



FACULTY OF LAW
University of Lund

Linnéa Arvidsson

Environmental Protection and EC Competition Law

Master thesis
20 points

Hans Henrik Lidgard

EC Competition Law

VT 1999

Contents

1 INTRODUCTION	4
1.1 General Remarks	4
1.2 Purpose and Method	5
2 THE EU ENVIRONMENTAL POLICY	7
2.1 The Legal Base for the Protection of the Environment	7
2.2 The Evolution of the EU Environmental Policy	7
2.3 Tendencies in the EU Environmental Policy: The Treaty of Amsterdam	9
2.4 Conclusions	11
3 THE EU COMPETITION POLICY	12
3.1 The Legal Basis and Contents of the EU Competition Policy	12
3.2 Background and Aim of the EU Competition Policy	12
3.3 The Treaty of Amsterdam and Competition	13
3.4 Conclusions	13
4 THE CONFLICT BETWEEN ENVIRONMENTAL PROTECTION AND COMPETITION: POLICY ASPECTS	14
4.1 The Growing Awareness of the Conflict	14
4.2 The Legal Status of each Policy	15
4.3 The Integration Principle	17
4.3.1 The Interpretation and Legal Enforceability of the Integration Principle	17
4.3.2 The Integration of Environmental Protection into Community Policies so far - the Example of Free Trade	19
4.4 Conclusions	22
5 THE CONSIDERATION OF ENVIRONMENTAL ASPECTS WITHIN THE RULES OF COMPETITION	24
5.1 Article 81	24
5.1.1 General Remarks concerning Article 81	24
5.1.2 The Possibilities of Considering Environmental Argumentation within the Four Exemption Requirements of Article 81(3)	25

5.1.2.1 The Measure must Contribute to Improving Production or Distribution or to Promoting Technical or Economic Progress.	26
5.1.2.2 The Measure must allow the Consumers a Fair Share of the Resulting Benefits	30
5.1.2.3 The Measure should not Impose any Restrictions which are not Indispensable to attain the Objectives of the Agreement	33
5.1.2.4 The Measure should not Eliminate Competition in respect of a Substantial Part of the Products in question	36
5.2 Article 81 in Conjunction with Articles 3(1)(g) and 10 of the TEC	36
5.3 Article 82	38
5.3.1 Introductory Remarks	38
5.3.2 The Notion of Dominant Position	39
5.3.3 The Notion of Abuse	39
5.4 Article 86	44
5.4.1 General Application of the Article	44
5.4.2 Case Law including Environmental Aspects	46
5.5 Articles 87-89 on State Aid	51
5.5.1 Environmental State Aid and the Polluter Pays Principle	51
5.5.2 The Notion of Aid	52
5.5.3 Aid for Environmental Purposes	53
5.5.4 Case Law	55
5.6 The Merger Regulation and the Environment	56
5.7 Conclusions	59
6 CONCLUSIONS	61

Summary:

In recent years, public as well as private measures taken in order to protect the environment have proved to affect competition. As consumers have become more and more alert to the environmental effects of the manufacture, use and ultimate disposal of goods, undertakings have taken measures improving the environmental protection not only due to legislation imposing stricter standards on products and processes, but also due to the fact that having a good environmental image can be an important marketing instrument. However, measures improving the environmental performance of undertakings are so costly and environmental requirements so difficult to comply with, that co-operation with other firms and other action likely to affect competition sometimes have represented the only possibilities for undertakings to conform to the new rules and consumer demands. Furthermore, measures taken by States such as legislation imposing stricter environmental standards and the granting of subsidies for environmental goals also affect competition. Whereas environmental legislation have proven to bring about consequences such as increased concentration of the markets and distortions on free trade, State Aids harm undistorted competition by artificially giving some undertakings a better position on the market at the expense of the other firms, thus harming the equality.

Within the European Union, the aims of environmental protection as well as free and undistorted competition are being pursued by means of highly developed policies accompanied by detailed legal frameworks. According to the Treaties, the EU shall aim for a high level of environmental protection at the same time as free competition must not be threatened, as being one of the most important means for attaining the more traditional EC goals such as economic growth and a high degree of competitiveness. As seen above, these goals often conflict, and the purpose of this thesis is to present the areas where the EU environmental policy and competition policy meet each other and to answer the question of how to deal with a conflict between the rules and principles they contain. The main question at issue is whether measures likely to restrict competition can be exempted from the prohibitions of the TEC competition rules and the Merger Regulation on the ground that they promote environmental protection.

The fact that a high level of protection and improvement of the quality of the environment as well as sustainable development nowadays are enumerated among the Community goals, whereas undistorted competition remains a means for the attainment of the Community objectives does not automatically imply that environmental aspects should prevail in a conflict with competition. Nor can such a conclusion be drawn from the recently strengthened integration principle, which, even though it is probably legally enforceable, merely requires competition policy to take the environment into account. Measures to protect the environment cannot be generally exempted from the competition rules and consequently, measures of

an undertaking or a Member State with environmentally positive effects must be taken in compliance with the competition rules of the TEC. The cases which have come before the Commission where environmental aspects have been included so far, show that environmental arguments nowadays can be put forward within the context of all the TEC competition rules, and probably in cases concerning the Merger Regulation as well. Even though there is no clear example of a competition restricting measure not being prohibited alone because of its environmentally positive effect, environmental considerations do play a part in the assessment of the competition rules and are likely to improve the chances for e.g. agreements or behaviour to be exempted from the prohibitions. Furthermore, the role given to the environment, both in the assessment of competition cases and in the Community as a whole, is increasing, and the tendency seems to be for environmental arguments to be given a more important role in the future. In the light of the fact that the Commission according to Article 6 TEC is obliged to take due regard to environmental arguments, such a conclusion is not surprising. However, the fact that environmental considerations must be taken into account when assessing the applicability of the prohibitions contained in the EC competition rules have, so far, not implied that environmental aspects are given the same importance regardless of which competition rule the environmental action is affecting. The Commission's assessment of conflicts between environmental goals and the aims of the competition rules is not coherent. In order to improve the treatment of the conflicts between environmental protection and competition in the future and to increase the legal certainty in these matters, the balancing between these interests made in the context of every specific competition rule should be reconciled.

Abbreviations

AG	Advocate General
CFI	Court of First Instance
COM	Commission
CMLR	Common Market Law Review
DG	Directorate General
DOC	Document
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Community
EU	European Union
IGC	Intergovernmental Conference
MR	Merger Regulation (4064/89)
OJ	Official Journal
RegR	Regeringsrätten (The Swedish Supreme Administrative Court)
RMUE	Revue du Marché Unique Européen
SEA	Single European Act
TEA	Treaty of Amsterdam
TEC	Treaty of the European Community
TEU	Treaty of the European Union
UN	United Nations

1 Introduction

1.1 General Remarks

Ever since the 1960s, the occidental countries have experienced a growing concern among their citizens for the environment, which has induced private as well as public action in order to meet the growing demand for measures improving environmental protection. International organisations and States have adapted their policies and activities to comply with these demands and as a result, legislation and international covenants imposing more stringent standards have been created and funds for environmental purposes have been allocated. Due to such authoritative measures as well as voluntarily, undertakings and other private parties have also taken part in the struggle for a sounder environment. In recent years, these environmental measures have proved to influence in the striving for another important objective of the above-mentioned parties, namely free and undistorted competition, which is one of the main means for obtaining overall goals such as economic growth and a high degree of competitiveness.

The effects on competition resulting from environmental measures can be both positive and negative, and likely to influence competition on a global as well as on a local level. The effects will, however, to a great extent depend on the form of the environmental measure. For instance, if environmental measures are taken in the form of legislation imposing stricter standards on production, such legislation is likely to e.g. increase the minimum efficient scale in the industry concerned, which might shut small and medium-sized competitors out of the market. Consequently, the concentration on the market will increase, and undertakings capable of complying with such higher standards might gain dominant positions or even situations of monopoly. If an environmental goal instead is pursued by rules imposing certain requirements concerning the quality of the final product, free trade is likely to be affected. In order to avoid the negative effects of legislation on competition and the competitiveness of national undertakings, States might instead prefer the use of so-called market-based instruments. Such instruments include State Aid for investments or activities promoting the environment as well as the concluding of covenants between the State and national undertakings, aiming for improving the latter's environmental friendliness. The competition restricting effects of subsidies are well known, and as far as covenants are concerned, the close co-operation that the attaining of their environmental goals require could easily spill over into competitive activities and facilitate co-ordination among competing undertakings. Moreover, the increasing concern among consumers for the environment has caused manufacturing as well as distributing undertakings to voluntarily take environmentally improving measures. Such unilateral commitment of undertakings to improve the environment has proven to involve obvious risks from the standpoint of competition, i.e. through the use of this process as a vehicle

for collusion or to disadvantage rivals. As a matter of fact, to argue that basically any action taken in order to improve the environmental protection may affect competition would not fall far from reality.¹ Accordingly, when choosing between possible measures aiming for the solving of an environmental problem, States and undertakings are inevitably also choosing between the different consequences for competition that these measures might imply.

In a European context, the aims of environmental protection as well as free and undistorted competition are being pursued by means of highly developed policies accompanied by detailed legal frameworks. In contrast to the long-standing tradition of the European competition policy, the EU environmental policy have only existed since the 1970s, and was not introduced in the EC Treaty until 1986. Nevertheless, it has experienced a dynamic evolution and today both policies count among the most important of the European legal framework. The interface between these two policies have, however, not been noticed until fairly recently.

1.2 Purpose and Method

The purpose of this thesis is to present the areas where the EU environmental policy and competition policy meet each other and to answer the question of how to deal with a conflict between the rules and principles they contain. The focus is on the European aspect of the relationship between competition and environment, implying that the Member States' national rules on the matter will be left outside of the scope of the analysis. Nevertheless, in the light of the fact that the influence of the EU framework on the corresponding national rules is quite important, the present thesis will hopefully be of interest also for the solving of conflicts on a Member State level. The main question at issue is whether environmental objectives can impose limits on the proper application of competition rules in situations where these rules normally would apply, or in other words: can measures which might restrict competition be exempted from the prohibitions of the EC competition rules on the ground that they promote environmental protection?

In order to analyse these questions, I will firstly deal with the backgrounds and main contents of the EU environmental and competition policies and legal frameworks, mainly in order to examine the importance of each policy but also to present the interaction between the policies which have existed ever since the creation of the environmental policy. The following two parts are devoted to the main issue of the thesis, namely the areas of conflict between the two policies. On the one hand, I will deal with the policy conflict in a broader context, analysing the legal status of each policy and the influence of the integration principle in this regard. On the other hand, I intend to examine how cases involving environmental

¹ For a further discussion on these matters, see e.g. OECD, 1996, p. 5 et seq. and Marin, 1998, p. 581.

aspects have been treated so far within the context of specific European competition rules, and how environmental arguments may be put forward when arguing for a measure or agreement not to be prohibited despite of having restricting effects on competition. The outline of this latter part is based on the structure of Title IV of the TEC, and both the rules concerning private action and the ones aimed at measures of the Member States will be dealt with. Furthermore, for the sake of completeness, the considering of environmental aspects within the context of the Merger Regulation will be analysed. Finally, the different roles given to environmental considerations within the context of every specific field of competition will be compared. In this regard, some final suggestions to improve the assessment of cases where the aims of free competition and environmental protection are conflicting will be presented.

The material used for writing this thesis mainly consists of Commission Decisions, due to the fact that the case law of the ECJ in these matters is rather scarce. Nor is legal literature on these questions abundant. Despite the fact that both competition law and environmental law are among the most active fields of research on a Community level, only two extensive studies on their interaction have been published as yet.² Hence, besides Commission Decisions, the main sources for this thesis were periodic articles, Commission Documents, Council Resolutions, the treaties and the Merger Regulation. Since the relationship between competition and environmental protection only recently has been noticed, all sources date from the 1990s.

² These are Portwood, Timothy, *Competition Law & The Environment*, London, Cameron May, 1994 and Rantala, Meri., *EC Competition Law and Environmental Protection*, Helsinki 1996.

2 The EU Environmental Policy

2.1 The Legal Base for the Protection of the Environment

The EU environmental legal framework consists of on the one hand, the Treaty rules, on the other hand the five environmental action programmes and secondary legislation. For the purposes in this thesis, the Treaty rules and the environmental action programmes are the most important. The rules relating to the protection of the environment in the treaties are found in Articles 2, 3, 6, 174-176 TEC and Article 2 TEU of which, for present purposes, the most significant is Article 6 TEC which expresses the so-called integration principle.³ In order to facilitate the understanding of the importance of these rules within the Community legal framework as well as to show the long-standing interaction between the EU environmental and competition policies, a brief summary of the evolution of the Community's environmental policy will follow.

2.2 The Evolution of the EU Environmental Policy

The birth of EU environmental policy is set by most authors to the year of 1973 and the entry into force of the very first Environmental Action Programme. Since then it has created an impressive array of environmental regulations with which it has turned into a main actor in the international field, and there is widespread agreement that the environmental policy represents one of the most successful areas of European integration.⁴ When the European Economic Community was founded in 1957, however, the main goals were to promote economic interests and trade between the Member States and environmental issues were not mentioned at all in the original Treaty of Rome.⁵ However, with the growing preoccupation for environmental issues amongst the Member States and with the UN Conference on the Environment in Stockholm in 1972 giving rise to a global international concern, the Community could no longer remain inactive in the field of environmental protection.⁶ As the Member States were creating more and more national environmental rules, free movement of goods and the competition were threatened, thus giving the Community a strong reason for introducing its

³ As concerns the objectives and principles of the EU environmental policy, these are expressed in Article 174 TEC, which enumerates the four objectives (Article 174.1) as well as six of the seven principles (Article 174.2). For present purposes, the most important principles are the polluter pays principle (which calls for an internalization of the costs caused by pollution within the polluting undertaking, thus promoting undistorted competition) and, of course, the integration principle.

⁴ Golub, 1998 p. 1

⁵ Rantala, 1996 p. 13

⁶ London, 1994, p. 291 and Mahmoudi, 1997 p. 45

own environmental policy. It was argued that if all Member States were facing the same environmental standards and thus the same conditions of competition, intra-community trade would be encouraged and competition would be more efficient.⁷ Hence, resulting from environmental concern as well as from the wish to ensure competition in the European markets, the basic framework for this new Community policy was set up in 1973 with the first environmental action programme⁸ by means of extensive interpretation of the Treaty.⁹

Notwithstanding, doubts remained of whether environmental protection could be regarded as a Community goal. Although the creation of environmental rules had not only been proven possible but also increased significantly, the question whether environmental protection regardless of the silence of the Treaty could be seen as a Community objective was still quite controversial. However, in the *ABDHU case*¹⁰, which concerned the compatibility of a directive imposing a system of permits on undertakings which disposed of waste oils with the principle of the free movement of goods, the Court held that "The directive must be seen in the perspective of *environmental protection, which is one of the Community's essential objectives*.(...) It follows from the foregoing that the measures prescribed by the directive do not create barriers to intra-Community trade, and that in so far as such measures, in particular the requirement that permits must be obtained in advance, have a restrictive effect on the freedom of trade and of competition, they must nevertheless neither be discriminatory *nor go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection, which is in the general interest*."(Emphasis added) Hence, for the first time, the Court had mentioned environmental protection as being one of the Community's essential objectives, implying that the EC environmental policy was finally settled, if not in the Treaty then at least in the ECJ case law. One year later the Member States adopted the Single European Act which for the first time "legalized" the Community's environmental policy by clearly giving it a constitutional base. A new Title VII was

⁷ Guyomard, 1995 p. 106 An additional positive effect concerning the environment is that the risk of "eco-dumping" is avoided when standards are harmonised.

⁸ Official Journal C 112, 20/12/1973. This first programme covered the years 1973-1976. Since 1973, all of the Community actions envisaged in the field of the environment have been described in (up to today there are five) Action Programmes, each of which represents the basic framework for EU environmental policy, thus providing a useful source of information when issues such as the present are analysed. See further the Second-Fifth Action Programmes (OJ C 139, 13/06/77 (1977-1981), OJ C 046, 17/02/83 (1982-1986) and OJ C 138, 17/05/1993 (1992-)), Mahmoudi, 1997, p. 45 et seq., and Liefferink/Skou Andersen, 1997 p. 11

⁹ Accordingly, the Community's environmental rules were for many years created with a dual legal base which somewhat illustrates the fact that the first EU environmental rules were made with the double motive of liberalisation of the internal market and environmental protection in mind: On the one hand, Article 94 was used for rules concerning harmonisation in order to proceed to the internal market (thus aiming for undistorted trade and competition), and on the other hand, Article 308 (which can be used for measures lacking a specific legal base in the Treaty) was used for the rules aiming purely for improved environmental protection. (See e.g. Degroux, 1995, p. 383).

¹⁰ Case 240/83 *ABDHU* (1985) ECR 531

introduced, consisting of Articles 174, 175 and 176 where the objectives as well as the principles of EU environmental policy are expressed. Moreover, ever since the SEA, purely environmental measures no longer needed to be created with Art 308 as a legal basis, but from Article 175 that prescribes that environmental rules can be adopted with unanimity.¹¹ Consequently, the Community could take environmental measures without needing to justify them in the light of the common market.¹² It was not until the Treaty of Maastricht, however, that environmental protection turned into a first-ranked issue within EU policies. Firstly, the environment was mentioned explicitly among the prime objectives of the EU in the new Article 2 of the Treaty, which implied that economic growth from that point had to take the environment into account.¹³ As a practical result, the hierarchy whereunder the environment would come after for example the free movement of goods was no longer valid.¹⁴ The second but also the most important aspect of the changes introduced by the Maastricht Treaty and the fifth environmental action programme was the integration of environmental concerns in the global strategy of the Community. Although the principle of integration was introduced already with the SEA in 1986, the new wording of the principle became much stronger with the Maastricht Treaty. Instead of stating that environmental protection *shall* be a component of the other policies of the Community (which was the case under the Single European Act), the new wording implied a much more dynamic approach with an express *obligation* for other Directorates General of the Commission to integrate environmental aspects.¹⁵ Hence, without giving precedence to one policy over another, whenever other Community policies (such as competition policy) are devised and applied, the Community institutions must give due regard to the environmental aspects of their actions. Moreover, with the new emphasis on the environment as introduced by Maastricht, the formerly well-established hierarchy between different principles of the Community (such as between free trade and competition and the environment) suddenly had to be called in question.¹⁶ Consequently, the Treaty of Maastricht brought about a growing interaction between the economical and environmental policies as well as an increased uncertainty on how to balance the objectives in a conflict situation.

2.3 Tendencies in the EU Environmental Policy: The Treaty of Amsterdam

As we have seen above, it is clear that the EU environmental policy without exception was strengthened every time the TEC and the action programmes were

¹¹ London, 1994, p. 291 and Jans, 1995 p. 6

¹² Vandermeerch, 1997 p. 79

¹³ Article 2 as introduced by the Treaty of Maastricht read as follows: "*the Community shall have as its task (...) to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment...*"

¹⁴ Llamas/ London, 1995 p. 17

¹⁵ Article 130r of the EC Treaty, as amended by the Maastricht Treaty.

¹⁶ London, 1994, s. 291 p. 292

amended. Consequently, on the eve at the 1996 intergovernmental conference, the environment was not high on the agenda since there seemed to be no need for further emphasis on environmental issues. Nevertheless, the environmental improvements attained in Amsterdam turned out to be remarkable.¹⁷ The environmental changes to the treaties as introduced by the TEA can be split into three main areas,¹⁸ of which the first one concerns the principle of *sustainable development*.¹⁹ By including this principle among the major EU objectives enumerated in Article 2 TEU and also placing it into the promotion of the framework of economic and social growth that the Member states and the signatories of the Treaty declared themselves bound to follow²⁰, sustainable development is inserted as a specific objective of both the Union and the European Community.²¹ Secondly, the TEA inserts "a *high level of protection* and improvement of the quality of the environment" amongst the tasks of the EC. This means that this principle now explicitly has been made part of the EC objectives enumerated in Article 2 TEC, and it has also been inserted in the Article 95(3) TEC.²²

Even more important, however, are the amendments concerning the *integration principle*. From the very outset of the IGC, representatives of the Member States expressed their will to reinforce the integration principle.²³ They saw three possible ways to realise this: through bringing the integration principle forward in the Treaty (as an objective of the TEC), through including an express reference to the environment in separate chapters of the Treaty, or through a combination of

¹⁷ It was mainly because of the insistence of the Nordic Member States that environment became included in the IGC discussion, see Van Calster/Deketelaere, 1998, p. 13

¹⁸ A fourth quite important amendment concerns the decision-making process and Article 175 TEC. This amendment extends the co-decision procedure to environmental development, which is of significance since it strengthens the powers of the European parliament, which is and has always been the most environmentally friendly institution of the Union. Although it is not relevant for present purposes, it may imply a further strengthening of the protection of the environment, which can be relevant for future balancing between the environment and other Community policies. Charles Reich presents an interesting discussion on the possible consequences of these changes. (Reich, 1997, p. 665-669) See also concerning the role of the European parliament e.g. Mahmoudi, 1997-1998 p. 408

¹⁹ Sustainable development, which implies a properly managed growth without detriment to the environment, has been a significant part of the EU environmental policy ever since the Fifth Environmental Action Programme was presented with its specific title "Towards Sustainability" in 1992.

²⁰ 8th indent of the Preamble to the TEU

²¹ The principle was already introduced in Article 2 TEC by the Treaty of Maastricht.

