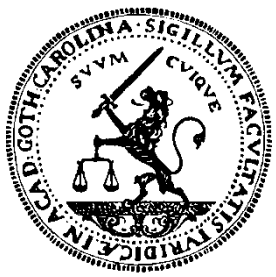

FACULTY OF LAW
Lund University

Victor Sand Holmberg

EU Competition Law and Environmental Protection – Integrate or Isolate?

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Contents

Summary

The European Commission has, in recent years, adopted an economic, consumer welfare-driven approach in its competition policy. Since the "*modernisation*" of the European competition law in 2004, the Commission has stated that "*objective economic benefits*" are necessary for the exemption in Article 101(3) TFEU to apply. While the Commission in the past may have taken environmental consideration into account in its competitive assessments, economic efficiency has become the paramount goal of EU competition policy. It may seem like decision-makers no longer are able to consider non-economic concerns when assessing anti-competitive agreements. Meanwhile, environmental law academics stress the importance of "*market-based instruments*" and the need for private cooperation to combat environmental decay. An increasing number of firms seek to do business in a way that minimises their environmental impact. Often, such initiatives require a certain degree of collaboration. The scope of Article 101(3) TFEU becomes highly relevant when companies enter into voluntary environmental agreements, which are restrictive of competition, but also carries great environmental benefits. Companies that cooperate to reduce their environmental pressure run the risk of violating Article 101 TFEU. However, the case law of the EU courts, as well as the decisional practice of the Commission, does not fully support the Commission's new approach. The Treaties demand that the Union strive towards a sustainable development and a high level of environmental protection. Traditionally, the EU courts have used a teleological interpretation method when analysing the provisions in the Treaties. It can be argued that the founding Treaties should be viewed as forming a coherent system. When the wording of Treaty statutes is vague enough to be open to interpretation, they should be interpreted as to help EU's overarching policy objectives. Article 101 TFEU is open to interpretation and allows for the Treaties' environmental goals to be taken into account. It can also be argued that it is economically rational to integrate environmental concerns into the competitive assessment. According to neoclassic economic theory, competition gives rise to "*external effects*" that must be internalised if society's resources are to be efficiently allocated. Even if we accept the notion that only "*objective economic benefits*" may satisfy Article 101(3) TFEU, neoclassic environmental economic theory suggests that environmental benefits can constitute just that. This thesis concludes that the constitutional structure of the Treaties demands that environmental concerns are to be taken into account under Article 101 TFEU. The thesis further argues that Article 101(1) TFEU should entail a consumer welfare test on the relevant market. Environmental benefits should be taken fully into account under Article 101(3) TFEU. The aggregated positive and negative effects to society as a whole are considered in this assessment. Environmental benefits should be relevant in Article 101(3) TFEU even if they cannot be calculated into "*objective economic benefits"*.

Sammanfattning

EU-kommissionens tillämpning av den europeiska konkurrenslagstiftningen har på senare år genomgått en förändring. EU-kommissionen kräver, sedan konkurrenslagstiftningens modernisering 2004, att ett konkurrensbegränsande avtal leder till ”*objektiva ekonomiska fördelar”* för att det ska undantas enligt Artikel 101(3) FEUT. Även om EU-kommissionen förr tog hänsyn till miljön i sin konkurrensrättsliga analys, är nu ekonomisk effektivitet det främsta målet för konkurrenslagstiftningen. Enligt nya riktlinjer utgivna av EU-kommissionen kan inte längre verkställande myndigheter ta hänsyn till icke-ekonomiska värden, såsom miljön, när de utvärderar konkurrensbegränsande avtal. Samtidigt framhåller sakkunniga inom miljörätten vikten av ”*marknadsbaserade instrument*” och privata initiativ för att värna om miljön. Det blir allt vanligare att företag själva försöker utforma sin verksamhet på ett sätt som minimerar deras miljöpåverkan. Inte sällan kräver detta att företagen inom en bransch samarbetar. Även om dessa samarbeten kan medföra stora miljömässiga fördelar, riskerar de att falla under förbudet i Artikel 101(1) FEUT, då de ofta är konkurrensbegränsande. Vilka värden som kan inkorporeras i det generella undantaget i Artikel 101(3) FEUT blir då högst relevant. Det förefaller som om EU-kommissionen inte anser att miljöfördelar kan rättfärdiga konkurrensbegränsande samarbeten. Detta synsätt är dock varken förenligt med EU-domstolarnas praxis eller EU-kommissions tidigare beslutspraxis. Fördragen kräver att Unionen strävar mot en hållbar utveckling och ett utbrett miljöskydd. Traditionellt har EU-domstolen använt sig av en teleologisk tolkningsmetod i förhållande till fördragen. Det kan argumenteras för att fördragen ska ses som en enhet; när bestämmelser i fördragen är öppet formulerade ska dessa tolkas så att Unionens övergripande mål uppnås. Det kan också argumenteras för att det är ekonomiskt rationellt att ta hänsyn till miljön i den konkurrensrättsliga analysen. Enligt nationalekonomisk teori ger konkurrens upphov till ”*externa effekter*”. Dessa externa effekter måste internaliseras om samhället ska allokera sina resurser effektivt. Då miljön kan beräknas till ett instrumentellt värde, bör miljöfördelar vara relevanta i Artikel 101(3) FEUT även om vi accepterar att det krävs ”*objektiva ekonomiska effekter*”. Denna uppsats drar slutsatsen att fördragen kräver att miljön ska spela roll i den konkurrensrättsliga analysen. Författaren anser att analysen under Artikel 101(1) FEUT ska fortsätta vara en snäv analys som enbart tar hänsyn till de negativa konkurrensrättsliga effekterna på den relevanta marknaden. Däremot bör analysen i Artikel 101(3) FEUT innefatta samtliga för- och nackdelar för samhället i stort. Miljöförbättringar bör tas hänsyn till oavsett om de kan beräknas till ”*objektiva ekonomiska fördelar”*.

Förord

När jag nu avslutar denna uppsats avslutar jag även min tid som student i Lund. Somliga skulle nog säga att jag varit student länge, då jag gått igenom både ett ekonom- och ett juristprogram, men jag tycker det har gått fort. Jag vill rikta ett första tack till mina klasskompisar på EC och på Juridicum. Jag hade aldrig klarat av att lägga ner så mycket tid på studierna om jag inte ständigt varit omgiven av trevliga, intelligenta och varma människor. Jag ser fram emot att träffa er alla igen någonstans ute i världen.

Jag vill tacka min handledare, Hans Henrik Lidgard, vars vägledning har varit ovärderlig.

Sheridan Brett ska ha en eloge för att minutiöst ha korrekturläst min uppsats.

Jag vill tacka min pappa för vägledning och motivation under min studietid.

Främst vill jag tacka min familj i Lund: mamma, mormor och moster, för oupphörligt stöd.

Lund, december 2014

Victor Sand Holmberg

1 Introduction

1.1 Background

One of the greatest challenges for decisions-makers today is finding balance between economic expansion and environmental protection. In order to prevent environmental decline, policy-makers must make room for environmental concerns in economic assessments. While competition law is one of the EU's most vital areas of economic competence, EU competition and environmental policies have, in recent years, controversially drifted apart. The European Commission has adopted an economic, consumer welfare-driven approach in its competition policy.[1] While in the past the Commission may have taken environmental consideration into account in its competitive assessments, since the "*modernisation*" of European competition law in 2004, the Commission has stated that "*objective economic benefits*" are necessary for the exemption in Article 101(3) TFEU to apply.[2] Consequently, as economic efficiency has become the paramount goal of EU competition policy it may seem like decision makers are no longer able to consider non-economic concerns when assessing anti-competitive agreements.[3] By adopting the consumer welfare standard, the Commission has declared that EU competition law shall not pursue other interests, such as environmental protection. However, the case law of the EU courts, as well as the decision practices of the Commission, do not fully support this new approach.[4]

The central question is whether EU competition law should pursue one or several values. One view is that the sole purpose of competition policy is to maximize economic efficiency, which leaves no room for considering public policy objectives, such as environmental policy. The conflicting view is that competition policy is based on multiple values that cannot be reduced to a single economic goal.[5]

The "*modernisation*" of the EU's competition law refers to the major reform which took place in 2004, when Regulation 1/2003 came into force.[6] However, Jones & Sufrin describe the "*modernisation*" as a wider and deeper phenomenon.[7] During the 1990s, the Commission began moving towards a more modern economic way of thinking in regards to competition law. During the modernisation process, the speeches, publications and "*soft law*" documents coming from the Commission all advocated that the EU's

[1] Jones & Sufrin (2014) p. 35.
[2] Article 101(3) Guidelines para. 33.
[3] Kingston (2012) p. 30.
[4] Jones & Sufrin (2014) p. 41.
[5] Townley (2009) p. 1.
[6] Regulation 1/2003
[7] Jones & Sufrin (2014) p. 43.

competition rules should promote efficiency and consumer welfare.[8] The Commissions new approach was first expressed in its *White paper on the modernisation of Article 101 TFEU,* where it stated that Article 101(3) TFEU was to "*provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations".*[9] The Commission's position is now articulated in the *Article 101(3) Guidelines*: "*The Objective of Article 101 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."*[10]

Prima facie, it may seem like the Commission has chosen the single goal approach in its competition policy. According to this view, environmental factors have no role in Article 101 TFEU. However, as Townley points out, "*the Commission has not sought to justify its adoption of a unitary objective on theoretical grounds*".[11] The *Article 101(3) Guidelines* themselves claims that it outlines the current state of jurisprudence.[12] This claim is surprising because it is generally accepted that both the EU courts and the Commission have taken public policy, including environmental factors, into consideration in the past.[13]

The arguments rejecting environmental protection in competition policy stems from the highly influential Chicago School competition theory. This theory argues that the sole goal of antitrust policy cannot be anything else but consumer welfare. Competition enforcers should, by this view, only strive to maximize economic efficiency and consumer welfare within the boundaries of other legislation. It is the legislator's job to pay attention to the environment, not the market actors themselves. In this sense, competition policy is an isolated area unaffected by society's other concerns, only focusing on maximising efficiency. Proponents of this approach argue that isolating competition from other public interests is the only way to have a predictable and transparent competition law in the European Union.[14] While the Chicago School has been highly influential in US antitrust-law, it is not certain that the Chicago School has influenced EU law in the same way. Some argue that EU law has instead been more influenced by ordoliberal theories, which according to them makes EU competition law more receptive to non-economical values.[15]

Some scholars reject the notion that competition law assessments should be separated from other public policy concerns, such as environmental policy.[16] Their argument as to why the two areas of law should intertwine is often

[8] Jones & Sufrin (2014) p. 42.
[9] White Paper on the Modernisation of Article 101 TFEU, para. 57.
[10] Article 101(3) Guidelines, para. 13.
[11] Townley (2009) p. 47.
[12] Article 101(3) Guidelines, para. 7.
[13] Townley (2009) p. 47.
[14] Odudu, Oxford Journal of Legal Studies (2010) p. 600.
[15] Monti (2007) p. 81.
[16] For example: Kingston (2012), Monti (2007), Townley (2009), Vedder (2003)

derived from a teleological and systematic interpretation of the Treaties. It can be argued that the founding Treaties should be viewed as the foundation of a coherent system. When the wording of Treatises statutes is vague enough to be open to interpretation, they should be interpreted as to help the EU's overarching policy objectives. In their view, Article 101 TFEU is open to interpretation and allows for the Treaties environmental goals to be taken into account. The Union's goal to attain a sustainable development and a high level of environmental protection is referred to explicitly in Article 3(3) TEU, Article 11 TFEU and Article 37 of the EU's Charter of Fundamental Rights.

Another argument for why competition and environmental policy should be integrated takes an economic approach. Even if we accept the notion that only "*objective economic benefits*" may satisfy Article 101(3) TFEU, neoclassic environmental economic theory suggests that environmental benefits can constitute just that. This line of argument highlights how the environment directly affects consumer welfare.[17] If environmental benefits constitute "*objective economic benefits*", it would mean that the new economic approach adopted by the Commission would not necessarily exclude environmental factors in competitive assessments.

While the Commission has chosen its single goal approach, environmental law academics stress the importance of market-based instruments, and the need for private cooperation to combat environmental decay.[18] There is a fundamental tension between economic and environmental goals. Despite the wording in Article 3 TEU stating that the Union shall work towards a "*high level of protection and improvement of the quality of the environment*", and numerous other pro-environmental amendments, the Treaties continue to prioritise economic goals. The debate is mostly relevant in the assessment made under Article 101(3) TFEU. Article 101(3) TFEU provides an exception to the prohibition of anti-competitive agreements in Article 101(1) TFEU. An agreement that would otherwise be prohibited because if its anti-competitive elements, may be declared lawful if it delivers benefits to the affected consumers. The scope of Article 101(3) TFEU is widely considered to be unclear.[19] The question is if Article 101(3) TFEU only applies to agreements increasing consumer welfare, or whether it also applies to agreements that are beneficial in a broader sense, contributing to public interests such as the environment. An increasing number of firms seek to do business in a way that minimises their environmental impact. Often, such initiatives require a certain degree of collaboration. The scope of Article 101(3) TFEU becomes highly relevant when companies enter into voluntary environmental agreements, which are restrictive of competition, but also carry great environmental benefits.

[17] Kingston (2012) p. 269.
[18] Vedder (2003) p. 45, Kingston (2012) p. 47.
[19] Kingston (2012) p. 261.

1.2 Purpose and Aim

The purpose of this thesis is to examine whether EU competition law admits a role for environmental concerns in the competitive assessment of corporate agreements under Article 101 TFEU. The research questions will, therefore, be:

- Are environmental concerns relevant in Article 101 TFEU?
- If so; when are environmental concerns relevant in Article 101(1) TFEU?
- And if so; when are environmental concerns relevant in Article 101(3) TFEU?

1.3 Method and Material

The method I employ in this paper is a traditional legal dogmatic method. Basically, this means that I will analyse the posed research questions stated above systematically against relevant legal sources. EU law has been described as consisting of two levels, a community level and a national level composed of 28 legal systems. The empowered EU institutions draft legislation within its conferred competence at the community level, which each member state realizes within its legal system at the national level. This thesis will deal with EU law at community level. The relevant sources of law are therefore EU Treaty law, secondary law, case law and other instruments, such as Commission decisions, guidelines and communication, also called "*soft law*".[20]

This essay is structured around my posed research questions. The second and third research questions are dependent on the answer to the first. Consequently, I will start by analysing my first research question from two different perspectives. Traditionally the EU Courts have used a teleological interpretation method when analysing the provisions in the EU Treaties.[21] Through this method, the EU Courts have attempted to interpret the provisions in order to achieve the Union goals set out in Article 3 TEU. I will first use a teleological approach towards the Treaties when analysing my first research question. Secondary, I intend to use an economic perspective. Environmental economics is a complex field of research and I do not claim that I will give the reader a comprehensive presentation of economic theory. My aim is to apply some basic environmental economic theories in order to give a suggestion as to how to consolidate environmental benefits with the concepts of "*consumer welfare*" and "*objective economic benefits*". After I have dealt with my primary research question I will address my second and third research question by investigating EU Treaty law, case law and soft law in order to discern when environmental policy has been relevant in Article 101 TFEU in the past.

