included proposal for the reform of the agriculture and cohesion policies and for a package of pre-accession assistance for the countries of Central and Eastern Europe. The climate change issue was seen as a good example of the need for integrating environmental concerns into other policies, since it required significant change in, for example, energy, energy use and air and road

[56] Bellamy, C. and Child, G. (2001)
[57] Commission Staff Working Paper, Greening the Budget, SEC(97) and Green Housekeeping Action Plan 1997-2000 for the Commission. IP 97/694,
[58] The Cologne Report on Environmental Integration. Mainstreaming the Environmental Policy.
[59] This system was set up in 1993 to monitor the implementation of the 1992 Fifth Environmental Action Programme EAP throughout the Commission.
[60] Indicators to Helsinki Summit, Brussels 24 November 1999
[61] Grimeaud, David. (2000)

transport.[62] In the annual Spring Council Meeting which was held in Barcelona it was reported that two Council configurations ECOFIN and General Affairs had adopted their "Cardiff Process strategies and that the fisheries policy integration strategy would be adopted before the end of 2002."[63] In September 2000 the Commission called for integration of environmental issues in EU economic policy. The Commissioner for economic and monetary affairs claimed that there is "no inherent contradiction between economic growth and the environment."[64] The Ecofin council proposed that the process of multilateral surveillance regarding structural reform should include the impact that economic activity and regulation can have on the environment. This would then enable the Broad Economic Policy Guidelines to incorporate fully the objectives of environmental integration.[65] The general trend is therefore that more and more policy areas of the EC have been integrating environmental concerns into their policy and decision making processes.

4. General features of the EC Competition policy

This chapter gives an overview of the general objectives of the EC competition policy, with special attention to Article 81 EC and rules regarding State Aid. The European Union has as one of its original and most important objectives the creation of a common market without internal borders or trade barriers in form of custom duties, quantities restrictions or any measure having equivalent effect. The common market relies mainly on; the four freedoms, a system to ensure undistorted competition and the approximation of laws to the extent required for the functioning of the Common market.[66]

It was observed as early as the Spark report of 1956 that a Treaty that aims to achieve economic integration by abolishing the barriers between the Member States could not be effective if private undertakings would be allowed to reconstruct such barriers.[67] The competition rules have consequently always played an important part in Community law. The role and objectives of EC competition law has, however, changed as the years have passed. One objective of the competition policy is to enhance efficiency so as to maximize consumer's welfare and achieve the optimal

[62] Commission of the European Communities. (1998) *Partnership for Integration – A Strategy for integration Environment into European Union Policies.*
[63] European Council (EC) Precedence Conclusions. 2002. Conclusions of the Barcelona European Council,
[64] Commission calls for integration of environmental issues in EU economic policy. IP/00/1029
[65] Commission calls for integration of environmental issues in EU economic policy. IP/00/1029
[66] Article 28 and 30 EC
[67] Comité intergouvernmental creé par la Conférence de Messine, Rapport des Chefs de delegation aux Ministress des Affaires étrangéres. (Brussels 1956)

use of resources.[68] It has been claimed that efficiency is not the main objective of the EC competition policy, it is only secondary to the primary objective of market integration (now the creation of a single European market). However, this has also been overridden by objectives such as fairness and the interests of small and medium-sized enterprises.[69] Others argue that there is no clear hierarchy between the various objectives of the Community in Article 2 EC; priorities are rather selected on a case-by-case bases,[70] the efficiency objective has surrendered in order to advance political, regional or other Community Policies,[71] job creation or the environment.[72]

In order to reach its objectives EC rules on competition address four different situations;"(i) agreements between two or more parties whose collusion prevents access to markets or products to the determinant of third parties or consumers and eventually leads to price increase; (ii) companies capitalizing from dominant position to the determent of competitors and customers; (iii) effects of structural changes (i.e. mergers and acquisitions) on the competitive environment; and (iv) state measures which affect market conditions."[73]

It is the Commission that will develop the general substantive policy regarding Article 81 EC. In the Walt Wilhelm case[74] the principle regarding the relation of national law and EC law was established. It claims that national law cannot allow what EC law prohibits. The traditional approach regarding enforcement of Article 81 EC notifications of agreements to the Commission and the Commission had monopoly over the application of Article 81(3) EC. National courts, however, could apply Article 81(1) EC but not Article 81(3) EC.[75] Since the Commission is constantly overburdened with matters and has a backlog of cases it has been trying to utilise available national recourses. The Commission started its Modernisation plans[76] in 1999 to overcome this problem. According to the new approach notifications are abolished and national courts and national competition authorities are empowered to apply Article 81 EC in its entity. This approach aims to move away from a system of notifications and authorisations that puts administrative burdens, both on companies with out market power, and the Commission. One of the objectives of the modernisation plans is to give better guidance, through regulations and guidelines, to companies, so as to make it possible for companies to assess for them selves if their action is in conformation with the EC competition

[68] This is based on traditional economic theory that goods and services will be produced in the most efficient way if circumstances of perfect competition or workable competition. Craig, Paul and De Búrca, Gráinne. (2003)
[69] Sauter, Wolf. (1997)
[70] Wesseling A, (2000)
[71] Kirkebride James and Scholes, Jeramy. (1996)
[72] Lidgard, Hans-Hendrik. (2000).
[73] Lidgard, Hans-Hendrik. (2000)
[74] C-14/68, Walt Wilhelm and Others v. Bundeskartellamt.
[75] Craig, Paul and De Búrca, Gráinne. (2003)
[76] White paper on Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty,

law, or not.[77] The modernisation plan will however not come into force on the 1st of May 2004, that is at the same time as the EU takes in 10 new Member States.[78]

It is the Commission that will develop the general substantive policy in the area of State Aid, in other words, State Aid is an area that the Commission has full competence over. Decisions of the Commission are under judicial review of the ECJ and CFI, however the courts will be mindful of the fact that assessment of allowing exceptions to the rules regarding State Aid may entail complex evaluation of social and economic data and therefore they will not substitute their view for that of the Commission. The Commission can also decide on how to develop its substantive policy; whether to use formal legislation or informal rule making. The Council has delegated its power in accordance with Article 94 EC to the Commission to make regulations exempting types of aid from the requirement of notification and that it will be regarded as compatible with the common market[79]. The Commission has used this power to make formal regulations concerning small and medium-sized enterprises,[80] de minimis aid,[81] and training aid[82]. In other areas the Commission has given guidelines, examples of such areas are particular industrial sectors, but also in relation to matters like environmental aid[83], and regional aid[84]. The Commission approach to give guidelines instead of formal regulations was held to be legitimate in Vlaams Gwest[85] case, provided that the guidelines were consistent with the Treaty.[86]

Guidelines given by the Commission have no binding legal force but provide the Member States with some guiding principles on how Article 87(3) EC will be understood.[87] The reason for using guidelines, that is essentially (just) policy documents, is in part practical and part conceptual. Practically, guidelines can help an overburdened employee of the Commission to cope with an increased workload. Conceptually, guidelines have the advantages generally associated with a rule making system by reducing the Member state "… room for manoeuvre in giving aid and the controllers margin of discretion, choice and possible arbitrariness; and they facilitate the transparency, legal security and credibility which result from strict and consistent enforcement, to the benefit of governments and industry."[88] The using of guidelines is however not unproblematic. One

[77] Lucking, Joachim (2000)
[78] Landmark reform simplifies and strengthens antitrust enforcement IP/02/1739
[79] Council Regulation 994/98 on notification (1998)
[80] Community Regulation 70/2001 on the application of Arts 87 and 88 of the E.C. treaty to state aid for SME´s (2001)
[81] Community Regulation 69/2001 on de minimis aid (2001)
[82] Community Regulation 68/2001 on training aid (2001)
[83] Community Guidelines on State Aid for Environmental Protection (2001)
[84] Community Guidelines on National Regional Aids (1998) and National Ceilings for Regional Aid under the Derogations Provided for in Art. 87(3)(a) and (c) for the Period 2000-06 (1999)
[85] Case T-214/95, see also Case C-313/90, CIRFS v. Commission (1993)
[86] Craig, Paul and De Búrca, Gráinne. (2003)
[87] Ziegler, Andreas R. (1996)
[88] Craig, Paul and De Búrca, Gráinne. (2003)

apparent problem with the usage of guidelines instead of regulations is of a broad intra-institutional nature. The Commission has claimed full competence in the area of State Aid and by giving out guidelines instead of proposing a Council regulation in accordance with Article 89 EC, which would involve the Council and the Member States, the Commission shows its preferences to deal with the matter internally.[89]

The general conclusion that can be drawn is that the competition law is meant to serve the aim of economic efficiency and creating an environment for growth and reducing obstacles for such a dynamic process. It does this in a formal way by creating "forseeabilty and legal certainty for the economic actors even if such rules sometimes operate to the determinant of the overriding goals."[90]

5. The Integration of environmental concerns into EC competition area

This chapter starts with giving a general overview of how environmental concerns have been integrated into the EC competition policy. Then attention is turned to Article 81(1) EC and 81(3) EC with emphasis on the Horizontal Guidelines from 2001. The last section gives an overview of the area that has the longest experience of integrating environmental concerns into the EC competition area, the EC State Aid rules.