²² This article states that the Commission as well as the European Parliament and the Council should seek to attain a high level of protection within their respective powers concerning the approximation of laws. However, it would seem that this last insertion might not be legally enforceable notwithstanding its political importance. See further Van Calster/Deketelaere, 1998, s. 15

²³ The importance of sector integration was being emphasised not only by some of the environmentally progressive Member states but also by the high-level Reflection Group preparing the negotiations, Liefferink/Skou Andersen, 1997 p. 13

both. Consensus in favour of the first option grew rather quickly, and consequently the integration principle has moved to the highest step of the Community's hierarchy. It is now included in a new Article 6 in the TEC, in contrast to its former place among the other environmental rules. This promotion may be of considerable importance but it is still uncertain how it may affect the significance of the environment in a possible conflict.²⁴ However, there is no doubt about the fact that the changes introduced by the TEA imply that environmental policy goals are more likely to affect other Community policies than ever before.

2.4 Conclusions

The EU environmental law has in short time established itself as one of the most important parts of the European legal framework, with more than 300 directives and regulations and five Environmental Action Programmes. The Treaty of Amsterdam has brought about the most important changes to the environmental rules in the treaties since their insertion with the Single Act in 1987. These changes reflect the increasing status of the EU environmental policy, and also the great concern of EU citizens concerning environmental issues. The fact that environmental protection and the integration principle now are clearly expressed early in the Treaty texts is also of importance. According to Guyomard, this might have a considerable effect on future practical cases.²⁵ Since the ECJ tend to use the method of teleological interpretation, it will consider the objectives of the Treaty and also its general philosophy and construction when dealing with a conflict between two Community policies. Thus, the new placement of environmental issues can have a greater practical effect than expected.

²⁴ These issues will be further developed below in chapter 4.4.3. Another important change is that the new wording extends the principle to apply not only to the policies of the Union, but also to the activities. (See further Gosalbo Bono, 1998, p. 81.) The wording introduced by the Treaty of Maastricht has been criticized for only giving a general mandate to the Community institutions for some future action, without specifying time or form for the fulfilment. (Mahmoudi, 1997-1998, p. 401 et seq.) This problem has partly been solved as the new wording refers to Article 3 and thus specifies the policies in which the environment has to be integrated.

²⁵ Guyomard, 1995 p. 31. His considerations concern the changes introduced in Maastricht, but in my opinion they remain valid for present purposes.

3 The EU Competition Policy

3.1 The Legal Basis and Contents of the EU Competition Policy

The principal competition rules for the present analysis are found in the TEC. Firstly, Article 2 establishes that the Community shall have among its tasks to promote a high degree of competitiveness. The following Article 3 sets out the general activities of the Community, and its (g) section requires the Community to set up a system ensuring that competition in the internal market is not distorted. Furthermore, Articles 3(m) and (n) enjoin the Community to strengthen the competitiveness of Community industry and to promote research and technological development. Secondly, these activities are expanded upon in the specific competition rules in Articles 81-89 and the Merger Regulation. Accordingly, four main areas of competition policy can be identified, all serving the same objective of ensuring that competition is not distorted by restricting either discrimination against other enterprises or the detrimental practice to consumers: anti-competitive agreements and practices (81 and 82), the liberalisation of regulated or monopolised sectors (86) the policing of State Aid (87) and the merger control.

3.2 Background and Aim of the EU Competition Policy

In contrast to the brief history of EU environmental policy, the competition policy of the Union has a long-standing tradition. Already in the Treaty of Rome, competition was mentioned as an essential objective, and its importance for the common market has hardly ever been questioned.²⁶ Competition law is one of the most highly developed areas of the Community's policies and also the one which affects undertakings the most. Since 1962, the Community has developed a very elaborate set of competition rules and until only a few years ago, the competition rules operated independently from any specific environmental impact or component that the cases to which the competition rules applied could contain.²⁷ In addition to the traditional role of competition law, which is to maximise efficiency at all levels of the economic process, to provide a stable economic environment and to protect the interests of the consumer²⁸, EC competition policy also aims to assist the process of European economic integration. This means that it should also ensure that trade barriers and restrictions that were previously

²⁶ See Jacobs, 1993, p. 37. However, the denomination "essential goal" is inaccurate, since free competition is not mentioned among the objectives of the EC, but only among the *means* for attaining the goals, which are enumerated in Article 3.

²⁷ Vandermeerch, 1997, p. 79

²⁸ See e.g. Ottervanger/Steenbergen/Van der Voorde, 1998 p. 2

imposed by legislation of the Member States is not replaced by harmful actions by private undertakings. The creation of the internal market is an essential condition for the development of a competitive industry.

3.3 The Treaty of Amsterdam and Competition²⁹

The Treaty of Amsterdam introduces a "high degree of competitiveness" among the new objectives of the Community.³⁰ This amendment confirms that competitiveness is one of the most important objectives of the Community and constitutes one of the basic means for strengthening economic growth, and through its insertion in Article 2 this objective has furthermore received the status of an EC principle. As such, it should affect all the policies and measures of the Community and not only the ones explicitly referring to competition and competitiveness. According to Gosalbo Bono, with the Treaty of Amsterdam the status of competition policy is therefore strengthened to be *'parmi les pièces maîtresses de la constitution économique de la Communauté'*.³¹ However, even though it can be argued that competition policy has been strengthened by means of the Amsterdam amendments, it is doubtful whether it has received the status of an EU objective. On the contrary, competition policy seems to remain in the same position as before the Treaty of Amsterdam, namely a *means* to achieve the Community goal of high competitiveness rather than a pure Community *objective*.³² These considerations are significant for the judging of a conflict with environmental policy.³³

3.4 Conclusions

In conclusion, as both environmental policy and competition policy seem to have been reinforced by the amendments of the Treaty of Amsterdam, the solving of a conflict has not been made easier. However, the promotion of environmental protection was more significant than the strengthening of the aim of free competition, which might imply that environmental aspects would have greater chances to prevail in policy conflict. On the other hand, the fact remains that competition policy has a long-standing tradition and is of crucial importance for classical Community goals such as economic growth and integration. In the following chapters, the problems associated to the balancing between the two policies will be further dealt with.

²⁹ This part is mainly based on the Treaty of Amsterdam itself and Gosalbo Bono, 1998, p. 61

³⁰ Article 2 TEC as amended by the Treaty of Amsterdam.

³¹ Gosalbo Bono, 1998, s. 63

³² See e.g. Rantala, 1996 p. 38

³³ See further in chapter 4.4.2.

4 The Conflict Between Environmental Protection and Competition: Policy Aspects

4.1 The Growing Awareness of the Conflict

It is only recently that the Commission has mentioned environmental aspects in its annual competition reports. This is understandable in the light of the fact that it was not until the mid 1980's that environmental protection was introduced in the Treaty. Nevertheless it is noteworthy that when the environmental policy and the integration principle finally were included by means of the SEA, the relevant XVIth Competition Report remained silent on the issue. It was not until the signing of the Maastricht Treaty on February 7, 1992 when the staff of DG IV suddenly found themselves obliged to consider and integrate environmental aspects that they started to take serious account of the environmental context. Accordingly, the Commission for the first time mentioned the interface between competition policy and environmental matters in its report of the same year.³⁴ Also in 1992, another Commission Document on the interplay between industrial competitiveness and the environment was released and followed by a resolution of the Council.³⁵ This resolution dropped the traditional premise that companies having to invest for the sake of environmental protection become less competitive. Emphasising that enterprises have an important part to play in improving the environment, the Council called for environmental protection requirements to be integrated into the definitions of other community policies. It also recognized that economic instruments to provide incentives for improved environmental performance and voluntary action by industry might achieve environmental progress more cost-effectively than compulsory environmental provisions.³⁶ At the same time, however, it noted that measures which distort competition or restrict trade nevertheless must be avoided in accordance with the provisions of TEC.³⁷

In accordance with these statements, the following year the Commission released an internal document which dealt with how the various Directorate Generals should treat environmental issues in the light of the environmental provisions introduced in Maastricht.³⁸ The document stated that not only the DG XI

³⁴ XXIIInd Competition Report (1992) para. 75-77.

³⁵ Council resolution of 3 December 1992 concerning the relationship between industrial competitiveness and environmental protection, OJ C 331, 16/12/1992, p. 0005-0007

³⁶ OJ C 331 point 6, where the Council in this regard specifically refers to agreements between industry and the governments of the Member States.

³⁷ OJ C 331 Preamble

³⁸ Communication concerning the integration of environmental policy considerations into other policies, COM(93)785/5, 2 of June 1993. See further Gyselen, 1994 p. 242

(responsible for the environment) should identify the way in which environmental aspects should be integrated, but that every DG was responsible for its own policy's integration. Hence, resulting from the changes introduced in Maastricht, the Commission tried to set the context for the analysis of the interface of competition and environment during two intense years of producing publications and communications. As a matter of fact, the Treaty of Maastricht introduced such a change in policy that it has been called an "environmental milestone" and consequently, when examining the general tendency concerning the integration of environmental aspects, this turning point should be borne in mind.³⁹ In spite of the policy making efforts of the Commission in the early nineties, the interface between competition policy and environmental policy is still far from clear. In addition, it is noteworthy that the Commission with the Competition Report of 1996 seems to have stopped considering the interface between competition and the environment, as the traditional chapter referring to these issues which was included in the Reports from 1992-1995 was no longer a part of the Report of 1996, and not in the following up to today either. Moreover, as we will see, the case law in these matters is still very scarce and although DG IV is examining several cases at the moment⁴⁰, no case has come before the ECJ as yet.

4.2 The Legal Status of each Policy

Considering the lack of case law, it is of crucial importance for the balancing between the environmental protection and competition policies to determine the legal status of each policy. As seen above, environmental protection has been an *objective* of the Community ever since the entry into force of the Treaty of Maastricht in 1992, and its legal status was even more strengthened by the amendments in the Treaty of Amsterdam.⁴¹ Competition policy, however, is not

³⁹ Rantala, 1996 p. 40

⁴⁰ Interview with Stefan Tobias, Stagiaire at DG IV (Commission) of the 19th of April 1999.

⁴¹ Despite its steady expansion, however, the role of the environmental policy remains very much in question depending on its permanent opposition to the other policies of the Community, and the question of its status within the Community framework is as yet unresolved. An interesting comparison to make, however, is with the status of fundamental human rights. In a number of cases, the ECJ has declared that human rights must be respected when applying Community rules relating to other policies, leading to the conclusion that Community rules must defer to the rules of human rights should a conflict arise. Does the EU environmental policy have a character similar to the "constitutional" character of the fundamental human rights within the EU legal order, or should it simply be treated as any other of the major policies of the Community? Some legal authors have taken the former view (see for example Evans p. 435, where he characterizes environmental protection as a constitutional demand of the Treaty), and given the requirement of Article 6 to integrate the environment into both the definition and implementation of every other Community policy (which is unique; no other EU policy is given a similar protection), it is not totally out of the question to give the environmental policy such a status. Moreover, as far as the integration principle is concerned, it has often been argued that it is of a "fundamental" or "constitutional" character, which seems to have been confirmed even by the ECJ, who in the case *République française v. Commission* (C327/91, 9 August 1994) called the principle "une disposition de portée constitutionnelle". Furthermore, according to Jean Raux, "Chacun aura compris que la clause de coherence environmental constitue une

mentioned among the enumeration of the EC goals as such, despite its long-standing tradition. On the contrary, free competition seems to constitute a *means* to achieve Community goals⁴² rather than a specific objective.⁴³ This should imply that environmental policy prevails over competition policy. On the other hand, in the case *Procureur Général v. Buys*, the Court held that Article 81 TEC "show(s) certain specific characteristics in relation to the system of competition which is *the aim* of the Treaty"(Emphasis added).⁴⁴ This interpretation, however, obviously exceeds what is expressly provided in the Treaty.⁴⁵

Having concluded that environmental protection is an essential goal of the Community while undistorted competition is not, one could ask whether this means that measures aiming for environmental protection should be generally exempted from the competition rules. The answer to this question must be negative. Firstly, the competition rules apply to all economic sectors unless specifically excluded.⁴⁶ All the exemptions made so far, such as the coal and steel sector, result from specific Treaty or Regulation provisions. Thus, since no such specific provision exists for any "environmentally friendly sector", the competition rules must be applicable also to environmentally friendly products and measures. Furthermore, competition law can contribute to environmental protection and therefore a general exemption would not even be desirable from an ecological point of view⁴⁷. Undistorted competition is useful also in the market for eco-products.⁴⁸ Moreover, it is a fact that if the above-mentioned polluter pays principle is implemented, the ecological impact of a product will be reflected in its price so that environmentally harmful products will be more expensive⁴⁹. Accordingly, it will be of crucial importance for the cheaper environmentally friendly products that the EC competition rules are applied properly in order to ensure that price-competition really works. Secondly, there are no provisions in

clause 'fondamentale' du Traité d'Union européenne"(see Raux, 1995 p. 7 et seq.). For additional comments on this comparison, see Portwood, 1994 p. 85 et seq. and Golub, 1998 p.

1

⁴² For an enumeration of the goals competition policy is meant to achieve, see Rantala, 1996 p. 38 and Gosalbo Bono, 1998, p. 63

⁴³ See above chapter 3.2.

⁴⁴ Case 5/79 *Procureur de la République v. Buys* (1979) ECR 3203

⁴⁵ For further comments, see Rantala, 1996 p. 54

⁴⁶ See Case 45/85 *Verband der Sachversicherer v. Commission*, (1987) ECR 405 at 451, para. 11-14

⁴⁷ This interdependency between the environmental policy goals and undistorted competition was for instance noted by the Commission in its XXIIIrd Competition Report (1993, para 162 et seq.) where it was stated that at the same time as competition policy must take account of environmental objectives, it has a very important role to play in achieving such objectives when put in its proper framework. Similar arguments can be found in the Council Resolution from 1992 concerning the relationship between industrial competitiveness and environmental protection mentioned below, where the Council for instance emphasises that market-based instruments and a competitive functioning of the markets are the best solutions for the integration of competitiveness and environmental protection.

⁴⁸ See Jacobs, 1993, p. 45 et seq. for a further discussion on these matters.

⁴⁹ See above note 3

the Treaty that can be used to justify a general exemption for measures protecting the environment from the application of the competition rules.⁵⁰ To argue, e.g., that the requirement of Article 6 to integrate environmental aspects in every Community policy implies that measures to protect the environment cannot be hindered by competition rules is not correct. The integration principle merely implies that environmental protection should be taken into account in the other policies, not that environmental aspects prevail over other Community goals. Accordingly, it cannot justify a complete exemption of environmentally friendly measures from the competition rules. It does, however, bring about other consequences for the application of the EC rules. These will be examined below.

4.3 The Integration Principle

As we have already seen, ever since 1982 when the integration principle first was clearly expressed in the third environmental action programme, the principle has undergone a rapid growth in importance.⁵¹ After having been considerably strengthened in Amsterdam, the promotion of the integration principle was once again the most emphasised issue in 1997 when the Fifth Environmental Action Programme was revised.⁵² No other Community principle has been given as strong a status, and it has been called the most important principle of EU environmental law.⁵³ But what does the integration principle really mean and what does its application imply? How have environmental considerations been integrated into the other policies of the Community so far and what does this tell us about the principle's influence on the European competition policy?

4.3.1 The Interpretation and Legal Enforceability of the Integration Principle

With the entry into force of the Treaty of Amsterdam, the integration principle was as we have seen above not only given a new place in the Treaty, but also a new wording: *"Environmental protection requirements must be integrated into the definition and implementation of Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development."* This means that the objectives of environmental policy must be

⁵⁰ The fact that some of the competition rules themselves provide for exemptions serve as a further argument against a general exemption. Thus, if environmental impact should be taken into account, it should be done within the framework of these exemption provisions.

⁵¹ As a matter of fact, already the two first action programmes contained some statements referring to an environmental concern within the other Community policies. The first programme, for example, stated that "l'action des Communautés dans ces différents secteurs (politiques sociale, agricole, régionale, industrielle, énergétique, etc.) doit tenir compte des préoccupations relatives à la protection et à l'amélioration de l'environnement (...) dans la conception et la réalisation de ces politiques sectorielles". The principle was, however, never explicitly adopted before 1982. See further Guyomard, 1995 p. 15 and Johnson/Corcelle, Guy, 1995 p. 3

⁵² Common Position on the Fifth Environmental Action Programme, OJ C 157, 24/05/1997 p.

12

⁵³ Rantala, 1996 p. 35

taken into account when making any decision that can have an effect on the environment; when creating rules as well as when applying them.⁵⁴ The principle affects every Community policy and, since 1992, it does not only recommend them to take account of the principles and goals of the environmental policy in their activities, but actually *obligates* them to apply these environmental principles.⁵⁵ However, even if this significance of the principle is clear, it is difficult to carry it out since its absolute application would imply if not a total questioning then at least a change of many of the Community's policies. In fact, the most developed policies of the Community, such as its competition policy, very often have economic goals that can easily conflict with environmental protection.⁵⁶ Even though the Commission has repeatedly stressed the potential positive link between environmental protection and economic development, concrete results have been very limited so far.⁵⁷ Hence, despite the promotion of the integration principle by the Amsterdam Treaty, the debate between the accomplishment of the internal market and the promotion of the highest standards of environmental protection is yet not settled,⁵⁸ nor is the discussion on the power of the principle. For instance, even though the principle has become more and more imperative, can one consider that it is sufficiently clear, unconditional and imperative to have a direct effect?⁵⁹ To complain before the ECJ that a decision has been made without taking due regard to the environment thus causing its annulment is not easy since it is hard to measure and quantify the degree of environmental consideration. According to Wierd, the integration principle is vague and he considers it questionable if it is legally enforceable.⁶⁰ Rantala, however, argues that the integration principle does have a legally binding effect. He bases his opinion on the literal form "must be integrated" and concludes that if it was not integrated, it would be possible to commence legal proceedings; either under article 169 TEC against a failure of a Member State to fulfil its treaty obligation, or under article 173 TEC in order to challenge the validity of a Community act which would not have taken the principle into account. As yet, however, there have not been any

⁵⁴In other words, "*pour toutes les mesures communautaires susceptibles d'avoir une incidence sur l'environnement, les objectifs de la politique d'environnement devront être pris en compte lors de la prise de décision.*", see Glaesner, 1988 and Guyomard, 1995 p. 12

⁵⁵ Ever since the entry into force of the Maastricht Treaty, the integration principle has been of this imperative nature.

⁵⁶ As seen above, the founding fathers of the CE never had environmental protection in mind when they set up the organisation. They only wanted to create a unified economic market, and even if environmental issues nowadays are important in the EU, the economic role of the Community cannot be questioned.

⁵⁷ Liefferink/Skou Andersen, 1997 p. 13. This has mainly been done in position papers in the fields of agriculture (COM(88)338), energy (COM(89)369), transport (COM(92)494) and industrial policy (SEC(92)1986).

⁵⁸ Van Calster/Deketelaere, 1998, p. 19

⁵⁹ See e.g. the case of *Van Gend en Loos* (Case 26/62 (1963) ECR 1), Shaw, 1993, p. 158 and Guyomard, 1995 p. 33

⁶⁰ Van Calster/Deketelaere, 1998, p. 18 and Wiers, 1998 p. 109. Wiers further criticises the Community for preferring the use of lofty terms such as sustainable development and sustainable mobility and a constant reference to the environment from more concrete environmental commitments, especially in the fields of trade and energy.

cases of this sort. This can be explained by the fact that even if environmental policy is not given precedence over the aims of another policy, this does not mean that there would be an infringement since it suffices that environmental policy was taken into account. Consequently, both Rantala and Wierd have a point with their opinions, since it is quite hard to challenge a measure for not being sufficiently environmentally friendly. However, as to decisions which cause significant, unrepairable *environmental damage*, the high status of the principle in combination with such an unmistakable infringement imply that the principle would probably be legally enforceable and thus capable of annulling such a measure.⁶¹ Furthermore, the doubts concerning the enforceability may have been dispelled with the Treaty of Amsterdam since the Commission nowadays seems to take the view that the principle is legally enforceable for harmful measures as well as environmentally positive ones. In a notice from 1998, the Commission clearly stated that similarly to the principle of subsidiarity, the fulfilment of the integration principle is subject to the legal control of the ECJ.⁶² It also stressed that the present economical development implies too many conflicts between development and environmental protection and that the policies therefore have to be changed in a more environmentally friendly direction. In order to achieve such an improved integration, the Commission finally undertook to make sure that environmental aspects are integrated in all its important initiatives.⁶³

4.3.2 The Integration of Environmental Protection into Community Policies so far - the Example of Free Trade

However, in spite of the undeniable status of the integration principle it cannot be regarded as giving an absolute precedence over other principles,⁶⁴ and so far, the Community institutions have tended towards refusing environmental aspects taking precedence over economical goals.⁶⁵ In addition, the Community is still involved in activities aiming for economic development that severely harm the environment, and to make environmental issues "slip" into a traditionally purely economic co-operation is not an easy task. In order to illustrate these problems, the dealing with the conflict between free trade and environmental protection (which has received far more attention than the interface treated in this thesis⁶⁶) includes

⁶¹ Guyomard, 1995, p. 33 and Rantala, 1996 p. 36

⁶² Kommissionens meddelande till Europeiska rådet: partnerskap för integration – en strategi för att integrera miljöskyddskrav i Europeiska Unionens politik, KOM(1998) 333 Slutlig, 27 maj 1998. In the Swedish edition it is stated that "Uppfyllandet av integreringskravet är i princip underkastat EG-domstolens rättsliga kontroll, precis som subsidiaritetsprincipen", p. 4

⁶³ KOM(1998) 333 Slutlig, 27 maj 1998, p. 6-7

⁶⁴ The Court has declared that in situations where two principles conflict, the one which is required by the situation and which is more appropriate shall be given priority (see Case 10/56 Meroni 1958 ECR 80). Principles can have different "weights of value" and the choosing of one does not exclude entirely the other, Rantala, 1996 p. 35

⁶⁵ Guyomard, 1995 p. 59

⁶⁶ See e.g. Llamas/London, 1995, Geradin, 1994, s. 2042, Wiers, 1993 p. 93, Reid/Milligan, 1996, p. 144, Krämer, RMUE, 1993 p. 45 and Krämer, CMLR, 1993 p. 111

interesting aspects. The possible conflict situations are quite obvious, and the question has also been dealt with by the ECJ in two quite famous cases. This conflict will not be treated in detail, since such examination would fall beyond the scope of this thesis. Nevertheless, in the light of the very scarce case law concerning environmental aspects affecting competition law, the treatment of ecological measures restricting free trade is very interesting since it offers some possible analogical conclusions.