[20] Reicher (2013) p. 110.
[21] Reicher (2013) p. 122.

The debate whether public policy has a role in European competition law has been on-going the last 20 years, and was intensified after 2004 in connection with the modernisation of the EU competition law. Prominent figures in the debate are Dr. Suzanne Kingston at University College Dublin and Dr. Christopher Townley at Kings College London, both of whom maintain that environmental concerns should be considered in the assessment under Article 101 TFEU. Contrarily, Dr. Okeoghene Odudu at the University of Cambridge argues an isolation principle, and maintains that EU competition law should have one single goal, namely consumer welfare. Many other academics have contributed to the debate, among them Prof. Richard Whish, David Bailey, Prof. Alison Jones and Prof. Brenda Sufrin, Prof. Giorgio Monti and Prof. Hans Vedder. It might seem like the Commission in recent years has adopted the isolation principle through its *Article 101(3) Guidelines,* and thereby put an end to the debate. However, while having a strong normative effect on decision-makers in the Community, this document has no actual legal effect.[22] In the absence of firm jurisprudence, it is still up for debate whether environmental policy is relevant in EU competition law.

1.4 Limitations

This thesis deals exclusively with EU law at the Community level, which means I will not cover any Swedish national legislation. However, conclusions made about substantive EU competition law in this paper are applicable to Swedish national competition law. Article 101 TFEU is directly applicable to agreements that affect trade between member states. Furthermore, the Swedish legislator has the ambition to apply Swedish substantive competition law consistently with EU competition law, regardless of whether the matter in question exclusively affects the Swedish market.[23]

Except for some short comments referring to the US anti-trust system, the reader will not be given a comparative perspective on other judicial systems. Instead, I focus on presenting a comprehensive exposition of EU competition law.

Furthermore, this thesis deals exclusively with Article 101 TFEU. Competition law is a broad area of law, and the integration of environmental concerns into competition policy is also relevant in relation to public procurement and abuse of dominant position under Article 102 TFEU. However, due to the limited scope of a thesis, I found that Article 101 TFEU could be analysed in a concise and comprehensive manner.

Finally, I will focus exclusively on the relation between competition law and environmental policy. Even if some arguments in this thesis may be transmitted to the wider debate concerning other public policy objectives in

[22] Reicher (2013) p. 127.
[23] Proposition 2007/08:135 p. 70.

relation to competition law, I believe one should be cautious when integrating competition law with other fields of interest. It is important to look at each public policy area in order to establish if it can be relevant in the competitive assessment.

1.5 Disposition

This paper is divided into six chapters. The second chapter will examine two diverse subjects. First, the theoretical background of EU competition law. This will be followed by a brief summary of the development of EU environmental policy and its regulatory mix. This background will provide a foundation to both the teleological and economic arguments presented in chapter three.

Chapter three will address my first research question: "*Are environmental concerns relevant in Article 101 TFEU?*". The question will be addressed using two different perspectives separated in two subchapters. First, Article 101 TFEU will be investigated in its Treaty context. A teleological and systematic interpretation of the Treaties will be performed in order to establish if the goal of environmental protection is relevant under Article 101 TFEU. Secondly, I will use neoclassic economic theory in order to establish the relation between consumer welfare and the environment.

The fourth chapter will address my second research question: "*When are environmental concerns relevant in Article 101(1) TFEU?*". This chapter will investigate the concept of "*restriction of competition*". Furthermore, it will take a closer look on how environmental agreements have been assessed under Article 101(1) TFEU in the past. Lastly, the chapter will deal with the "*ancillary restraint doctrine*".

The fifth chapter will address my third research question: "*When are environmental concerns relevant in Article 101(3) TFEU?"*. The chapter will first look at how public policy objectives have been assessed under Article 101(3) TFEU in the past. Thereafter, each of the four cumulative conditions under Article 101(3) TFEU will be interpreted in relation to environmental agreements.

The sixth and final chapter will provide a conclusive analysis including the authors' own opinion about the relation between competition and environmental policy.

2 Background

"*Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in value arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules".*[24]

R. Bork "*The Antitrust Paradox: A Policy at War with Itself*" 1993

2.1 Competition law theories

The question whether environmental protection has a role in EU competition law is largely dependent on which competition theory perspective we choose to adopt: that will ultimately decide what we perceive to be the objective of EU competition law. Competition law is an intricate subject where law, economics and politics are interrelated. Fundamentally, competition regulation exists in order to achieve a desired socio-economic outcome.[25]

A common concern of all free-market competition theories is that firms with excessive market power are able to harm consumer welfare, for example, by reducing output, raising prices, suppressing innovation, and hindering new entrants to the market.[26] Instead, it is desired that market actors struggle on equal terms for superiority and for obtaining the markets customers. The competition between market actors creates incentives to always be better by lowering prices, enhancing quality, and increasing the product availability. Competition is a dynamic process where the firm will be forced to outperform its competitors. This process will ultimately increase the overall welfare of the society.[27] Under these circumstances, the price mechanism will level output to match demand, so that allocation of resources is maximised.[28] *Rivalry* is consequently the essential means through which desirable societal goals can be obtained.

Up to this point, the different competition theories agree with each other. However, the theories disagree on how and to what extent competition law should be applied to maximise societal welfare. The central question is whether competition law should be guided by one or several goals. We will now look at three different theories of competition: *Ordoliberalism, the Harvard School,* and *the Chicago School.*

[24] Bork (1993) p. 50.
[25] Monti (2007) p. 54.
[26] Whish & Bailey (2012) p. 2.
[27] Vedder (2003) p. 25.
[28] Kolstad (2000) p. 85.

2.1.1 Ordoliberalism

Ordoliberalism is not only relevant for competition law, but also, an all-encompassing political and economic philosophy.[29] With origins in 1930s Germany, the theory is rooted in liberalism. Just like classical liberals, the ordoliberals hold that in order to achieve economic prosperity and economic freedom, it is essential to develop an economic system that supports competition. However, the theory does not share the liberals' view that the state should play a minimal role. Instead, they advocate a competitive market within a constitutional framework, which may further a just distribution of resources in society. This framework serves mainly to counter excessive concentration of public and private power. In this system, the state's role is to continuously adapt and safeguard the economic constitution.[30]

Competition policy is fundamental to the ordoliberal theory. The essential aim is to repress harmful concentration of economic power in the free market, which means that anti-monopoly law is central to ordoliberal competition policy. Monopolies are repressed in order to achieve "*performance competition*" which entails competition that provides better products and services for consumers. The ordoliberals do not believe in a strict separation between economic efficiency and other society goals. They view economy and competition as tools to integrate society around democratic and humane principles, meaning that competition is merely a means to pursue non-economic values. Consequently, the ordoliberal viewpoint is that an "*integrated policy perspective*" must be adopted where each decision is taken with a holistic approach to the community's legal, political and economic systems. An economic system, where policy areas are divided, ignores the interaction between policy areas. Orloliberal competition theory argues that competition law, if it stands separated from other concerns, has little or no value to the Community as a whole.[31]

2.1.2 The Harvard School

The Harvard School competition theory was developed in the 1940s and focused on market structure and its behaviour.[32] Certain market structures were, according to this theory, the cause of anticompetitive conduct. Competition regulation should consequently be devised to prevent such market failures.[33] The highest-ranking goal of this theory was to optimise the societal welfare as a whole. Much like the ordoliberal ideas, anti-trust policy was an integrated part of a broad economic policy strategy according to the Harvard School. Consequently, the anti-trust policy was viewed as an

[29] Jones & Sufrin (2014) p. 33.
[30] Kingston (2012) p. 12.
[31] Bastidas (2011) p. 49.
[32] Also know as "The Structure-Conduct-Performance paradigm", see Monti (2007) p. 57.
[33] Monti (2007) p. 62.

instrument to attain multiple societal goals.[34] Advocates of the theory argued that non-economic goals, such as fairness in society, were included as legitimate goals of competition policy. The theory was concerned with preserving the optimum market order. If conditions of the relevant market were departing from the optimum order, the state had to interfere. These departures could be the existence of monopolies or entry barriers to the market. These market failures could also constitute misuse of resources that gave rise to external effects, such as environmental damage. To cure these deficits, state intervention in the market was necessary. This could be done through competition policy. The Harvard school was highly influential in the US during the 1950s and 1960s, but lost much of it popularity with the introduction of the Chicago School.[35]

2.1.3 The Chicago School

The Chicago School revolutionised competition law in the 1970s by rejecting much of the accepted competition theories at the time in the US. The Chicago School saw neoclassic microeconomics, in particular price theory and the presumption of profit maximisation, as the essence of antitrust policy.[36] The fundamental difference between the Chicago School theory, compared to the Harvard School theory and Ordoliberalism, was the belief that market forces alone would result in maximising societal welfare. The state was to exercise little or no influence on the market.[37] The market was "*self-healing*" and inefficient entities would be exterminated through the survival of the fittest. The sole goal of competition law should be the pursuit of economic efficiency.[38] Economic efficiency was a mean of obtaining consumer welfare.[39] The Chicago School was closely associated with Robert Bork. His view of the single goal principle can be summarised by the following lines:

"*No body of law can protect everything that people value. If antitrust could, we would need no other statues. If we trace the implications of the proposition, it results in judges deciding cases as if the Sherman Act said: 'A restraint of trade shall consist of any contract, combination, or conspiracy that fails to produce, in the eyes of the court, the optimum mix of consumer welfare and other good things that Americans want'. That is inevitably the result of bringing into judicial consideration an open-ended list of attractive-sounding goals to be weighed against consumer welfare."*[40]

The Chicago School's single goal approach to competition policy leaves no room to pursue non-economical considerations such as environmental concerns. Competition policy should, according to the theory, be free from

[34] Vedder (2003) p. 30.
[35] Bastidas (2011) p. 55.
[36] Kingston (2012) p. 23.
[37] Vedder (2003) p. 35.
[38] Jones & Sufrin (2014) p. 23.
[39] Odudu, Oxford Journal of Legal Studies (2010) p. 601.
[40] Bork (1993) p. 74.

political consideration, which would only render it inefficient. It was argued that a unitary goal enhances legal certainty and justiciability.[41] Furthermore, restricting competition to achieve short-term political objectives would deteriorate the welfare of society due to increased uncertainty in the market in the long run. According to the theory, courts and government agencies were not suited for taking public policy into consideration. This task was to be left for the legislator.[42] Leaving public policy decisions for the legislator would provide integrity to the legislative process and enhance predictability in the courts while avoiding arbitrary rulings. Redistribution of wealth was not a task for competition law, but instead done by the legislator and the government through taxation.[43]

2.1.4 Conclusion

A clear line can be drawn between Ordoliberalism and the Harvard School theory and, on the other hand, the Chicago School. All three theories' ultimate goal is to maximise societal welfare. However, the Chicago School believes that the societal welfare is maximised through isolating competition law from other policies by allowing competition policy to strive towards one single goal, namely efficiency. Contrarily, both Ordoliberalim and the Harvard School see competition as a means to achieve multiple societal goals.

The question is which of these theories has had the biggest influence on EU competition law. The ordoliberal theory was highly influential on the early Community's economic policy and its competition law.[44] The Chicago School quickly became dominant in the US, although its influence in the EU was less evident. Monti maintains that the early ordoliberal influences kept the Chicago theory from being fully accepted in Europe. European competition law has until now favoured economic freedom, market integration and other treaty goals above pure economic efficiency.[45]

It might seem like in recent years the Chicago School has taken hold of EU competition law. EU competition policy, led by Directorate General Competition, is increasingly reliant on economic reasoning. The modernisation reform in 2004 has introduced an efficiency-based approach, i.e. the single goal policy of the Chicago School. However, Kingston argues that this new approach in no way suggests that the Commission has fully adopted the Chicago School theory. It is uncertain if the US antitrust policy, with its focus on a single efficiency goal, can be transferred into a EU context. As mentioned earlier, our competition policy will ultimately be decided by how we perceive our economy should be structured. In Article 3(3) TEU, the Union states its vision of obtaining a sustainable social market economy with a high level of environmental protection, a

[41] Odudu (2006) p. 159.
[42] Jones & Sufrin (2014) p. 27.
[43] Kingston (2012) p. 27.
[44] Bastidas (2011) p. 46.
[45] Monti, Common Market Law Review (2002) p. 1060.

fundamental constitutional difference between the US and the EU competition law systems. EU competition policy rests on a different constitutional and legal framework to that of the US.[46]

In sum, the development towards an economic approach in EU competition law does not imply that EU competition enforcers have selected a particular model of competition theory. EU competition policy displays a mixture of attributes from different theoretical models. Even though economic welfare and efficiency constitute important goals in the EU competition policy, there is little evidence that these goals are exclusive.

2.2 EU Environmental policy

2.2.1 The development of EU environmental policy

Environmental policy was, unlike competition policy, not included in the original Treaty of Rome. When the Treaty was signed in 1957, the original goals of the Community were to achieve a lasting peace and to establish an integrated European market. At the time, the field of environmental law was a relatively new notion to the original member states. However, during the later half of the 20th-century, environmental policy developed into one of EU's most important areas of law.[47]

The starting point for the EU environmental policy was the 1972 Paris Summit of the European Council, where it was declared that a focus solely on economic growth was unwise. It was said, "[e]*conomic expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced.* […] *It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind*".[48] Environmental protection was made an explicit goal of the Community in 1986 by inserting Article 25 of the Single European Act.[49] Although the environment was an ancillary policy to the Communities' primary goals of achieving an internal market, it nevertheless provided a legal basis for environmental legislation. Environmental concern was given a higher priority in the Maastricht Treaty, which entered into force in 1993.[50] The insertion of a reference to environmental protection in Article 2 EC, which said that "*to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment"* was of major importance. Consequently, sustainable development and environmental concern were,

[46] Kingston (2012) p. 40.
[47] Ibid., p. 98.
[48] Bulletin of the European Communities. "Statement from the Paris Summit" (1972) p. 2
[49] SEA.
[50] Treaty of Maastricht.

for the first time, made fundamental goals of the Community.[51] The Treaty of Amsterdam, which was adopted in 1999, furthered the importance of the Community's environmental goals, thanks in a major part to the then newest member states of Sweden, Finland and Austria.[52] Article 2 EC stated that a "*high level of protection and improvement of the quality of the environment*" was a Community objective. Furthermore, the integration principle was introduced which required environmental protection to be integrated into the definitions and implementation of the Union's policies and activities.[53]

In 2001, the Council added sustainable development as a third goal to the Lisbon Strategy, stating "*[s]ustainable development – to meet the needs of the present generation without compromising those of future generations – is a fundamental objective under the Treaties. That requires dealing with economic, social and environmental policies in a mutually reinforcing way.*" [54] The Treaty of Lisbon was enacted in 2009 which made The Treaty of the European Union (TEU) and The Treaty of the Functioning of the European Union (TFEU) the constitutional basis of the European Union.[55] The Union's values and objectives have its constitutional base in TEU. Article 3(3) TEU states both the Union's competitive and environmental objectives:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

The integration of environmental concerns into the Union's policy is required by the so-called "*integration principle"* in Article 11 TFEU and reads:

Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.