5.1. EC competition policy and the environment

The European Commission adopted on 9th June 1999 a communication to the Council of Ministers and the European parliament regarding the single market and the environment. The main purpose of the communication was to show that the EU "can and must consolidate and further develop the positive interaction between two legitimate demands of European citizens: the smooth operation of the single market and a sufficient degree of environmental protection."[91] But how can the "legitimate" aim of environmental protection be integrated into the smooth operation of the single market having in mind the special status of the competition area? Especially, having in mind, that many have feared that a pursuit of a high level of environmental protection could damage the Community's competitiveness.[92] However, the EU Commissionaire for the Environment claimed that "over time, removing environmentally damaging subsidies and

[89] Craig, Paul and De Búrca, Gráinne. (2003)
[90] Lidgard, Hans-Hendrik. (2000)
[91] Commission adopts a communication on the Single market and the Environment. 9 June 1999.
[92] Commission adopts a communication on the Single market and the Environment. 9 June 1999.

implementing the polluters pays principle should enhance economic efficiency and competitiveness."[93] Article 6 EC still, requires more, than removing environmentally damaging subsidies and implementing the polluters pays principle.

Having this in mind it is interesting to look further into how the Directorate-General Competition, here after DG Competition, vision how they will integrate environmental concerns into the competition policy of the EC. Analyses of the material that the DG Competition publishes on their home page on the Internet show that integration of environmental concerns into the competition policy and decisions has begun. It is stated that Community law provides that environmental considerations must be integrated into all other Community policies and that this includes European competition policy. However, the DG Competition emphases that "both the national legislator and the industry have to respect competition law in putting in place environmental initiatives. Neither should they establish forms of collaboration, rules or practices that would constitute unjustified obstacles to competition."[94]

This change in the EC competition policy should also be viewed in connection with the new Article 2 EC that introduces into EC primary law for the first time the concept of Sustainable Development. This change is significant since earlier versions of Article 2 EC was based entirely on economic consideration. The Treaty of the European Union (TEU) incorporated a qualitative aspect, while still economic centred by stipulating that the Community sought to set up a "sustained and non-inflammatory growth respecting the environment"[95] The insertion of this term into the treaty can be viewed as a clarification of the relationship between economic progress and environmental protection. A recognition that the environment is not longer a mere appendix to Community policies on economic integration but "rather to be balanced against them, so as to satisfy economic and social development objectives on the one hand and environmental protection on the other hand."[96] Next sections will look more closely on how the EC competition authorities have integrated environmental objectives into its policies and decision making processes regarding Article 81 EC and State Aid.

5.2. Competition rules as limits to market integration

5.2.1 General

The four freedoms and European competition law form the heart of the European economics. Negative market integration based on the four

[93] Commission calls for integration of environmental issues in EU economic policy. IP/00/1029
[94] European DG Competition homepage, Available online: http://europa.eu.int/comm/competition/index_en.html
[95] Article 2 TEU
[96] Deckert, Martina R. (2000)

freedoms allows competition. This competition is then protected against restrictions by undertakings[97], or Member States regarding State Aid, by means of the competition rules. The rules on the four freedoms, mainly Article 28 and 30 EC, and competition rules, Article 81 and 82 EC, can therefore apply to one and the same measure of a Member State. It is also possible that a conduct of undertaking could fall under Article 28 EC and be also within the scope of Article 81(1) EC, or vice versa.[98]

There is however an important difference between the limitations bestowed on negative integration in accordance with Article 28 EC or Article 81 EC. Article 28 EC contains explicit exemptions or justifications from the market freedoms and ECJ has accepted "mandatory requirements" as imminent restrictions on market freedoms. In the field of the four freedoms there are several tools that can be used to harmonise the sometimes conflicting aims of competition policy, as discussed in chapter 4. Article 81(1) however contains an absolute prohibition on restriction to competition that could affect trade between the Member States.[99] This is not surprising since Article 81(1) EC is primarily aimed at private undertakings. The only explicitly stated basis for exemptions is in Article 81(3) EC.

The Commission and the ECJ have, in the interest of balancing conflicting goals of the EC competition policy, both relied on Article 81(1) EC and 81(3) EC. Looking at the Commissions practice and ECJ jurisprudence reveals that both have integrated environmental concern by using Article 81 EC, which restricts its cope of application and Article 81(3) EC so as to widen the scope of the provisions. The objective of this chapter is to give an overview of how Article 6 EC regarding integration of environmental concerns manifests itself in relation to Article 81(1) EC and Article 81(3) EC, starting with the former.

5.2.2. Restricting the scope of Article 81(1) EC to enhance environmental integration?

This section will go over the main methods the Commission has applied to restrict the scope of application of Article 81(1) EC so as to implement the aim of Article 6 EC to integrate environmental concerns into competition law. The main rules regarding this are in the guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements from 2001, hereafter the Horizontal Guidelines.[100]

The main aim of the Horizontal Guidelines is to set out principles to assess horizontal cooperation agreements under Article 81 EC. The guidelines define horizontal cooperation as an agreement or concerted a practice that is

[97] Undertaking today is generally defined as a broad entity, covering companies under common economic control. Lidgard, Hans-Hendrik.(2000)
[98] Deckert, Martina R. (2000)
[99] Deckert, Martina R. (2000)
[100] Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, here after the Horizontal Guidelines.

entered into between companies that are operating on the same level in the market. This covers cooperation agreements between competitors in areas such as research and development (R & D), production, purchasing, commercialisation and the environment.[101]

Reasons for setting guidelines for these kinds of agreements are that they can lead to competition problems. For example, if undertakings in a cooperation agreement "agree to fix prices or output, to share markets, or if the cooperation enables the parties to maintain, gain or increase market power and thereby cause negative market effects with respect to prices, output, innovation or the variety and quality of products."[102] The main reasons for allowing horizontal cooperation is based on the presumption that it can lead to substantial economic benefits. Especially in connection to increasing the competitiveness of European companies in the global market place.[103] The Horizontal Guidelines are seen as complementary to the Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements (The Specialisation block exemption Regulation) and Commission Regulation (EC) No 2659/2000 of 29th November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (the R & D block exemption Regulation). The Horizontal Guidelines are also concerned with those types of cooperation namely agreements on R & D, production, purchasing, commercialisation, standardisation, and last but not least, environmental agreements which no block exemption regulations has been issued for.[104]

The starting point is what are environmental agreements[105], they are defined as "those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set out in Article 174 of the Treaty. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations. This excludes agreements that trigger pollution abatement as a by-product of other measures."[106] Types of agreements that usually fall under being environmental agreement are most R & D agreements or cooperation agreements to set standards or improve environmental conditions but it is less likely that they include restrictions with respect to prices and output.[107] The Guidelines give a few examples of what could constitute an environmental agreement; first, agreements that can be encouraged or made

[101] Article 1.1. Horizontal Guidelines
[102] Article1.2. Horizontal Guidelines
[103] Article1.2. Horizontal Guidelines
[104] Article10. Horizontal Guidelines
[105] In the guidelines it is mentioned that the term agreement is used in the sense defined by the Court of Justice and the Court of First Instance in the case law on Article 81. It does not necessarily correspond to the definition of an agreement in Commission documents dealing with environmental issues such as the Communication on environmental agreements COM(96)
[106] Para, 179 Horizontal Guidelines
[107] Para, 10 Horizontal Guidelines

necessary by the Member States; agreements that set out standards on the environmental performance of products or production processes; agreements at the same level of trade, whereby the parties provide for the common attainment of an environmental target such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency.[108] A good example of the Commissions efforts to encourage new ways to reach environmental improvements is by placing outside the scope of Article 81(1) EC, comprehensive industry-wide schemes for complying with environmental obligations on take-back or recycling.[109]