In short, measures to protect the environment have been allowed in spite of the fact that they restricted free trade. The principle of free trade is just as significant as the principle of undistorted competition within the EC legal framework, if not even more important. The EC treaty contains a variety of provisions designed to prohibit impediments to intra-Community Trade, among which the most central provision is Article 28. This article prohibits all measures having equivalent effect to quantitative restrictions on imports. In its judgement *Dassonville* the Court stated that all trading rules enacted by Member States which are capable of hindering, actually or potentially, intra-Community Trade fall under the prohibition in Article 28.⁶⁷ From this statement it is clear that one must look to the effects of a measure and not to its aim when deciding whether Article 28 is applicable. Consequently, in theory, any environmental measure making the import of goods from other member states more difficult or costly than domestic production falls under the ECJ's definition. However, the prohibition in Article 28 is not absolute. Two categories of exceptions are possible: One derived from Article 30 of the TEC and the other derived from the so-called rule of *Cassis de Dijon*.⁶⁸ Environmental considerations can be made within the context of both exemption possibilities: Firstly, even though environmental protection does not figure explicitly among the enumeration of purposes justifying trade restrictions in Article 30, some grounds can be used to justify ecological measures. For example, environmental measures can contribute to the protection of human health or to the life of animals and plants. Secondly, in the above-mentioned *ABDHU case*, the Court extended its *Cassis de Dijon*-rule to include environmental protection among to the motives capable of justifying trade restrictions.

Having concluded that environmental protection can justify trade restrictions, it may be interesting to investigate when and how the environmental argument actually has been used so far. The first case in which the question came up was

⁶⁷ Case 8/74, *Procureur du Roi v. Dassonville et al.*, 1974 ECR 837

⁶⁸ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 ECR 649. In this case, the ECJ recognised that Member States may, when applying measures which apply equally to domestic and foreign products, restrict imports for motives other than those specifically mentioned in article 30. The Court stated that "obstacles to movement (...) must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of health, the fairness of commercial transactions and the defence of the consumer."

the famous *Danish Bottles case*.⁶⁹ In this case, the Commission argued that a Danish law requiring beer to be sold in containers of a particular shape and to be returnable constituted a breach of Article 28 of the Treaty. The Danish Government counter-argued among other things that the system adopted was set up for the protection of the environment, and the ECJ recognised that environmental considerations had to be taken into account. It accepted that the protection of the environment was "a mandatory requirement" which may limit the application of Article 28 and found that the restriction on the type of bottles to be used was justified in the interests of protecting the environment.⁷⁰ However, the level of protection must be situated at a reasonable level according to the Court, which focused its reasoning on the principle of proportionality. According to this principle, measures justifiable under article 30 or the Cassis de Dijon- rule must not restrict trade more than absolutely necessary for the attainment of their legitimate purpose (such as environmental protection). Thus, the Court stated that environmental measures should not "go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection."

Another landmark case concerning environmental protection and trade restrictions is the *Wallonian Waste case*.⁷¹ This case concerned a prohibition applied by the Belgian government on the disposal, within the Wallonian region, of waste from another Member State or even another region of Belgium. Although a mandatory requirement such as the environment normally only can be relied on in the case of measures which apply indiscriminately to national and imported products, the ECJ found that it was necessary to take account of the specific nature of waste.⁷² Referring to the principle that environmental damage should be rectified at source, the Court found that for ordinary waste, the ban was an allowable departure from the requirements of Article 28 in the name of environmental protection.⁷³

To sum up, even though Article 6 TEC implies that restrictions on free trade should be possible for environmental reasons, it does not mean that environmental goals should automatically be treated as superior in a conflict situation. However, although environmental rules were inserted into the EC Treaty at a later stage, they cannot be considered to be subordinate to the provisions on the free circulation of goods. There are, as we have already seen above, several provisions that underline the specific importance of environmental issues within the EC treaty. All these provisions show that the EC treaty tries both to optimise the protection of the environment and to ensure that the environment is duly taken into

⁶⁹ Case C-302/86, *Commission v. Denmark*, 1988 ECR 4607

⁷⁰ See further Ege/Boye, 1998 p. 118 et seq.

⁷¹ Case C 2/90, *Commission v. Belgium*, 1992 ECR 4431

⁷² See for a further comparison with earlier ECJ case law, Petersmann, 1995 p. 71 et seq.

⁷³ Such a favour to the environmental aspect at the expense of free trade seems to have been rather unexpected. See further *Case-Law of the European Court of Justice on Environmental matters*, Working Paper W-21, Environment, Public health and Consumer Protection Series. 6-1997 p. 9

account by other EC policies.⁷⁴ So far, however, the tendency in the confrontation between trade and environment has mostly been for the former to prevail, implying that the burden of proof has been on the environmental lobby to demonstrate that its actions are reasonable and do not involve trade protectionism. According to Reid and Fraser Milligan, however, this burden has now been shifted, at least provided that the requirements of the proportionality and the non-discrimination principles are observed.⁷⁵ In fact, the ECJ has generally found a quite reasonable balance between the competing values of free trade and environmental protection, and it is fair to state that environmental aspects have been at least to some extent integrated into the free trade policy of the EU.⁷⁶ This conclusion is of interest for the present purposes. Since the competition rules are not more important in the Community than the ones concerning free trade, the fact that environmental goals can justify restrictions on trade implies that the same balancing should be possible between environment and competition. As yet there have been no cases before the ECJ to confirm such an analogy, and besides the impact of environmental measures on trade is far from settled. The ECJ has for example in a number of cases recently showed that the desire to prevent every form of “green protectionism” remains very strong within the Community. Thus, by using the proportionality principle the ECJ has prohibited one German and one Italian law restricting the imports of certain foodstuffs which these Member States defended with environmental arguments.⁷⁷

4.4 Conclusions

The interaction between the environmental policy and the competition policy of the Community includes, as we have seen above, conflicts as well as mutual benefits. In its dealing with these questions, the Commission seems to have been more eager to focus on the interplay aspects, whereas no clear statements have yet been made concerning how to balance the policies in case of a conflict situation. The fact that a high level of protection and improvement of the quality of the environment as well as sustainable development nowadays are enumerated among the Community goals, whereas undistorted competition remains a means for the attainment of the Community objectives does not automatically imply that environmental aspects should prevail in a conflict. Nor can such a conclusion be drawn from the integration principle, which, even though it is probably legally enforceable, merely requires competition policy to take the environment into account. Finally, as we have seen above, measures to protect the environment cannot be generally exempted from the competition rules and consequently, measures of an undertaking or a Member State with environmentally positive effects must be taken in compliance with the competition rules of the TEC.

⁷⁴ Krämer, 1997 p. 48

⁷⁵ Reid/Fraser Milligan, 1996 p. 148

⁷⁶ However, some authors are not too eager to agree that environmental matters are well integrated with free trade in the Community: See especially Wiers, 1998 p. 106 et seq.

⁷⁷ Case C131/93, *Commission v. Germany* RCE 1994/7 p. 3303 and Case C249/92 *Commission v. Italy*, RCE 1994/9 p. 4311. See further Guyomard, 1995 p. 64

Besides, given the benefits environmentally friendly products can obtain from undistorted competition, such a general exception is probably not even desirable. The question remains, however, whether any measures at all can be exempted because of their positive effects on the environment, and if so, how such an exemption can be justified within the framework of every specific competition rule. These questions will be dealt with in the following chapter.

5 The Consideration of Environmental Aspects within the Rules of Competition

5.1 Article 81

5.1.1 General Remarks concerning Article 81

In recent years, consumers have become more and more alert to the environmental effects of the manufacture, use and ultimate disposal of goods. Consequently, undertakings have experienced that having a good environmental image can be an important marketing instrument, thus allowing environmental considerations to influence their commercial activities on a voluntary basis. Moreover, due to new and often quite stringent environmental legislation adopted by the Member States, undertakings have been faced with requirements that are so difficult to comply with that co-operation with other firms sometimes have represented the only possibility to conform to the new rules. Hence, the Commission has received an increasing number of competition cases containing environmental aspects and most cases have concerned Article 81.⁷⁸ Article 81 prohibits all agreements between undertakings⁷⁹, decisions by associations of undertakings and concerted practices⁸⁰ which restrict competition⁸¹ and have the potential of effecting trade between Member States.⁸² Such agreements are automatically null and void under Art 81(2) but may be exempted from the prohibition after examination by the Commission according to Art 81(3). Article 81(3) TEC sets four conditions, all of which have to be met cumulatively.

As far as the interaction between Article 81 and environmental protection is concerned, it is mainly in the context of the assessment of the exemption possibility under Article 81(3) that the environmental considerations of relevance

⁷⁸ Idot, 1995 p. 259

⁷⁹ Under “agreement” fall not only binding agreements but also so-called “gentlemen’s agreements”, Case 41/69 *ACF Chemiefarma v. Commission*, (1970) ECR 661. The term “undertaking” includes any legal or natural persons practising some kind of economic activity. Westin, 1997 p. 34

⁸⁰ Concerted practices mean intentional co-operation between undertakings, which does not correspond to normal market conditions, in order to minimize the risks of competition. See Case 48/69 *Imperial Chemical Industries Ltd v. Commission* (1972) ECR 619.

⁸¹ Or with the wording of article 81, measures “which have as their object or effect the prevention, restriction or distortion of competition within the common market”.

⁸² The Court has held that agreements are capable of affecting trade between Member States if they have a direct or indirect, actual or potential effect on trade, see Case 56/65, *Société Technique Minière v. Mascinembau Ulm GmbH* (1966) ECR 235

to the agreement may come into play.⁸³ The test of Article 81(1) is a strictly economic one, whereas Article 81(3) is the provision containing the “heart” of competition policy and thus the provision primarily envisaged by the requirements of the integration principle.⁸⁴ There is no provision contained in Article 81(3) that directly refers to the environment⁸⁵, but this fact does not prevent environmental considerations to be made. As a matter of fact, in its XXIIIrd Competition Report the Commission stated that the terms of Article 81(3) are sufficiently broad to include other policy objectives⁸⁶, and more specifically environmental protection objectives.⁸⁷ However, positive ecological effects of an agreement alone are probably insufficient to qualify for exemption under Art 81(3) and according to the Commission, it can only exempt an agreement restricting competition but having a favourable impact on environmental policy if the agreement meets every single one of the four conditions laid down in Article 81(3).⁸⁸ Below, these four conditions will be analyzed separately in order to examine what kind of argumentation might be used for justifying environmental measures.⁸⁹

5.1.2 The Possibilities of Considering Environmental

⁸³ However, some remarks concerning Article 81(1) can be of interest also from an environmental point of view. If at least one of the requirements of Article 81(1) is not fulfilled, an agreement generally escapes its applicability. If a whole sector of an industry for example agrees on using a common environmental quality mark, which is related to an objective standard and free to use for any firm who fulfils the standards, there should be no infringement of Article 81(1). Consequently, joint information campaigns or joint environmental training programs should normally fall outside the scope of article 81(1). However, such a mark may not be used to create exclusive sale or purchase networks. See Commission Notice on Cooperation between undertakings, OJ C 75/3 (1968) as rectified in OJ C 84/14 (1968)

⁸⁴ See Vogelaar, 1995 p. 542 et seq. and Bouckaert, 1993 p. 119 and 122. Furthermore, in its XXIIInd Competition Report the Commission stated that “It is clear that agreements which restrict competition continue to be prohibited by Article 81(1) even if the parties invoke environmental protection in order to justify them.” (para. 77)

⁸⁵ In the XXIIIrd Competition report, however, the Commission seems to insinuate that there were plans in Maastricht to amend Article 81(3) in order to introduce such a specific environmental exemption possibility, see para. 91 (p. 51)

⁸⁶ In the case *Metro I* for example, the ECJ stated that the protection of employment could be part of an interpretation concerning Article 81(3), See *Metro I*, Case 26/76, 25 October 1977, ECR 1875

⁸⁷ XXIIIrd Competition report (1993) para 91, p. 51 et seq. Furthermore, in the Commission Document from 1992 concerning the relationship between industrial competitiveness and environmental protection (which was followed by a Council Resolution the 3 December 1992, OJ C 331/5), the Commission (while warning that agreements involving environmental aspects may be contrary to Articles 81 and 82) stated that environmental benefits will have to be considered in the context of Article 81(3) only.

⁸⁸ XXIIIrd Competition report (1993) para 91, p. 51 et seq.

⁸⁹ Some legal authors argue for a fifth, negative condition to be included on the grounds of the integration principle. This condition would require that no exemption should be granted under Article 81(3) unless ecological considerations have been taken into account, thus implying that a measure harming the environment considerably could not be exempted even if it fulfilled the other four conditions. See further Jacobs, 1993 p. 58, Rantala, 1996, p. 64 and Portwood, 1994, p. 157.

Argumentation within the Four Exemption Requirements of Article 81(3)

5.1.2.1 The Measure must Contribute to Improving Production or Distribution or to Promoting Technical or Economic Progress.

Under this requirement there are relatively many examples of arguments to use for a firm wanting to justify an environmental agreement. Below, six possible arguments which undertakings involved in agreements restricting competition but having a favourable impact on environmental protection may put forward when seeking to fulfil the first requirement of Article 81(3) will be presented. These will be followed by an overview of the hitherto existing cases in which environmental considerations have been taken into account.

The first potential argument can be called *the environmental quality argument*. The argument is based on the fact that practices contributing to a higher quality of a product have been considered to improve the production and to promote technical and economic progress within the meaning of the first condition by the ECJ.⁹⁰ As consumers are becoming more and more environmentally concerned, the ecological friendliness of a product has become a relevant factor in their choice of what to buy.⁹¹ Environmental friendliness of a product should therefore be regarded as a quality factor. Hence, if enterprises reduce the detrimental effects on the environment through changing for example their manufacturing or recycling processes, this may result in a raising of quality of the product and consequently be in conformity with the first requirement of Article 81(3).⁹²

Two arguments which are related to the aim of the Community to promote economic development are *the broadening of offers* and *the creation of new markets arguments*. If an agreement or practice is considered to expand a market or to create new ones, the Commission has taken the view that the first requirement should be fulfilled, since such consequences can contribute to improving production or distribution or to promoting technical or economic progress.⁹³ When ecological products are introduced on the market, the range of available products is likely to expand and this may even occur to the extent that a new market for eco-products or eco-industry would be created. Accordingly, agreements implying such consequences should be regarded to fulfil the first requirement. However, these two arguments might seem a little difficult to base an

⁹⁰ In the case *Yves St Laurent Parfumes* of 1992 (OJ L 12/24), it was even stated from the part of the Commission that a high price can effect the quality of a product. Thus, why should not improved environmental protection do? See further on this matter Portwood, 1994 p. 133 and Kapteyn/Verloren van Themaat, 1990 p. 518

⁹¹ This fact can be proved by the fact that the Community in 1992 adopted an eco-label scheme, which would hardly have been done unless environmental friendliness of a product would be expected to have an effect on the demand. See further Portwood, 1994 p. 134.

⁹² Rantala, 1996 p. 59 et seq.

⁹³ Portwood, 1994 p. 134 et seq.

exemption on. An even more far-fetched market based argument can be found by drawing a parallel to the case of *Bayer/Gist- Brocades*⁹⁴, in which co-operation between two competing pharmaceutical firms was accepted by the Commission on the ground that it made production of new penicillin possible that otherwise (if competition would have been left to play freely) would not have been produced, due to technical restrictions and difficulties on the market. An exemption was thus given because “free competition (was) unable to produce the best result economically speaking”. Accordingly, one can argue that since polluting companies which do not internalize the costs of negative effects on the environment, prevent an efficient allocation of resources and thus cause distortion on competition, agreements between competitors making the production of environmentally friendly products possible should be encouraged and exempted.⁹⁵ However, once again, this *argument of free competition’s insufficiency* seems extremely far-fetched.

A more concrete and plausible reason to put forward in order to make agreements improving environmental protection pass the first requirement is similar to the widely accepted *higher safety standards argument*. In several cases, the Commission has exempted agreements concerning e.g. selective distribution or joint marketing, on the grounds that they contributed to higher safety standards in cars⁹⁶, in nuclear fuel processing⁹⁷ and in storage and transport of radioactive products.⁹⁸ The Commission has argued amongst other things that selective distribution may be justified if it contributes to the elimination of dangers to life and health or harmful effects on the environment.⁹⁹ Similarly, agreements implying higher environmental protection standards should also be exempted since such standards are likely to bring about the same positive effects on production, technical or economic progress as higher safety standards. Since the Commission furthermore is obliged to consider environmental protection standards according to Article 6, the argument is even stronger.

⁹⁴ See Commission Decision 76/172/EEC of 25 December 1975, *Bayer/Gist-Brocades*, OJ L 30/13 1976 para. 19.

⁹⁵ The lack of internalisation of external effects is generally considered to imply an inefficient allocation of resources. (See e.g. Polinsky, 1989, p. 87 et seq. and 91 et seq.) Consequently, environmentally friendly measures which increases the internalisation contributes to an efficient allocation of economical resources which is also one of the objectives of the Community’s competition policy and prompts economic progress within the meaning of Article 81(3). For further details on the possible use of this argument, see Portwood, 1994 p. 142 et seq.

⁹⁶ Commission Decision *BMW* 1975, OJ L 29/1 at. 6-7

⁹⁷ Commission Decision *United Reprocessors* 1976 OJ L 51/7 at. 11. See also the *European Fuel Consortium case* below, where the Commission took a similar view.

⁹⁸ Commission decision *Amersham&Buchler* 1982 OJ L 314/34 at. 36

⁹⁹ See *BMW* para. 37. As far as the second requirement is concerned, higher safety standards and lower environmental risk has also been considered to be for the benefits of consumers. See *United Reprocessors* and Portwood, 1994 p. 140.

The last argument simply suggests that *improved environmental protection is part of improved production and technical and economical progress*, without making a detour around positive effects on markets or product quality. This argument has been used in several cases, of which the most important ones will be mentioned. However, as we will see, in these cases the environmental factor has been held to be of an ancillary nature rather than the essential argument.

As a matter of fact, environmental considerations have been taken into account in the Commission's competition decisions ever since the 1960s, but without explicit reference to the term "environment".¹⁰⁰ It was not until 1983 and the case *Carbon Gas Technologie* that the Commission first mentioned the environment, although the environmental reasoning in this case merely was one factor among others.¹⁰¹ The case concerned agreements made by several big fuel suppliers with the aim of doing research and development work in the field of coal gasification. Even though the Commission considered that the agreements fell under the restrictions of Article 81(1), it exempted the agreement stating amongst other things that "using the resulting gas in the conversion process of power stations should be more efficient and less harmful to the environment than direct combustion of coal." This was the first time that a measure's positive effect on the environment was regarded to add to the fulfilment of the first condition.

A couple of years later, the Commission was again confronted with the question of whether environmental positive effects could be considered to promote technical progress in the *BBC Brown Boveri case*.¹⁰² In this case, the Commission exempted an agreement between BBC and the Japanese company NGK aimed at developing a high performance energy battery. The battery was destined to play an important role in the propulsion of electrically driven vehicles, because of its high energy density. The Commission noted that "the use of electrically driven vehicles causes no damage to the environment through harmful exhaust emissions or loud engine noise. There is therefore much to be said for the co-operation in terms of improvement in the quality of life of consumers."

Environmental aspects were as stated above also included in the reasoning of the Commission in the *Assurpol case*.¹⁰³ The EEIG Assurpol was set up by a number of French insurance companies to provide for a reinsurance pool for environmental risks. Assurpol also carried out studies and surveys aimed at developing the standards of insurance of environmental risks. The pool agreement was held to fall under the scope of Article 81(1) since the participating insurance

¹⁰⁰ See for example the Commission Decision *ACEC Berliet* from 1968 (OJ L 201) concerning a less polluting electric system for buses.

¹⁰¹ Commission decision (1983) OJ L 376/17. According to Gyselen, the environmental protection aspect in this case constituted what British law refers to as *obiter dictum*, see further Gyselen, 1994 p. 256. Concerning the history of the term environment as used in competition decisions, see Idot, 1995 p. 260

¹⁰² Commission Decision (1988) OJ L 301/68

¹⁰³ Commission Decision (1992) OJ L 37/16

companies were no longer free to independently determine the general conditions and the premiums of the insurance policies concerning environmental risks. Nevertheless, the Commission decided to exempt the pool on the ground that it contributed to technical and economic progress, and “to the protection of the environment”. The Commission argued that since insurance of environmental risks was not widely available as a result of the difficulties of identifying the risks as well as calculating an appropriate premium, the co-operation made an insurance possible that otherwise might not have existed. As concerned the restrictions on participating undertakings’ independently setting premiums and conditions, they were deemed to have been necessary for the attainment of Assurpols objective: enable environmental risks to be insured. Competition was not held to be eliminated because the consumers were not deprived of a choice between the pool members, and the freedom of choice was likely to be increased as a result of the pool facilities. One aspect of the case which makes it less important for present purposes is that the decisive factor for the granting of the exemption was the availability of environmental risk insurance rather than a direct protection of the environment. However, as availability of insurance funds is actually beneficial to the environment since it makes the financing of clean-up and other costs possible, the case remains relevant.