This so-called "*policy-linking*" clause should be read in connection with Article 7 TFEU, which ensures harmony between the Union's policies and activities:

The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of power.

[51] Kingston, European Law Journal (2010) p. 785.
[52] Treaty of Amsterdam.
[53] Kingston (2012) p. 100.
[54] Presidency Conclusions of the Goteborg European Council, 2001, para. 19
[55] Jones & Sufrin (2014) p. 100.

A similar provision like the one in Article 11 TFEU, is found in Article 37 of the EU's Charter of Fundamental Rights[56] with the heading "*Environmental protection*":

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Lastly, Article 191 TFEU states a number of goals for the Union in relation to environmental protection. Union policy shall contribute to preserving the quality of the environment, protecting human health, promoting rational utilisation of natural resources and promote measures at the international level to deal with regional and worldwide environmental problems.

2.2.2 The shift towards market-based instruments

As we saw in the previous section, environmental protection is an important Union law principle. One of the most prominent developments in EU environmental policy has been the increased use of market-based instruments, which utilize the market mechanisms to obtain environmental goals. Even though state regulations and prohibitions still constitute the principal driving force in EU environmental policy, private initiatives are being recognised as vital for preserving the environment. This gradual shift from regulatory to market-based instruments has had consequences for the relationship between EU environmental and competition policy, bringing environmental policy within the scope of Article 101 TFEU.[57]

Direct regulation remains the principal means to enforce EU environmental policy. A typical example of direct regulation is a regulation setting a limit on the amount of pollution emissions by companies each year. Direct regulation is suitable for certain areas of environmental protection, especially setting emission limits for a particular installation or an industry. State regulation is also necessary for protecting certain precious natural resources, such as preserving biodiversity or endangered species.[58]

Direct regulation carries advantages in the form of legal certainty and transparency.[59] However, there are several disadvantages with direct regulation. Legislative procedure is slow and often has problems keeping up with technical innovation in the industry and state authorities tend to be uninformed and lack up-to-date information as to which standards are suitable. This often leads to either over- or under-regulation. The state may counter this problem by frequently updating environmental standards, but

[56] Charter of Fundamental Rights.
[57] Vedder, 2003 p. 45.
[58] Ibid., p. 46.
[59] Kingston (2012) p. 45.

then the advantage of legal certainty is lost. Also, information gathering and enforcement are costly, which makes direct regulation an expensive instrument. Lastly, direct regulation is considered hampering to the market actors' initiative to innovate. It is believed that a market actor who meets the allowed level of pollution will not invest in pollution abatement technologies if this would mean going beyond the state-set standard.[60]

The use of market-based instruments slowly began in the 1990s. The fundamental feature of these instruments is they use the market mechanism to provide incentives to guide behaviour towards a desired environmental outcome.[61] Market-based instruments include environmental taxation, tradable emission permits, and private environmental agreements. Neoclassic economic theory identifies the existence of externalities and market failures as the cause of environmental degradation.[62] Externalities exist because the polluter only bears a small part of the cost of pollution. Unchecked, the market mechanism will result in excessive pollution because no market actor is required to pay for the cost to society. Market-based instruments try to internalise these external costs more adequately, consequently putting a price on pollution. This is in accordance with the so-called "*polluter pays principle*", which is the favoured EU environmental policy.[63] Market-based instruments provide an economically efficient way to achieve environmental goals by generating incentive for the market actors to go beyond what has been prescribed by the state.[64] A firm who can reduce pollution more cheaply than its competitors will have an incentive to do so. Market-based instruments are self-regulating and consequently cheaper for the society than direct regulation.

One type of market-based instrument is voluntary environmental agreements. Such agreements can be seen as a part of the Corporate Social Responsibility phenomenon.[65] Many states promote corporate social responsibility, which entails companies and individuals taking initiative on a voluntary basis to integrate social and environmental concerns in their business operations. Many companies seek to do business in a way that minimises their environmental impact. Sometimes these initiatives require a certain degree of collaboration. Voluntary environmental agreements may include agreements between market actors to reduce pollution, eco-labelling or setting environmental industrial standards. Proponents of these types of agreements contend that they can reach parts of the economy that direct regulation fails to reach. They are highly flexible and quick to implement. The Commission has recognised the importance of voluntary environmental agreements, and has acknowledged that non-regulatory measures are more appropriate and flexible for addressing environmental issues in some

[60] Vedder, 2003 p. 47.
[61] Ibid., p. 47.
[62] Tietenberg & Lewis (2012) p. 25. The economic theory behind externalities will be explained further in Chapter 3.2.
[63] XXVth Report on Competition Policy 1995, para. 84.
[64] Kingston, 2012 p. 51.
[65] Ibid., pp. 76 – 78.

cases.[66] Furthermore, the Commission has stated that private co-operation agreements have several advantages over state intervention. Private agreements promote a pro-active attitude in the industry. They are considered more cost efficient and can provide tailor made solutions for the industry at hand.[67]

Market-based instruments also have shortcomings. The prince-mechanism may fail in an artificial market and polluting can become "*cheap*". Self-regulation might also facilitate collusion in the relevant market. Consequently, market-based instruments must always be used in combination with direct regulation.[68] Nevertheless, Vedder holds that the only way to truly internalise all environmental costs is by allowing producers to enter into environmental agreements. Such agreements are likely to be restrictive of competition, because competition inherently involves a degree of wastefulness due to externalities.[69]

2.2.3 Conclusion

As we saw in section 2.2.1, environmental policy during the later part of the 20th century has grown into one of the Union's most prominent areas of law. The goal of sustainable development and environmental protection is explicitly stated in Article 3(3) TEU, Article 11 TFEU and Article 37 of the EU's Charter of Fundamental Rights. Sustainable development has since 2001 been one of the three Lisbon Strategy goals, the other two being economic and social goals. However, the integration of sustainable development issues into EU policy areas has been "*painfully slow*" according to Kingston. Kingston maintains that of the three goals that are inherent in "*sustainable development*", i.e. economic, social and environmental, the environmental goal has been left behind. Sustainable development has become *"a green catchword in policy documents and in the preamble to legislation, it rarely has a noticeable effect on the substantive rules or standards ultimately adopted"*.[70] Nevertheless, the Treaty obligates decision-makers to integrate environmental concerns in other areas of Union policy.

A significant development in EU environmental policy has been the shift from the exclusive use of direct state regulation to a regulatory mix where market-based instruments have an important role. Direct regulation has been found inflexible and has had problems to meet the requirements of industries. It is dependent on the efficiency and flexibility of the state, two

[66] COM(2001) 31 Environment 2010: Our future, Our choice, para 2.3. See also: COM(2002) 412 Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, p. 5.
[67] Commission Green Paper, Promoting a European framework for Corporate Social Responsibility, paras. 42 – 60.
[68] Vedder, 2003 p. 48.
[69] Ibid., p. 55.
[70] Kingston (2012) p. 105.

traits seldom attributed to the EU. The state also lacks resources to achieve full enforcement of every industry. Therefore, direct regulation has been described as giving a false sense of security. State control is necessary and in certain environmental areas essential, but nevertheless has limits and cannot be the sole instrument for achieving sustainable development.[71]

Market-based instruments have been found as necessary compliments to direct regulation. It can be argued that the only way to obtain sustainable development is to make environmental protection an integrated part of market actors' everyday economic assessment, while giving them some freedom on how to approach the environmental problem. Direct regulation will always be an external factor forced upon the parties that only has to be respected. This integration might be accomplished by letting market actors co-operate to achieve environmental objectives.[72] However, these private initiatives may conflict with EU competition law.

[71] Kingston (2012) p. 49.
[72] Vedder (2003) p. 48.

3 Are environmental concerns relevant in Article 101 TFEU?

3.1 Systematic and Teleological Argumentation

This line of argument, held by Kingston and Townley among others, is grounded in the system of the Treaty and its underlying principles.[73] Basically, the argument is that the founding Treaties should form a coherent system. Townley considers that it is not enough to perform a mere textual analysis of Article 101 TFEU in order to clarify whether environmental concerns are relevant to the provision.[74] In hard cases where two Treaty goals conflict, such as environment and competition, the EU Courts adopt a holistic view of the Treaties structure and objectives. The Courts then use a methodology based on systematic and teleological arguments, rather than semiotic/linguistic, to solve these types of conflicts.[75] Kingston argues "*where possible, and where Treaty provisions are sufficiently open-textured to be open to interpretation, they should be interpreted so as to help, and not hinder, the EU's other policy objectives"*.[76] Jones & Sufrin also maintain that EU competition rules must be viewed in the context of the aims and objectives of the EU.[77] Because environmental protection and sustainable development are two Treaty objectives, the provisions regulating competition in the Treaty should help in achieving these goals.

Townley states that the Treaties generate conflicts by setting different goals for the Union without an apparent hierarchy, and through the inclusion of policy-linking clauses.[78] Unlike US anti-trust law, EU competition law is not a "*stand-alone*" competition legislation aimed at isolated goals. Rather, the EU's competition law is part of a web of inter-related articles that form the Treaties. Consequently, it is important to investigate which other goals might be relevant to the competition articles, by putting Article 101 TFEU in its Union law context. The Union has pursued a multitude of objectives which go far beyond that of undistorted competition ever since the Maastricht Treaty.[79] The ultimate aims of the Union are outlined in Article 3 TEU. As we saw in chapter 2.2.1, Article 3.3 TEU states that the Union shall work for "*the sustainable development of Europe"* based on a "*highly competitive social market economy"* while having a "*high level of protection and improvement of the quality of the environment"*.

[73] Kingston (2012) p. 97.
[74] Townley (2009) p. 48.
[75] See for example: Case 283/81 CILFIT v Ministereo della Sanità [1982] ECR 03415 para. 20.
[76] Kingston (2012) p. 97.
[77] Jones & Sufrin (2014) p. 18.
[78] Townley (2009) p. 48.
[79] Casey, European Law Journal (2009) p. 362.

Article 3 TEU does not disclose any hierarchy between the different aims. The lack of hierarchy between the Union's objectives creates a problem because the different goals may conflict with each other. This is the case where in pursuing a sustainable development, a high level of environmental protection and a highly competitive market are often incompatible. Implementing provisions such as Article 101 TFEU in turn must consequently deal with these conflicting aims. In *TeliaSonera* the Court of Justice stated that the function of EU's competition rules is "*precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union".*[80] Jones & Sufrin hold that the phrase "*well-being of the Union*" is a clear reference to the goals set out in Article 3 TEU.[81]

Conflicts also arise due to the Treaties policy-linking clauses. Article 11 TFEU, as noted in chapter 2.2.1, contains the integration principle, which obligates EU policymakers to integrate environmental protection requirements into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. Competition is a Union policy, meaning that environmental consideration must be taken when competition policy is implemented. This article should be read in connection with the general policy-linking clause, Article 7 TFEU, which ensures consistency between policies and activities.[82] In contrast to the other provisions in the Treaty that promote sustainable development, Article 11 TFEU poses a concrete obligation for all EU decision-makers to integrate environmental protection requirements.[83] This has been acknowledged by the Court of Justice in *PreussenElektra,* concerning the free movement rules in Article 34 TFEU. In this case, the court held that due to the integration principle, "*environmental protection requirements must be integrated into the definition and implementation of other Community policies"*. The court stated that protecting the environment was a "*priority objective*" for the Community, and accordingly, a requirement to purchase renewable energy was not considered a restrictive measure incompatible with Article 34 TFEU.[84]

The Treaties' implementing provisions, such as Article 101 TFEU, deal with conflicting objectives in two principal ways.[85] First, the Treaties allow for some values to exclude others. This is the case in Article 346 TFEU where no provisions in the Treaty, including competition policy, shall preclude any Member State from taking necessary measures for the

[80] Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB [2011] ECR I-00527 para. 22. The case considered if TeliaSonera's pricing policy constituted an abuse of dominant position under Article 102 TFEU.
[81] Jones & Sufrin (2014) p. 48.
[82] Kingston (2012) p. 106.
[83] Vedder (2003) p. 68.
[84] Case C-379/98 PreussenElektra v. Schleswag AG [2001] ECR I-02099 paras. 73 – 81.
[85] Townley (2009) p. 52.

protection of essential interests of security related to war material. However, this is an extreme way of settling conflicts. In the past, the EU courts have been reluctant to use exclusion insofar as Article 101 TFEU is concerned.[86] Typically, the Treaties find a compromise between the conflicting objectives. This has been the case concerning Article 34 TFEU, where the provision of free movement of goods has been balanced against public policy concerns set out in Article 36 TFEU. Environmental protection has been recognised by the EU courts as an acceptable justification to restrict free movement.[87] Kingston maintains that the EU competition rules should be interpreted consistently with the EU internal market rules, allowing a compromise with environmental concerns within Article 101 TFEU. As mentioned above, the policy-linking environmental clause in Article 11 TFEU demands that environmental concerns should be taken into account in both the "*implementation and the definition of other policies*" which should further imply compromise in cases of conflict.