The Guidelines divide environmental agreements into three categories; first, *agreements that do not fall under Article 81(1)*; second, *agreements that almost always fall under Article 81(1)* and third, *agreements that may fall under Article 81(1).* The distinction is based on the nature of the agreements, mainly on the likelihood of attainment of environmental objectives but also in connection to the market. Examples of *agreements that do not fall under Article 81(1)* despite the aggregated market share of the parties are if no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target. Here the focus is on the discretion left to the parties as to means that are technically and economically available to attain the environmental objective. A good example of this is the Commission decision regarding CEMEP[110] which will be discussed further in chapter 5.2.4. Another example is agreements that set environmental performance standards on products or processes that do not appreciably affect product and production diversity in the relevant market. Finally, agreements that creates new markets, for instance recycling agreements, will not generally restrict competition, provided that and for as long as, the parties will not be capable of conducting the activities in isolation.[111]

Agreements that almost always come under Article 81(1) and are therefore banned are those whose true aim is not reaching environmental objectives but rather serves as a tool to "engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation, or if the cooperation is used as a means amongst other parts of a broader restrictive agreement which aims at excluding actual or potential competitors."[112] With the last category *agreements that may fall under Article 81(1),* the Horizontal Guidelines set up a grey area so as to make it more easier for undertakings to assess if their environmental agreement falls under Article 81(1) EC or not. This is necessary, bearing in mind that this system relies on a certain self-assessment of the undertakings themselves. Environmental agreements are likely to be caught by Article 81(1) EC if they cover a major share of an industry at national or EC level and restrict the parties ability to devise the characteristics of their products or the way in which they produce

[108] Para, 183-184 Horizontal Guidelines
[109] Para, 181 Horizontal Guidelines
[110] Commission decision regarding CEMEP
[111] Para, 184-187 Horizontal Guidelines
[112] Para, 188 Horizontal Guidelines

them, thereby granting them influence over each other's production or sales. The same goes for environmental agreements that could phase out or significantly affect an important proportion of the parties' sales as regards their products or production processes. In this instance the market share of the parties is important in the appraisal. Collection and recycling service agreements between undertakings that hold a significant market share in a substantial part of the common market could also appreciably restrict competition provided other actual or realistic potential providers exist.[113]

The Horizontal Guidelines rely on economic evaluation and an important parameter in that evaluation is assessing the relevant market. The effects of the environmental agreement are to be assessed on the markets to which the agreement relates.[114] Special issues emerge regarding assessing the relevant market when the pollutant is not itself the intended product. Then the relevant market encompasses the markets of the product into which the pollutant is incorporated.[115] Another variation is deciding the relevant market for collection/recycling agreements, it is then necessary to assess both the effects on the market(s) on which the parties are active as producers or distributors and also the effects on the market of collection services potentially covering the good in question.[116] What rules apply if the environmental agreement falls within Article 81(1) EC is the subject of next section.

5.2.3. Widening the scope of Article 81(3) EC to enhance environmental integration?

If an environmental agreement falls under the scope of Article 81(1) EC it can still be allowed if it falls within the scope of Article 81(3) EC. Article 81(3) reads as follows:

> "The provision of paragraph 1 may, however, be declared inapplicable in the case of:
>
> -any agreement or category of agreements between undertakings;
>
> -any decision or category of decisions by association of undertakings;
>
> -any concerted practice or category of concerted practice,
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

[113] Para, 189-191 Horizontal Guidelines

[114] The relevant market is to be defined according to the Notice on the definition of the relevant market for the purposes of Community competition law

[115] This will be difficult in cases were for example, the agreement is for the reduction of emissions of pollutants in the production face of a product.

[116] Para, 182 Horizontal Guidelines

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in questions."[117]

The next issue at hand is therefore to look at what objectives are relevant when assessing if an environmental agreement could fall under the exemptions laid out in Article 81 (3) EC. Deckert puts forward the assumption that "the Maastricht Treaty has introduced a new balance between policies at the Community level"[118] but that it nevertheless does not mean that the policies introduced might justify exemptions beyond the wording of Article 81 (3) EC. Rather that (only) the normative elements of Article 81 (3) EC are to be interpreted with regard to Article 2, Article 3 EC and the integration principle. Deckert claims that it is "well established that the protection of the environment (Article 6 EC Treaty) in particular may fall under the category of 'promoting of technical or economic progress' in Article 81(3) EC Treaty."[119] Evidence of this is in the 2002 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation. Therefore, attention will be given to the section in the Horizontal Guidelines that puts forward guiding principle regarding when and how to assess if environmental agreements could be exempted under Article 81(3) EC.

The Commission starts by stressing that it takes a positive standing "on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the EC Treaty as well as in Community environmental action plans, provided such agreements are compatible with competition rules."[120] If an agreement falls under Article 81(1) EC it can still gain exemptions under Article 81(3) EC, in order to do so it must satisfy four conditions; to improve the production or distribution of goods or promote technical or economic process; consumers must receive a fair share of the benefits; the restrictions must be necessary to reach the goal and it cannot lead to the elimination of competition in respect of a substantial part of the products in question. It is within the power of the Commission to grant individual exemptions but also to exempt categories of agreements with block exemptions but no block exemption regulations have been issued for environmental agreements.[121]

The starting point in the Horizontal Guidelines is that despite the fact that the environmental agreement is caught by Article 81(1) EC it still can have economic benefits which, either at individual level or aggregate consumer level, outweigh their negative effects on competition.[122] Here the criteria used to assess what the negative effects of competition are, is weighted on the net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline were no action is taken. There is a

[117] Article 3 EC Treaty.
[118] Deckert, Martina R. (2000)
[119] Deckert holds that the theory of practical concordance can be used to balance horizontal conflicts i.e. to co-ordinate EC competition law and conflicting EC policies regarding the systematic interpretation of Article 81 (3) EC. Deckert, Martina R. (2000)
[120] Para, 192 Horizontal Guidelines
[121] Craig, Paul and De Búrca, Gráinne. (2003)
[122] Para, 193 Horizontal Guidelines

requirement that environmental costs are measured in economic terms. When calculating the cost it must include cost of the effects of lessened competition along with compliance cost or effects on third parties.[123]

Indispensiality to the attainment of the environmental goals and that the agreement will not eliminate competition are factors that are of great importance when evaluation if the agreement could be exempted. The Commission states that the more objectively economic efficiency is demonstrated, the more each provision is deemed indispensable to the attainment of the environmental goal. Otherwise the environmental agreement needs to be supported with cost-effective analyses showing that the alternative ways of reaching the environmental goals would be more economically or financially costly than the way proposed.[124] However, it does not matter whatever the environmental or economic gains are, or the necessity of the provisions, the agreements can never "eliminate competition in terms of product or process differentiation, technological innovation or market entry in the short or, where relevant, medium run."[125] The Guidelines are based on the jurisprudence of the ECJ, as well as on the decisions taken by the Commission, in particular two decisions of the Commission are of special interest, CECED,[126] and CEMEP.[127] Both decisions will be further discussed in next section.

5.2.4. Comparison of integration according to Article 81(1) EC and 81(3) EC

The Integration Principle in Article 6 EC requires that environmental objectives will be taken into consideration when implementing other policies, but is quite about how that is done. In regards to Article 81 EC the Commission has implemented Article 6 EC in the Horizontal Guidelines by setting out criteria's which makes it possible for companies and national courts to assess for themselves if environmental agreements on the negotiation table will fall outside the scope of Article 81(1) EC or are likely to receive exemptions in accordance with Article 81(3) EC. The new Horizontal Guidelines are in the spirit of the Chicago school of thought that is emphasizing the prime importance of economic analyses in competition law enforcement.[128] However, the Guidelines though requiring thorough economic analyses of, for example, the relevant market also approve of exempting environmental agreements because of overall benefits for the environment.[129],[130] The question at hand is to explore how far the

[123] Calculation of the benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions. Para 194
[124] Para 195-196 Horizontal Guidelines
[125] Para 197 Horizontal Guidelines
[126] Commission decision regarding CEDED
[127] Commission decision regarding CEMEP
[128] Vogelaar, Floris (2002)
[129] Vogelaar, Floris (2002)

Commission would go to enhance environmental goals, to do this it is necessary to first look at the fore mentioned decisions of the Commission, CEMEP and CECED.