In the case of the *European Fuel Consortium*¹⁰⁴, the Commission took a favourable view of a co-operation aiming for the study and evaluation of the safety and the environmental consequences of nuclear energy. According to the members, the co-operation was necessary for effective action and “contribut(ed) to the promotion of technical progress by improving environmental and safety aspects of the nuclear fuel cycle”. Furthermore, the uniting of highly specialised expertise was said to “bring about improvements in safe and environmentally responsible operating practise of nuclear fuel cycle facilities (...) thereby achieving higher health and safety standards and improved environmental care in the countries concerned”. The Commission declared to this that it is “ a major objective of the Community to achieve these actions as rapidly and effectively as possible”. Apart from confirming that improved environmental aspects contributes to the promotion of technical progress within the wording of Article 81(3) a second conclusion can be drawn from this case, namely if the impact on competition of a co-operation is not too significant at the same time as a question of crucial general interest such as environmental protection is included, the Commission can give negative clearance. It is difficult to say, however, which of the latter facts weighed more; the insignificant impact on competition or the importance of environmental protection.¹⁰⁵

¹⁰⁴ see Notice pursuant to Article 19 (3) of Council regulation No 17 concerning a notification received in Case IV/34.781 - *EEIG EFCC (European Fuel Cycle Consortium)* (1993) OJ C 351/6

¹⁰⁵ See further Rantala, 1996, p. 79.

A final example is an exemption granted by the Commission to an agreement between *Ford and Volkswagen*.¹⁰⁶ The two companies were going to develop a “multi-purpose vehicle”, whose environmental advantages such as increased recyclability, reduced use of potentially hazardous materials, lower emissions and fuel consumption were regarded by the Commission as a relevant improvement of production and progress.

When comparing the above-mentioned cases, the *Brown Boveri* case seems to be the most interesting as far as the integration of environmental aspects is concerned. In contrast to the other five cases, the Commission in the *Brown Boveri* case presents the environmentally positive effects of the agreement as being the most important factor for considering the requirement of technical progress to be fulfilled, and not only an additional ingredient.¹⁰⁷ To give the environment such a role is, however, fully in line with the general tendency within the Community of emphasising the environment as well as with the Commission’s statements in its recent policy-making documents. For instance, the strengthening of the integration principle as established in *Amsterdam* suggests that improved environmental protection should alone be sufficient to imply improved production and progress in the future. In addition, the Commission has stated explicitly that improvements concerning the environment in particular are considered to improve production and to promote technical or economical progress.¹⁰⁸ However, even if improved environmental protection should accordingly imply fulfilment of the third condition, it must be borne in mind that environmental arguments still cannot serve as justification for restrictions on competition, which are not necessary for the environmental objective.¹⁰⁹

5.1.2.2 The Measure must allow the Consumers a Fair Share of the Resulting Benefits

As far as the second condition is concerned, the wording of “benefits” does not only refer to a reduction in price, but also to other advantages the consumer may have from the agreement or practice, such as higher quality products or introduction of new goods onto the market.¹¹⁰ This is important for environmentally friendly products, since measures to increase the environmental protection are expensive and therefore very likely to cause a raise in price of a product. Because the quality of an ecological product is considered as higher than

¹⁰⁶ Commission Decision (1993) OJ L 20/14

¹⁰⁷ Gyselen, 1994, p. 256

¹⁰⁸ See XXVth Competition Report, para. 85, p. 41 (Swedish ed.) and the Communication of the Commission to the Council and to the European Parliament on industrial competitiveness and environmental protection (SEC (1992) 1986 Final) where the Commission states that voluntary agreements of undertakings to protect the environment will increase the demand for eco-technology and accelerate technical and economic progress in the new eco-industry with its great potential. See also Portwood, 1994, p. 149.

¹⁰⁹ This question will be dealt with in the context of the third Article 81(3) requirement, see below.

¹¹⁰ See Commission Decisions *Clima Chappée-Buderus*, (1969) OJ L 195/1 and *Jaz-Peter*, (1969) OJ L 195/10, Rantala, 1996 p. 60 and Portwood, 1994, p. 151

that of a normal one¹¹¹, however, this benefit in quality can overrule the negative effect of such a raise in price. However, it is important that the negative effects for the consumers (such as higher prices) originate from a higher environmental protection and not from an elimination of competition.¹¹² Another fact which might complicate the fulfilment of the third condition for agreements aiming for environmental protection is that the consumer advantages are likely not to occur at once, but only after a considerable amount of time. According to the ECJ case law, however, delays will not prevent measures from being accepted as benefiting the consumer, in so far as the undertaking can prove a fair share for the consumer in the long run.¹¹³

That increased environmental protection should be considered to benefit the consumer was further confirmed in the *KSB/Goulds/Lowara/ITT case*¹¹⁴, which concerned agreements made by some of the world's largest pump manufacturers. Although the agreements restricted the possibilities for other undertakings to compete with the group, the Commission considered them to fulfil the conditions of Article 81(3). Among other things, the Commission stated that "the advantages rising from the co-operation benefit consumers at the very least through the improvement in the quality of water pumps. Moreover, two aspects of the new pumps, i.e. energy conservation and the facts that the fluids handled by the pump are not polluted, are environmentally beneficial". This statement clearly shows that the Commission did consider the environmental benefits to be relevant when assessing the compliance with the third condition of Article 81(3).

Moreover, it has been argued that the term "consumer" actually can be stretched out to include all persons who benefit indirectly or directly from the measure of the undertaking. Accordingly, any agreement aiming for environmental protection can be regarded as benefiting the consumers since a sound environment actually affects everyone positively.¹¹⁵ In fact, in the contributions of the Commission to an OECD conference concerning the effects of environmental agreements on competition the Commission seems to agree with this argument.¹¹⁶ Furthermore, the decision of the Commission in the *Exxon and Shell Groups case*¹¹⁷ could be interpreted as supportive of this idea. In this case, the two chemical companies wished to conclude a set of agreements in order to operate a joint venture which

¹¹¹ See discussion in chapter 5.1.2.1.

¹¹² See OECD, 1996, p. 68

¹¹³ See e.g. Commission Decision *Synthetic fibres*, 1984, OJ L 207/17 and Jacobs, 1993 p. 56 et seq.

¹¹⁴ Commission Decision of 12 December 1990 (1990) OJ L 19/25

¹¹⁵ See further Jacobs, 1993 p. 57

¹¹⁶ The Commission stated that "quant il s'agit d'évaluer l'intérêt des consommateurs, même s'ils sont pénalisés en termes pécuniaires à court terme, on considère que l'intérêt à prendre en compte est celui constitué par la protection de l'environnement. Il faudra, bien sûr, s'assurer que l'augmentation éventuelle des prix pour les consommateurs soit le résultat de la prise en compte des aspects environnementaux et non de l'élimination de la concurrence.", OECD 1996, p. 68

¹¹⁷ Commission Decision (1994) L 144/20

would produce linear low-density polyethylene. The co-operation would imply reduction in the use of raw materials and of plastic waste as well as avoidance of environmental risks involved in transport, which, according to the Commission, would be perceived “as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern”.

Similar arguments were used in the *Philips and Osram case*.¹¹⁸ The case is not only of significance because of the reasoning of the Commission concerning the third requirement, but also because environmental aspects are taken into account in every step of the analysis of the Commission.¹¹⁹ Philips and Osram wished to conclude a joint agreement of manufacturing and selling lead glass tubing for certain types of lamps, in order to enable Osram to close its existing factories which were not equipped with emission reducing devices. Osram would then profit from the more environmentally friendly factories of Philips. Furthermore, the two undertakings also wished to combine their research and development capacities in order to develop lead-free substitutes for lead glass since environmental laws had become stricter. Concerning the first condition, the Commission established that “the joint venture will result in lower total energy usage and a better prospect of realizing energy reduction and waste emission programmes”.¹²⁰ It also took the reduced environmental and energy costs resulting from the agreement into account, as well as other environmentally positive aspects which were regarded as a quality factor. Due to these facts, the Commission took the view that the agreement implied improvement in the production of goods, thus fulfilling the first condition. As far as the benefits for the consumers were concerned, the Commission declared that “the use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities”.¹²¹ From this it seems clear that positive environmental effects benefiting consumers in general, such as a decrease in pollution, are sufficient to fulfil the second condition even when such benefits would not specifically affect the consumers of the product in question. However, in the Philips Osram case, the consumers of the relevant product were also given specific benefits such as cost advantages, which somewhat conditions

¹¹⁸ Commission Decision *Philips Osram*, 1994, OJ L 378 p. 0037-0044

¹¹⁹ In this regard, the case makes a good example of how the Commission ever since the reinforcement of the integration principle in the Treaty of Maastricht seems to have a greater awareness of the need to take account of environmental aspects in every step of its decision-making process. As stated before, this falls fully within the requirements emanating from the integration principle. See e.g. Bouckaert, 1993 p. 119.

¹²⁰ *The Philips Osram case*, para 26

¹²¹ *The Philips Osram case*, para 27. In addition, it considered that the research and development achievements concerning lead-free materials reinforced the positive effects for the consumers and that the improvements furthermore eventually would result in cost advantages. Concerning the indispensability condition, the Commission considered the joint venture indispensable for achieving the energy and costs savings as well as lower emissions. Consequently, the measure passed the third requirement as well, due partly to these environmental considerations.

such a conclusion. Nevertheless, the argument that environmental friendliness of a certain product (or even a sound environment in general) is to the benefit of the consumer is widely accepted, and therefore this second condition is not likely to cause any problems for measures benefiting the environment to pass the Commission's assessment. As far as the third condition is concerned, however, the outcome of the assessment is far more uncertain.

5.1.2.3 The Measure should not Impose any Restrictions which are not Indispensable to attain the Objectives of the Agreement

This condition is not exactly the same as the proportionality principle, although some authors seem to mix up the concepts.¹²² Whereas Article 81(3) requires the measure in question to be impossible to execute in a less restricting way, the proportionality principle rather demands a balancing of competing interests to be made. However, the assessment of the four requirements as a whole does in fact imply a proportionality test, where the Commission weighs up the restrictions of competition arising out of agreement against its environmental objective.¹²³ The outcome of this balancing will of course depend on the circumstances of each specific case, and is quite hard to predict. However, certain kinds of restrictions on competition will probably never pass the assessment of the Commission, regardless of any underlying, purely environmental aim. The Commission has clearly stated that it will remain "very firm" as far as severe restrictions on competition are concerned.¹²⁴ For instance, agreements which, *de jure* or *de facto*, would close national markets to foreign operators and prevent access of third parties are, in principle, never indispensable and thus very likely to be prohibited.¹²⁵ The same applies to agreements which could result in a product being squeezed out of the market or in multilateral tariff systems and price fixing. So far, there has been no case before the Commission concerning the former restriction whereas the latter were present in the *VOTOB case*¹²⁶. *VOTOB* was a Dutch association of six independent tank storage companies, who operated on a

¹²² Portwood, 1994 p. 154 and Gyselen, 1994, p. 251

¹²³ See e.g. XXVth Competition Report, para 85, p. 40. An environmental objective can also be transformed into an economic objective by using the above-mentioned argument that improved environmental protection increases a product's quality. To aim for higher quality of a product is a widely accepted and normal goal for an agreement or practice, which does not have to be defended in the same way a purely environmental aim might have to be before a more economically than environmentally concerned DG IV. Consequently, it only remains for the undertakings concerned to show that the measures are indispensable for the attaining of the environmental friendliness wanted, without having to justify the environmental goal as such. However, given the present status of the integration principle this detour might not be necessary.

¹²⁴ OECD 1996, p. 74 and XXVth Competition Report, para 85, p. 40.

¹²⁵ In this regard, the Commission has clearly stated that the EU gives priority to the achievement of the internal market, implying that environmental aims never can justify a closure of national markets to operators from other Member States: "Les priorités de l'Union en terme de réalisation du grand marché intérieur et d'union économique et monétaire nous permettent d'affirmer qu'un objectif environnemental ne devrait jamais être en mesure de justifier la fermeture des marchés nationaux aux opérateurs d'un autre État membre." OECD 1996, p. 69. See also the *Spa Monopole case*.

¹²⁶ XXIIInd Competition Report (1992) para. 177-86

non-captive storage market offering storage facilities to third parties. In order to finance new measures decreasing their pollution, they decided to add to their tariffs a separate and uniform “Environmental Surcharge”(ES). In its decision, the Commission firstly stated that measures to protect the environment are indispensable when the measure does not go beyond what is necessary to achieve the goal. Secondly, when assessing the agreements compliance with the third requirement, the Commission objected to the separate character of the ES because that made it look like a tax rather than a negotiable component of the price. Nor did it accept the uniform character of the ES, stating that this would discourage each VOTOB member from seeking more cost-efficient environmental investments than its competitors and thus prevent price-competition between the six companies. In the end, when the VOTOB members undertook to change the agreement by renouncing the fixed charge and instead incorporate the costs of their covenant investments on an individual, not horizontally agreed manner, the Commission closed its file. The balancing between the goals of competition and environmental protection the Commission was faced with in the VOTOB case can be illustrated by the following statement from the decision: “Although the Commission welcomes voluntary initiatives to improve the environmental conditions in a given sector, it has to ensure that undertakings competing in that sector do not resort to agreements which go beyond what is necessary to achieve that goal.”¹²⁷ Hence, as is required from the integration principle, the Commission did take account of the environmental aspect when assessing the VOTOB case, but as often is the case in competition and free trade proceedings, the agreement stumbled on the proportionality (or the indispensability) requirement. The Commission’s view in the VOTOB case was that the environment will be better served by competition than by the lack of it, since a freely set storage tariff would provide an incentive for cost-efficient remedies to the environmental problem. Although the VOTOB surcharge thus was found to infringe the third condition, this does not imply that the Commission is opposed to any possible passing on to consumers of costs resulting from investments improving the environmental protection. On the contrary, the Commission has stated that it approves of similar measures making customers more aware of environmental problems, insofar as the customers are not barred from challenging price increases resulting from the investment and the shopping around for the smallest increase.¹²⁸ To conclude, the Commission does take environmental protection into account when assessing an agreement or practice, but where measures implying serious distortion on competition such as price fixing are involved it is not likely that the Commission will accept the measure as indispensable for the environmental objective.

One example of an agreement that the Commission probably not found it hard to prohibit regardless of the agreement’s pronounced environmental goal is provided

¹²⁷ XXIIInd Competition Report (1992) para 177

¹²⁸ XXIIInd Competition Report, para 185, p. 108

by the *Ansac case*.¹²⁹ Ansac was a joint selling association of American companies for the sale of natural dense soda ash. The undertakings involved argued that since it would be better for the environment to use natural soda ash rather than synthetic soda ash (as the former is lower in chloride), technical progress would be promoted, thus making it possible for the Ansac agreements to be exempted from the Article 81(1) prohibition. The Commission, however, stated in a rather ironic way that “Ansac’s environmental argument (...) presupposes that it is the only vehicle by which a natural soda ash could reach the Community, i.e., that if Ansac were not granted an exemption, no individual United States producers would market the product in the EEC” and made it clear that these arguments did not cut ice. Since it could not see how the environmental friendliness of natural soda could be linked with the joint sales agency being indispensable, therefore the Commission rejected the request for exemption.

Another case that shows that environmental aspects cannot be used to justify restrictions that are unrelated to the environment is the *Oliebrancher Foellesrad case*.¹³⁰ This case concerned a number of Danish oil companies who wanted to create an Environmental Pool in order to finance the clean-up of polluted petrol station sites. Under the Pool’s rules, whenever the Danish authorities ordered a clean-up of a polluted petrol station, the Pool would pay for the clean-up provided the owner of the station would agree to close down the station afterwards. If the owner would want to re-open it, he would have to both reimburse the pool for the cleaning costs and pay an additional sum of 250.000 DK. The Commission took the view that the requirement not to re-open amounted to a restriction of competition - a quite obvious one since the number of petrol stations serving the public hardly can be regarded as relating to any environmental concern. Considering that environmental tools should not be used to regulate the market in matters unrelated to environmental protection, the Commission put pressure on the Pool, which later on decided to amend its rules.¹³¹

To conclude, the third condition of Article 81(3) is the one that seems to be the most difficult for environmental agreements or practices to pass and also the one where the balancing of interests is mainly made. With the insertion of the obligation to consider the environmental aspects, it has been perfectly acceptable to mention environmental protection as the objective of an agreement. However, the increased status of the integration principle has not changed the fact that measures restricting competition but promoting environmental protection must be the *only* proper alternative for attaining the environmental goal to be regarded as indispensable within the meaning of Article 81(3). In fact, the Commission seems to enjoy a considerable freedom to act when assessing agreements’ compliance with the requirement of indispensability, and the question of whether

¹²⁹ Commission Decision (1991) OJ L 152/54

¹³⁰ See XXIVth Competition Report (1994) p. 368

¹³¹ See Vandermeersch, 1997 p. 91

indispensability for reaching an environmental objective alone can constitute a reason for justifying restrictions on competition remains uncertain.¹³²

5.1.2.4 The Measure should not Eliminate Competition in respect of a Substantial Part of the Products in question

This requirement demands a careful examination of the relevant market and potential competitors, in order to investigate to what extent the companies concerned can still compete with each other as well as to what extent the market has been affected by the agreement. Thus, the possibilities for environmental arguments to influence in the assessment of this condition are not as many as to require deeper analysis.¹³³ It should be noted, however, that the fourth condition probably is met in so far as the more environmentally friendly products remain in competition with more traditional products.¹³⁴

5.2 Article 81 in Conjunction with Articles 3(1)(g) and 10 of the TEC

Some anti-competitive behaviour of undertakings can result from covenants concluded with a Member State government, rather than from any voluntarily established environmental goals. As a matter of fact, in daily practice there will hardly ever be an example of pure horizontal and private initiative in environmental matters. Instead, there will nearly always exist an underlying legislative measure or initiative of a Member State and in many cases, planned legislation may by means of discussion with the industry end up being converted into a covenant.¹³⁵ Such covenants encouraged by the public authorities might compromise the effect of competition rules, for example by requiring firms to engage in behaviour, which restrict competition. That this can have a very appreciable effect on competition and trade between Member States was specifically noted by the Commission in its XXIInd Competition Report, where it stated that the Court in such cases has held that Article 81 may apply, in conjunction with Articles 3(1)(g) and 10 of the Treaty.¹³⁶ According to the ECJ in the *Van Eycke case*¹³⁷, these rules in combination imply that Member States may not

¹³² The reason for this is that in the cases examined by the Commission so far, the environmental aim of an agreement have not been the only objective considered in the assessment of the indispensability condition, see e.g. *the Philips Osram case*, para 28.

¹³³ However, the question of whether the Commission will consider so-called eco-products as constituting a separate market or being part of the general market is quite interesting, and will be dealt with below within the context of the applicability of Article 82. For a further discussion on this condition, see Portwood, 1994, p. 156

¹³⁴ According to Jans, such a conclusion can be drawn from the *Assurpol* and *Brown Boweri* cases, Jans, 1995, p. 249.

¹³⁵ See e.g. the *VOTOB case*. As a matter of fact, the Community institutions have indicated that they favour the use of such “voluntary” agreements and more indirect steering by public authorities from pure legislation. See further the Fifth Environmental Action Programme, OECD, 1996 and Jans, 1995, p. 253 et seq.

¹³⁶ XXIInd Competition report (1992), para. 77. Article 3(1)(g) establishes that a system ensuring that competition in the internal market is not distorted should be a part of the measures adopted in order to reach the Community goals. Pursuant to Article 10, the

-introduce measures which require or encourage the adoption by companies of restrictive agreements, nor
-render restrictive agreements binding upon non-participating companies, nor
-introduce measures which delegate regulatory powers to private undertakings thus leading to restrictions of competition.¹³⁸

Accordingly, a Member State cannot count on making restrictive agreements legal by "officializing" them through incorporation or transformation into a legislative measure. On the contrary, Member States should always be aware of that their legislative support to private covenants might be criticized for being disproportional or violate Articles 3(1)(g) and 10 *juncto* Article 81.¹³⁹ However, the sole fact that a government's environmental measure has anti-competitive effects will not cause it to be in breach of Articles 3(1)(g) and 10 *juncto* 81.¹⁴⁰ Since it is virtually inherent in many kinds of environmental legislation that they have anti-competitive effects, any other conclusion would lead to a prohibition of a considerable amount of environmental rules.¹⁴¹ Accordingly, a government measure can only infringe Articles 3(1)(g) and 10 *juncto* 81 if the underlying environmental agreement or practice is prohibited by Article 81.¹⁴²

Member States must abstain from any action which could jeopardize the attainment of the objectives of the Treaty.