Article 101(3) TFEU is written in a way that makes balancing different values possible, but its text does not allow for all Treaty objectives to be taken into account. Which values may be taken into consideration is open for debate, but we have seen that the policy-linking clauses, such as Article 11 TFEU, entail an express balancing imperative. Kingston argues that Article 11 TFEU, in combination with the goals set out in Article 3 TEU, obligates policy-makers to apply environmental protection requirements at all times in priority to all other potentially conflicting objectives.[88] She points out that this approach is the only viable option given that the majority of scientific research finds environmental disaster is imminent if a "*business as usual*" approach is taken by governments in relation to the environment.[89]

In cases of irresolvable conflict between two Treaty goals, such as the goals of competition and protection of the environment, Kingston suggests falling back on the principle of proportionality. This formula has often been used by the Courts in situations where it has been questioned whether measures taken by EU institutions are compatible with general principles of EU law.[90] The formula has three parts: a measure is proportionate when (1) the measure is suitable to achieve a legitimate aim under the Treaty, (2) the measure is the least restrictive of the conflicting EU goals as is possible, and (3) the measure does not have an excessive effect on other interests.[91] The result would, according to Kingston, be that "*where a measure (private or*

[86] Townley (2009) p. 62.
[87] Case C-297/05 Commission v Netherlands [2007] ECR I-07467 para. 77. The case dealt with a requirement, posed on foreign cars, to preform a roadworthiness test before registration in the Netherlands. It was questioned if this requirement violated the free movement provision under Article 34 TFEU.
[88] Kingston (2012) p. 115.
[89] Kingston, European Law Journal (2010) p. 789.
[90] See for example: 154 & 155/04 Alliance for Natural Health [2005] ECR I-06451 para. 112. The case concerned if Directive 2002/46, prohibiting marketing of food supplement, was compatible with Union law.
[91] De Búrca, Yearbook of European Law (1993) p. 113.

state) is suitable to achieve the EU's environmental policy objectives, and there is no way of achieving these objectives that is less restrictive of competition, the measure should be allowed under EU competition law".[92]

The EU Courts have a long tradition of balancing public policy goals within Article 101(1) TFEU and Article 101(3) TFEU, using the principle of proportionality.[93] In both *Wouters* and in *Meca-Medina,* the EU Court of Justice balanced public policy concerns against the restrictions of competition under Article 101(1) TFEU, concluding that the former outweighed the latter, finding, there was no infringement of Article 101(1) TFEU.[94] Furthermore, the EU Courts have used the first condition of Article 101(3) TFEU to balance different public policy aims, for example in *Metro I, Matra,* and *Métropole Télévision*.[95] The text of the article has been interpreted expansively, where "*improving technical progress"* has been interpreted to include agreements improving our ability to protect the environment.

The conflicting view is that Article 101 TFEU should be applied in isolation, solely for the purpose of creating a system to ensure competition is not distorted, leaving the rest of the Treaty to deal with the other aims of the Union. Environmental concerns would therefore be dealt with by other provisions and policies, in line with the Chicago School theory. However, Townley rejects this argument on several grounds.[96] No other Treaty provisions are read in isolation, which would run contrary to the Treaties' ordoliberal traditions. If the Treaties were interpreted in this way, then all aims in Article 3 TEU would have their own implementation articles, such as Article 101 TFEU for competition policy. This is, however, not the case. Furthermore, the EU Court of Justice held in *Continental Can* that Article 101 TFEU aims to bring about several of Article 3 TEU's objectives.[97]

Odudu submits three principal objections against the systematic/teleological argumentation. First, he questions if the policy-linking clauses in the Treaty can create rights and obligations for subjects of European law.[98] The only way of derogating from a Union objective is if the policy-linking clauses can create a positive obligation to pursue other goals. In order to create rights and obligations on private subjects the policy-linking clauses must have horizontal direct effect. Odudu maintains that nothing suggests that

[92] Kingston (2012) p. 115.
[93] Townley (2009) p. 65.
[94] Case C-519/04 P Meca-Medina and Majcen v Commission [2006] ECR I-6991 and Case C-309/99 Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577.
[95] Case 26/76 Metro SB-Grobmärke GmbH & Co KG v Commission [1977] ECR 1875, Case T-17/93 Matra Hachette SA v Commission [1994] ECR II-595, and Joined cases T-528, 542, 543 & 546/93 Métropole Télévision and others v Commission [1996] ECR II-649.
[96] Townley (2009) p. 51.
[97] Case 6/72 Europemballage Corporation and Continental Can Company Inc. v Commission [1973] ECR-215 paras. 22 – 25. The concerned Continental Can's dominant position in Europe and if the company possibly violated Article 102 TFEU
[98] Odudu, Oxford Journal of Legal Studies (2010) p. 606.

this is the case. Consequently, the policy-linking clauses can only pose obligations on Member States.[99] Policy-linking clauses require public policy to be considered when the Union legislates, rather than when Union legislation is enforced.

Secondly, Odudu questions whether taking public policy concerns into account under Article 101 TFEU, such as environmental sustainability, is legitimate.[100] He writes that "[i]f *such non-efficiency objectives are important to Union citizens one would expect them to be pursued through democratic, political, legislative routes"*. Odudu highlights the point that the Union is an entity with limited competence, as a result of the principle of conferral. Implementing environmental concerns through Article 101 TFEU would mean that EU competition law becomes hijacked in order to obtain wider goals. Efficiency is the only policy protected by competition law, achieved by a legitimate and democratic process.

Lastly, balancing public policy goals such as the environment within Article 101 TFEU, requires reading into Article 101 TFEU beyond its wording. He writes that "*the circumstances in which Article* [101] *can be sacrificed for some other socially desirable goal must be expressly stated and clearly specified*".[101] The uniformity of Community law, Odudu says, will not survive the unilateral determination that certain goals trump Article 101 TFEU.

An interesting question is if Article 11 TFEU provides the possibility of using Article 101 TFEU to prohibit environmentally disastrous agreements even though the agreements are not restrictive of competition. Article 101 TFEU has been used in this way in relation to market integration. The Commission has condemned agreements as restrictive of competition even when they did not lead to inefficiencies and higher prices (see Chapter 4.1 for a definition of "*restriction of competition*"), only because the agreement conflicted with the Treaty goal of market integration.[102] However, both Kingston and Townley note that the policy-makers' power is limited to the wording of the Treaties, which is a result of the conferral of power principle. The Treaties do not permit policy-makers to choose a greener option outside their policy area. An agreement between market actors that has disastrous consequences for the environment, but nonetheless do not affect competition, cannot be prohibited by Article 101 TFEU. It goes beyond the scope of the article, and would constitute a miss-use of power.[103]

[99] Odudu (2006) p. 167.
[100] Odudu, Oxford Journal of Legal Studies (2010) p. 608.
[101] Odudu (2006) p. 169.
[102] Townley (2013) p. 37. See also joined cases C-468/06 etc. Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton [2008] ECR I-07139 para. 65. The case dealt with if a refusal by GlaxosmithKline, whom held a dominant position on the market in Greece, to fully meet orders from pharmaceuticals wholesalers, constituted an abuse of dominant position under Article 102 TFEU.
[103] Kingston (2012) p. 117. See also Townley (2009) p. 255.

3.2 Economic Argumentation

Another way of arguing why environmental factors should be taken into account in EU competition law, is by suggesting that environmental benefits constitute "*objective economic benefits*" as described in the Commissions *Article 101(3) Guidelines*.[104] While the systematic argumentation above assumed that environmental protection constituted a non-economic factor, but nevertheless should be considered due to the structure of the Treaties, this line of argumentation proposes that environmental consideration is done within the consumer welfare approach.

Scholars observed as early as in the 18th century that natural resources were finite. John Stuart Mill argued in 1865 that there were limits to economic expansion due to the limited quantity of land combined with a growing population. He argued that not only was endless economic expansion impossible, but also undesirable. The value of land could not simply be expressed in terms of agricultural effectiveness. Land had, according to Mill, an intrinsic value, which inevitably would be lost due to economic growth.[105] The principle of limits to growth has become increasingly influential during the later half of the 20th century. The 1972 Club of Rome report, *The Limits to Growth,* found that the Earth's resources were limited. Due to these limitations and the growth of population, industrialisation and pollution, the Earth's ability to support its population will be reached within one hundred years.[106] The limit of growth thesis has become a theoretical foundation for the policy development at an international level. At the EU level, the limits of growth thesis has inspired the Commissions Communication, *GDP and Beyond*, which held that GDP growth could not be the only measure of economic success.[107] It was argued that incorporating social and environmental achievements as development indicators was vital to give a true reflection of long-term economic success. The limits of growth thesis highlights a fundamental problem; namely, that environmental resources are scarce, and an economic policy that does not support sustainable development will inevitably lead to economic degradation.[108]

In neoclassic economics, the environment is regarded as a composite asset that offers a multitude of services.[109] As with all other assets, it is rational to strive to enhance, or at least prevent depreciation of the value of this asset. The environment provides services directly to consumers; it might be the air we breathe, the nourishment we consume, or the pleasure of a beautiful landscape. Excessive waste will depreciate the value of the asset and reduce the services it provides; because of pollution the air becomes unbreathable, water becomes undrinkable and the landscape barren and unattractive.

[104] Article 101(3) Guidelines, para. 33.
[105] Montgomery (2012) p. 205.
[106] Club of Rome (1972) p. 183.
[107] COM (2009) 433 GDP and Beyond: Measuring Progress in a Changing World p. 3.
[108] Kingston (2012) p. 168.
[109] Tietenberg & Lewis (2012) p. 17.

The Commission's goal for the competition policy is set out in paragraph 33 in the *Article 101(3) Guidelines* and states that *"*[t]*he aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."* An allocation of resourses is effective if the economic surplus derived from those resources is maximised by the allocation. Economic surplus is the sum of consumer and producer surplus.[110]

Consumer welfare can be equated with consumer surplus.[111] The goal of the EU competition rules, as defined by the Commission, is therefore to enhance consumer surplus. Consumer surplus is a basic economic concept, and is a measurement of the value the consumer places on a product minus what it costs to obtain it from the market. In other terms, the surplus of a specific consumer is the difference between how much a consumer is willing to pay for a product and how much the product cost to acquire on the market.[112] The total consumer surplus is therefore the total willingness to pay for a category of goods in excess of its cost. A multitude of factors affects consumer surplus. For example, lower product quality or reduced consumer choice would reduce consumer surplus. A price increase would also lower the consumer surplus. Important to notice is that the cost of obtaining a product is not equal to its price. Environmental degradation caused by producing a specific good, for example CO_2 emissions that lower the quality of air, is also a cost for the consumer. Environmental damage will consequently reduce consumer surplus.

Environmental damage is a form of market failure.[113] This type of market failure is described in neoclassic economical theory as "*external effects*". Externalities occur whenever the welfare of one actor, it can be a firm or a household, depends not only on this actor's activities, but also on activities under the control of another actor. Another way of describing it, is that external effects occur in situations where an actor does not fully bear all the cost and consequences of his own actions. For example, take two firms located by a river. The first firm is a steel manufacturer located upstream. The other firm is running a hotel downstream. Both firms use the river but in different ways. The steel manufacturer uses the river to clean its machines, with the result of waste being dumped into the river. The other firm uses the river for its natural beauty. Due to the fact that the steel manufacturer does not bear the cost of the reduced business of the hotel, it has no incentive to minimise its pollution. The steel manufacturer produces steel and pollution, but the damage to the water resource is not reflected in the steel firm's costs. The price mechanism will fail to allocate resources efficiently, and output of the commodity, steel, will be too high. While the steel manufacturers economic surplus is maximised, the economic surplus for the hotel and its consumers will be reduced. This is the case for

[110] Tietenberg & Lewis (2012) p. 20.
[111] Jones & Sufrin (2014) p. 12.
[112] Ibid., p. 4.
[113] Vedder (2003) p. 15.

everybody affected by the pollution. Depending on the span of the pollution, the economic surplus will be reduced for the society as a whole, because the allocation of resources is in reality not efficient on the steel market, because it does not bear all of its costs.[114]

The same example may be used, but instead of looking at individual firms, we look at entire markets. Suppose all steel manufacturers emit pollution when producing steel. The consumers on the relevant market for steel will only bear a small part of the total cost of the pollution. Instead, the total cost of pollution will be carried by every consumer on every market. Even though workable competition is prevalent in the steel market, the pricing mechanism fails to allocate resources effectively and the overall economic surplus of the society is reduced.[115]

This inefficient allocation of resources can be dealt with in different ways. The state concerned could penalize companies that emit more than a given amount of pollution each year.[116] However, as we saw in section 2.2.2, there are several disadvantages with state regulation. First of all, state regulation will never encourage companies to reduce their emissions further than the set amount and be "*more efficient*". Secondly, the "*efficient*" amount of pollution is very hard for the state to calculate. Thirdly, it may be considered a waste of public expenditure and an unwise use of time to legislate, administer and enforce pollution control in every industry.[117] It may be more efficient to use market-based instruments.[118] Market-based instruments include both taxing pollution, tradable emission vouchers and voluntary environmental agreements. These instruments force companies to internalise the cost of pollution in the relevant market, consequently affecting the pricing mechanism, reducing demand and decreasing output to an efficient level. A way of dealing with externalities is to let the firms on the relevant market enter into voluntary environmental agreements where the firms themselves choose how to internalise the costs. This may be done by setting emission standards, choosing a more environmentally friendly production process, or simply by reducing output to the efficient level. However, these types of agreements will result in a reduced economic surplus on the relevant market, consequently also reducing consumer surplus. Meanwhile, the economic surplus of society as a whole will increase. Here lies the crux of the issue. A competition policy that only focuses on maximising consumer surplus on the relevant market will not allow for such an agreement at the expense of society.

[114] Tietenberg & Lewis (2012) p. 43.
[115] Kolstad (2000) p. 78.
[116] Townley (2009) p. 24.
[117] Ibid., p 32.
[118] Vedder (2003) p. 48.

3.3 Conclusion

The two lines of argument presented above hold that environmental concerns should be taken into account in Article 101 TFEU.

The first line of argument adopted a teleological approach to the Treaties. The Treaties are pursuing a multitude of Union goals that often conflict with each other. Aiming at a high level of environmental protection and maintaining a sustainable development may conflict with keeping a highly competitive market economy. The EU courts have previously dealt with these kinds of conflicts through compromising within the implementation articles, such as Article 101 TFEU. When Treaty provisions are open-textured enough, they should be interpreted to help other Treaty goals. This has been achieved by the EU Courts through a teleological and systematic interpretation of the Treaty. The Union's goals to protect the environment are stated in Article 3.3 TEU, Article 11 TFEU and 191 TFEU. Article 11 TFEU poses a concrete obligation that environmental concerns must be integrated into the definition and implementation of the Union's policies and activities. This is in line with ordoliberal theory, which holds that each economic decision must be viewed in relation to the greater economic constitution. By this view, it is fundamentally wrong to regard EU competition law as a special area in EU law isolated from environmental concerns.