The CEMEP decision concerned an agreement between some 20 manufacturers of standard low voltage motors, which are members of the European Committee of Manufacturers of Electrical Machines, and Power Electronics (CEMEP). The aim of the agreement is to establish a classification and labelling for standard low voltage motors into three categories according to their energy efficiency. The agreement also forms a part of the European Union strategy to improve energy efficiency of electrical appliances. The parties to the agreement committed themselves to reduce, by at least 50% their joint sales of the least energy efficient motors before 31 December 2003, which today is about 70% of the market for these kinds of motors. In its analyses the Commission took into consideration that at the time no homogeneous and visible definitions and classifications were available for how energy efficient motors were. Furthermore, the agreement sets an overall reduction target for all the members of the agreement, not precise individual obligation. The Commission therefore concluded that although the parties to the CEMEP agreement hold a major market share the agreement would not restrict competition in the meaning of Article 81 EC.[131]

The CECED decision concerned a notification to the Commission regarding environmental agreements by the Council of Manufactures of Domestic Appliances (CECED). The agreement is designed to reduce the energy consumption of washing machines and by that reduce polluting emissions from power generation. To achieve the objectives the participants, who hold 95% of the EU market, would stop producing and importing into the EU the least energy efficient washing machines[132]. Parties to the agreement also undertook to promote consumers awareness of environmentally friendly machines and technological development. The Commission reached the decision that:

> "Although participants restricts their freedoms to manufacture other machines than those labelled A to C (with some exceptions), thereby restricting competition, the agreement fulfils the conditions for an exemption pursuant to Article 81(3) of the EC Treaty: more efficient and technologically advanced products are likely to replace those phased out; saving on electricity bills for individual purchaser more than compensate potentially higher purchase cost; the agreement is also beneficial in reducing emissions from electricity generation and

[130] In accordance with Case C-513/99, Concordia Bus Finland Oy Ab, v. Helsingin kaupunki, HKL-Bussiliikenne,
[131] CEMEP press release IP/00/508
[132] Machines labelled under energy category D and G, pursuant to Commission Directive 95/12/EC

> does not eliminate competition which is vigorous in the market, as regards prices, washing performance, brand image etc.[133]

EC Competition Commissionaire stressed that the CECED decision clearly illustrated that environmental concerns are in no way contrary to the competition policy provided that the restriction are proportionate and necessary for achieving the environmental objectives aimed at to the benefit of both current and future generations.[134]

Parties to both the CEMEP and CECED agreements hold a major proportion of the relevant product market (CEMEP 80% and CECED 95%) and there is no restriction regarding entry of new participants. Both environmental agreements affect mainly the composition of output not the total amount of output. The main difference between the agreements is that in CECED the achievements of the set target result mainly from individual obligations placed on the parties as to their production and sales of different energy classes. The Commission singled out in the CECED decision those individual commitments not to manufacture or import machines in certain energy classes, restriction of competition by making sure of that competitors will not meet the demand for lower efficiency machines and in the short run likely price increase. Parties to the CEMEP agreement are not bound by similar individual commitments regarding their behaviour in the market regarding production and sale. Another difference is that in the CEMEP case there was no widely established definition of energy efficiency for the product market. Therefore, competition did not appreciable take place on that product characteristic. Other differences of interest are that the overall magnitude of upgrading in the market is 2.5 times higher in CEMEP that in CECED, however, the price increase that could be expected is from the upgrading is considerably lower. The end buyer in CEMEP is also an industrial user and not a consumer. [135]

The decisions indicate firstly that the Commission responsible for competition matters does integrate environmental concerns into the competition field regarding Article 81 EC. Even more importantly that the Commission is ready to widen the scope of what falls outside the scope of Article 81(1) EC lastly, that exemptions are possible in accordance with Article 81(2) are possible on environmental grounds only.[136] ECJ has still not ruled in a exemption case were the sole arguments is environmental benefits. The Court has also not given clear signs regarding if Article 81(3) should be interpreted narrowly or broadly.[137] In the Commission Decision KSB/Goulds/Lowara/ITT the fact that the product was environmentally

[133] CECED press release IP/00/148
[134] CECED press release IP/00/148
[135] Martinez-Lopez, Manuel. (2000)
[136] Bellamy and Child, claim "In CECED, a decision primarily based on the environmental benefits, the Commission granted exemption under Article 81(3) to an agreement between virtually all the European importers and manufacturers of domestic washing machines to stop importing or producing the least energy-efficient machines, thereby reducing the polluting emissions from power generation." Bellamy, C. and Child, G. (2001)
[137] Craig, Paul and De Búrca, Gráinne. (2003)

friendly, constituted to fulfil the requirement that the consumers would get their share of the benefits resulting from the agreement.[138]

Vogelaar has criticised that Article 81 EC should be interpreted on the basis of arguments other than pure "competition arguments". The basis for his opinion is that economic progress should thus only include elements showing direct economic relationship between parties involved or direct economic effects the derive from such operation for third parties. Vogelaar insists that "elements of other policies of the Community should, strictly speaking, not be assessed within this framework. Such elements should be addressed by other Treaty provision."[139] This view is based on that the competition policy of the EC is based on purely economic aims, but not as discussed in chapter 3 also on other aims and objectives.

The Horizontal Guidelines were on the drafting stage when the CECED and CEMEC cases were on the table of the Competition Commission. The Guidelines are in many ways based on these two cases, the section regarding environmental agreements.[140] One of the expected impacts of the new Guidelines is that it is believed that they will increase legal security that would in turn stimulate cooperation with little or no market power in particular small and medium sized enterprises (SMEs). Additionally, it is presumed that it will increase the contractual freedom of the undertakings and they will be freed from the cost and delays associated with unnecessary delays.[141]

5.3. State Aid rules

State Aid rules are part of the EC competition system to ensure undistorted competition and it has as other components of the common market integrated environmental protection in its policy. The main instrument to assist the Commission to fulfil its obligation is the Community Guidelines on State Aid for environmental protection. The Community Guidelines on State Aid for environmental protection reflects the conflict between the need to ensure undistorted competition in the common market and environmental protection requirement.[142]

In the early 1970's Member States became increasingly interested in protection of the environment against pollution. One of the measures that the Community envisioned to promote the protection of the environment was to allow the Member States to give State Aid to help firms to comply with environmental obligations. The Commission in 1974 published a memorandum[143] that provided for a transitional period from 1st January

[138] Commission Decision, KSB/Goulds/Lowara/ITT
[139] Vogelaar, Floris (2002)
[140] Vogelaar, Floris (2002)
[141] Lucking, Joachim. (2000)
[142] Commission, Eighth Survey of State Aid in the European Union, Com (2000)
[143] The Memorandum was titled "Community Approach to State Aids in Environmental Matters"

1975 to 31st December 1980 so that aid that did not exceed certain degressive levels could be authorised in favour of existing firms who had to comply with environmental obligation imposed on them. The plan was that after the transitional period aid given by the Member States for the protection of the environment would be submitted to stricter conditions.[144] However, because of an economic crisis in 1970's the Member State could not sufficiently assist companies to invest in environmentally sound technology. The Commission consequently extended the transitional period to 31st December 1986, regarding aid necessary for the implementation of new environmental standards.[145] In 1986 the Commission realised that the transitional approach did no longer apply, the need to balance the protection of the environment and to avoid distortions of competition were there to stay. As a response the Commission decided to apply the 1980 criteria's until the year 1992.[146] In 1994 the Commission issued new and more comprehensive set of guidelines regarding environmental aid.[147] The rules were more precise and importantly allowed 15% investment aid for all existing firms for adoption of new standards. In addition, 30% investment aid was also allowed for firms undertaking environmental protection measures in the absence or beyond Community requirement. The 1994 Guidelines also left considerable room for giving operating aid. These rules did not however develop in a void, at the same time the Polluters-Pay principle gained force as well as the concept of Sustainable development.[148]

Authors like Andreas R. Ziegler, have pointed out that in spite of the validity in the Community of the Polluters-Pay principle[149], the Commission has since the 1970's tried to find a balance between the possible environmental benefits of State Aid and the distorting effects they can have on competition and trade.[150] The Commission views its guidelines as a compromise between the implication of the Polluters-Pay principle and the general wish to give adaptation aid.[151] The Community has always allowed exceptions from the Polluters-Pay principle, as can be seen in Articles 92 (2)(3), 42, 77, and 80 EC. The cost of environmental protection becomes a

[144] Schina, Despina (1987)
[145] Vedder, Hans (2001)
[146] The 1980 guidelines were then additionally prolonged with two temporary measures until 1994.
[147] Community Guidelines on State aid for environmental Protection. (1994)
[148] In the Bruntland report sustainable development is " development that meets the needs of the present without compromising the ability of future generations to meet their own needs." United Nations World Commission on Environment and Development (WCED) (1987)
[149] The Polluters Pay Principle first emerged in the First Environmental Action Programme in 1973 but came an integral part of the Communities legal system with the coming into force of the Single European Act now Article 174(2). One of the reasons that the Polluters-Pay principle has gained force is the link between environmental protection and economic development as well as efforts to use economic instruments in environmental protection law and policy. The Polluter-Pays principle implies that companies internalise the costs for environmental protection, in other words it requires that " the cost of pollution should be born by the persons responsible for causing the pollution and consequently cost." Sands, Philip (1995)
[150] Ziegler, Andreas R. (1996)
[151] Ziegler, Andreas R. (1996)

common burden, which is carried out by the general public. However, the Community has recommended since 1974 that the Member States avoid those exceptions and that they should apply the Polluters-Pay principle in the field of environmental protection. According to Jean-François Pons, Deputy Director General, DG Competition the Commission's position towards State Aid is that it should no longer be used to make up for the absence of cost internalisation and that prices must accurately reflect costs.[152] New Community Guidelines on State Aid for the environment issued in 2001 show that even though the Community is getting stricter in the "old" areas they also open up doors for further State Aid in "new" sectors.