¹³⁷ Case 267/86 *Van Eycke v. Aspa* (1988) ECR 4769

¹³⁸ Case 267/86 *Van Eycke v. Aspa* (1988) ECR 4769 para 16. See further in Vandermeerch, 1997 p. 95. This case law has eventually been confirmed in the Cases *Ohra, Meng and Reiff*, C 2/91, 245/91, 185/91, from 1993, in the case *Delta Schiffart* C 153/93 from 1994, in the case *Peralta* C-379/92 ECR I-3453 from the same year and finally in the case *Leclerc*, 412/93 in 1995. Examples of such measures could be a government's extending the application of an environmental agreement to cover an entire industry (such a system already exists in the Netherlands concerning collective agreements, see further Jans, 1995, p. 252) or a Member State allowing the industry in question to set its own emission or product standards. Concerning the latter, it should be mentioned that this does not imply that industry cannot be consulted by a state during the legislative procedure. Only if industry representatives participate acting purely in their own capacity and having regard only to their own interest can the following State measure be deemed a reinforcement by State action of a private restrictive agreement violating Articles 3(1)(g)/5 and 81, see Case 136/86 *BNIC v. Aubert*, (1987) ECR 4789.

¹³⁹ *Bureau National Interprofession du Cognac*, Case 123/83, 1985, ECR 391 and *Vogelaar*, 1995, p. 545

¹⁴⁰ This conclusion has been drawn from the *Peralta* case, where the Court stated that an Italian legislation prohibiting vessels from discharging harmful substances into the sea could not be regarded to violate the articles mentioned. The Court e.g. stated that "That legislation does not require or foster anti-competitive conduct since the prohibition which it lays down is sufficient in itself. Nor does it reinforce the effects of a preexisting agreement." (The *Peralta* case, para. 21)

¹⁴¹ For instance, a normal legislation setting emission standards implies that it is no longer possible for firms producing more pollution to compete.

¹⁴² See *Rantala*, 1996 p. 54 and Cases 311/85 *Vereniging van Vlaamse Reisbureaus v. Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* (1987) ECR 3801, 136/86 *Bureau National Interprofessionnel du cognac v. Auber* (1987) ECR 4789 and 66/86 *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs* (1989) ECR 803.

What are the chances for an undertaking involved in a covenant with the State to be regarded as a violation of the competition rules? The mere fact that a government is exerting pressure on the industry to conclude an agreement does not prevent Article 81(1) from being applicable concerning the undertaking's behaviour.¹⁴³ However, if legislation is adopted, an undertakings simple compliance with legislation without an underlying agreement does not fall under the scope of Article 81(1) TEC.¹⁴⁴ It is thus the nature of the State measure that decides whether the undertaking can be accused of infringing Article 81 or not.¹⁴⁵ If the State measure *obligates* the firm to act in breach of the article, such action does not fall within Article 81 as far as the undertaking is concerned. In this case, it is the measure of the State that must be assessed according to the competition rules.¹⁴⁶ On the other hand, if the State measure simply *authorizes* the firm to act contrary to Article 81, the undertaking (and not the State) should be held responsible for the infringement.¹⁴⁷

Another interesting aspect concerning covenants induced by the government is that if public authorities assist in the financing of covenant measures, not only Articles 81, 3 and 10 are relevant but also the provisions on State Aid included in Articles 87-89. In a covenant context, State Aid may occur in many forms and can range from subsidies and tax alleviation to legislative measures guaranteeing for example sources of private sanctioning.¹⁴⁸ These questions will be separately analyzed in chapter 5.5. on State Aid. However, it is already worth mentioning that it has been argued that State Aid case law can be used for analyzing present covenants as well, by means of analogy.¹⁴⁹

5.3 Article 82

5.3.1 Introductory Remarks

Similarly to Article 81, the aim of Article 82 is to maintain free and effective competition and as we have seen above, this goal might conflict with environmental objectives in a variety of situations. Article 82 prohibits enterprises with market power, known as undertakings in a dominant position, from abusing their power. The prohibition concerns both private and public undertakings as

¹⁴³ See e.g. Bouckaert's analysis of a Flemish proposal of an environmental agreement in Bouckaert, 1993 p. 75

¹⁴⁴ See the cases *Greece v. Council*, 62/88, 1990 ECR 1527 and *Commission v. Council*, C-300/89, 1991, ECR I-2867

¹⁴⁵ *Idot*, 1995 p. 261

¹⁴⁶ The legislation concerned might in that case be criticized on the basis of Articles 3(g), 5, 28, 81, 82 and 86, according to the nowadays constant case law of the ECJ. (see for example the case *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, Case C-179/90, 1991, ECR I-5889)

¹⁴⁷ *Idot*, 1995 p. 261 and Cases "*L'affaire du sucre*" 40/74, ECR 1663 and "*L'affaire des cigarettes*" 209-215/78, ECR 3125

¹⁴⁸ See further Vogelaar, 1995, p. 554

¹⁴⁹ Vogelaar, 1995, p. 555

well as undertakings entrusted with the operation of services of general economic interest.¹⁵⁰ The relevant question for present purposes is how to deal with situations where a dominant firm's environmentally friendly behaviour might be considered as abusive within the meaning of Article 82. In order to answer this question we should firstly know whether such behaviour can be exempted from the prohibition because of its positive effects on the environment. The problem is that in contrast to the previously treated article, Article 82 does not contain any exemption clause. Consequently, regardless of the importance of an underlying environmental goal, measures constituting an abuse according to Article 82 shall be prohibited. Environmental objectives, even when pursued in a bonafied manner by the company concerned, can never be a justification for abuse.¹⁵¹ Thus it is only by means of interpretation of the abuse itself that environmental protection measures can escape a violation of Article 82.¹⁵² Accordingly, the second fact to investigate concerns how this can be made. There are two important concepts within Article 82 where the Commission must make a judgement, namely whether there is a dominant position and whether there is an abuse. Environmental considerations may, as we will see, come into play in both assessments.

5.3.2 The Notion of Dominant Position

Firstly, when analysing whether an undertaking has a *dominant position*, the Commission examines the relevant market. An important question to consider here is if environmentally friendly products should be considered to act on the general market or on a specific market for eco-products. The greater the market, the smaller the chances that an undertaking receives a dominant position. As the consumers are becoming increasingly concerned of environmental friendliness, the replaceability of environmental products diminish and thus the scope of the relevant markets for eco-products narrows to become separate from the general ones. This is in fact making it more difficult for environmentally friendly enterprises to escape an infringement of Article 82, as far as the definition of a dominant position is concerned.

5.3.3 The Notion of Abuse

The second part of the Article 82 assessment concerns how behaviour aiming for environmental protection may confront the notion of *abuse*. It should be recalled that once the behaviour of a firm is regarded to be abusive, no environmental benefits can be invoked to justify such behaviour. Article 82 contains an enumeration of particular examples of abuse, and as we will see, there exist several possible situations where an undertaking aiming for environmental

¹⁵⁰ Measures taken by undertakings falling within the two latter concepts, however, are assessed according to Article 86, which will be treated below.

¹⁵¹ Vandermeersch, 1997 p. 92. However, if an undertaking exclusively deals with activity promoting a sound environment, it might fall out of the scope of Article 82 as well as the other competition provision, see further *the Cali case* mentioned below in chapter 5.4.2.

¹⁵² Idot, 1995 p. 259

protection risks behaving abusively.¹⁵³ The first example of abusive behaviour enumerated in Article 82 concerns *indirect or direct unfair pricing policy or other unfair trading conditions*. For instance, if a dominant enterprise increases its prices due to higher costs resulting from measures to improve the environmental protection in its production processes, this might be challenged as unfair pricing. However, as we have seen above concerning Article 81, higher environmental standards of a product also increases its quality, and consequently charging more for a better product could hardly be qualified as abusive. Moreover, not only raising prices but also lowering them might imply abusive behaviour. Accordingly, an enterprise with market power in environmentally friendly products cannot sell them at a predatory price merely on the basis that this will assist its introduction and consolidation on the market. Even though this implies positive environmental effects in the long run (as increased consuming of ecological products improves the environment), once an abuse has been established similar arguments cannot exempt the behaviour from the article 82 prohibition.

Limiting production, markets or technical development to the prejudice of consumers is the second example of abuse contained in Article 82. One interesting question regarding this example is whether a dominant firm wishing to become more environmentally friendly should be permitted to decide only to purchase from (or sell to) dealers or customers which have proven environmental policies. Once again, higher environmental standards of a product increase its quality and thus, if a dominant enterprise requires its suppliers to fulfil certain environmental standards, this should not be regarded as abuse since demanding high-quality products from a supplier should not be considered abusive. Consequently, such an attempt of an undertaking to improve its environmental policy would probably escape from the prohibition of Article 82. Another behaviour falling under the second example is a dominant undertaking holding an important new technology to reduce emissions but keeping it as a business secret to itself. In this case environmental protection only gains from an application of Article 82, thus making it possible for other enterprises to use the environmental friendly technology.

Thirdly, an abuse can also consist of the *applying of dissimilar conditions to equivalent transactions with other trading parties, which places them at a competitive disadvantage*. For instance, the refusing of access to dominant environmental pools of whatever nature would fall under this provision. Such behaviour should be avoided in order not to be accused of abuse.¹⁵⁴ An example of a conduct which would probably not violate Article 82, however, is a dominant firm who refuses to deal with manufacturers who produces with more emissions

¹⁵³ The following presentation of possible examples is far from exhaustive. For further examples see for example Jacobs, 1993 p. 62 et seq., Vogelaar, 1995 p. 562 et seq., Rantala, 1996 p. 65 et seq., Portwood, 1994 p. 169 et seq.

¹⁵⁴ Vogelaar, 1995 p. 562 et seq. and case law presented below.

than others, though the final products seem to be identical. By using the argument that a green lifecycle increases the quality, such dissimilar treatment would probably not result in abusive behaviour.

The last example concerns “*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*”. The most obvious example of such abuse is so-called tying. An environmental example may be an undertaking requiring its purchasers to not only buy its products but also the tools necessary for recycling the product. If there is an objective necessity for such a tie and if it passes the proportionality test it should be accepted. The integration principle in Article 6 suggests that increased environmental protection should be regarded as such an objective necessity. Another possible situation is a dominant enterprise which in order to make its environmental policy more stringent requires its suppliers to only deliver products which fulfil certain standards. A concrete example is asking for beverages to be bottled in recyclable glass bottles instead of plastic ones (e.g. resulting from new legislative measures). Once again, since such requirements can be considered as improving the quality of the product, a similar demand should not be regarded to imply abusive behaviour.

As we have seen, the same environmental quality argument¹⁵⁵ which was presented within the context of Article 81 can be used to justify measures promoting the environment also when assessing the compliance of a dominant firm’s behaviour with Article 82. Accordingly, a firm’s discrimination of normal products and processes to the advantage of environmentally friendly ones does not imply abusive behaviour. Moreover, in the light of the increased status of the integration principle the question whether or not there had been an abuse of a dominant position should be answered with due regard taken to environmental objectives. However, although environmental improvements resulting from certain behaviour thus should add to the behaviour’s possibilities of complying with Article 82, such advantage for the environment is not strong enough to always imply non-applicability of the prohibition.¹⁵⁶ Nor can the integration principle or the fact that a high level of protection of the environment now is an expressed Community goal render practise which is detrimental to the environment abusive.¹⁵⁷ Nevertheless, these Community objectives may play a part even though Article 82 lacks of an exemption possibility. So far, however, these issues are far from clarified since the interaction between Article 82 and environmental policy has been present only in a scarce number of cases, of which none has been before the ECJ.

¹⁵⁵ See above chapter 5.1.2.1.

¹⁵⁶ Jacobs, 1993, p. 62 et seq.

¹⁵⁷ Jans, 1995, p. 250

The first case of interest for present purposes to come before the Commission was the *Spa Monopole case*, which concerned a complaint from a Belgian producer of mineral water (Spa Monopole) concerning a German recycling system for standardized refillable bottles.¹⁵⁸ The system was set up by an association of German mineral water producers (called GDB) which had entered into agreements with almost every German supermarket chain, and access was refused to all non-German producers. In 1987, the Commission rejected the complaint by Spa finding that the exclusion of foreign water producers did not affect these producers sufficiently since alternative packages (such as PVC and one-way glass) still had free access to the German market. However, when a new German legislation in 1992 prohibited the use of plastic one-way bottles as well as glass bottles lacking of a recycling system, the situation on the German market changed radically. As the foreign producers no longer could use other packages than recyclable ones, they would have had to establish a new pool besides the GDB pool in order to distribute their beverages, but since the supermarket chains found dealing with a second system too cumbersome to organize and too expensive in terms of handling and storage, the GDB *de facto* held a position monopoly. The Commission found that the GDB was abusing its position since GDB by not granting foreign producers access effectively made it impossible for them to penetrate the German market. The measure of GDB fell under Article 82(2)(c) TEC and the “applying of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage” since the restriction of access was directed only to foreign producers. As a result of the Commission’s intervention, the GDB opened its pool to other producers.

In this case a real confrontation between the goals of environmental protection and undistorted competition never came about, since avoiding the abusive behaviour did not prevent the environmentally positive effects from occurring, but rather increased their scope. However, it is still interesting and not only from an Article 82 point of view. An interesting point is that the GDB’s infringement of Article 82 actually was provoked from the legislative measures of the German State. If Germany would not have prohibited the use of non-recyclable bottles, the GDB measures would probably have passed the test in 1992 just as they did in 1987. As we have seen above, pursuant to Article 10, the Member States must abstain from any action which could jeopardize the attainment of the objectives of the Treaty. Undistorted competition belong to the things which should not be jeopardized, since Article 3(1)(g) establishes that a system ensuring that competition in the internal market is not distorted should be a part of the measures adopted in order to reach the Community goals. Hence, it can be argued that Germany was the one to be condemned by the Commission (instead of GDB) for infringing Article 82 (in conjunction with Article 10 and 3(1)(g)) since its legislation did not only reinforce the effects of agreements distorting competition, but actually changed compatible, harmless agreements into prohibited ones.

¹⁵⁸ XVIIrd Competition Report (1987) para. 75 and XXIIIrd Competition Report (1993) para. 240

A following question is then why the Commission chose to assess the GDB measures and not the German State measures? It has been argued that the Commission may have thought that it was not worth starting proceedings against Germany because they expected that the legislation would have been found justifiable to limit also the competition rules.¹⁵⁹ Considering the fact that environmental protection was found to be a mandatory requirement capable of limiting the application of Article 28 TEC by the ECJ in the above-mentioned Danish Bottle case, the German legislation (which was quite similar to the Danish one) would maybe have been treated equally, thus judged not to violate the competition rules. There is a difference between the cases, however. In the Danish Bottle Case, the ECJ used the so-called *Cassis de Dijon-rule* when it justified the Danish measures. This rule, as we have seen above¹⁶⁰, was first established with the *Cassis de Dijon* case and then reinforced with the *ABDHU* case to imply that obstacles to movement must be accepted in so far as such provisions may be recognised as being necessary in order to satisfy mandatory requirements such as environmental protection. The question is whether this rule can apply to Article 82 and Article 81 as well. A comparison between these Articles and Article 28 shows that the former apply to undertakings whereas the latter concerns actions taken by Member States, which are confirmed to have altruistic goals. This difference is of crucial importance, since the *Cassis de Dijon-rule* was made in order to permit such altruistic goals (including environmental protection) to be achieved in spite of a breach of Article 28. As Articles 81-82 concern only undertakings which in general are considered to have only economic aims, there seems to be no reason for including a *Cassis de Dijon-rule* in Articles 81 and 82. Hence, the only ways remaining for exempting restrictions on competition in cases similar to the *Spa Monopole* case is either using the possibilities included in Article 81(3), or by interpreting “abuse” in an environmentally friendly manner as far as Article 82 is concerned. Consequently, considering this lack of a *Cassis de Dijon-rule* in Articles 81 and 82, it could maybe have been possible for the Commission to condemn the German measures as infringing Article 82 in conjunction with article 10.¹⁶¹

Another case which is quite similar, also in its relation to State measures, is the *DSD-case* (*Duales System Deutschland*).¹⁶² *DSD* was (and still is) the only association to operate a system for recuperation of waste created by German industry in order to facilitate compliance with the German Packaging waste Regulation. The producers who wanted to become members of the *DSD* had to apply for a licence, and pay a fee to the *DSD* who then undertook to collect the waste. The producers accepted were allowed, but not obliged, to place a symbol

¹⁵⁹ Rantala, 1996 p. 56

¹⁶⁰ See chapter 4.3.2. concerning trade and the environment.

¹⁶¹ However, the question of whether these articles include such a proportionality test (or rule of reason) or not remains unclear, see further Furse, Mark, 1999 p. 143 et seq.

¹⁶² XXIIIrd Competition Report (1993) para. 95.

on their packages (the “Grüne Punkt”) which indicated that the packages were not only recyclable but also to be collected by the DSD. Due to remarkable campaigns for the “Grüne Punkt” products among the very environmentally concerned German consumers as well as the difficulties for other associations to create a more efficient system, the DSD gained a dominant position. The DSD system was notified to the Commission and has been the object of a number of complaints alleging that it violates the EC competition rules.¹⁶³ The issue before the Commission is the *de facto* monopoly position of DSD in Germany, which could give rise to abusive conduct, for instance by hindering the access of producers established in other Member States to the German market. However, monopoly power does not necessarily have to lead to abuse, and the matter was still under investigation by the Commission when the most recent sources found were written.¹⁶⁴ The expected outcome is for the DSD activities to be given a green light by the Commission, and it has been argued that this proves that there is a growing desire to reconcile environmental demands with competition requirements within the Commission.¹⁶⁵

In conclusion, although Article 82 does not provide for any explicit exemption possibility, the Commission can still take environmental aspects into account when assessing a case under Article 82. As we have seen in *Spa Monopole*, it was sufficient for the pool to give access to foreign producers in order to avoid infringement of Article 82. It has been argued that the Commission actually could have accused the pool for more abusive behaviour, but chose not to do so in order to avoid a total prohibition of the pool’s environmentally friendly activities, thus using the principle of proportionality.¹⁶⁶ However, the test of Article 82 remains rather stiff due to the lack of exemption possibilities. Consequently, firms might have an interest in being qualified as entrusted with the operation of services of general public interest in order to fall under the application of Article 86, where explicit exemption possibilities are provided for. This article will be examined below.

5.4 Article 86

5.4.1 General Application of the Article

Article 86 is addressed to the Member States. It requires them not to take nor maintain in force any measure contrary to the rules contained in the Treaty in

¹⁶³ See XXIIIrd Competition Report (1993) para. 95 and Gyselen, 1994 p. 252 et seq.

¹⁶⁴ Vandermeersch, 1997 p. 93, London 1997, p. 635 et seq. and Khalastchi/Ward, 1998, p. 281.

¹⁶⁵ London, 1997 p. 637. The case has at the same time been assessed by the German Federal Cartel Office, which .e. has prohibited an attempt of DSD to extend its operations from merely dealing with sales packaging to include transport packaging since the Cartel Office found that it was likely that DSD would extend its monopolistic position and thus eliminate small and medium-sized waste disposal companies, see further OECD, 1996 p. 28 et seq.

¹⁶⁶ Idot, 1995 p. 259, referring to an intervention by a high official within the Commission, J. Dubois.

favour of certain undertakings, namely public undertakings and undertakings to which they grant special or exclusive rights. The provision refers particularly to the rules provided for in Article 12, which prohibits discrimination on grounds of nationality, and Articles 81 - 89. The purpose of Article 86 is to ensure that the close relationship between state-related undertakings and the State do not create imbalances and distortions of the market to the detriment of other undertakings. The Commission is entitled to assess whether a measure of a Member State infringes the Article by means of Articles 86(3) and 226 TEC.¹⁶⁷ In contrast to Article 82, Article 86 contains an exemption possibility which can be used even in cases when an infringement of the Treaty rules has been established. Accordingly, although firms entrusted with the operation of services of general economic interest are subject to the Treaty rules under normal circumstances, they can be granted an exemption according to Article 86(2) if the application of such rules would “obstruct the performance, in law or in fact, of the particular tasks assigned to them”. It should be borne in mind, however, that Article 86(2) is an exemption clause, which should be interpreted strictly.¹⁶⁸ The importance of this article has been greatly enhanced thanks to the case law of ECJ and the CFI, and there is no doubt that special right companies in the environmental field also shall be subject to the rules and tests as defined by the two courts.¹⁶⁹ However, most probably due to the fact that Article 86 is at the meeting-point of a great number of various policies (including competition, environmental protection and social policies), this case law is not entirely coherent.¹⁷⁰ Moreover, the treatment of environmental issues within the framework of this provision is even more unclear, since this question has been virtually ignored up to now both in judicial decisions and in the work of legal writers.¹⁷¹ This situation is likely to change, however, since environmental aspects are very common in State regulated sectors. As we will see below, the traditional monopolistic sectors concerning the distribution of gas, water and electricity will always involve environmental considerations and the question is what part these aspects may play within the assessment of Article 86. Below a brief account of case law from the ECJ as well as the Swedish Supreme Administrative Court where environmental aspects have been considered will follow. On the one hand, cases where environmental aspects have been included in the assessment of the *applicability* of the article will be dealt with and on the other hand, situations where environmental considerations affected the possibility for infringing measures to be *exempted* will be presented.

¹⁶⁷ See e.g. the judgement by Regeringsrätten in the *case of Barsebäck*, Cases 1424-1998, 2397-1998 and 2939-1998 from the 16 June 1999, para 6.3.2.

¹⁶⁸ This was stated in Case 155/73 *Sacchi* (1974) ECR 409

¹⁶⁹ Vogelaar, 1995 p. 662

¹⁷⁰ See further Edward, 1996 p. 1.