The second line of argument investigated the relationship between consumer welfare and the environment. We saw that the same neoclassic economic theory on which the Chicago School bases its competition theory, values the environment as a composite asset, providing services and benefits to all humans. Consequently, consumer welfare is dependent on how we use our environmental resources, and how we will be able to harness essential ecosystem services in the future. Environmental damage will have a direct and adverse effect on consumer welfare. Furthermore, an environmental benefit resulting from, for example, a production innovation reducing pollution, would increase consumer welfare. We also saw that even though workable competition is prevalent on the relevant market, the rivalry may not allocate resources efficiently due to external effects. These externalities can be dealt with through both direct regulation or market-based instruments. These two types of instruments have different pros and cons as we saw in section 2.2.2. However, a competition policy that solely focuses on enhancing consumer surplus in the relevant market will not allow environmental agreements that aim to internalise the cost of externalities, and which bring environmental benefits that ultimately increase total societal welfare. In sum, if the goal of competition law is to enhance consumer welfare, then the benefits of a clean environment, or conversely its degradation, become relevant in Article 101 TFEU.

One last remark is essential. In order to be able to balance environmental benefits against anti-competitive effects on the relevant market, it is vital that benefits for the environment can be translated into "*objective economic*

benefits". Many people would probably say that it is impossible to put a price on the environment. It is not possible to put a value on the beauty of nature; its value is intrinsic and beyond measurement. While this argument is valid, not placing a value on the environment leaves us with evaluating it at 0.[119] For the sake of integrating competition and environmental law, we must put an instrumental value on environmental benefits. The primary difficulty lies in the fact that in contrast to private goods, no market and observable market price exists for many environmental goods. Environmental goods can be anything from agriculture, forestry, the generation of electricity, to breathable air and the beauty of nature. The challenge lies in developing techniques for evaluating environmental goods.

The goal is to estimate the total willingness to pay for the environmental resource in question.[120] Non-market evaluation is a complex field of study in environmental economics, and far beyond the scope of this essay. However, there are plenty of evaluation methods for non-market goods. One of these is the revealed preference approach, which is an indirect way of arriving at estimations. It derives its estimate by observing an individual's behaviour in relation to ecosystem services. If, for example, an improvement in water quality would be followed by an increased demand for fishing licenses, the increase in demand could be used for evaluating water quality. It is also possible to compare product prices in different environmental conditions, for example, property prices.[121] In sum, it seems possible to quantify environmental benefits into "*objective economic benefits*".

[119] Tietenberg & Lewis (2012) p. 76.
[120] Ibid., p. 82.
[121] Kingston (2012) p. 182.

4 Environmental policy in Article 101(1) TFEU

4.1 Article 101(1) TFEU general

The prohibition of anti-competitive agreements is found in Article 101(1) TFEU. The policy of Article 101(1) TFEU is to prohibit agreements between undertakings that have an object or effect of restricting competition. It is possible to distinguish four fundamental conditions in order for Article 101(1) TFEU to be applicable, namely:

- An *agreement* must exist between the undertakings
- The agreement must have as *object or effect to restrict competition*
- The effect on competition must be *appreciable*
- The agreement must have an appreciable *effect on the trade between member states*[122]

The assessment whether the agreement is "*restrictive of competition*" has changed over time. In the past, before the "*modernisation*", the Commission applied a formalistic approach towards agreements under the Article 101(1) TFEU assessment.[123] The Commission was mostly concerned with whether the agreement restricted the commercial freedom of the involved parties. This formalistic approach took little account of the actual effects of the agreement in its economic context, rendering the prohibition overly broad. The Commission has, through the modernisation process, changed its analytical framework by accepting the consumer welfare standard.[124] This analytical framework involves investigating the effects of the agreement in its economic context. Whether the parties' freedom of action is somewhat reduced is relevant only if the reduced discretion has potential to harm consumer welfare. The assessment must take into account the potential competition that would have existed in the absence of the agreement. This approach is in line with the EU Courts' jurisprudence, which was summarised in *Métropole Télévision.*[125] The Court of First Instance held that the analysis under Article 101(1) TFEU is confined to whether the agreement at issue produces anti-competitive effects. The assessment as to whether it also produces pro-competitive effects must the done under Article 101(3) TFEU. In connection with this statement, the Court rejected

[122] Whish & Bailey (2012) p. 99.
[123] Lugard & Hancer, European Competition Law Review (2004) p. 410.
[124] Monti (2007) p. 21.
[125] Case T-112/99 Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission [2001] ECR II-02459. The case concerned an agreement between French companies in the television sector, which, according to the Commission, violated Article 101 TFEU.

the notion that Article 101(1) TFEU would allow for a so-called "*rule of reason*".[126]

While the approach when analysing an agreement is clear from the paragraph above, the concept of "*restriction of competition*" remains difficult to grasp. There is still a vast debate as to what this concept entails.[127] Monti suggests that competition law has three core values: economic freedom, market integration and efficiency.[128] If an agreement infringes any of these values, it is restrictive of competition in the meaning of Article 101(1) TFEU. The Commission's view, which appears in the *Article 101(3) Guidelines,* is that in order for Article 101(1) TFEU to be infringed, the agreement in question must decrease consumer welfare.[129] The objective of Article 101(1) TFEU is to protect competition as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.[130] As described in Chapter 3.2, consumer welfare is equated with consumer surplus, and is reduced, for example, when prices are raised above competitive level. These negative effects are likely to occur only when the parties possess market power.[131] When determining if competition is restricted in the sense of Article 101(1) TFEU, the principal question seems to be whether the agreement is likely to negatively effect competition by increasing the undertakings' ability to raise prices, reduce output, quality, or innovation.[132] Consequently, it seems that among the three core values presented by Monti, the Commissions regards efficiency as most important.

It is not necessary to establish any anti-competitive effects if the agreement has been found to be restrictive by object.[133] The Court of Justice has stated that an agreement is restrictive by object when it is restrictive by its very nature. An agreement is restrictive by its very nature when it concerns price fixing, market sharing or output restrictions. Just because an agreement has public policy aims does not exclude it from being deemed to restrict competition by object, which was concluded in *GlaxoSmithKline.*[134] Consequently, an agreement that is deemed restrictive by object would not be "*saved*" from falling under Article 101(1) TFEU, even though it carries substantive environmental benefits. Conversely, an agreement that has as an object to cause environmental damage, but otherwise is not restrictive of

[126] Case T-112/99 Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission [2001] ECR II-02459 paras. 72 – 76.
[127] Townley (2012) p. 173.
[128] Monti, Common Market Law Review (2002) p. 1069.
[129] Kjolbye, European Competition Law Review (2004) p. 570.
[130] Article 101(3) Guidelines, para. 13.
[131] Article 101(3) Guidelines, para. 25.
[132] Lugard & Hancer, European Competition Law Review (2004) p. 412. See also Article 101(3) Guidelines, para. 24 and Case T-168/01 GlaxoSmithKline Services Unlimited v. Commission [2006] ECR II-2969 para. 118. The case concerned an agreement obligating GlaxoSmithKline's distributors in Spain to operate a price distinction between products sold domestically and products sold outside of Spain. The Commission had found the agreement in violation of Article 101 TFEU.
[133] Case C-49/92 Commission v Anic Partecipazioni SpA [1999] I-4125 para. 99.
[134] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P GlaxoSmithKline Services Unlimited v Commission [2009] ECR I-9291, para. 58.

competition, does not fall under Article 101(1) TFEU, as we saw in Chapter 3.1. Article 101(1) TFEU is, by its wording, limited to prohibit agreements that are restrictive of competition.[135]

Even though the Court of First Instance made clear in *Métropole télévision* that no balancing of pro- and anti-competitive effects of an agreement was to occur under Article 101(1) TFEU, the EU Courts have in several cases accepted restrictive agreements under Article 101(1) TFEU because of their beneficial objectives. This is the so-called *ancillary restraint doctrine.* Before we discuss this further we will first investigate how environmental agreements have been assessed under Article 101(1) TFEU.

4.2 Article 101(1) TFEU and Environmental Agreements

The main type of environmental protection instrument that might infringe Article 101 TFEU is the so-called voluntary environmental agreement. In a communication from 2002, published by the Directorate General Environment, the Commission identified environmental agreements as "*those by which stakeholders undertake to achieve pollution abatement, as defined by environmental law, or environmental objectives set out in Article* [191 TFEU]."[136] The importance of environmental agreements and the increased use of market-based instruments in EU environmental policy were emphasised in the communication.

The *2001 Horizontal Cooperation Guidelines*, published by the Directorate General Competition, contained a separate chapter dealing with environmental agreements. It described the requirements for an environmental agreement, and how these were assessed under Article 101 TFEU.[137] This chapter was excluded in the new *2010 Horizontal Cooperation Guidelines.*[138] The *2010 Horizontal Cooperation Guidelines* merely provides some guidance on how to assess environmental standard agreements. However, the Commission has stated that the extraction of the environmental chapter does not imply any downgrading for the assessment of environmental agreements.[139] Consequently, the *2001 Horizontal Cooperation Guidelines* might still give some guidance on how to analyse environmental agreements in the absence of the EU courts' jurisprudence.[140]

[135] Kingston (2012) p. 229.
[136] COM(2002) 412 Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, p. 4.
[137] 2001 Horizontal Cooperation Guidelines, para. 179.
[138] 2010 Horizontal Cooperation Guidelines.
[139] Commission Press Release, Competition: Commission adopts revised competition rules on horizontal co-operation agreements, 2010 p. 4.
[140] Kingston (2012) p. 243.

The *2001 Horizontal Cooperation Guidelines* separated environmental agreements into three categories: those that never fall under, those that may fall under, and those that always fall under Article 101(1) TFEU.

An environmental agreement will not infringe Article 101(1) TFEU in three situations. First, if the agreement does not place any precise individual obligations upon any of the parties, or if the parties are just loosely committed to achieve a sector-wide environmental target, Article 101(1) TFEU is not infringed.[141] This is dependent on what degree of discretion the parties have to obtain the environmental goals after concluding the agreement. In *ACEA,* the Commission found that an agreement among automobile manufacturers to reduce the amount CO_2 from its cars did not infringe Article 101(1) TFEU.[142] The reason was that the parties had only agreed upon a sector-wide emissions aim, and the parties were free to decide how to achieve this aim individually. The Commission found that this would encourage ACEA's members to develop and introduce new CO_2-efficient technologies independently. Secondly, Article 101(1) TFEU should not be infringed if the agreement concerns products whose importance is marginal for influencing purchase decisions on the market.[143] Thirdly, if the agreement generates dynamic efficiencies, which could not have been obtained without the agreement, Article 101(1) TFEU should not be relevant. Dynamic efficiencies are generated if the agreement gives rise to a new market or product.[144] The *2010 Horizontal Cooperation Guidelines* expresses "*if the agreement enables the parties to launch a new product or service, which,* […] *the parties would not otherwise have been able to do"*.[145]

Conversely, the environmental agreement will always fall under Article 101(1) TFEU where the cooperation does not truly concern environmental objectives, but serves only as a front to a disguised cartel.[146] An example is the *IAZ* case*,* where the Belgian Association Nationale des Service d'Eau agreed with all manufactures and importers of washing machines to use a conformity label for certain environmental requirements. The Court of Justice found that the real objective was to hinder parallel imports by creating entry barriers.[147] Furthermore, agreements that fix prices, reduce output or allocate market shares, always fall under Article 101(1) TFEU, even where the expressed objective is environmentally friendly. This was the case in *VOTOB,* where an agreement between six Dutch companies fell under Article 101(1) TFEU. The Commission found that the agreement to pass on a fixed environmental surcharge to consumers due to the cost of storing used chemicals constituted horizontal price fixing.[148]

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[141] 2001 Horizontal Cooperation Guidelines, para. 184.
[142] XXVIIIth Report on Competition Policy 1998 para. 131.
[143] 2001 Horizontal Cooperation Guidelines, para. 186.
[144] Ibid., para. 187.
[145] 2010 Horizontal Cooperation Guidelines, para. 163.
[146] 2001 Horizontal Cooperation Guidelines, para. 188.
[147] Joined cases 96-102, 104, 105, 108 and 110/82 NV IAZ International Belgium and others v Commission [1983] ECR-3369.
[148] XXIIth Report on Competition Policy 1992 paras. 177 – 186.

Finally, there are some borderline cases, which may fall under Article 101(1) TFEU depending on the effects on the concerned market. The Commission has stated that an infringement is most likely to occur when the agreement covers a major share of the relevant market and, when the agreement has a binding effect on individual actors.[149] An agreement may, for example, fall under Article 101(1) TFEU if the two parties are dominant actors on the market and the agreement substantially restricts the parties' discretion to devise the characteristics of their products, or substantially effects output on the market.[150] Environmental standard agreements for product and production processes that significantly affect a large proportion of the parties' sales may infringe Article 101(1) TFEU.[151] Furthermore, environmental standards may be deemed unlawful under Article 101(1) TFEU when they are restrictive of price competition, constitute barriers to entry or give rise to excessive information exchange regarding prices. In *CECED,* the Commission found that an agreement, which set standards for energy consumption between importers and producers of washing machines, infringed Article 101(1) TFEU, because the parties held 95% of the relevant market.[152] However, where environmental standards are non-discriminatory, transparent, and open to all market actors, environmental standardisation agreements do not infringe Article 101(1) TFEU.[153] An example would be to create a private eco-label, or to set environmental standards for certain products. If such standards have been agreed upon in an open and transparent manner, and are freely accessible to all market actors, it would not constitute a breach of Article 101(1) TFEU.[154] Agreements infringing Article 101(1) TFEU may however be saved by Article 101(3) TFEU.[155]

4.3 The Ancillary Restraint Doctrine

In some judgements, the Court of Justice has held that even if an agreement contains severe restrictions of competition, it might not infringe Article 101(1) TFEU if the restraints do not go beyond what is necessary to achieve a legitimate objective.[156] Case law from the EU courts show that when considering whether an agreement has an anti-competitive effect on the market, it is possible to argue that the restrictions are necessary to enable the parties to obtain a legitimate commercial purpose.[157] For example, in *Société Technique Minière*, the Court of Justice said that an agreement conferring exclusivity on a distributor, which poses large restrictions on competition,

[149] 2001 Horizontal Cooperation Guidelines, para. 190.
[150] Ibid., para. 189.
[151] 2010 Horizontal Cooperation Guidelines, para. 252.
[152] CECED, OJ 2000 L 187/47.
[153] 2001 Horizontal Cooperation Guidelines, para. 189.
[154] 2010 Horizontal Cooperation Guidelines, para. 331.
[155] Kingston (2012) p. 247.
[156] Jones & Sufrin (2014) p. 216.
[157] Whish & Bailey (2012) p 130. See also Article 101(3) Guidelines, paras. 18(2) and 28 – 31

might not infringe Article 101(1) TFEU when it is "*really necessary for the penetration of a new area by an undertaking*".[158] In order to be deemed necessary, the restriction must be objectively needed for the implementation of the main transaction, and proportionate to it. The EU courts have reasoned similarly in a large number of cases. The EU courts have followed this line of thought when assessing restrictive agreements with public policy objectives in a few particular cases, the most prominent being *Wouters*.[159] Consequently, the EU courts have balanced public policy against competition restrictions within Article 101(1) TFEU.