Before turning to the 2001 Guidelines it is necessary to go through the legal bases of those rules. To determine if a Member State action would be considered for State Aid under the EU State Aid rules it is necessary to start with Article 87 EC. Article 87 (1) EC looks at Member States' public sectors and whether it spends state money in the same way as an undertaking in the private sector that is forced to operate under normal market economy. Many cases before the Community courts therefore revolve around if the state has in its role as an investor or a creditor behaved according to normal market economy principles. The rule the Courts have applied is the "market economy investor test". It evaluates if the public sector behaved in a similar way as a normal private sector investor under normal market economy condition would behave when making the investment in the private sector.[153] If the investment made by the public sector passes this test the aid in question will not be considered State Aid contrary to Article 87(1) EC. Therefore, subsidies that do not fulfil all the criteria stipulated in 87(1) EC are still generally admissible, that is State Aid does not distort competition or is a hindrance to trade.

Article 87(2) EC lists three types of aid which are compatible with the common market despite falling under 87(1) EC, that is; aid having a social character which is granted to individual consumer without discrimination; aid to make good for damages caused by a natural disasters and special concessions regarding the unification Germany. Article 87(3) EC is more relevant when State Aid for environmental protection is deemed compatible with the common market. The first exception is regarding "aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment";[154] the second has been used in cases concerned with the development of environmental protection and serious disturbances to the economy of Member State.[155] The third discretionary exception provides that "aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading condition to an extent contrary to the

[152] Pons Jean-François (2001)
[153] Bartosch, Andreas (2002).
[154] Article 87(3)(a) EC
[155] Article 87(3)(b) EC

common interest"[156] may be compatible to the common market. The fourth provides that aid to promote culture and heritage conservation may be compatible with the common market[157] and the last constitutes a safety net by providing that the Council can after a proposal from the Commission take a decision of other categories of aid that may be deemed to be compatible with the common market.[158,159]

The second discretionary exception in Article 87(3) EC opens the door for the Commission to accept a proposal from a Member State for environmental aid.[160] The Commission has chosen not to issue regulations in this area but continues on the same path as set in the 1970's by giving guidelines that gives the Member States and other interested parties an indication on what is a likely decision on the part of the Commission regarding State Aid for environmental protection. When comparing the 1994 Guidelines with the new Guidelines on State Aid for environmental protection this view seems to be founded on firm ground. Further notice will therefore be given to the contents of the guidelines from 2001.

The new Guidelines on State Aid for environmental protection take into account the Community renewable energies policy and also the new forms of aid, that had emerged since the 1994 Guidelines, granted by the Member States. The 2001 Guidelines are made of a total of 11 chapters and are even more precise than the 1994 Guidelines. In the introduction chapters a short overview of the changes in the policy regarding environmental aid is given and the main principles that the new Guideline is based on, namely the Integration Principle in Article 6 EC and principles in Article 174 most importantly the Polluters-Pay principle. The Commission uses the lessons from the functioning of the 1994 guidelines and the two principles as the building blocks for the new guidelines. The Commission states that its approach in the 2001 Guidelines "…consists in determining whether, and under what conditions, State Aid may be regarded as necessary to ensure environmental protection and sustainable development without having disproportionate effects on competition and economic growth."[161] The scope of the 2001 Guidelines and definitions are given in chapter B. It is attention grabbing how detailed the scope of the guidelines are, and their interactions with regulations that the Community has issued on connected subjects. Chapter E of the 2001 Guidelines contains the general conditions for authorising environmental aid, which the Commission has divided into three areas, investment aid, aid for horizontal measures and operating aid.

The first area is investment aid, here the notion of what is "eligible cost" is of great importance, since the aid intensity for investment cost is described

[156] Article 87(3)(c) EC
[157] Article 87(3)(d) EC
[158] Article 87(3)(e) EC
[159] Craig, Paul and De Búrca, Gráinne. (2003)
[160] Article 87(3)(b) EC "…aid to promote the execution of an important project of European interest or to remedy a serious disturbance in the economy of Member State's..."
[161] Para. 5. Community Guidelines on State Aid for Environmental Protection (2001)

as a percentage of these costs as shown in Table 2. According to paragraph 37 of the 2001 Guidelines, eligible costs need to be strictly confined to the extra investment cost necessary to reach the environmental goals and also to be aimed at an improvement beyond Community standards. In a recent decision of the Commission regarding an invitation to submit comments pursuant to Article 88(2) EC, regarding a State Aid case from the United Kingdom, concerning aid to newsprint reprocessing capacity support under the WRAP programme. The Commission came to the conclusion that the aid, as it was described by the United Kingdom, did probably not fall under the 2001 Guidelines since the aim of the aid in question was just to get United Kingdom in line with Community standards. Commission noted that the investment was not designed to improve on standards directly applicable to the company, but to comply with Community standards that apply to the United Kingdom. The Commission doubts whether the investment qualifies as an investment in the meaning of point 29 of the 2001 Guidelines. The investment, at least in part, may rather constitute an investment, to which the environmental guidelines do not apply.[162] Regarding the use of renewable energy the eligible cost are those extra costs compared to the situation were it would have used conventionally produced energy. The following Table 2 shows investment aids, which is allowed according to the 2001 Guidelines.

Table 2 Investment aid allowed according to the 2001 Guidelines[163],[164]

Type of aid	Basic rate	Bonus	Remarks
Adaptation of SME to new standards	15%		Only for three years following adoption of new standards
Improvement beyond Community standards	30%	+10% for SME	
Investment in absence of	30%	+10% for	

[162] Commission Decision 61/2002 (ex N 196/2002)—Aid to newsprint reprocessing capacity support under the WRAP programme. Invitation to submit comments pursuant to Article 88(2) of the EC Treaty

[163] Extra bonus is added on top of the aid intensities shown in Figure 1. For Article 87(3)(c) regions there are and extra 5% and for Article 87(3)(a) there is an extra 10%. Vedder, Hans. (2001)

[164] Vedder, Hans. (2001)

Community standards		SME	
Investment to comply with national standards going beyond Community Standards.	30%	+10% for SME	
Energy saving measures	40%	+10% for SME	
Combined production of heat and electricity	40%	+10% for SME +10% when they serve the needs of an entire community	
Promotion of renewable sources of energy	40%	+10% for SME	Up to 100% can be allowed in which case no further aid may be granted
Land rehabilitation	100%, plus 15% of the cost of the work		If identifiable and able to bear the cost, the polluter should pay and no aid may be granted
Relocation of firms	30%		-Only when relocation from an urban area or Nature 2000 where the activity was lawfully carried out. -The relocation was ordered by a public authority on environmental grounds, and the strictest standards apply in the new location

Table 2 illustrates that Small and Medium Sized companies (SME´s) have not only to know what block exemptions are allowed under the regulation regarding State Aid for SME.[165] They should also try to keep informed about other Community legislation and guidelines. Overall the 2001 Guidelines give more guidance regarding when investment aid is acceptable especially regarding SME´s. In comparison with the 1994 Guidelines they are a great improvement above all regarding energy related instruments.