¹⁷¹ Jans, 1995 p. 255

5.4.2 Case Law including Environmental Aspects

Firstly, environmental aspects may be of influence in the assessment of which state-related undertakings fall under the article.¹⁷² As seen above, firms taking certain measures likely to infringe Article 82 have an interest in being qualified as public or general service-operating undertakings since Article 82 does not provide for any exemption. For instance, in the case of *Inter-Huiles*, it was argued that a number of French undertakings authorized by France to collect *all* waste oil (thus prohibiting the export of such oil) should be regarded as undertakings entrusted with the operation of services of general economic interest within the meaning of Article 86(2).¹⁷³ If Article 86 would have been regarded to be applicable, an exemption would have been possible provided that the prohibition of export would have been deemed essential for the firm's accomplishment of their task of general interest. Unfortunately the Court never made the issue clear in its judgement, since it considered the prohibition on exports to infringe the rules of free trade even if the French authorization would have been regarded as a grant of an exclusive right.

In the case *Diego Cali et Figli*, the Court somewhat cleared its assessment of the possibility for firms dealing with environmental protection to fall outside the scope of the competition rules.¹⁷⁴ In this case, however, the question concerning the definitions of undertakings contained in Article 86 never arose because the undertaking concerned was exempted already from the applicability of Article 82. The case concerned an Italian undertaking having a monopoly position in its handling of pollution surveillance and pollution clean-up in the port of Genua, and the question before the Court was whether the undertaking was abusing its dominant position. The Court stated that "Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to *the protection of the environment* which are *typically those of public authority*. It is not of an economic nature justifying the application of the Treaty rules on competition"(Emphasis added)¹⁷⁵ That the firm levied a charge for its services did not change the Court's opinion. In comparison with earlier ECJ case law on the matter, the Court seems to have been quite generous

¹⁷² For details concerning the meaning of "public undertaking" and undertakings granted with special rights see further Blum/Logue, 1998 p. 8 et seq. As concerns firms entrusted with the operation of services of general economic interest and Article 86(2) see Blum/Logue, 1998, p. 22. It should be noted, however, that since the definition "undertaking entrusted with the operation of services of general economic interest" introduces a derogation from the rules on competition, the ECJ interprets it narrowly, see in particular Case 127/73 *BRT v. SABAM and Fonior* (1974) ECR 313, para 20 and AG Cosmas in Case 343/95 *Diego Cali et Figli* (1997), para 95.

¹⁷³ Case 172/82 *Inter-Huiles* (1983) ECR 555

¹⁷⁴ *Diego Cali et Figli case*

¹⁷⁵ *Diego Cali et Figli case*, para 23. The Court referred in this context to another case, namely C-346/92 *SAT Fluggesellschaft v. Eurocontrol* (1994) ECR I-43, para 30.

in its assessment of the Italian firm's activities as non-economic.¹⁷⁶ Considering the growing importance of the environmental integration requirement in the Community's recent policy documents, however, such a development is fully in line with the general tendency. According to my understanding, the Cali case provides a good argument for every undertaking dealing with environmental protection, both for firms whose activities may be regarded as non-economic and for undertakings which cannot count on such a qualification. Concerning the latter, the case can still be referred to when seeking the application of Article 86 and its exemption possibility, since the Court considered the tasks of protecting the environment as being "typically those of public authority".

Secondly, once the activities of an undertaking have been regarded to fall within the scope of Article 86, the question of how environmental protection issues may affect the assessment of the exemption possibility contained in the article arises. The first case to come before the ECJ containing environmental aspects in this regard was the *Almelo case* from 1994,¹⁷⁷ which concerned distribution of electricity. After having found that an exclusive purchasing clause prohibiting local electricity producers from importing electricity violated Article 81 as well as Article 82, the Court stated the following: "Restrictions on competition from other economic operators must be allowed in so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, *particularly concerning the environment*, to which it is subject." (Emphasis added)¹⁷⁸. However, although the Court in this case included environmental aspects as part of the necessity test contained in the Article 86(2) assessment, they still only seemed to play a role when assessing whether the relevant measure could be deemed necessary for performing the task under *acceptable economic conditions*.¹⁷⁹ In the opinion of AG Darmon, however, the protection of the environment was given a far more important role by means of his interpretation of how the proportionality test included in Article 86 should apply. Although the proportionality principle is not explicitly included in Article 86, according to well-established ECJ case law this principle fully applies, implying

¹⁷⁶ See for example C-41/90 *Höfner* (1991) RCE I-1979 where even a public recruitment office were considered to exercise economic activity, although it provided free services. See further on these issues Blum/Logue, 1998 p. 60 et seq.

¹⁷⁷ Case 393/92 *Gemeente Almelo v. NV Energiebedrijf Ijsselmij* (1994) ECR I-1477. See also *Idot*, 1995 p. 259

¹⁷⁸ *The Almelo Case* para. 49. This interpretation of the Court is an expansion of the so-called *Corbeau test* or *necessity test*, which implies that restrictions on competition, or even the exclusion of all competition resulting from a Member State's grant of special rights to undertakings may be permitted to the extent that they are necessary to perform a task of general economic interest under economically acceptable conditions. See further Blum/Logue, 1998 p. 28 et seq. The *Almelo case* thus expands this test to include costs and environmental legislation among the factors to consider when applying the *Corbeau test*

¹⁷⁹ According to Jans, however, the *Almelo case* shows that the Court wishes to keep open the possibility of restrictions on competition under Article 86 for environmental reasons.

that derogation from the Treaty rules may be permitted to give effect to a legitimate objective, but only provided they go no further than necessary to achieve the objective in question.¹⁸⁰ A legitimate objective may not only be the fulfilment of a task of general interest as provided in Article 86(2), but also the protection of the interests set out by means of Articles 30, 56 and other imperative requirements of Community law.¹⁸¹ In this regard, AG Darmon stated that: "Article 90(2) of the EC Treaty does not prohibit a monopoly on importing electricity resulting from an agreement between undertakings or an exclusive purchasing obligation imposed on local electricity supply companies by regional supply companies, provided that it is established before the national court that such measures constitute the only means of ensuring(...)the effective protection of the environment." (Emphasis added).¹⁸² It is for the holder of the exclusive right to demonstrate that the challenged measures are the *only* means to ensure that the legitimate objective is attained. Accordingly, although the proportionality test of AG Darmon enables the argument of environmental protection to be put forward, the test seems to be strictly applied.¹⁸³

Similar questions on the influence of the environmental argument as far as the exemption possibility in Article 86 is concerned recently arose in the Swedish *Barsebäck case*. The case concerns a complaint to the Commission as well as to the Swedish supreme administrative court (RegR) from the Swedish electricity supplier Sydkraft and its subsidiary Barsebäck Kraft AB (BKAB) against Swedish measures ordering the closure of one of two reactors at the nuclear power station Barsebäck. Sydkraft and BKAB have argued that the forced closure is contrary to Article 86 in combination with Article 82 because it strengthens the dominant position of Vattenfall, the state owned electricity company. The Swedish government has argued, e.g., that even if the closure is found to infringe Articles 82 and 86, there exists a kind of proportionality test¹⁸⁴ included in Article 86 implying that an infringing measure should be exempted from the prohibition where the measure is in pursuit of a legitimate objective (e.g. a "protection interest"¹⁸⁵) and proportionate.¹⁸⁶ If so, a measure falling within the

¹⁸⁰ Thus, it is closely linked to the necessity test contained in Article 86(2), see further above concerning the Corbeau test. See further Blum/Logue, 1998 p. 182.

¹⁸¹ Blum/Logue, 1998 p. 182 and Case RTT v. GB, (1991) C-18/88 ECR I-5941

¹⁸² The Almelo case, Opinion of Mr Darmon, para 172(2).

¹⁸³ See further in Blum/Logue, 1998, p. 183 et seq.

¹⁸⁴ This proportionality test (or public interest exception) is similar to both the above-mentioned rule of Cassis de Dijon and the proportionality test suggested by AG Darmon in *the Almelo case*, and is by Sydkraft and RegR called a "rule of reason".

¹⁸⁵ In Swedish a "skyddsintresse", see further the memorial from the Swedish government to RegR, www.naring.regeringen.se/energi/pdf/barseback2.pdf, p. 37-46. Such a protection interest can e.g. be the interest of an appropriate location of a nuclear power station.

¹⁸⁶ In addition, the Swedish State has argued that also Article 82 contains a similar public interest exception, although not explicitly included. According to the government, the ECJ cases Meng and Corbeau has showed that Member States can justify violations of Article 82 by assigning to the public interest. (The Barsebäck case p. 77)

scope of Article 86 cannot infringe the competition rules if the restriction on competition is indispensable for the attainment of a legitimate objective in the general interest.

As yet, these questions have only been analysed by RegR¹⁸⁷ and it remains to see whether the Commission will examine the case as well.¹⁸⁸ The judgement of the Swedish court, however, seems to confirm the reasoning of the government as concerns the public interest exception implicitly included in Article 86. The Court firstly established that general interests of non-economic nature according to ECJ case law can justify the exemption of e.g. television broadcasting from competition.¹⁸⁹ Secondly, the Court stated that the relevant State measure was based on considerations concerning safety and the environment, and "thus brought about by general interests".¹⁹⁰ Finally, after having regarded the Swedish State's closure of Barsebäck to fulfil requirements of proportionality, the Court concluded that the measure was not in breach with Articles 82 and 86 and that the State did not even have to take any further measures in order to prevent restrictions on competition.¹⁹¹

Even though it seems clear that RegR considers that measures taken in pursuit of a general interest can be exempted from competition (and, moreover, that environmental protection falls within the definition of such a general interest) it remains unclear on *what legal ground* the Court has based its conclusions. The opinion that Article 86 contains a proportionality test implying that derogations are permitted if they are indispensable for the attainment of an objective in the public interest remains controversial. For instance, in their defence before RegR, Sydkraft and BKAB argued that the State's public interest exception argument constituted a "rule of reason" exception, which could not exist within the context of Article 86 because the case law of the ECJ where such a rule has been applied deals with the much broader situation of general laws which might have effects on competition, not the specific context of the State both trading in a market and

¹⁸⁷ *The Barsebäck case*, Cases 1424-1998, 2397-1998 and 2939-1998 from the 16th of June 1999.

¹⁸⁸ According to Mr Albert of DG IV (Dir. E3), the Commission had still not began to examine the case, and according to Mr Jan Erlandsson, Sydkraft had not yet decided whether to restrict or not to the outcome in RegR. (Phone interviews of the 17/05/1999 and 15/06/1999 respectively.)

¹⁸⁹ See the Barsebäck case, p. 78 where RegR refers to the cases *Sacchi*, 155/73 (1974) p. 409 and *ERT C-260/89* (1991) p. I-2925. In this regard, however, the Court also stated that the competition rules imply that even when a State measure in pursuit of a general interest can be justified, the State might be obligated to make sure that competition is not unnecessarily distorted. Hence, the State might e.g. be required to prevent price discrimination. See the Barsebäck case p. 78 and cases *Bodson* 30/87 (1988) p. 2479 and *Höfner* 41/90 (1991) p. I-1979.

¹⁹⁰ (My translation from "Avvecklingslagen grundas på överväganden rörande bl.a. säkerhet och miljö. Lagen dikteras således av allmänna intressen"), *The Barsebäck case*, p. 79. Hence, RegR considered that environmental protection is a general interest, which is fully in line with previous ECJ case law (as we have seen e.g. in the above-mentioned ABDHU case).

¹⁹¹ *The Barsebäck case*, p. 78

regulating it.¹⁹² An interesting question is whether the reasoning of RegR is based on such a rule of reason or simply on the necessity test¹⁹³ provided for in Article 86(2). It is hard to draw any conclusions on this matter since the judgement is quite vague in this regard. However, Article 86(2) was not mentioned in the reasoning of RegR, nor was it invoked by the Swedish government. RegR merely stated that the measure did not infringe Articles 86(1) and 82¹⁹⁴, which seems to indicate that the Court did in fact draw its conclusions on the basis of an implicit public interest exception justifying an infringement of Article 86 instead of using Article 86(2).¹⁹⁵ Furthermore, as we have seen above, such an implicit exemption possibility would (similarly to the Cassis de Dijon rule) have its main importance in making the achievement of altruistic goals possible.¹⁹⁶ Given the fact that such goals are very likely to be included in Article 86 cases, as the article concerns State related measures, the argument put forward by the complainants that a public interest exception is impossible seems to be further weakened. On the other hand, Article 86 was specifically designed to prevent Member States distorting competition in favour of their own companies. This protection could be greatly weakened if a State could just invoke the general interest as an exception.¹⁹⁷

To conclude, the question of whether there is such a second exemption possibility included in Article 86 remains unanswered. However, if so, there should be no doubt about the fact that environmental protection constitutes a legitimate

¹⁹² Sydkraft and BKAB referred in this regard to *the Corbeau case*, where the Court chose not to follow the opinion of the AG who suggested an introduction of a rule of reason within Article 86(1), see Case *Corbeau*, C-320/91, (1993), ECR I-2533 and the Barsebäck case, p. 77.

¹⁹³ See the "Corbeau test" mentioned above.

¹⁹⁴ Nor did the State have to make the measures less altering on competition.

¹⁹⁵ The Barsebäck case, p. 79

¹⁹⁶ See above chapter 5.3.3.

¹⁹⁷ Furthermore, the fact that Article 86 already is provided with an exception possibility (namely the one contained in Article 86(2)) implies that it would be against the scheme of the article to include a second exemption possibility. In this regard, another argument put forward by Sydkraft and BKAB in order to prove that a rule of reason exception cannot be included in Article 86(1) is of interest. Referring to the *Johnston v. Constable case* (Case 222/84, 1986, ECR 1651), which concerned public safety, the complainants maintain that a general exception appears to be specifically excluded in the ECJ case law. In the case in question, the ECJ stated that "...the only articles in which the Treaty provides for derogations applicable in situations which may involve public safety are Articles 36, 48, 56, 223 and 224 which deal with exceptional and clearly defined cases. *Because of their limited character*, those articles do not lead themselves to a wide interpretation and *it is not possible to infer from them that there is inherent in the Treaty a general provision covering all the measures taken for reasons of public safety*. If every provision of Community law were held to be subject to a general provision, regardless of the specific requirements laid down by the provisions of the Treaty, this might impair the binding nature of Community law and its uniform application." (Emphasis added) By means of an *e contrario* interpretation of this case, one could argue that since there actually is a general provision requiring every Community policy to take environmental protection into account (namely the integration principle), it should be possible to include an implicit general exception concerning the environment in Article 86.

objective capable of justifying an exemption according to such a rule, given the requirements of the integration principle and established case law.¹⁹⁸ It might even be possible to argue that Member States taking measures which concern environmental protection have a greater chance to invoke even the *existence* of a public interest exception in order to exempt the measures from the prohibition in Article 86(1) than when taking measures aiming for other policy objectives, since environmental protection due to the integration principle is given a status never seen before in Community law.¹⁹⁹ However, even if such an implicit exemption possibility does not exist, the consideration of environmental aspects within the context of Article 86(2) remains possible as far as undertakings falling under that provision are concerned.

5.5 Articles 87-89 on State Aid

5.5.1 Environmental State Aid and the Polluter Pays Principle

In a way, one could argue that after having dealt with several conflicts between the Community's competition and environmental policies that they at least have one thing in common: In principle, both policies disapprove the granting of State Aids. On the one hand, State Aids harm undistorted competition, since some undertakings artificially are given a better position on the market at the expense of the other firms, thus harming the equality.²⁰⁰ On the other hand, State Aids are clearly contrary to one of the most important elements in European environmental policy, namely the polluter pays principle.²⁰¹ Applying the polluter pays principle implies that the costs required to reduce nuisances and pollution should be borne by the undertakings whose activities are causing environmentally harmful effects, but the grant of aids by states implies that the public and not the polluter pay in the end.²⁰² Hence, the Commission has noted that "environmental policies both at national and at Community level should be based, not on the general grant of aid by states, which simply means that the public pays in the end, but on the imposition of obligations (standards and levies) enabling the authorities to make the polluters bear the cost of protecting the environment".²⁰³ Nevertheless, environmental subsidies are being accepted, and the question is how this acceptance is legally and politically motivated? As far as the policy aspect is concerned, environmental aid is allowed since it can help environmental objectives to be attained in situations when market forces are not sufficient to cause people to act in an environmentally desired way, or when environmental protection is

¹⁹⁸ See e.g. the *ABDHU case*, the RegR in the *Barsebäck case* p. 79, and AG Darmon in the *Almelo case*.

¹⁹⁹ See the discussion concerning the *Johnston v. Constable case*, supra note 197.

²⁰⁰ See further Evans, 1998 p. 434 and Buigues/Meiklejohn, 1996 p. 68

²⁰¹ Some commentators consider that this principle renders all State Aids for environmental compliance impermissible, see further Budlong, 1992 p. 456

²⁰² See further especially Budlong, 1992 p. 444 et seq. and Jans, 1995 p. 256

²⁰³ IVth Competition Report (1974), para. 176

seriously in conflict with social or economic objectives. As the Commission puts it in its XXIIIrd Competition Report from 1992, “they may be a second-best solution”,²⁰⁴ and as a matter of fact, aid for environmental purposes are among the least politically controversial of the subsidies given by the Member States.²⁰⁵

5.5.2 The Notion of Aid

Concerning the legal aspect of the acceptance of environmental subsidies, it might first be interesting to examine what measures might be considered as “aid” before investigating the legal basis for environmental aid. From the case law of ECJ it is clear that the term “aid” must be interpreted broadly. Direct aid in the form of grants as well as indirect aid²⁰⁶ is regarded as State Aid, and even a reduction in the price of electricity has been seen as State Aid.²⁰⁷ As far as examples including environmental aspects are concerned, tax reliefs for undertakings using recycled material, subsidized loans for air pollution control and waste management have been regarded as State Aid.²⁰⁸ To put it simply, there are just as many forms in which aid can be granted, as there are objectives for it to be granted. However, there are some difficulties concerning the application in spite of the width of examples. In the *ABDHU case*, the dividing line between aid and genuine compensation paid by the government was discussed.²⁰⁹ The case concerned a payment from the government to undertakings collecting waste oils, and the Court considered the payments to be straightforward remuneration for services. The *Asteris case* concerned the question whether compensation for damages should be treated as aid, and the Court held that compensation paid on the grounds of liability for an unlawful act by public authorities was not to be seen as aid.²¹⁰ Furthermore, to be regarded as aid within the framework of Article 87, the aid must be awarded to specific undertakings or industries and thus contain an element of favouring.²¹¹ Consequently, aid to increase general environmental awareness does not fall within the scope of the State Aid articles.²¹² From the

²⁰⁴ Para 166. See also the 1994 Community Guidelines on State Aid for environmental purposes, OJ C 72/3 para 1.4

²⁰⁵ See further Seventh Survey on State Aid in the European Union in the manufacturing and certain other sectors, COM(1999) 148 final, Brussels 30 March 1999 and Rouam, 1998 p. 76

²⁰⁶ Indirect aid include tax remissions, interest subsidies, tax reliefs, preferential tariffs...basically any situation where the state does not receive income it normally would have received. See further Jans, 1997, p. 110

²⁰⁷ OJ 1994, C 32/27 and Jans, 1995 p. 258

²⁰⁸ See these examples and more in XXIIIrd Competition Report, point 420 and XXIIInd Competition Report points 449 and 452-453.

²⁰⁹ Case 240/83 *ABDHU* (1985) ECR 531, see further above.

²¹⁰ Case 106-20/87 *Asteris* (1988) ECR 5515. This is of interest especially concerning environmental damages, since this type of payment is regularly found in the field of environmental law, see Jans, 1995 p. 261

²¹¹ See *the Dutch Manure case* mentioned below, which provides an illustration of these matters

²¹² Firstly, such measures normally are far too general to benefit any specific enterprises, and secondly, according to the Commission in the new guidelines (Community guidelines on State Aid for environmental protection, Official Journal C 72/3, 10/03/1994, paragraph 3.3) they are explicitly exempted.

new guidelines it furthermore appears that measures to encourage final consumers to buy ecological products will normally not fall under Article 87 either, for the same reasons as in the former example.²¹³

5.5.3 Aid for Environmental Purposes

Once a measure falls within the concept of State Aid, Article 87(3) provides a list of grounds on which aid may be considered compatible with the common market.²¹⁴ The list is exhaustive, and aid aiming for environmental protection is not explicitly included. However, several grounds can be (and have been) used to justify environmental aid and the guidelines formulated by the Commission point out what grounds that fit best. In accordance of what has been stated so far about the impact of the integration principle on competition rules, it is not alone sufficient to justify an exemption from the State Aid rules. Consequently, the mere fact that aid promotes environmental protection will not suffice to justify aid. Nevertheless, the integration principle tells us that environmental effects must be taken into account when assessing aid. How can this be made concerning State Aid considering the fact that no specific environmental ground is provided for in Article 87- in other words: To what extent can the grounds enumerated in Article 87 be used to make environmental aid compatible with the State Aid rules?

This question has been answered in the Community frameworks for State Aids aiming for environmental protection ever since the first one came in 1974.²¹⁵ For twenty years it provided guidance for one particular type of aid, namely investment aid helping enterprises to adapt their existing installations to new environmental norms. During these years, the Commission took the view that all adaptation aids "promote(d) the execution of an important project of common European interest" within the meaning of Article 87(3)(b), which for example was clearly illustrated in the case *Glaverbel*.²¹⁶ There are, however, more possible grounds for allowing environmental aid. As far as Article 87(2) is concerned, the first conceivable permissibility ground for environmental aid concerns aid "having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned".²¹⁷ However, it is not easy to fit in environmental aid in this provision since such aid normally is granted to producers and not to consumers. The second possibility of Article 87(2) concerns aid to make good for damages caused by natural disasters

²¹³ Paragraph 3.5, *ibid*.