In *Wouters,* a Dutch lawyer was prohibited from practicing as a lawyer in a firm of accountants, by a rule adopted by the Dutch Bar Council, which prevented lawyers from entering into partnerships with non-lawyers. The Court of Justice acknowledged that this kind of rule was restrictive in the meaning of Article 101(1) TFEU. However, the Court of Justice held that the rule was not violating Article 101(1) TFEU "*since that body* [the bar association] *could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession"*.[160] Consequently, the Court of Justice held that account had to be taken to the objectives of the restriction, and the overall context in which they were adopted.[161] In this case, the objectives of the rules were to ensure the integrity and professionalism of legal service providers in the Netherlands. Ultimately, even though the rules adopted by the bar association were deemed anti-competitive, the Court of Justice concluded that the agreement did not infringe Article 101(1) TFEU, as the restraints were necessary for the proper practice of the legal profession. The Court found that the Bar of Netherlands could not pursue this aim by less restrictive means. Finally, the restrictive effects did not go beyond what was necessary. Consequently, the Court of Justice balanced the public policy interest of proper practice of the legal profession against the restrictions of competition, using the proportionality test.[162]

In *Albany,* the Court of Justice held that collective bargaining between organisations representing employers and employees fall outside the scope of Article 101(1) TFEU.[163] The Court reasoned that the Union's activities included not only competition policy, but also a policy in the social sphere. "*It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in*

[158] Case 56/65 Société Technique Minière [1966] ECR 235 p. 250. The case concerned Technique Minière, a French company, appointed as an exclusive distributor of "*grader-machines*" in France. The question was if this exclusive agreement infringed Article 101 TFEU.
[159] Case C-309/99 Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577.
[160] Ibid., para. 110.
[161] Jones & Sufrin (2014) p. 218.
[162] Monti (2007) p. 113.
[163] Case 67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] I-5751.

pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [101] *of the Treaty*".[164] The conclusion drawn by the Court was that certain competitive restrictions are inherent in collective agreements, and for this reason fall outside of Article 101(1) TFEU.

Another similar judgment was given in *Meca-Medina,* where the Court of Justice decided that anti-doping rules, in a sport context, did not infringe Article 101(1) TFEU.[165] Even though the rules were restrictive of competition, they had a legitimate objective, namely, to combat drug use in order for competitive sports to be conducted fairly.

In sum, these judgements tell us that in certain cases it is possible to balance non-competition objectives against restrictions of competition, where the non-competition objectives can outweigh the restriction, with the consequence that Article 101(1) TFEU is not infringed. The question is whether this principle of ancillary restraints can apply by analogy to restrictions ancillary to environmental agreements. It has been argued that these cases must be interpreted narrowly and that the ancillary restraint principle only applies to collective bargaining and self-regulation by professional associations.[166] It is important to read these cases restrictively in order to prevent the EU competition assessment from being too open to political consideration. However, while acknowledging this, Kingston argues that the ancillary restraint principle is relevant to environmental agreements. She writes "*where a competitive restriction is objectively necessary to the achievement of an agreement's environmental objectives such that the agreement would not otherwise have been entered into (Albany), or is necessary to carry out an environmental regulatory task (Wouters), it is possible to interpret Article 101(1) TFEU in a way that favours environmental protection.*[167]

Other scholars downplay the relevance of these cases. Jones & Sufrin maintain that if balancing is required under Article 101(1) TFEU, the two-folded system of Article 101 TFEU becomes problematic.[168] Not all public policy justifications should be taken into account in Article 101(1) TFEU, because it would render Article 101(3) TFEU redundant, which in turn would go against the wording of the Treaty. Therefore, it is required to make a subtle interpretation of ancillary restraint case law.

Whish & Bailey suggest that there are two types of balancing operations allowed under Article 101(1) TFEU. In *Société Technique Minière*, the restrictions were ancillary to a legitimate commercial operation, while in

[164] Case C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] I-5751 para. 60.
[165] Case C-519/04 P Meca-Medina and Majcen v Commission [2006] ECR I-6991.
[166] Kingston (2012) p. 236.
[167] Ibid., p. 240
[168] Jones & Sufrin (2014) p. 249.

Wouters, the restrictions were ancillary to a regulatory concern.[169] This would limit the balancing operation allowed under Article 101(1) TFEU to these types of situations. In cases like *Wouters,* balancing would only be relevant to achieve a regulatory aim. Furthermore, the restrictions must be directly relevant and necessary to the implementation of the main operation.

Townley questions whether making a link to the ancillary restraints doctrine is appropriate. The doctrine is extremely imprecise and "*begs more questions than it answers and is exceedingly difficult to apply"*.[170] Neither the Courts nor the Commission have given any explanation why balancing has been allowed in Article 101(1) TFEU.[171] Whish writes that "*if it were not for the procedural difficulties* [in Wouters and Albany], *analysis of the policy objectives under Article 101(3) would seem to be the natural way to proceed, given the bifurcated structure of Article 101"*.[172] The difficulties he speaks of refer to the fact that these cases were tried before the modernisation process in 2004, where the Commission had the monopoly on approving agreements under 101(3) TFEU after they had been notified. Consequently, in these particular cases, if the agreements would have been found to infringe on Article 101(1) TFEU, they would have been declared void under Article 101(2) TFEU, which would have had awkward consequences for the member states in question. Townley suggests that the rulings in *Wouters* and *Albany* were an attempt by the Court of Justice to reach the "*right*" result in the specific case. "*Now that those procedural rules are no longer in place, the notification regime has gone and the whole of Article* [101] *is directly applicable, one might argue that there should be no more cases like Wouters, and thus no more balancing within Article 101(1)"*. [173]

However, in *Oficiais de Contas,* concerning rules adopted by a professional association of accountants who demanded obligatory training for its members, the EU court of Justice confirmed the relevance of *Wouters*.[174]

4.4 Conclusion

When assessing an agreement's anti-competitive effects under Article 101(1) TFEU, the central question is whether the agreement is likely to negatively affect competition by increasing the undertakings ability to raise prices, reduce output, reduce quality or innovation, i.e. reduce consumer welfare. This is done by investigating the agreement's effect in its economic context. In accordance with *Métropole Télévision*, potential efficiencies, such as environmental benefits, should not be taken into account under Article 101(1) TFEU. Article 101(1) TFEU is only concerned with the

[169] Whish & Bailey (2012) p. 130.
[170] Townley, 2009 p. 132
[171] Ibid., p. 133.
[172] Whish & Bailey (2012) p. 130.
[173] Townley (2009) p. 137.
[174] Case C-1/12 Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência [2013] ECR-00000 para. 97.

effects on competition. Consequently, environmental agreements are assessed under Article 101(1) TFEU using the same principles as for non-environmental agreements.

The *2001 Horizontal Cooperation Guidelines* provide some guidance as to how to assess environmental agreements. These guidelines have a formalistic approach to the agreements, focusing on the freedom of the market actors. If an environmental agreement has a binding effect on the market actors, it will infringe Article 101(1) TFEU. Yet, the formalistic approach has been abandoned in favour of the consumer welfare approach since 2004. This might suggest that the Commission will have a more efficiency-oriented approach towards environmental agreements, and this might also be the reason why the chapter was excluded in the new *2010 Horizontal Cooperation Guidelines*.

Even though *Métropole Télévision* firmly rejected the balancing of negative and positive effects of an agreement under Article 101(1) TFEU, the *ancillary restraint doctrine* diffuses the picture. *Oficiais de Contas* confirm the jurisprudence under *Wouters.* It is consequently possible to balance public policy against restrictions of competition under certain circumstances, with the result of rendering Article 101(1) TFEU inapplicable. Article 101(1) TFEU has not been deemed infringed in the cases where the competitive restrictions are regarded inherent in, or ancillary to, an agreement's legitimate non-competition objectives. Although there is considerable doubt when and where a balancing may be performed, there are reasons to believe it is possible.

The question is whether environmental agreements under some circumstances may fall under the *ancillary restraint doctrine.* In the absence of precise guidance, one should proceed with caution. There seems to be little consensus among scholars as to what the jurisprudence under *Wouters* actually entails. One possible guess is that the *ancillary restraint doctrine* is applicable in a context where restrictions in an agreement between private undertakings are necessary to perform an environmental regulatory task, where normally such a task would have been carried out by the state.

5 Environmental policy in Article 101(3) TFEU

5.1 Article 101(3) TFEU general

The overall assessment of Article 101 TFEU is split into two parts. If it has been established that an agreement is restrictive of competition in the meaning of Article 101(1) TFEU, it may nevertheless be accepted under Article 101(3) TFEU if it can be proven that the agreement produces pro-competitive benefits that outweigh the anti-competitive effects. If the overall effects are beneficial for consumers, the agreement should be held compatible with Article 101 TFEU. Article 101(3) TFEU thereby constitutes a general legal exception to the prohibition of anti-competitive agreements. In order to satisfy Article 101(3) TFEU, the agreement must fulfil four cumulative conditions, two positive and two negative[175]:

- The agreement must contribute to improving the production or distribution of goods or to promoting technical or economical progress.
- The consumers must be allowed a fair share of the resulting benefits.
- The agreements must not impose restrictions that are not indispensable to the attainment of these objectives on the concerned undertakings.
- The agreement must not afford such undertakings the possibility of eliminating competition in a substantial part of the production in question.

Before 1 May 2004, the Commission had an exclusive right to grant an exception under Article 101(3) TFEU if companies notified the Commission about the agreement beforehand. However, the system of notification was abolished by Council Regulation 1/2003, and since then Article 101(3) TFEU has been directly applicable to all agreements. The Commission shares the competence of approving agreements with national courts and national competition authorities. Whish & Bailey maintain that before 2004, when the Commission enjoyed somewhat of a "*margin of appreciation*", factors other than purely economic ones could be applied in the assessment under Article 101(3) TFEU.[176] It is no longer possible to notify an authority about an agreement; either the agreement satisfies Article 101(3) TFEU or it does not. The undertakings concerned bear the risk of their agreement constituting a breach of Article 101(1) TFEU. Article 2 of Regulation 1/2003 stipulates that the burden of proof rests on the Commission or a national competition authority to show that the agreement in question

[175] Whish & Bailey (2012) p. 151.
[176] Ibid., p. 159.

infringes Article 101(1) TFEU.[177] However, once an infringement has been established, the burden of proof shifts to the concerned undertaking to show that the agreement satisfies the four conditions in Article 101(3).[178]

When the Commission's "*monopoly*" on deciding whether to grant individual exceptions under Article 101(3) TFEU was abolished in 2004, concerns were raised that national competition authorities and national courts would apply the statute inconsistently because it was overly broad. A second fear was that the government would influence its national competition agencies to pursue other social policies at the expense of competition.[179] This fear is reflected in the *White Paper on the Modernisation of Article 101 TFEU,* which stated that "[a]*rticle* [101(3) TFEU] *is intended to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations".*[180] It was argued that it was unwise to let national courts balance public policy issues against the cost of anti-competitive agreements in the Article 101(3) TFEU assessment.[181]

5.2 Public policy balancing in Article 101(3) TFEU

The question is whether an environmental agreement that brings environmental benefits of some sort, but is restrictive of competition and therefore infringes Article 101(1) TFEU, may be declared lawful through the exception in Article 101(3) TFEU. The problem is, as has already been explained, the Commission's new consumer welfare approach and its requirements on "*objective economic benefits*".

EU case law shows that public policy benefits, i.e. non-economic benefits, have been considered under Article 101(3) TFEU in the past. The Court of First Instance stated in *Métropole Télévision* that "[i]*n the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article* [101(3)] *of the Treaty."*[182] In *Metro,* the Court of Justice held that employment policy was a relevant factor under the first condition in Article 101(3) TFEU. It was considered *"a stabilising factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which*

[177] Council Regulation 1/2003.
[178] Whish & Bailey (2012) p. 152.
[179] Ibid., p. 156.
[180] White Paper on the Modernisation of Articles 101 TFEU, para. 57.
[181] Jones & Sufrin (2014) p. 254.
[182] Joined cases T-528, 542, 543 & 546/93 Métropole Télévision and others v Commission [1996] ECR II-649 para. 118. The case concerned a Commission decision to accept an agreement that granted exclusive broadcasting rights between European Broadcasting Union and its members. It was questioned if this agreement violated Article 101 TFEU.

reference may be had pursuant to Article [101(3)]."[183] Furthermore, in *Metro II*, the court held that objects of a different nature than those of competition law may justify competitive restrictions, if proportionate.[184] In *DSD*, the Court of First Instance indirectly confirmed that environmental protection, in the form of better waste management, justified an exception under Article 101(3) TFEU.[185] This case law shows that the EU courts have been open to include public policy benefits in the Article 101(3) TFEU assessment.[186]

The Commission has also had an open approach towards public policy balancing in Article 101(3) TFEU. In the XXIth Report on Competition Policy, the Commission said, "*it would be wrong to look at the Community's competition policy in isolation from other policies".*[187] It was argued that the link between competition law and other Community objectives was a "*two-way process*": competition policy helped to achieve other goals, while competition policy could be applied in direct reference to other objectives.[188] The Council, as well as the Parliament, supported this view in several documents.[189]

Since the "*modernisation*" of the EU competition law in 2004, there have been few cases dealing with the application of Article 101(3) TFEU. Consequently, there is little jurisprudence available for interpreting the four criteria. In the absence of guiding case law, the Commission's *Article 101(3) Guidelines* are a valuable instrument for interpreting Article 101(3) TFEU. Whish & Bailey maintain that the *Article 101(3)* Guidelines should be applied in a "*reasonably and flexibly manner rather than in a mechanical manner*".[190] However, these guidelines are at times difficult to reconcile with the approach previously taken by the EU courts, and by past decisions made by the Commission, as well as the Treaty's objectives and goals.[191] It must be kept in mind that Commission Guidelines only constitute "*soft law*", and cannot alone change the legal situation.[192]

The Commission states in its *Article 101(3) Guidelines* that Article 101(3) TFEU is concerned with consumer welfare and to ensure efficient allocation of resources.[193] The role of Article 101(3) TFEU is to determine, when an agreement has been found infringing Article 101(1) TFEU, the "*positive*