The approach regarding aid for horizontal measures has changed considerably since the 1994 Guidelines. The basic approach according to the 1994 Guidelines was that horizontal measures did not constitute State Aid in the first place. Now horizontal measures constitute aid and fall therefore under Article 87(1), but SME´s can still get aid for advisory/consultancy service that can play an important role in helping SME´s to make progress in environmental protection.[166] Accordingly, aid may be granted in harmony with regulation 70/2001.[167] Taking into account what has been said before regarding SME´s access to investment aid there seems to be ample reason for SME´s to get aid to be kept informed about the different aid scheme that could be compatible to the EC rules.

[165] Regulation 70/2001 on the application of Arts 87 and 88 of the E.C. treaty to state aid for SME´s (2001)
[166] Vedder, Hans (2001)
[167] Regulation 70/2001 on the application of Arts 87 and 88 of the E.C. treaty to state aid for SME´s (2001)

Operating aid is in many ways the most interesting aid area in the 2001 rules since operating aid it is almost per se prohibited. The reason for this turn in the Guidelines regarding aid for environmental protection from 1994 to 2001 is mainly because the Commission had to respond to the number of eco-tax schemes[168] and schemes were operating aid was given to promote renewable energy usage.[169] The experience from numerous Commission decisions is represented in the 2001 Guidelines. Table 3 shows the type of operating aid that is allowed according to the 2001 Guidelines.

Table 3 Operating aid allowed according to the 2001 Guidelines

Type of aid	Conditions	Remarks
Promotion of waste management and energy savings	-Degressive aid 100% of extra cost but in 5 years to 0% -Non-degressive aid 50% of extra cost for 5 years Non-degressive aid for 10 years if	Only if beyond or in absence of Community standards
New tax in a sector or a activity or on products	A) agreement between the MS and recipient or a voluntary agreement B) goes beyond Community tax after reductions or no Community tax but still significant proportion of the national tax	No or beyond Community harmonization
Existing taxes in a sector or a activity of on products	The same condition as for new taxes +appreciable positive environment. impact of the tax + the aid must have been decided before adoption of the tax or significant change	
To develop processes for production of electric power from conventional energy sources with much higher energy efficiency	- Non-degressive aid total exemptions for 5 years -10 year exemption	10 year exemption only applies if the rules regarding new taxes and existing taxes are followed.
Renewable energy sources	A)Unit investment cost are particularly high B) Green certificates or tenders C) Cost calculated on external societal cost that are avoided, not over EUR 0,05 per kWh	The aid only for the difference between the cost of producing energy from renewable energy sources and market price of that energy.
Combined production of heat and electricity	A)Unit investment cost are particularly high B) Green certificates or tenders C) Cost calculated on external societal cost that are avoided, not over EUR 0,05 per kWh D) Industrial plants	

The schemes that are listed in Table 3 are familiar, at least to those interested in matters regarding the environment. The two exempt certain companies, sectors or products from new or old taxes if there are no Community standards or if the aid goes beyond the Community standards. Regarding operating aid for waste management it can only be given if the waste management or energy savings schemes go beyond, or, in lack of Community standards. This position of the Community is an interesting one. Member States are allowed to set higher standards than the harmonising

[168] Triebswetter, Ursula (1998)

standard regarding waste management[170] and can as a result, with high standards induce that waste generated in their country is dealt with, within other Member States like in the Wallonia waste case.[171] Facing a flood of waste into Wallonia from the surrounding countries were waste legislation was much stricter then in Wallonia - legislation was enacted to effectively prohibited the storage, tipping or dumping in Wallonia of waste that was originated outside Wallonia. The ECJ ruled that even though the legislation in question infringed two Community directives and Articles 28 and 30 EC[172] that, considering the abnormal influx of waste into Walloon region the ban was justified by "imperative requirements of environmental protection."[173] This case shows that allowing Member States to enact stricter rules can lead some of them to see benefits in having strict standards and by that getting rid of environmental problems that are associated with waste. Other scholars still focus on the perspective that a Member State that wants to maintain or introduce higher levels of protection will potentially expose their industries to distortion of competition.[174] On the other hand, by allowing Member States to aid companies in the waste sector seems to have the potential to balance out the need of some Member States for higher standards and the risk of other Member States then ending up with added waste problem.

Scholars have commented on the important role the Kyoto Protocol in the 2001 Guidelines. The Commission in addition to the measures described before, opened up for Member States to adopt certain State Aid measures to reach the reduction in CO_2 emissions that the Community has undergone. The Commission however gives no indication or "guidelines" on what kind of measures will be approved, besides the ones that are described in the 2001 Guidelines. The Commission clearly intends to deal with those state measures case by case, and not to take any initiative regarding what kind of measures are acceptable for each Member state to fulfil its obligation in accordance with the Kyoto protocol. This is therefore an area that the Commission recognises as potential for State Aid beyond what the Commission has already dealt with.

To conclude, it is necessary to have in mind that State Aid for environmental protection has a longer history within the EC legal system than the Integration Principle in Article 6 EC. Initially, in the 1970s the Commission saw the measures as a temporary measure but soon it was clear that State Aid in the environmental sector was there to stay. Over the years the Commission refined its Guidelines in that way that now the Member States are redirecting aid to horizontal objectives. Since aid that is not granted to specific sectors, is usually considered as being targeted to market

[170] Von Quitzow, Carl Michael.
[171] C-2/90 Commission v Belgium (1992).
[172] Notaro, Nicola (2000)
[173] C-2/90 Commission v Belgium (1992).
[174] Is in compliance with the EC treaty due to the right according to Article 176 for reverse discrimination.

failures and as being less distortive than sectoral and ad hoc aid.[175] Examples of horizontal objectives are Research and development, safeguarding the environment, energy saving, support to small and medium-sized enterprises, employment creation, the promotion of training and aid for regional development.[176] Thus while efforts are made to reduce State Aid to specific sectors the Commission looks favorable on aid intended for improvements of the environment as can be seen in the 2001 Guidelines. State Aid for environmental protection is therefore still a valid tool to enhance environmental goals of the Community and Member States.

6. The effect of the Integration Principle on the EC competition policy

This chapter will start by exploring how the Integration Principle has influenced the EC competition policy in general, but also with special attention to Article 81 EC and the EC State Aid rules. Then the issue of what legal effect the Integration Principle can have is explored.

6.1. The double aim in the competition field

The following figure 1 illustrates how the Integration Principle influences the EC competition policy. The Integration Principle claims that environmental requirements that are mainly found in Article 174 EC should be integrated into the Community policies and activities referred to in Article 3 EC. Listed in Article 3 EC are different activities of the Community such as sectorial policies like the common agriculture and fisheries policies, transport, industry policies and also the competition policies. The environmental objectives in Article 174 EC are integrated into the sectorial policies and the competition policy with integration instruments. Examples given of integration instruments are secondary legislation like regulations, guidelines, new policy instruments and integration methods as described in chapter 3.

[175] In contrast, aid to support specific sectors is likely to distort competition more than aid for horizontal objectives and also tends to favor other objectives than identified market failures. Moreover, a significant part of such aid is granted to rescue or restructure companies in difficulty. State aid Scoreboard – Online Spring 2003 update, COM(2003)

[176] State aid Scoreboard – Online Spring 2003 update, COM(2003)

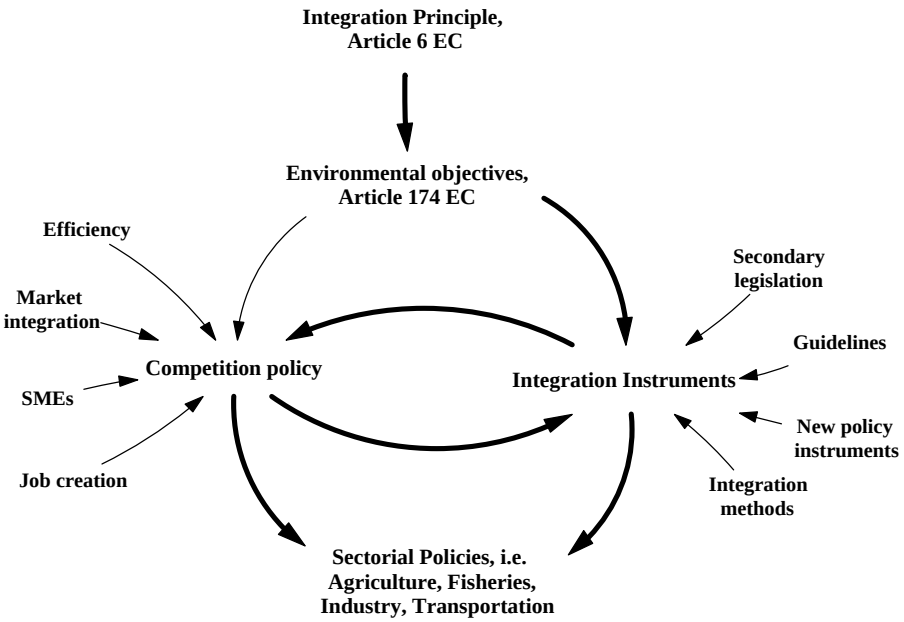

Figure 1 Integration Principle connection to EC policy areas and integration instruments

The competition policy of the EC has as its objectives to make it easier for SMEs to thrive in the market, jobs to be created and environmental objectives to be obtained, as discussed in length in chapter 4. Environmental objectives have also been part of the EC competition policy regarding State Aid since the 1970s, before the Integration Principle existed.