²¹⁴ It should be noted that according to the ECJ, the kinds of aid enumerated in Article 87(2) are not affected by the prohibition in 87(1), but directly compatible with the common market, (See Evans, 1998 p. 436 and Case 78/76 *Steinike und Weinlig v. Germany* (1977) ECR 595, 608) whereas Article 87(3) establishes a list of aids which *may* be considered to be compatible with the common market. The Commission, however, has tried to keep control over all kinds of aid, falling under both provisions.

²¹⁵ Gyselen, 1994, p. 246

²¹⁶ Case 62/87 *Glaverbel* (1988) ECR 1573. It was this exception that was the most used until the new guidelines came in 1994, see further Jans, 1995 p. 264 et seq.

²¹⁷ See further Budlong, 1992, p. 450 et seq.

or other exceptional occurrences²¹⁸. Similarly to the former provision, this exemption possibility is not very likely to be used for environmental purposes.²¹⁹ In contrast to the limited exemption possibilities under Article 87(2), there are several provisions in Article 87(3) under which environmental aid may fall. A part from the above-mentioned common interest exception ground, environmental aid has also been accepted by means of Articles 87(3)(c) concerning development of certain activities or areas²²⁰ and (d) concerning “other categories of aid” as may be specified by decision of the Council.

The 1974 guidelines were replaced in 1994 with a new framework where the compliance with the polluter pays principle was pushed a few steps further.²²¹ Accordingly, the Commission now recognizes four types of environmentally relevant State Aids; the above mentioned *investment aid*, the so-called *soft aids*²²², *operating aid* and *aid to promote the buying of ecological products*.²²³ Concerning the grounds chosen to justify environmental aid, the Commission has switched from preferring the promotion of the execution of an important project of common European interest as legal ground to placing environmental measures within the category of sectorial and regional aid.²²⁴ The content of the new guidelines will not be analyzed in detail, nevertheless a few questions are of interest.²²⁵ In accordance with the polluter pays principle, no investment aids can be granted to new plants but only to installations which have been in operation for at least two years. Similarly, operation aid (aid that relieves

²¹⁸ Article 87(2)(b)

²¹⁹ According to Budlong, environmental aid cannot be given by means of Article 87(2)(b). Nevertheless, environmental aid due to flooding caused by the river Maas in the Netherlands has demonstrably been approved under his provision, see further Jans, 1997, p. 113. However, the provision is to be interpreted strictly as a result of the provision's character of exception.

²²⁰ However, if the development is likely to occur also without the subsidy, aid can not be accepted, Case 730/79 *Philip Morris Holland BV v. Commission* (1980) ECR 2671. See further on this exception Budlong, 1992 p. 452 et seq.

²²¹ On the one hand, the control over adaptation aids concerning existing installations was tightened. On the other hand, the Commission changed policy from focusing on aids aiming to help undertakings comply with new legal requirements to also considering other types of aid which assist companies in their wish to make environmental improvements that go beyond legal obligations. This new approach is fully in line with the declarations of the fifth environmental action programme calling for preventive action and the necessity to make undertakings more environmentally concerned on their own initiative instead of merely responding to legal obligations. See further the Guidelines on State Aid for Environmental protection, OJ No C 72, March 3, 1994. These guidelines will be in force until December 31, 1999.

²²² Soft aids include for example aids which compensate costs incurred by undertakings when they invest in vocational training or assistance by consultants in the environmental field, which clearly reflects that preventive action rather than regulatory action is advocated in the fifth action programme. See further in Gyselen, 1994, p. 248

²²³ Concerning the latter, such aid is only acceptable if solely is to the benefit of the final consumer. Rouam, 1998, p. 78

²²⁴ Article 87(3)(c), see further Portwood, 1994 p. 193 and Jans, 1997 p. 114

²²⁵ As for the rest, I refer to the proper guidelines, Buigues/Meiklejohn, 1996 p. 82, Vandermeerch, 1997, p. 77 et seq. and Gyselen, 1994, p. 242 et seq.

undertakings from the costs resulting from the pollution or nuisance they cause) can only be approved in exceptional circumstances, e.g. in the fields of waste management and relief of environmental taxes, and on condition that the aid is temporary and in principle degressive. Furthermore, the aid must not violate other TEC rules, such as the rule of free movement of goods. For instance, temporary relief from environmental taxes might be authorized where such relief is necessary to offset losses in competitiveness, particularly at the international level. Two cases can illustrate the Commission's policy regarding operate aid.

5.5.4 Case Law

In the *Dutch manure bank case*²²⁶ the Dutch government had set up a "manure bank" for the disposal of excess manure in an environmentally acceptable manner. The activities of the bank were to be financed by public funds which were raised by a levy to be paid by farms producing more manure than could be used on their land. According to the Commission, these public funds constituted a form of State Aid, and the mere fact that the subsidy was financed by companies in the same sector which also got the benefits from it did not prevent the subsidy from qualifying as aid.²²⁷ However, the Commission made a distinction between the covering of the fixed costs of the manure bank (such as infrastructure and overhead) and the variable costs. It concluded that the aid could be authorized under Article 87(3)(c) as an aid "facilitating the development of certain economic activities" insofar as the aid covered the fixed costs, since the bank actually created a controllable and environmentally sound outlet for manure that otherwise may be difficult to dispose of. However, concerning the variable costs of the manure bank the Commission regarded these costs as "operating aid" to Dutch manure processing companies, to the detriment of other manure processors in other Member States. In the Commission's view, the financing of the variable costs should rather be borne entirely by the farms who actually made use of the bank, e.g. through imposing delivery fees upon them. Thus, the operating aid part of the subsidy was allowed only for a two-year period.²²⁸

In contrast to the manure case, operating aid was approved by the Commission in the *Danish CO2 tax exemption case*.²²⁹ The Danish government (as well as the Dutch) had introduced a new energy tax in order to make undertakings pay for the CO2 content of their energy source thus encouraging them to look out for less polluting energy sources and more efficient ways of using energy. However, the government had decided to grant tax reductions for a number of intensive energy

²²⁶ Commission Decision, march 11, 1992, OJ no L 170, June 25, 1992, p. 34

²²⁷ The Court did the same reasoning in the case *Commission v. France*, Case 259/85, November 11 1987, ECR 4418

²²⁸ The Commission's approach concerning waste is different when it comes to household waste, where it allows Member States to both set up and finance systems for e.g. the collection of waste paper for recycling purposes, see further Gyselen, 1994, p. 249

²²⁹ See XXIIInd Competition Report (1992), para 451 and Vandermeerch, 1997, p. 102. There is also a similar Swedish case presented in the XXVI Competition Report p. 246, see further Rouam, 1998, p. 79.

consumers, which doubtless constituted operating State Aid for the companies concerned, and moreover clearly departed from the polluter pays principle. Nevertheless, the Commission decided to approve the tax reductions, partly because the undertakings in question otherwise would have suffered a sharp loss of competitiveness in comparison with its competitors in less environmentally concerned Member States. Hence even those companies which enjoyed a tax reduction paid probably more than the ones located in other Member States. Furthermore, the Commission obviously wanted to encourage the tax system since it was in line with the Community's own environmental policy and a pending Commission proposal.²³⁰

To conclude, it is nowadays widely recognized that environmental protection must be pursued by the public authorities (and thus with public money) as well as by the business community (through application of the polluter pays principle) if the objectives are to be given a chance of being attained. In this manner, it has been argued that the environmental policy has filtered through to the Commission's State Aid policy, and that, for the sake of coherence, a similar balancing should be applied in other competition cases as well.²³¹ Below, the question of coherence between the different areas of competition protection as far as the integration of environmental aspects is concerned will be further dealt with. The assessment of environmental State Aid has an important role to play in such a comparison, firstly because the area of State Aid has the most long-standing tradition among the competition rules of integrating environmental issues, and secondly because the Commission in its State Aid decisions seems to have been more favourable to environmental integration than in its other assessments.

5.6 The Merger Regulation and the Environment

In order to find out to what extent environmental considerations can be taken into account when assessing whether a merger creates or strengthens a dominant position in the Common market with prevented competition as a result, two questions have to be answered: On the one hand, the question of whether environmental aspects can be considered at all when assessing mergers and on the other hand, if so, in what context such environmental arguments can be put forward. Accordingly, does the environmental improvement resulting from e.g. a merging of two companies in order to improve the environmental protection in their methods of production play any part at all in the assessment of such a concentration?

Firstly, according to Cook and Kerse, the Merger Regulation is designed (as well as generally applied) with such a focus on competition-related factors that other factors rarely influence in the judgement of compatibility.²³² However, Recital 13

²³⁰ See Gyselen, 1994, p. 250

²³¹ Vogelaar, 1995, p. 540

²³² Cook/ Kerse, 1996, p. 163 et seq.

of the MR requires the Commission to take account on the general goals of the Treaty when treating merger cases, and since a high level of environmental protection now is explicitly included in Article 2 TEC as being a Community objective, this gives enough basis to answer the first question positively.²³³ Furthermore, the integration principle applies to all Community legislation and to every Community policy, hence the conclusion concerning environmental protection within the framework of the Merger Regulation is the same as for all competition rules of the Community: The integration principle does not automatically provide for environmentally friendly measures to be generally exempted from the Merger Regulation, however it does require that its rules are interpreted in an environmentally sound manner.

Secondly, how and where in the defence of a merger can arguments concerning the merger's effects on the environment be put forward? Two provisions of the MR may allow environmental considerations to be made. Firstly, although the basic test for incompatibility in Article 2 MR appears to be solely competition based, it does include, however, some other criteria which have to be considered, such as the development of technical and economic process in Article 2(1)(b) MR. Hence, if a concentration cannot be given green light on competition grounds, it might nevertheless be defended if such progress is sufficiently important.²³⁴ As stated above, environmental improvements should be regarded as economical and technical progress since the ecological friendliness of a product adds to its quality. Article 2(1)(b) MR further requires the Commission to take the interests of the intermediate and ultimate consumers into account, which provides a possibility to put forward arguments similar to those referred to above under the examination of the third condition of Article 85(3). However, these means of defence of an environmentally friendly merger should not be overestimated, since they would probably only be available in so far as there is still doubt over the creation or strengthening of a dominant position after all the other criteria in Article 2 MR have been taken into account.²³⁵

²³³ Not only Recital 13 but also Recital 4 provides some justification for submitting material unrelated to competition issues since it refers to the Community goals of increased competitiveness and growth as well as raised standard of living. As we have seen above, firstly, the Community takes the view that a promotion of the eco-industry as well as a raise of environmental standards are likely to increase competitiveness. Secondly, the traditional objectives of growth and raised standards are now influenced by the principle of sustainable development.

²³⁴ Furthermore, the development must be to the advantage of the consumers and it must not be associated with any restriction on competition apart from the ones already included in the concentration itself, see Portwood, 1994 p. 184. The concentration must also pass the test of indispensability for the wanted results on the progress of technical and economical development, see further on indispensability above in chapter 5.1.2.3.

²³⁵ Portwood, 1994 p. 184. See also the *MSG Media Service case* (OJ L 364/1, 1994) where the Commission stated that "The reference to this criterion (contribution to technical and economic progress) in Article 2(1)(b) of the Merger Regulation is subject to the reservation that no obstacle is formed to competition" and Cook/Kerse, 1996, p. 165.

Secondly, in the *Vittel case*²³⁶, trade unions in the Perrier group challenged a conditional clearance given by the Commission on the ground that the Commission had not taken due account to the requirement of Recital 13 MR to consider general Community goals in its assessment. In its defence before the ECJ, the Commission argued that Recital 13 could not impose specific positive obligations requiring it to, e.g., analyse the employment consequences in a particular undertaking of a notified concentration. It further argued that it was not for the Commission to show that it had taken the fundamental objectives of Article 2 TEC into account, but rather for the applicant to establish that the clearance of a concentration was liable to prejudice those objectives. Although the ECJ dismissed the unions' application on the basis that any prejudice to Perrier workers was not attributable to the clearance decision, it nonetheless seemed to suggest that some kind of positive obligation on the Commission's part resulted from the requirement of Recital 13²³⁷. Even though the judgement have not led the Commission to include any formal acknowledgement that it has examined concentrations from the perspective of Article 2 TEC so far, the reasoning of the *Vittel case* can nonetheless be used for justifying environmental arguments to be put forward within the context of the MR, especially since the TEA introduced a high level of environmental protection as a Community goal. Hence, by invoking Article 2 and 6 TEC in combination with Recital 13 MR, it should be possible to challenge a Commission Decision for not having fulfilled the requirement of the mentioned rules to consider the environmental aspects in its decision.

Furthermore, Portwood suggests a third means of environmental defence concerning mergers, which can be criticised for being too far-fetched but which might nevertheless be of some interest. Since Article 2(1)(a) MR refers to the need to take into account the structure of *all the markets* concerned within the internal market, beneficial effects on one market might be used as an argument of defence for competition restriction effects on another market.²³⁸ In this regard, one could argue that that a concentration harming the competition in one market but improving the environment (and consequently the technical and economical progress) in another should be approved regardless of the effects on the former market. If for example some energy industry companies merge in order to achieve environmentally friendly methods of producing energy, this may have considerable positive environmental effects on several other markets. However, as yet there have been no cases before the ECJ where environmentally friendly aspects of a merger have conflicted with restrictions on competition. Although environmental aspects must be taken into account if such a case would appear, it remains to see how powerful the environmental argument is when conflicting with the preventing

²³⁶ *Case Comité Central d'Entreprise de la Société Anonyme Vittel v. European Commission*, T-12/93 (1995) ECR 1247

²³⁷ *The Vittel Case*, paras. 38-40 and Cook/Kerse, 1996, p. 168 et seq.

²³⁸ See further Portwood, 1994 p. 185

of a merger “between elephants” of Community dimension which is most likely to affect free competition considerably.

5.7 Conclusions

The number of competition cases before the Commission in which environmental aspects are included is increasing, and most of these cases concern Article 81, in which environmental considerations mainly come into play within the context of the exemption possibility established by Article 81(3). Although there is no specific provision for environmental protection contained in Article 81(3), the Commission’s statements as well as its decisions show that environmental aspects are being taken into account and weighed against the goal of undistorted competition when the possibility of exemption of agreements and practices is being assessed. A great variety of arguments may be put forward by environmentally friendly undertakings when seeking an exemption, and recent case law from the Commission seems to indicate that the Commission is considering these environmental arguments to a greater extent now than before.²³⁹ As a matter of fact, such a tendency is fully in line with the past decade’s strengthening of the status of environmental protection in the Treaties as well as in the Community as a whole. This increased concern for the environment is not least being found on a national level, especially in the northern Member States. A new way for the governments of the Member States to raise environmental standards without having to face the inconveniences entailed with legislation²⁴⁰ is to conclude covenants with the undertakings concerned. Both parties to such covenants are, however, subject to the competition rules: While the conduct of the undertakings must not infringe Article 81, the Member States are obliged not to threaten competition according to this article in combination with Articles 3(1)(g) and 10. As yet, there have been no such cases against a Member State before the ECJ where environmental aspects have been included, but as we have seen, parallels can be drawn from other cases in order to somewhat clarify the situation.

As far as Article 82 is concerned, however, several cases have come before the Commission in which behaviour aiming for environmental protection but distorting competition have been included, and there also exists a variety of hypothetical examples of such behaviour which are of interest for present purposes. Although Article 82 does not contain any explicit exemption possibility, the case law of the Commission has proved that this does not prevent environmental considerations

²³⁹ This conclusion can be drawn from *the Philips Osram case*. However, the assessment of the Commission is still far from predictable. Environmental agreements are above all likely to stumble on the indispensability requirement of Article 81(3). In order to increase the legal certainty in this regard, it has been argued that, after having gathered more experience in the environmental field, a specific group exemption within the context of Article 81 should be considered. (See Vogelaar, 1995, p. 560 et seq.)

²⁴⁰ For further details concerning these inconveniences and alternative means, see OECD, 1996 and the Fifth Environmental Action Programme.

to be made when assessing whether there has been abusive behaviour, and that improvements on the environment might increase the possibilities of non-applicability of Article 82. If the Article 82 prohibition nevertheless is regarded to apply, dominant undertakings which fall under the definitions of public undertakings or undertakings granted with special rights may seek applicability of Article 86 in order to receive green light for measures promoting the environment, since this provision is provided with an exemption possibility. In addition, recent case law seems to indicate that a second exemption possibility is included in Article 86, in the shape of a proportionality or necessity test in which environmental considerations would have an important role to play.²⁴¹

That the goal of improved environmental protection may justify distortions on competition can also be illustrated by the policy adopted by the Commission in the area of State Aid. Aid for environmental purposes has been accepted ever since 1974, and the Commission has in general been quite generous in its assessment of such aid. Accordingly, the goal of a high level of environmental protection has been allowed to prevail over competition considerations, in so far as the distortions on competition have not been unnecessary for the environmental goal to be attained. Finally, environmental considerations might also be included in the assessment of concentrations between undertakings according to the Merger Regulation. Although there, as yet, have been no cases of this kind, the MR does contain a number of provisions under which environmental arguments may be put forward.

²⁴¹ The role of environmental protection would thus be to constitute the general interest in the pursuit of which some distortion on competition would be allowed.

6 Conclusions

The growing concern for environmental protection within the Community has caused undertakings, Member States as well as the EU to take measures aiming for improved environmental protection. As we have seen, such measures are most likely to affect both free trade and competition within the Community. During the past decade, the relationship between environmental objectives and the traditional Community goal of undistorted competition has attracted more and more attention, and environmental arguments can nowadays be put forward within the context of both the TEC competition rules and the Merger Regulation. Moreover, in its assessment of these rules, the Commission is obliged to take due regard to such environmental arguments according to Article 6 TEC. However, the fact that environmental considerations must be taken into account when assessing the applicability of the prohibitions contained in the EC competition rules have, so far, not implied that environmental aspects are given the same importance regardless of which competition rule the environmental action is affecting. As seen, there exists a great variety of different measures to choose between in order to attain a certain environmental goal, and the probability for such measures to be prohibited by the Commission differs considerably. Nevertheless, the Commission's assessment within the context of every specific rule is based on similar considerations. When assessing such measures' compliance with a rule of competition, the Commission has two things to bear in mind. Firstly, according to Article 2 TEC, the level of environmental protection must be as high as possible. Secondly, Article 3(1)(g) requires that competition must not be distorted.²⁴² When seeking to fulfil these two demands, the proportionality principle offers a handy solution by merging the two requirements into one single test, according to which the potential disadvantages to the competitive structure of the market should be compensated by the objective environmental advantages of the case.²⁴³ It is for the Commission to strike the balance between a sound and coherent competition policy on the one hand, and often overwhelming "public interest" aspects of the environmental policy on the other, even when these aspects are being pursued in private agreements.²⁴⁴ That this balance is made properly is of crucial importance. On the one hand, if the competition policy of the Commission is too strict the environment can deteriorate as when environmentally sound investments are deferred out of fear that otherwise costs cannot be internalised. On the other hand, if restricting measures with positive environmental effects are

²⁴² That DG IV must take due regard also to the former principle is required by Article 6 TEC.

²⁴³ The exact meaning of this principle has been dealt with in chapter 5.4.2.

²⁴⁴ This has also been noted by the Commission in its XXVth Competition report, para. 85, thus confirming the Commission's statement in its XXIIIrd Competition report (para. 170) that "*the Commission in its analysis of individual cases will have to weigh the restrictions of competition in the agreement against the environmental objectives that the agreement will help attain, in order to determine whether, under this proportionality analysis, it can approve the agreement*".

accepted too often, dispensable restrictions on competition might be allowed under cover of environmental protection.²⁴⁵

However, not only should an equilibrium between the *interests* of the environmental policy and other Community policies be found, but also a balance between the different *means* for environmental protection. Hence, in my opinion, there is a third fact that the Commission should bear in mind, namely that its assessment of every conflict between environmental protection and undistorted competition should be *coherent no matter which means is chosen*. Consequently, the proportionality criteria more or less explicitly contained in the various competition rules should be reconciled in its application within the various contexts. Moreover, as we have seen, there is not only an interface between environmental protection and competition, but also between the preservation of the integrity of the internal market and the other two policies. Governments taking legislative measures protecting the environment are faced with the requirements of Articles 81 and 82²⁴⁶ as well as Article 28. Hence, there is not only a need for the Commission to adopt a coherent policy regarding its competition rules, but it should also take account of the balance between free trade and environmental protection when seeking to reconcile its assessment of these matters.

The above-mentioned *VOTOB case* can be used to illustrate the problems resulting from an incoherent standard of assessment.²⁴⁷ Some additional remarks concerning the background of the case are however necessary for the understanding of this case in the context of a coherent standard of assessment. As a matter of fact, the agreements of the VOTOB members were not concluded on a purely voluntary basis, but resulted from co-operation with the Dutch State. In 1989 and under pressure of imminent legislation, the VOTOB members had entered into a covenant with the Dutch government, according to which substantial investments were to be made in new technological facilities in order to reduce the VOTOB members' vapour emissions from so-called "black-list" products with up to 90 percent. An independent institute analyzed the possibilities for financing these investments and concluded that these exceeded the six VOTOB member's financial capacities substantially.²⁴⁸ However, at the time of signing the agreement, a general State Aid scheme was in place in the Netherlands for new investments, and the VOTOB members were thus quite sure of receiving the subsidies deemed essential for the investment. Hence, it came as a great surprise for the VOTOB members when the Dutch government soon after the

²⁴⁵ As we have seen, up to now, the Commission has had a rather suspicious attitude in assessing the sincerity of the real will of firms or Member States to protect the environmental measures which may at the same time distort competition.