[183] Case 26/76 Metro SB-Großmärkte GmbH & Co. KG v Commission [1977] ECR 1875 para. 43. The case concerned the legality of SABA's selective distributional system for electronic equipment. For the contrary interpretation of this case, see Kjolbye, European Competition Law Review (2004) p. 571.
[184] Case 75/84 Metro II [1986] ECR-3021, para. 65.
[185] Case T-289/01, DSD [2007] ECR II-1619.
[186] Whish & Bailey (2012) p. 159.
[187] The XXIth Report on Competition Policy 1991, p. 39.
[188] Monti (2007) p. 90.
[189] See for example: Council Conclusions on the Contribution of industrial Policy to European Competitiveness, and, XXIVth Report on Competition Policy 1994, p. 23.
[190] Whish & Bailey (2012) p. 152.
[191] Kingston (2012) p. 261.
[192] Townley (2013) p. 41.
[193] Article 101(3) Guidelines, para. 13.

economic effects of the agreement".[194] Benefits can be taken into account if they can be calculated into objective economic benefits. The concerned party must show that even though the agreement restricts competition, the economic activity that is the object of the agreement will lead to other benefits.[195] If the pro-competitive effects outweigh the anti-competitive effects, the agreement is exempted from the prohibition.[196]

By pro-competitive effects, the Commission is referring to efficiency gains that "*create additional value by lowering the cost of producing an output, improving the quality of the product, or creating a new product"*.[197] The benefits must be quantified in order for balancing to be performed against the negative effects.[198] The Commission separates between "*cost efficiencies*" and "*efficiencies of a qualitative nature*". Cost efficiencies may follow from the development of new production technologies, synergies resulting from the integration of existing assets, and economies of scale and scope.[199] Qualitative efficiencies may, for example, arise from technical advances ensued from research and development agreements.[200]

The Commission states that the four conditions of Article 101(3) TFEU are exhaustive and an exemption may not be made on any other condition. Concerning other Treaty goals, such as environmental protection, the Commission states, "*goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article* [101(3)]".[201] In sum, environmental concerns may be taken into account, as long as they enhance consumer welfare and an efficient allocation of resources.[202]

According to the Commission, non-economic goals can only be of ancillary relevance in the assessment. The Commission supports its view by reference to the *Matra* case, where a future joint venture between two major automobile manufacturers in Portugal was under scrutiny. The joint venture would lead to a large number of jobs and foreign investment in one of the poorest regions in Europe, which in turn would lead to reduced disparities within the Union. However, the Commission held that this "*would not be enough to make an exemption possible unless the conditions of Article* [101(3)] *were fulfilled, but it is an element which the Commission has taken into account"*.[203]

This narrow interpretation of Article 101(3) TFEU favoured by the Commission, would only permit agreements that generated improvements in

[194] Article 101(3) Guidelines, para. 33.
[195] Jones & Sufrin (2012) p. 253.
[196] Article 101(3) Guidelines, para. 11
[197] Ibid., para. 33.
[198] Ibid., paras. 51 – 54.
[199] Ibid., paras. 64 – 67.
[200] Ibid., para. 70.
[201] Ibid., para. 42.
[202] Ibid., para. 13.
[203] Case T-17/93 Matra Hachette SA v Commission [1994] II-595 para. 179

economic efficiency. According to this view, Article 101(3) TFEU would consequently only allow balancing the restrictive effects of an agreement under Article 101(1) TFEU against the increase of economic efficiency. Whish & Bailey support this way of interpreting Article 101 TFEU.[204] They maintain that Article 101(1) TFEU assesses whether the agreement could lead to allocative inefficiencies, whereas Article 101(3) TFEU permits the agreement if it compensates the loss with productive efficiency. Whish & Bailey argue that the national competition authorities and national courts are ill placed to consider public policy objectives in Article 101(3) TFEU due to the diverse interests within each member state. The application of Article 101(3) TFEU would be inconsistent in the Union and, therefore, is a narrow view of Article 101(3) TFEU preferred.[205] Odudu agrees with this view: Article 101(1) TFEU involves an inquiry into whether allocative efficiency is reduced by the agreement, while Article 101(3) TFEU involves an inquiry into whether the allocative inefficiencies are compensated by productive efficiencies.[206] Productive efficiencies should be equated with technical progress that lead to new and better products, raising the standard of living. The pursuit of legal certainty and uniformity in decision-making is superior to the use of competition law as an instrument to obtain the Treaties' objectives.

Townley, on the other hand, argues that a consumer welfare test should be done exclusively under Article 101(1) TFEU, which means measuring allocative efficiencies. This leaves Article 101(3) TFEU open to balance a multitude of public policy objectives against anti-competitive effects, in accordance with the *Métropole Télévision* judgement.[207] The Courts have not since the modernisation taken a position regarding the broad or the narrow view of Article 101(3) TFEU.[208]

In sum, there is still a raging debate, despite the *Article 101(3) Guidelines,* as to whether public policy has a role in Article 101(3) TFEU. The *Article 101(3) Guidelines* does not explicitly exclude the relevance of other Treaty goals under Article 101(3) TFEU, but in order for a Treaty goal to be relevant, it must fulfil the four conditions outlined. Consequently, the relevance of environmental benefits in the competitive assessment depends on whether those benefits can be subsumed under the conditions of Article 101(3) TFEU.

5.2.1 First condition – Benefits

The issue of how environmental factors should be taken into account in under Article 101(3) TFEU comes down to the interpretation of the first condition of Article 101(3) TFEU. The central question is whether

[204] Whish & Bailey (2012) p. 157.
[205] Ibid., p. 160
[206] Odudu (2006) p. 157.
[207] Townley (2009) p. 254.
[208] Whish & Bailey (2012) p. 161.

environmental benefits constitute improving the "*production or distribution of goods*", or promoting "*technical or economic progress*"?

Before the modernisation in 2004, many of the Commission's competition policy documents supported the relevance of environmental factors. In its *XXVth Report on Competition Policy*, the Commission held that restrictions on competition could be weighed against environmental benefits using the principle of proportionality. Improving the environment was, according to the Commission, to be regarded as a factor that improved production or distribution, or promoted economic or technical progress.[209] Furthermore, the 2001 *Horizontal Cooperation Guidelines* directly addressed the case where environmental benefits arising from an agreement could be evaluated economically. It held that "[e]*nvironmental agreements caught by Article* [101(3)] *may attain economic benefits which, … , outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs."*[210] In the following paragraph, the *2001 Horizontal Cooperation Guidelines* stated that the benefits should be assessed in two stages. Where the individual consumers have a positive rate of return under reasonable payback periods, there is no need to evaluate the aggregated positive return to consumers in general. If this is not the case, then the aggregated societal benefits should be objectively calculated and assessed.[211] This statement implies that the interpretation of "*consumer*" might encompass society in its entirety.[212]

Kingston maintains that the statement in the *2001 Horizontal Cooperation Guidelines* was "*an important step towards the internalisation of environmental costs and benefits in EU competition analysis and, in turn, towards achieving integration of the EU's environmental and competition policies"*.[213] Consequently, if environmental benefits can be calculated into objective economic benefits, the Commission's *2001 Horizontal Guidelines* support that they should be taken into account. As already discussed in Chapter 4.2, this environmental chapter was excluded in the new *2010 Horizontal Cooperation Guidelines*, but as the Commission has held, this did not entail any "*downgrading for the assessment of environmental agreements*".[214]

The Commission has taken environmental protection into account in its decisional practice concerning Article 101(3) TFEU as far back as 1983, when it decided on the *Carbon Gas Technologie*.[215] In its early decisions,

[209] XXVth Report on Competition Policy 1995, para. 85.
[210] 2001 Horizontal Cooperation Guidelines, para. 193.
[211] Ibid., para. 194.
[212] Townley (2007) p. 150.
[213] Kingston (2012) p. 269.
[214] Commission Press Release, Competition: Commission adopts revised competition rules on horizontal co-operation agreements, 2010, p. 4.
[215] Carbon Gas Technologie OJ 1983 L376/17. The Commission took into account that a new process of coal gasification would lead to environmental benefits. See also for example

the environmental benefits were of little consequence in comparison to restriction of competition, and no exceptions were granted on environmental benefits alone.[216] However, environmental protection has enjoyed an increased influence in the Treaty, and consequently has grown more important in the Article 101 TFEU assessment.

In *EACEM*, the Commission approved an agreement between the European Association of Consumer Electronics Manufacturers and 16 of its members, all of which were major producers of television and video recorders.[217] The producers had entered into a voluntary commitment to reduce their products' energy consumption in stand-by mode. No individual firm was able to introduce reduced energy consuming machines due to large costs and small margins in the industry. The commitment would increase prices for customers and was of such binding character that the Commission found it infringing Article 101(1) TFEU. However, the Commission found the environmental benefits constituted technical and economic progress under the first condition. The Commission stated that: *"The energy saving could amount to 3.2 TWh a year from 2005. This reduction in energy consumption will have a significant impact in terms of the management of energy resources, reductions in CO_2 emissions and, accordingly, measures to counter global warming."*[218]

Two years later, the Commission took a similar decision in *CECED*. Manufacturers and importers of washing machines, which together accounted for 95% of the relevant market, agreed upon discontinuing production and importation of the least energy efficient washing machines. The objective of the agreement was to pursue a collective energy efficiency target and to develop more environmental friendly products.[219] The agreement was deemed restrictive of competition in the meaning of Article 101(1) TFEU because the parties bound themselves to cease producing and importing certain types of washing machines. This would bring anti-competitive effects in terms of price increases and reduced technical availability for consumers. The Commission also noted that the agreement would involve information exchange and cooperation between the competitors. Nonetheless, the Commission granted an exception under Article 101(3) TFEU because the environmental benefits for the society outweighed the costs. The parties could show that energy consumption would be reduced up to 20%, with the result of 7,5 TWh saved by 2015. CECED could also show estimations that 3,4 million ton CO_2 emissions would be avoided. Individual consumers would experience cost savings through reduced electricity bills, and a vague estimated said that they would recoup the price increase within 9 to 40 months. The Commission also

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Exxon/Shell OJ 1994 L144/20, para. 67. The Commission took into account that an agreement between Exxon and Shell carried a reduction in the use of raw materials and in the volume of plastic waste.

[216] Vedder (2003) p. 163.

[217] XXVIII Report on Competition Policy 1998, para. 122.

[218] Ibid., para. 130.

[219] CECED OJ 2000 L 187/47.

estimated that savings in marginal damage from CO_2 emissions would be 41 to 61 € per ton, and in relation to that stated, "*the benefits to the society brought about by the CECED agreement appear to be more than seven times greater than the increased purchase cost of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines".*[220] Acting Competition Commissioner at the time, Mario Monti, commented on the decisions, and said that environmental concerns were in no way contradictory to competition policy.[221]

In *DSD,* the Commission granted an exception under Article 101(3) TFEU for a nationwide collection and recycling system established by 95 undertakings from packaging industries in Germany.[222] This operation was designed to meet the requirements of German national law concerning waste management. The system was run by DSD, a private undertaking, who entered into exclusive recycling agreements with local collectors. These exclusive agreements were restrictive of competition in the meaning of Article 101(1) TFEU. However, the Commission found the exclusive agreement necessary to obtain the environmental objectives, consequently saying the agreement "*contributes to improving the production of goods and to promoting technical or economic progress."*[223] The Commission's decision was later confirmed by the Court of First Instance.[224] The Court never directly addressed the question of whether the environmental benefits fulfilled the first condition, because this matter was never appealed. However, the Court found that the restrictions were proportionate for attaining the environmental objective.[225]

In sum, the decisional practice of the Commission shows that environmental benefits fulfil the first criteria insofar as they can be subsumed into objective economic benefits. In none of the decisions above (*EACEM*, *CECED*, *DSD*) were the environmental benefits subsumed into direct cost savings for the individual consumer. Rather, the main reason for exemption was the overall cost benefit for society as a whole.

5.2.2 Second condition – A fair share to consumers

To fulfil the second condition, also called "*the pass-on condition*", the concerned undertakings must demonstrate that a fair share of the resulting

[220] CECED OJ 2000 L187/47 para. 56.
[221] Commission Press Release, Commission approves an agreement to improve energy efficiency of washing machines, 2000.
[222] DSD OJ 2001 L319/1.
[223] Ibid., para. 146.
[224] Case T-289/01 DSD [2007] ECR II-1691.
[225] Ibid., para. 200.

benefits will accrue to the consumers in the relevant market.[226] Environmental benefits are typically diffused and not often specifically addressed to the consumers in the relevant market. Furthermore, the beneficial effects might not occur immediately. The *Article 101(3) Guidelines* states, "*the concept of "consumers" encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final customers*".[227] The *Article 101(3) Guidelines* also state that the assessment made under Article 101(3) should be made within the confines of each relevant market.[228]

It might seem like this definition excludes the relevance of consumers outside the relevant market. However, in the *CECED* decision discussed above, the Commission considered the "*collective environmental benefits",* stating that the environmental benefits flowing from the agreement "*would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines*".[229] The conclusion from this case is that the overall effect on all markets can be taken into account in the economic assessment. This view is supported by Vedder, who advocates a broad definition of "*consumers*". He maintains that the environmental policy-linking clause in Article 11 TFEU allows for the societal benefit as a whole to be taken into account.[230]

The concept of "*a fair share*" is described by the Commission in the *Article 101(3) Guidelines* and implies that the passed-on benefits must compensate at least the consumers for the adverse impact of the anti-competitive agreement.[231] However, it did not seem like the consumers in *CECED* individually were fully compensated. Nevertheless, the environmental benefits must be felt by the consumers in the relevant market.[232]

Another issue is whether future generations should be included in the consumer concept. This is especially relevant concerning long-term environmental goals such as combating climate change. The *Article 101(3) Guidelines* takes a surprisingly broad approach and states, "*the fact that pass-on to the consumers occurs with a certain time lag does not in itself exclude the application of Article* [101(3)]. *However, the greater the time lag, the greater must the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on.*"[233]

[226] Whish & Bailey (2012) p. 163.
[227] Article 101(3) Guidelines, para. 84.
[228] Article 101(3) Guidelines, para. 43.
[229] CECED OJ 2000 187/47 para. 56.
[230] Vedder (2003) p. 173.
[231] Article 101(3) Guidelines, para. 85.
[232] Jones & Sufrin (2012) p. 259.
[233] Article 101(3) Guidelines, para. 87.

5.2.3 Third condition – Indispensability

The third condition requires that the restrictions are indispensable for obtaining the agreement's objective. Kingston holds that this condition involves the principle of proportionality.[234] The parties are required to show that the efficiencies are specific to the agreement in the sense that "*there are no other economically practicable and less restrictive means of achieving the efficiencies*".[235] Townley maintains that "*practicable and less restrictive means*" includes not only other types of agreements available for the parties, but also whether the objective can be obtained by any other means, which includes direct regulation.[236] Consequently, Townley advocated a very narrow interpretation of the third condition.