Figure 1 also illustrates that the competition policy has a double agenda in connection to the integration of environmental protection requirements into EC policies and activities. The DG Competition has the obligation to integrate environmental concerns into the competition policies. Though, possibly more importantly, the DG Competition wants to make sure that when other policy areas are integrating environmental requirements they do that within legal framework of the competition rules. Both the Integration Principle and the competition policy has in them cross section elements, since they put forward rules that other EC policies are obliged to follow.

The most apparent sign of how environmental protection requirements have been integrated into the interpretation of Article 81 EC is the Horizontal Guidelines. The issue that needs to be looked at now is whether the aim of the sections concerning the environment in the Horizontal Guidelines are set to integrate environmental concerns into the competition decision making process or if they are put forward to make sure that the when other policy areas are integrating environmental concerns they follow the competition principles. It is stated in the Horizontal Guidelines that it does not matter whatever the environmental gains are or the necessity of the provision, an agreement can never eliminate competition in terms of product or process

differentiation, technological innovation or entry onto the market.[177] The main reason for allowing horizontal agreements according to the Horizontal Guidelines are that they can lead to substantial economic benefits and the Guidelines are set forward in the spirit of the Chicago school were economic analyses is in the forefront when analysing if agreements are compatible with the EC competition policy. Having also in mind that some state that ideally Article 81 EC should be interpreted on the bases of competition arguments only, that is economic argumentation.[178] The schizophrenic nature of the EC competition rules are however also apparent in the Horizontal Guidelines. The economic evaluation of an environmental agreement is based on net benefits in terms of reduced environmental pressure resulting from the agreement as compared to a baseline where no action is taken.[179] Here the Guidelines open up a wide area for assessing the total cost if no action is taken. This allows the economic analyses to take in factors that are usually left out in calculating cost that actions have on the environment, like cost of diminishing natural resources.

Integration of environmental concerns into the EC State Aid has a much longer history than the Integration Principle. The main environmental rule that has influenced this area is the Polluters-Pay principle. The introduction of the Polluters-Pay principle into Community legal system has put constant pressure on the Commission to try to close the gate for aid for environmental protection. This is unless the measures can be regarded as necessary to ensure environmental protection and sustainable development and without having disproportionate effects on competition and economic growth. It can be assumed with considerable certainty that the Polluters-Pay principle has had significant effect on closing the door on State Aid for individual companies or sectors that do not fulfil Community environmental standards, which was the initial objective of allowing aid for environmental protection. Although the door has closed for these kinds of aid, other doors have opened up. The 2001 Guidelines indicate two important factors regarding the Commissions standpoint on State Aid for environmental protection. Firstly, State Aid for environmental protection is still a valid tool to enhance environmental goals of the Community and Member States. That is in areas were the Polluter-Pay's principle does not directly apply. Secondly, Member States are the appropriate source of schemes for environmental protection in the new areas.

In regards to the double objective of the Integration Principle in the competition field, this is not as apparent in the State Aid field. The common denominator of the new areas where State Aid is admissible for enhancement of environmental goals is that they are a response to obligation that the EU has taken on as a whole but left in the hands of Member States to implement the obligations. The objectives are known and there is a need to get funds from Member States, since turning away from the unsustainable behavioural patterns are not likely to pass the conventional economic

[177] Para, 195 Horizontal Guidelines
[178] Vogelar, Floris (2002)
[179] Para, 194 Horizontal Guidelines.

assessment as put forward by the Chicago School. These measures are more in the spirit of the interventionist theories of the Harvard School.[180]

The next issue at hand is examining whether environmental goals should have priority over competition goals. According to Grimeaud Article 6 EC gives no indication that environmental concerns should have priority over economic and social matters and he doubts that the new Article 6 EC will make the integration of environmental concerns compulsory and effective.[181] The DG Competition has also stated that Community law provides that environmental considerations must be integrated into all other Community policies and that this includes European competition policy. However, emphasis is on that "both the national legislator and the industry have to respect competition law in putting in place environmental initiatives. Neither should they establish forms of collaboration, rules or practices that would constitute unjustified obstacles to competition."[182] This quotation gives a good indication that the DG Competition emphasizes the importance of when environmental initiatives are integrated in other EC policy areas. They are in conformation with competition law, thereby indicating that integration of environmental objectives into competition policy is secondary to the objective of making sure that integration of environmental initiatives into other policies does not break the competition rules.

6.2. The legal effect of the Integration Principle

The question at hand is if the Integration Principle has any legal meaning or strength at the EC level or whether the EC Council or Commission acts could be annulled because environmental integration had not been executed. It has been pointed out that it will be difficult to establish principles like the environmental integration principle in such a way as to be legally enforceable when taken on its own. The main reason for this is that the principle calls for "further specifying and implementing measures before it can be applied in practice."[183] Grimbaud argues that the same applies for sustainable development and the environmental protection requirements that relate to EC environmental law objectives, principles and other conditions or aspects of environmental policy according to the new Article 174(1)(2)(3) EC. Therefore, it is highly improbable that the Integration Principle would amount to a legal test upon which Community acts could be assessed and even found unlawful in the event of insufficient integration of environmental concerns.[184] In the 1992 Perelta case[185] the ECJ ruled that ex Article 130r(2) EC principles are "confined to defining the general

[180] Kirkebride James and Scholes, Jeramy. (1996)
[181] Grimeaud, David. (2000)
[182] European Competition Authority homepage, Available on line: http://europa.eu.int/comm/competition/index_en.html
[183] Grimeaud, David. (2000)
[184] Grimeaud, David. (2000)
[185] Case C-379/92 Peralta, also Case 62/88 Greece v Council of the European Commission, paras 19 and 20 also Case C-2/90, Commission of the European Communities v Kingdom of Belgium para 34

objectives of the Community in the matter of the environment." Further explanations regarding the effect that not implementing the general objectives of the Community in matters regarding the environment is found in the Bettati Case where the ECJ stated:

> "That provision thus sets a series of objectives, principles and criteria which the Community legislator must respect in implementing environmental policy. … However, in view of the need to strike a balance between certain of the objectives and principles mentioned in Article 130r and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the Council, by adopting the Regulation, committed a manifest error of appraisal regarding the conditions for the application of Article 130r of the Treaty".[186]

What is a "manifest error of appraisal regarding the conditions for the application of Article 130r" was not further explained, but this case indicates that the court is, in specific circumstances, ready to review the legality of a regulation based on if the principles in former Article 130r. [187]

In the ECJ ruling in the Concordia Bus case[188] the matter at hand was if Council Directive relating to the coordination of procedures for the award of public service contracts could be interpreted as allowing the public contracting authority to decide to award a contract to the tender who submits the economically most advantageous offer. If when assessing what is the economically most advantageous offer, they may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract. The Court took into consideration when assessing if the regulation at hand could be interpreted widely that Article 6 EC states that environmental objectives should be integrated into Community policies and activities. Therefore, the court concluded that the relevant EC legislation did not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender. The ECJ ruled that taking into consideration ecological criteria in economical criteria was permissible so long as it did not confer an unrestricted freedom of choice on the authority, as expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination. This case gives an

[186] Case 341/95, Gianni Bettati v Safty Hi-Tech Srl, para 34-35

[187] In a more recent case the Court of First Instance states that "Similarly, Article 153 EC refers to a high level of consumer protection and Article 174(2) EC assigns a high level of protection to Community policy on the environment. Moreover, the requirements relating to that high level of protection of the environment and human health are expressly integrated into the definition and implementation of all Community policies and activities under Article 6 EC and Article 152(1) EC respectively." T-141/00 *Artegodan v Commission*

[188] Case C-513/99, Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab, and Helsingin kaupunki, HKL-Bussiliikenne, para 10-73

indication that the court will at least take into account ecological criteria into economical evaluation even though the relevant EC legislation does not expressly state that environmental concerns are part of the evaluation.