²⁴⁶ Through the effects of Articles 3(1)(g) and 10

²⁴⁷ See above chapter 5.1.2.3.

²⁴⁸ In addition, since similar companies in neighbour countries such as Germany and Belgium were under no obligation to invest in emission reduction equipment, the members could hardly raise their prices as a result of such investments since they in that case would suffer a considerable loss in competitiveness.

signing of the covenant withdrew the State Aid scheme altogether, so that the members were faced with an instant-financing deficit of their covenant obligations. As a result, they decided to add to their tariffs the above-mentioned “Environmental Surcharge” (ES), which they had calculated would amount to exactly the same sum as the State Aid they had expected to, receive after a number of years. The agreement to introduce the ES was duly notified to the Commission, who as we have already seen raised two objections to the agreement concerning Article 81 TEC, but closed its file when the VOTOB members decided to renounce the ES.

What makes this case interesting for present purposes is to compare the actual outcome of the case with possible outcomes resulting from assessments of other competition provisions.²⁴⁹ If VOTOB e.g. had been given the initially expected subsidy, which actually amounted to a sum identical to the amount of the environmental surcharges, what would then have been the outcome? As we have seen above, the Commission has a long-standing tradition of approving environmental State Aids, and by drawing a parallel to the CO2 case, it seems very likely that a subsidy given to the VOTOB members would have been approved by the Commission²⁵⁰. The cases are actually quite similar since both concern firms making costly investments to reach a higher level of protection than their average competitors. Moreover, both cases affect the polluter pays principle. What is striking is that in the Danish case, the competition restricting measure also infringed the polluter pays principle by letting the Danish state pay for the emission reducing investments. In VOTOB, however, the suggested agreement would have been in perfect accordance with that principle as the ES would have been paid by the real polluters thus making them aware of the environmental problem when having to contribute to the emission reducing costs. In spite of this difference to the advantage of VOTOB, the Commission’s assessment in the CO2 case was more favourable. Although the Commission’s reasoning in VOTOB makes good sense, in my opinion it must be seen as unsatisfactory that an agreement which merely replaced a probably accepted subsidy (and even improved the situation from an environmental as well as from a

²⁴⁹ Or even to compare it with other cases concerning the same provision, since the VOTOB case does not seem to be in accordance with Assurpol either. In Assurpol, the restrictions on participating undertakings’ independently setting premiums and conditions were deemed to have been necessary for the attainment of Assurpol’s objective of enabling environmental risks to be insured. The Commission even stated that “the existence of standard policy conditions makes it easier for consumers to compare the commercial premiums charged by each of the insurers belonging to Assurpol” and that “these restrictions do not go beyond what is necessary as they leave the insurer members entirely free to fix commercial premiums” (The Assurpol case, para 39 and 40.) The restrictions on competition in VOTOB were very similar to those in Assurpol, and so were the non-restricting elements. In VOTOB as well as in Assurpol, the members remained entirely free to fix the rest of their tariffs (a part from the ES) and the standardised and visible ES made it easier for the costumers to compare their commercial tariffs.

²⁵⁰ As a matter of fact, the Commission had already approved the general Dutch State Aid scheme.

competition point of view!) was not acceptable. This clearly shows that there is a lack of coherence between the Commission's assessment under the State Aid articles and Article 81. As a matter of fact, the Commission's standard of assessment concerning these two sets of rules is quite different. On the one hand, the test of indispensability of Article 81 is rather crude, as some restrictions on competition, such as price cartels, will be prohibited regardless of their effects on the environment. On the other hand, the balancing between competition restricting effects and improved environmental protection according to Article 87 seems a lot more fine-tuned and does not lead to the all-or-nothing situation that Article 81 often creates. If an aid is reasonable, it can be exempted from the prohibition of Article 87(1) and if not, it can easily be changed in order to be reasonable enough to be exempted.

However, as stated above, not only Articles 81 and 87 may come into play in situations like VOTOB. The Dutch government might as well had chosen to create a new legislation concerning emission reduction, combined with an obligation for storage companies to charge an environmental surcharge in order to comply with the polluter pays principle. Would such a measure have been regarded as infringing the competition rules, i.e. Articles 3(1)(g)/10 *juncto* Article 81? Or would it have violated the rules of free trade, i.e. Article 28? The outcome of a balancing between altruistic, environmentally friendly State measures and their impact on competition seems to be more likely to end up favouring the State and the environment than a similar balancing with an undertaking being the one taking a measure in order to promote the environment.²⁵¹ It is, however, important that the Commission assesses all conflicts between environmental objectives and undistorted competition similarly, not least in the light of the fact that the Member States of today's EU have different traditions as far as regulatory means are concerned.²⁵² On the one hand, States which favour regulatory means will have their measures investigated through Article 28 since environmental regulations are likely to affect free trade. On the other hand, States with a more deregulatory approach (thus preferring market-based instruments) will have to confront either Article 81 in conjunction with Articles 3(1)(g) and 10 as far as government-induced agreements are concerned, or Article 87 concerning subsidies. If the Commission's internal market policy is less strict than its competition policy, undertakings located in States preferring market-based instruments might put pressure on their governments in order to make them impose standards they originally might have been happy to agree upon themselves, in a more efficient way. However, if the Commission instead would let environmentally positive agreements or aids slip through more often than environmental legislation, firms in States with regulatory traditions might seek to co-operate more than normally, whereas the State itself would ease its aid policy. Consequently, it is desirable that

²⁵¹ As has been seen in the Danish Bottles case above, the ECJ took serious account of the environmental aspects when assessing the Danish measures.

²⁵² Furthermore, these differences are likely to increase as the Union expands towards Eastern Europe.

the Commission applies the proportionality and the indispensability tests contained in the provisions examined above in a coherent manner; with the same severity or generosity no matter which provision the measure is likely to infringe.

Bibliography

Articles:

Buigues, Pierre-André and Meiklejohn, Roderick, Reconciling State Aid Policy with Other Community Policies, from *Developments in European Competition Policy*, Editor: Aad van Mourik, Maastricht, EIPA, 1996, p. 67

Bouckaert, J, Het verenigbaarheid van milieubeleisovereenkomsten met het Europees kartelrecht, *Tijdschrift voor privaatrecht*, No 1, 1993, p. 75

Budlong, Scott C., Article 130r(2) and the Permissibility of State Aids for Environmental Compliance in the EC, *Columbia Journal of Transnational Law*, Vol. 30, No 1, 1992, p. 431

Evans, Andrew, Law, Policy and Equality in the European Union: The example of State Aid Control, *European Law Review*, Vol. 23, No 5, October 1998, p. 434

Van Calster, Geert and Deketelaere, Kurt, Amsterdam, the Intergovernmental Conference and Greening the EU Treaty, *European Environmental Law Review*, Vol. 7, No1 January 1998, p. 12-25

Degroux, Xavier, Le choix de la base juridique dans l'action environnementale de l'union européenne, *Cahiers de droit européen*, No 3, 1995, p. 383

Geradin, Damien, Balancing Free Trade and Environmental Protection - The interplay between the European Court of Justice and the Community Legislator, from *Trade and the environment: The search for balance*, London, 1994, p. 204

Glaesner, Hans-Joachim, "L'environnement comme objet d'une politique communautaire" in *La protection de l'environnement par les CE*, Editor: J. Charpentier, Pedone, 1988

Gosalbo Bono, Ricardo, Les politiques et actions communautaires, from *Le Traité d'Amsterdam*, Editions Dalloz, 1998, p. 61

Gyselen, Luc, The emerging interface between Competition Policy and Environmental Policy in the EC, ur *Trade and the Environment: The search for balance*, Editors Cameron, Demaret, Gerardin, London, 1994, s. 242

Idot, Laurence, Environnement et droit communautaire de la concurrence, *La Semaine Juridique*, No 24, 1995, p. 257

Jacobs, Reto, EEC Competition Law and the Protection of the Environment, *Legal Issues of European Integration*, No 2, 1993, p. 37

Jans, J. H., Does the polluter really pay?, from *Recente ontwikkelingen in het Europees milieurecht*, Editor: D. Geradin, Antwerpen, Kluwer, 1997 p. 77

Khalastchi, Ruth and Ward, Halina, New instruments for sustainability: An assessment of environmental agreements under Community law, *Journal of Environmental Law*, Vol. 10, No 2 1998, p. 257-290

Krämer, Ludvig, L'environnement et le Marché unique européen, *Revue du Marché Unique Européen* 1/1993, p. 45

Krämer, Ludvig, Environmental protection and Article 30 EEC Treaty, *Common Market Law Review* 30: 111-143, 1993

London, Caroline, Droit communautaire de l'environnement, *Revue trimestrielle de droit européen*, 1994, p. 291

London, Caroline, Droit communautaire de l'environnement, *Revue trimestrielle de droit européen*, No 3, 1997, p. 629

Marin, Alan, EC Environment Policy, from *New Challenges to the European Union: Policies and Policy-Making*, Ashgate, Hampshire 1998, p. 545-591

Raux, J., Avant-propos to Guyomard, Jacques, *L'intégration de l'environnement dans les politiques intra-communautaires*, Rennes, Editions APOGÉE, 1995 p. 7 et seq.

Reich, Charles, Le traité d'Amsterdam et le champ d'application de la procédure de codécision, *Revue du Marché Commun et de l'Union Européenne*, No 413, December 1997, p. 665-669

Reid, Donald A. and Fraser Milligan, Morton, Trade and Environment: Finding A Balance: The European Approach, *European Environmental Law Review*, Vol. 5, No 5, 1996 p. 144

Vandermeerch, Dirk, The interaction between Environmental Policy and EC Competition Law, from *Recente ontwikkelingen in het Europees milieurecht*, Editor: D. Geradin, Antwerpen, Kluwer, 1977, p. 77

Vogelaar, Floris O. W., Towards an improved integration of EC Environmental Policy and EC Competition Policy: An interim report, from *International*

Antitrust Law and Policy 1994, Fordham Corporate Law Institute, Editor: Barry Hawk, The Hague, 1995, p. 529

Wiers, Jochem, Regional and Global Approaches to Trade and Environment: The EC and the WTO, *Legal Issues of European Integration*, 1998, Vol. 25, No 1, p. 93

Books:

Blum, Françoise, Logue, Anne, *State monopolies under EC Law*, Chichester, 1998

Cook, C.J. and Kerse, C.S., *E.C. Merger Control*, Sweet&Maxwell, London, 1996

Edward, David A. O., *Article 90 EC-Treaty and the deregulation, liberalisation and privatisation of public enterprises and public monopolies*, Bonn, 1996

Ege, Christian and Mette Boye, *EU's miljøpolitik: Kan frihandel og miljø forenes?*, Copenhagen, Ecocouncil, 1998

Fejo, Jens, *EU-konkurrenceret*, Copenhagen, 1997, 2 ed.

Furse, Mark, *Competition law of the UK & EC*, London 1999

Golub, Jonathan, *Global competition and EU environmental policy*, London, 1998

Guyomard, Jacques, *L'intégration de l'environnement dans les politiques intra-communautaires*, Rennes, Editions APOGÉE, 1995

Jans, J. H., *European Environmental Law*, Kluwer, 1995

Johnson, Stanley P. and Corcelle, Guy, *The environmental policy of the European Communities*, London, Kluwer, 1995, 2nd edition

Kapteyn, P. and Verloren van Themaat, P., *Introduction to the Law of the European Communities*, 2nd ed., Boston, 1990 p. 518

Krämer, Ludvig, *Focus on European Environmental Law*, London, Sweet&Maxwell, 1997, 2nd edition

Liefferink, Duncan and Skou Andersen, Mikael, *The innovation of EU environmental policy*, Copenhagen, Academic Press, 1997

Llamas, Michael and London, Caroline, *EC Law on protection of the environment and the free movement of goods*, London, Butterworths, 1995

Mahmoudi, Said, *EU:s miljö rätt*, Stockholm, 1997

Ottervanger, T. R., Steenbergen, J., Van der Voorde, S. J., *Competition Law of the European Community, the Netherlands and Belgium*, The Hague, Kluwer, 1998

Petersmann, Ernst-Ulrich, *International and European Trade and Environmental Law after Uruguay Round*, London, Kluwer, 1995

Polinsky, A. Mitchell, *An introduction to law and economics*, Boston, Little, Brown and Company, 1989, 2nd edition

Portwood Timothy, *Competition law & The Environment*, London, 1994

Rantala, Meri., *EC Competition Law and Environmental Protection*, Helsinki, 1996.

Rouam, Claude, *Le contrôle des aides d'Etat aux entreprises dans l'Union européenne*, Paris, 1998

Shaw, Josephine, *European Community Law*, London, Macmillan Press Ltd, 1993

Westin, Jacob, *Introduktion till EG:s konkurrensregler*, Stockholm, 1997

Community Acts and Documents:

Acts of the Council:

Council Resolution of 3 December 1992 concerning the relationship between industrial competitiveness and environmental protection, Official Journal C 331, 16/12/1992 p.5

Community guidelines on State Aid for environmental protection, Official Journal C 72/3, 10/03/1994

Common Position on the Fifth Environmental Action Programme, OJ C 157, 24/05/1997 p. 12

Acts and Documents of the Commission:

XXII Report on Competition Policy 1992

XXIII Report on Competition Policy 1993

XXIV Competition Report 1994

XXV Competition Report 1995

XXVI:e Rapporten om konkurrenspolitiken 1996

XXVII:e Rapporten om konkurrenspolitiken 1997

COM(1993) 785/5, Brussels 3/06/1993: Communication concerning the integration of environmental policy considerations into other policies

COM(1994) 465 final, Brussels 03.11.1994: Economic Growth and the Environment: Some Implications for Economic Policy Making

KOM(1998) 212 slutlig, Bryssel den 07.04.1998: Rapport från kommissionen till rådet and europaparlamentet om avregleringen av energimarknaderna

KOM(1998) 333 slutlig, Bryssel den 27.05.1998: Partnerskap för integration- en strategi för att integrera miljöskydds krav med Europeiska Unionens politik

COM(1999) 148 final, Brussels 30.03.1999: Seventh Survey on State Aid in the European Union in the manufacturing and certain other sectors

Commission Position papers on agriculture (COM(88)338), energy (COM(89)369), transport(COM(92)494) and industrial policy (SEC(92)1986)

Documents of the European Parliament:

Case-Law of the European Court of Justice on Environmental matters,
Working Paper W-21, Environment, Public health and Consumer Protection
Series 6-1997

Europaparlamentet and Europeiska Unionens miljöpolitik, Arbetsdokument
W-20, Serie Miljö, folkhälsa and konsumentskydd, Generaldirektoratet för
forskning

Other Sources:

Competition Policy and the Environment: OECD Working Paper Vol. IV,
No. 5, Paris, 1996

Phone interview of the 19/04/1999 with *Mr Stefan Tobias*, Stagiaire at DG IV, State Aid dep.

Phone interview of the 17/05/1999 with *Mr Albert* of DG IV (Dir. E3)

Phone interview of the 15/06/1999 with *Mr Adv. Jan Erlandsson*, Sydkraft Servicepartners AB

Regeringens yttrande till Regeringsrätten i fråga om Barsebäck (the memorial from the Swedish government to RegR), published on the homepage of the Swedish Ministry of Industry:

www.naring.regeringen.se/energi/pdf/barseback2.pdf

Complaint pursuant to Article 90 EC by Sydkraft AB, no IV/36939 at the Commission

Table of Cases

Decisions of the European Commission:

-1969

Commission Decision *Clima Chappée-Buderus* (1969) OJ L 195/1

Commission Decision *Jaz-Peter* (1969) OJ L 195/10

1970

Commission Decision *BMW* (1975) OJ L 29/1 at. 6-7

Commission Decision *United Reprocessors* (1976) OJ L 51/7

Commission Decision *Bayer/Gist-Brocades* (1976) OJ L 30/13

1980

Commission Decision *Amersham&Buchler* (1982) OJ L 314/34

Commission Decision *Carbon Gas Techonlogy*, (1983) OJ L 376/17

Commission Decision *Synthetic fibres*, (1984) OJ L 207/17

Commission Decision *BBC Brown Boweri*, (1988) OJ L 301/68

1990-

Commission Decision *KSB/Goulds/Lowara/ITT*, (1990) OJ L 19/25

Commission Decision *Ansac* (1991) OJ L 152/54

Commission Decision *Assurpol* (1992) OJ L 37/16

Commission Decision *Yves St Laurent Parfumes*, (1992), OJ L 12/24

Commission Decision, *Dutch Manure Bank*, (1992) OJ L 170/34

Commission Decision *Ford and Volkswagen* (1993) OJ L 20/14

Commission Decision *Philips Osram*, (1994) OJ L 378

Commission Decision *MSG Media Service* (1994) OJ L 364/1

Commission Decision *Exxon and Shell Groups* (1994) OJ L 144/20

Cases of the European Court of Justice:

-1969

Case 10/56 *Meroni* (1958) ECR 80

Case 26/62 *Van Gend en Loos* (1963) ECR 1

Case 56/65, *Société Technique Minière v. Mascinenbau Ulm GmbH* (1966)
ECR 235

1970

Case 41/69 *ACF Chemiefarma v. Commission*, (1970) ECR 661.

Case 48/69 *Imperial Chemical Industries Ltd v. Commission* (1972) ECR
619.

Case 127/73 *BRT v. SABAM and Fonior* (1974) ECR 313

Case 155/73 *Sacchi* (1974) ECR 409

Case 8/74, *Procureur du Roi v. Dassonville et al.* (1974) ECR 837
Case 40/74 *Sugar case* ECR 1663
Case 26/76, *Metro I* (1977) ECR 1875
Case 78/76 *Steinike und Weinlig v. Germany* (1977) ECR 595, 608
Case 120/78, *Rewe-Zentral AG v. Bundesmonopoverwaltung für Branntwein*
(1979) ECR 649
Case 209-215/78 *L'affaire des cigarettes* (1979) ECR 3125
Case 5/79 *Procureur de la République v. Buys* (1979) ECR 3203

1980

Case 730/79 *Philip Morris Holland BV v. Commission* (1980) ECR 2671
Case 172/82 *Inter-Huiles* (1983) ECR 555
Case 123/83 *Bureau National Interprofession du Cognac* (1985) ECR 391
Case 240/83 *ABDHU* (1985) ECR 531
Case 222/84 *Johnston v. Constable* (1986) ECR 1651
Case 45/85 *Verband der Sachversicherer v. Commission* (1987) ECR 405
Case 259/85 *Commission v. France* (1987) ECR 4393
Case 311/85 *Vereniging van Vlaamse Reisbureaus V. Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* (1987) ECR 3801
Case 66/86 *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs* (1989) ECR 803
Case 136/86 *BNIC v. Aubert* (1987) ECR 4789
Case 267/86 *Van Eycke v. Aspa* (1988) ECR 4769
Case 302/86 *Commission v. Denmark* (1988) ECR 4607
Case 30/87 *Bodson* (1988) ECR 2479
Case 62/87 *Glaverbel* (1988) ECR 1573
Case 106-20/87 *Asteris* (1988) ECR 5515

1990-

Case C-18/88 *RTT v. GB* (1991) ECR I-5941
Case C-62/88, *Greece v. Council* (1990) ECR I-1527
Case C-260/89 *ERT* (1991) ECR I-2925.
Case C-300/89, *Commission v. Council* (1991) ECR I-2867
Case C-2/90 *Commission v. Belgium* (1992) ECR I-4431
Case C-41/90 *Höfner* (1991) ECR I-1979
Case C-179/90 *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA* (1991) ECR I-5889
Cases C-2/91, C-245/91, C-185/91, *Ohra, Meng and Reiff* (1993) ECR I-5751 et seq.
Case C-320/91, *Corbeau* (1993) ECR I-2533
Case C-327/91 *République française v. Commission* (1994) ECR I-3641
Case C-346/92 *SAT Fluggesellschaft v. Eurocontrol* (1994) ECR I-43
Case C-249/92 *Commission v. Italy*, (1994) ECR I-4311
Case C-379/92 *Peralta* (1994) ECR I-3453

Case C-393/92 *Gemeente Almelo v. NV Energiebedrijf Ijsselmij* (1994) ECR I-1477.

Case C-131/93 *Commission v. Germany* (1994) ECR I-3303

Case C-153/93 *Delta Schiffart* (1994) ECR I-2517

Case C-412/93 *Leclerc* (1995) ECR I-0179

Case T-12/93 *Comité Central d'Entreprise de la Société Anonyme Vittel v. European Commission* (1995) ECR 1247

Case C-343/95 *Diego Cali et Figli* (1997) ECR I-1547

Cases of Regeringsrätten (The Swedish Supreme Administrative Court):

The Barsebäck case, Cases 1424-1998, 2397-1998 and 2939-1998 from the 16th of June 1999.

Other Cases mentioned:

The VOTOB case: XXIInd Competition Report (1992) para. 177-86

The Danish CO2 Tax exemption case: XXIInd Competition Report (1992), No 451, para. 252

The Spa German Bottle case: XVIIrd Competition Report (1987) para. 75 and XXIIIrd Competition Report (1993) para. 240

The DSD case: XXIIIrd Competition Report (1993) para. 95

The European Fuel Cycle Consortium case: see Notice pursuant to Article 19 (3) of Council regulation No 17 concerning a notification received in Case IV/34.781 - *EEIG EFCC (European Fuel Cycle Consortium)* (1993) OJ C 351/6

The Oils Foellesrad case: XXIVth Competition Report (1994) p. 368