It is however doubtful that it is right to measure the effectiveness of a principle like the environmental integration principle solely on if it can be considered as a legal tool for sanctioning insufficient or incorrect environmental policy. Especially when having in mind that the integration methods most commonly used like the EIA does not require that the most environmentally advantageous outcome will be chosen.[189] The main reason for the increased awareness that integration of environmental concerns in all policy domains and decision-making processes of the EC is necessary is because the methods used before were not working. Now the emphasis is, for example, on procedural requirements (EIA, SEA) and taking up methodology that ensures that policy makers take more enlightened decisions. There is also an increased tendency to have the instruments used both self-executive, market based and also in such a loose language that they cannot be effectively forcible by legal means.[190] Since even the evaluation of what is environmentally most advantageous can be disputed between different stakeholders when the final goal is sustainable development[191] the problems of assessment will only increase. The Integration Principle is a strategy put forward to turn away from the old ways of doing things when the EC issued regulations that did not amount to much for the overall improvement of the environment.

Another important feature of the Integration Principle is based on the concept of path dependency. That is when conditions create "a tendency for change in any given direction to make further change in the same direction more likely."[192] This essentially means that if policy makers start taking environmental aspects into consideration they will be starting on a path that will make further changes in the same direction more likely. This however does not change the fact that as long as the Integration Principle is not legally binding for the Community institutions, they do not create rights for third parties in case of non-compliance.[193] However, the ECJ in the Bettati Case opened up the possibility that it would review if the Council by adopting a Regulation has committed "a manifest error of appraisal

[189] The EC EIA directive although specifying that certain projects in Annex I should undergo an EIA there is nothing that specifies that the most environmentally advantageous outcome should be should be chosen.
[190] Macrory, Richard and Purdy, Ray. (1997)
[191] The concept sustainable development is not defined in the Treaty but when assessing its content it is necessary to have in mind Article 2 EC especially that the Community shall have as its task to have a "harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflammatory growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, economic and social cohesion and solidarity among Member States. "
[192] Scrase, Ivan J. and Sheate, William R. (2002)
[193] Grimeaud, David. (2000)

regarding the condition for the application of Article 130r of the Treaty".[194] This does not, however, change the reality that the Member States citizens, NGOs and other organizations will have difficulties to exercise their functions as guardians of the Treaty as envisioned in the Van Gend en Loos Case[195] with the aim of improving the state of the environment in the Member States.

To conclude, when assessing the effect of the Integration Principle it is necessary to have in mind the reason behind this principle. As discussed in chapter 3 the main reasons behind the emerging of the principle are that the conventional ways of environmental protection were not working. After issuing environmental regulation for decades the environmental quality in the Member States still remained poor. New methods are used for enhancing environmental protection, such as market-based and tax-related instruments, non-compulsory means of regulation and eco-labelling. Additionally, new methods were proposed like Integration across the environmental media, a method used in the IPPC regulation[196], Sustainability Assessment has also been introduced by setting sustainability indicators and the DG Competition has begun to integrate stakeholders into the governance by asking for comments from the public while proposed regulations and guidelines are still on the drafting table.[197] The Decision of the Commission in the CEMEC and CECED also gave a strong indication that the Commission regards environmental agreements as highly positive and that such agreements can be exempted exclusively on environmental grounds. Overall, and especially when having the principle of path dependency in mind, the Integration Principle seems to have made some impact on the competition policies and their decision making processes. Although, it is necessary to have in mind that the DG Competition has put as much or not more emphasis on making sure that when other sectorial policies integrate environmental objectives they do that within the framework of EC competition law.

7. Conclusion

The integration of environmental protection requirements into the definition and implementation of the EC competition policy is a process that has great

[194] Case 341/95, Gianni Bettati v Safty Hi-Tech Srl, para 34-35
[195] Case 26/62 Van Gend en Loos (NV Algemene Transporten Expeditiie Onderneming) v. Nederlandse Administrative der Belastingen.
[196] Council Directive on Integrated Pollution Prevention and Control (IPPC)
[197] The Competition Authority homepage has a special link were the public is ask to participate in Consultations both regarding Competition case and Legislative and policy initiative. The link has been open for comments since the year 2000.

potential. The Integration Principle gained both political and legal weight when the principle was moved to Article 6 EC as can bee seen by the Council and the Commission actions to further speed the integration process. The main obstacle for the success of the integration process is the fact that there seems to be no consent regarding what the Integration Principle really entails in the context of EC legal system. Many integration methods are available for reaching the objectives of the Integration Principle, but the DG Competition has not demonstrated much ingenuity in trying new methods to integrate environmental concerns into its policies but relies mainly on issuing guidelines.

The area of the EC competition policy field that has most experience with integration of environmental objectives is the State Aid area. The Commission has endorsed State Aid for environmental protection since the 1970s. First, Member States were allowed to give aid to help companies to reach standards set by the European Union. Today aid for environmental protection is considered to be acceptable. The Commission also views it as positive that State Aid is moving from the sectoral policies to horizontal objectives, since aid that is not granted to specific sectors, is usually considered as being targeted to market failures and as being less distortive than sectoral and ad hoc aid.[198] The Commission has even opened up for Member States to adopt State Aid measures to make it possible for the Member States to reach the stated goals in CO_2 emissions. The Polluters-Pay principle has also had a positive influence on State Aid rules, resulting in that State Aid is now not for picking up the laggards. State Aid for environmental protection is rather used by Member States to steer certain sections of the society into more sustainable pathways with the common good in mind.

The EC competition policy has always had objectives other than pure efficiency goals. Other objectives of the EC competition policy are, for example, fairness, interest of small and medium-sized enterprises- SMEs, market integration and the environment. The competition policy also has a double agenda regarding the reasons behind integrating environmental concerns in accordance with the integration principle. The DG Competition has the duty to integrate environmental requirements into its policies and decision making processes. Though, possibly more importantly, the DG Competition wants to make sure that when other policy areas are integrating environmental requirements they do that within the legal framework of the competition rules.

The claim is made that the main methods that the Commission applies to enhance environmental protection requirements regarding horizontal agreements is to restrict the scope of application of Article 81(1) EC, or to widening the scope of Article 81(3) EC. In 2001 the Commission issued the

[198] In contrast, aid to support specific sectors is likely to distort competition more than aid for horizontal objectives and also tends to favor other objectives than identified market failures. Moreover, a significant part of such aid is granted to rescue or restructure companies in difficulty. State aid Scoreboard – Online Spring 2003 update, COM(2003)

Horizontal Guidelines, which includes for the first time special sections regarding environmental agreements. The Horizontal Guidelines are based on economic analyses but they also show signs of the schizophrenic nature of the EC competition policies, by accepting a broad concept of what constitutes environmental costs. The Horizontal Guidelines indicates that although the DG Competition emphasises the need for other policy areas to respect competition rules when integrating environmental objectives, it has also integrated environmental protection concerns into the competition policy.

The Integration Principle legal meaning and strength at the EC level has been debated. Some have argued that the Integration Principle has little or no legal effect since it is highly improbable that it would amount to a legal test upon which Community acts could be assessed and even found unlawful in the event of insufficient integration of environmental concerns.[199] However, the ECJ case law has demonstrated that the court will assess if a manifest error of appraisal regarding the condition for the application of old Article 130(r) (now Article 6 EC and 174 EC) did happen.[200] Additionally, in the Concordia Bus case the ECJ ruled that having in mind the Integration Principle it was acceptable to take environmental considerations into account when assessing what was the most economically advantageous offer. Despite the fact that contested EC regulation did not stipulate environmental concerns as one of the factors that was permissible to take into account when assessing the economically most advantageous offer.[201]

These rulings of the ECJ give indications that the Integration Principle can have legal effect and that there is no reason to disregard the Integration Principle as not being compulsory and effective. Finally, the decisions of the Commission in the CEMEP and CECED cases give a strong indication that the Commission regards environmental agreements as highly positive and that such agreements can be exempted exclusively on environmental grounds. It is also doubtful that the right way to measure the effectiveness of the Integration Principle is to do so solely on whether the Integration Principle can be considered as a tool for sanctioning insufficient of incorrect environmental legislation. Overall, and especially when having the principle of path dependency in mind, the Integration Principle seems to have made a noticeable impact on the EC competition policy, the implementation of competition law and decision making processes.

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