The indispensability-test is applied to an environmental agreement in the same way as to any other type of restrictive agreement. Many environmental agreements have failed to fulfil this criterion, because even though the environmental objective was genuine, the agreement's provisions were found disproportionately restrictive.[237] It is unlikely that hardcore restrictions are considered indispensable.[238] In the *VOTOB* case, the Commission found that an agreement between six tank storage operators failed to fulfil the third condition.[239] The six undertakings had agreed on adding a fixed environmental surcharge to all tariffs for storage of covenant products. The fee harmonised the cost and consequently the Commission found that the agreement excluded price competition, even though the fee was just approximately 4% of total costs. It is quite possible that the agreement would be exempted if the surcharge were in form other than a fixed, flat rate charge, which would have been less restrictive.

5.2.4 Fourth condition – No elimination of competition

The aim of the final condition is to ensure that effective competition remains in the relevant market. The *Article 101(3) Guidelines* state, "*ultimately the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements*".[240] The Guidelines hold that rivalry between undertakings is an essential driver of economic efficiency, and that when competition is eliminated; short term gains will eventually be outweighed by long-term losses stemming from a lack of competition.[241]

[234] Kingston (2012) p. 280.
[235] Article 101(3) Guidelines, para. 75.
[236] Townley (2009) p. 312.
[237] Kingston (2012) p. 282.
[238] Kjolbye, European Competition Law Review (2004) p. 574.
[239] XXIIth Report on Competition Policy 1992, para. 177.
[240] Article 101(3) Guidelines, para. 105.
[241] Whish & Bailey (2012) p. 165.

In the *2001 Horizontal Guidelines,* the Commission states that in relation to environmental agreements, "*[w]hatever the environmental and economic gains and the necessity of the intended provisions, the agreement must not eliminate competition in terms of product or process differentiation, technological innovation or market entry in the short or, where relevant, medium run*."[242] Kingston finds the Commission's position reasonable; "*[i]t is hard to conceive of a situation where total elimination of competition on an important competitive parameter would be indispensable to achieve the environmental aims of an agreement"*. The elimination of competition can risk initiatives to innovate, which in the long run may undo the development of environmentally cleaner technology.[243]

5.3 Conclusion

Article 101(3) TFEU is the key to integrate the Union's environmental and competition policies. The *Article 101(3) Guidelines* does not explicitly exclude public policy from the Article 101(3) TFEU assessment. Paragraph 42 states that all Treaty goals may be taken into account as far as they can be subsumed under the four conditions. Consequently, whether environmental benefits can be weighed against restrictions of competition under Article 101(3) TFEU depends on whether they fulfil the four cumulative conditions. This depends in particular on the interpretation of "*technical and economic progress*", and "*consumers*" in the first and second condition. Where the environmental benefits resulting from the agreement lead to direct cost savings for individual consumers, there is little doubt that the environmental benefits can fulfil the first condition, even by the Commission's new standard. The Commission has considered environmental concerns within Article 101(3) TFEU in past decisions. *CECED* shows that consumers might be interpreted widely, encompassing the aggregated cost benefit for the whole of society. It implies that even though the undertakings are unable to demonstrate that the consumers in the relevant market receive full compensation for the cost of the restrictions, the aggregated societal benefit may be taken into account.

However, it is unclear if environmental benefits can be taken into account only where they can be calculated into economic benefits, such as cost savings, or if non-economical environmental benefits, such as ensuring the survival of an endangered species, might suffice. Monti interprets *CECED* and *DSD* as suggesting that environmental protection is becoming a core value of competition law, next to economic freedom, market integration, and efficiency.[244] According to the Commission's new approach expressed in the *Article 101(3) Guidelines*, however, this is very doubtful. The *Article 101(3) Guidelines* demand objective economic benefits and economic efficiency. There have been no cases where non-economic environmental benefits have outweighed economic efficiency since the modernisation.

[242] 2001 Horizontal Cooperation Guidelines, para. 197.
[243] Kingston (2012) p. 288.
[244] Monti, Common Market Law Review (2002) p. 1075.

However, the Court of First Instance said in *Métropole Télévision* that public policy concerns might be taken into account under Article 101(3) TFEU, without mentioning that the benefits must be evaluated in economic terms.

6 Discussion and Final Conclusion

6.1 Should environmental concerns be relevant in Article 101 TFEU?

The constitutional structure of the Treaties demands that environmental concerns are to be taken into account under Article 101 TFEU. I firmly agree with the view that the Treaties form a coherent system, and that a holistic approach should be taken towards every Union goal. EU competition policy cannot be implemented in a vacuum, but must be consistent with other Treaty goals. The Union's environmental objectives are expressed in Article 3 TEU, Article 11 TFEU and 191 TFEU. Policy-linking clauses such as Article 11 TFEU pose concrete obligations to integrate environmental concerns into the Union's policies. The existence of policy-linking clauses support the view that all judicial reasoning should be done coherently with the legal system as a whole. Conflicts arise within the Treaty between different Union goals because there is no set hierarchy among them. The aims set out in Article 3 TEU to achieve a delicate balance between social, environmental and economic goals require compromising. The wording in Article 101 TFEU is sufficiently open for interpretation to allow such compromising and the pursuit of different values. When Treaty provisions are open-textured enough, they should be interpreted to help in achieving all Union goals.

The concept of having isolated policy areas within the Treaties, unaffected by other policies, seems contradictory to the structure of the Treaties. I do not believe in isolated goals where policy areas are divided, and where one policy's success is achieved at the expense of another. If the Treaty meant for some objectives to be implemented in isolation, I would expect it to be expressly stated. It seems illogical to state several Union goals without a clear hierarchy in the same article if some goals were meant to overrule others. Unlike some policy areas in EU law, environmental policy goals cannot be achieved using a strict demarcation against other policy areas. Environmental policy must be integrated to become a part of every other policy area, if environmental decay should be halted. This is the role of the integration principle under Article 11 TFEU. The strong wording of Article 11 TFEU, which states that environment protection "*must"* be integrated, poses an extensive obligation to integrate environmental concerns in other policy areas.

The Treaties were built on ordoliberal values, which saw competition as a means to achieve a democratic and a humane society. According to ordoliberalism, competition is not an end in and of itself. All Union policies, including competition policy, rest in a constitutional framework and should

therefore be implemented with an integrated policy perspective. In cases of conflict between Union goals, the EU courts usually resolve these conflicts by compromising. The teleological interpretation method used by the EU courts is well known. When the EU courts construe provisions in the Treaty, they tend to regard the framework of the Treaty as a whole. The EU courts have, for example, clearly demonstrated an integrated approach and allowed exceptions from the goal of free movement of goods in Article 34 TFEU based on environmental concerns. While there is no firm case law that supports that environmental considerations should be taken into account under Article 101 TFEU, the EU courts have been open to include other public policy objectives under Article 101 TFEU in the past. The most prominent case is *Métropole Télévision,* where the Court of First Instance expressly stated that public interest could base an exemption under Article 101 TFEU. Furthermore, in *DSD*, the Court of First Instance found that restrictions inherent in agreements aiming to achieve environmental goals were proportionate.

Taking environmental concerns into account under Article 101 TFEU is rational according to neoclassic economic theory. If we accept the premise that the goal of EU competition law is to enhance consumer welfare and ensure efficient allocation of resources, environmental concerns should be taken into account because the environment is directly reflected in these values. The environment has both an instrumental and an intrinsic value. If we focus on the instrumental value, we can conclude that the environment is constantly providing us with services. We can also conclude that these services and resources are finite. Environmental degradation is consequently reducing societal welfare, which directly affects consumer welfare. External cost must be internalised in order for resources to be allocated efficiently. This is the essence of the Union's official environmental policy, "*polluter pays*". If we look exclusively at the allocation of resources on the relevant market, i.e. we accept the isolation principle, it may appear that the allocation is effective under workable competition, but in fact the consumers are enjoying products that are too cheap at the expense of society. Production will be too high and the real cost will be distributed on every human, which is realised in terms of increased environmental pressure. These costs must therefore be internalised through different means.

We have seen that there are several instruments available for pursuing environmental objectives and for internalising external costs. Direct regulation, where the state legislates and enforces a prohibition, is suitable for certain environmental areas, but it is obvious that direct regulation cannot be the only instrument available for protecting the environment. It has been described as slow and inflexible to the ever-changing demands of industry. It is impossible for the state to enforce environmental protection in every industry. Direct regulation also fails to use the most powerful force, namely the market mechanism. This is the strong characteristic of the market-based instruments. A key feature of modern EU environmental protection is the private actor initiative, which most efficiently internalises the external costs. It is crucial that all sectors of society are allowed to work

towards improving the environment. The industry plays major role in realising an internalisation of environmental costs, and environmental protection.

However, these kinds of instruments require EU competition enforcers to review their approach to competitive restrictive agreements. One of these market-based instruments is the voluntary environmental agreement. In the view of competition law, these agreements may restrict competition by increasing the market actors' ability to reduce consumer surplus by raising prices, and reducing production and consumer choice. What they are doing in environmental economic terms is internalising costs that should be born by the relevant market in the first place. Therefore, it is crucial for our society that competition law is designed to allow for environmental benefits to be taken into account. A competition policy that completely ignores external effects will ultimately lead to economic deterioration.

The Chicago School theory believes that the market force alone will maximise societal welfare. The state should not meddle in the affairs of the market. Political considerations should be left out of the competitive assessment; environmental protection is solely a matter for the state. The state should set the limits for what is environmentally acceptable, and then let competition roam free within those boundaries. The sole goal for competition is efficiency. The primary argument for this way of thinking is that it brings legal certainty; it is the only way to make competition law predictable. "*No body of law can protect everything that people value. If antitrust could, we would need no other statutes*", to quote Bork. Even though Bork has a point, and it is a very attractive and simple way of thinking about competition law, this line of thought will ultimately ruin society. The Chicago School's answer to external effects is to increase the use of state regulation. However, we have seen that the state is unable to enforce adequate environmental protection on all markets. Private initiative has become a key for environmental protection. However, it seems that the Chicago School would not allow cooperation between firms even though it would bring extensive environmental benefits. Legal certainty and predictability are important, but not the sole value a legal system should strive to achieve. Fairness, promotion of humanitarian goals, and coherence with other areas of law, are as important.

Furthermore, I do not agree with the view expressed by Whish and Bailey that national courts and authorities would be ill placed to consider public policy objectives under Article 101 TFEU. I believe that national authorities are well suited to make sound judgements in each individual case. Arbitrary judgments and unpredictability can be avoided if the Commission provides clear and comprehensive guidelines. Furthermore, Directorate General Environment can contribute by issuing guidelines in creating common policies on evaluating environmental benefits. The new "*economic approach*" taken by the Commission, or more precisely by the Directorate General for Competition, implying that public policy concerns are irrelevant under Article 101 TFEU, is creating confusion because it is not justified on

any theoretical grounds. The *Article 101(3) Guidelines* neither reflect current jurisprudence, nor the Commissions own past decisional practises. In any event, the Commission cannot change the current legal situation with these guidelines. These guidelines are mere soft law and hold no legally binding effect. However, they do hold great normative effect, and they will without a doubt affect many coming decisions in the Member States. The uncertainty as to what extent environmental benefits may be taken into account is especially dire since 2004, when every national competition agency was entitled to grant exceptions under Article 101(3) TFEU. The confusion might very well result in fewer firms taking the initiative to reduce their environmental impact.

The scope of the obligation conferred by Article 11 TFEU to integrate environmental protection is hard to define. It could be argued that restrictions of competition, necessary to internalise external costs to the relevant market, should always be allowed. When first faced with a potentially restrictive agreement, the Commission's or a national competition agency, would begin with assessing the actual cost of the industry, and the relevant market. If the agreement had as its sole objective to internalise these costs, then it should be allowed under Article 101 TFEU, as a result of the integration principle under Article 11 TFEU. The positive effects of internalising costs will be that both consumers and producers will cut back on consumption due to more realistic prices. When full internalisation is achieved, the producers would truly start competing in delivering environmental friendly products. In the long run, competition would not be distorted, it would be as fierce as ever, only that consumer preferences would be different. The most environmentally effective company would win. However, full internalisation is still a utopian thought. It is also evident that the current competition law would not allow for such environmental agreements. Full internalisation would probably require environmental fees to be passed on to the consumers in the form of fixed surcharges. This is considered hardcore price fixing, and would almost always be prohibited by Article 101 TFEU, which was the case in *VOTOB*.

Consequently, the scope of Article 11 TFEU remains uncertain. What should be certain is that environmental concerns should have a role in the Article 101 TFEU assessment.

6.2 When should environmental concerns be relevant in Article 101(1) TFEU?

I do not believe that environmental concerns are especially relevant under Article 101(1) TFEU. Even though environmental objectives are relevant under Article 101 TFEU, it does not mean that they should be considered all the time. Environmental benefits deriving from the agreement should only be taken into account under Article 101(3) TFEU. The bifurcated structure of Article 101 TFEU makes little sense if balancing is done in both Article 101(1) TFEU and Article 101(3) TFEU. Consequently, environmental

agreements should be assessed in the same way as any potentially restrictive agreement. This will render Article 101 TFEU more transparent and predictable.

Consequently, I suggest that Article 101(1) TFEU merely entails a consumer welfare test on the relevant market. The central question should be if the agreement increases the parties' ability to affect consumer welfare negatively by exercising market power. No other benefits should be taken into account, although the negative effects on the relevant market should be taken full account under Article 101(1) TFEU. An environmental agreement with the aim of internalising the cost of the relevant market will probably entail reduced competition between market actors, information exchange and price increases for consumers, which would result in a lower consumer surplus on the relevant market. Environmental agreements will therefore often infringe Article 101(1) TFEU.

The *2001 Horizontal Guidelines* showed that environmental agreements risk infringing Article 101(1) TFEU if they have a binding effect on the parties and the agreement encompasses a substantial part of the market. These factors are still relevant in the assessment under Article 101(1) TFEU because they directly affect the parties' market power and their ability to negatively affect consumer surplus. However, the new "*modernised*" approach, adopted by the Commission towards competition law, should be taken into account. The *2001 Horizontal Guidelines* reflect the old way, where "*restriction of competition*" was equated with the commercial freedom of the actors. The new approach focuses on the actual effects of the agreement in its economic context. I believe that the reason for extracting the chapter concerned with environmental agreements from the new *2010 Horizontal Guidelines* might have been its formalistic approach, which did not correspond to the new economic approach taken by the Commission.

The bifurcated structure of Article 101 TFEU serves a procedural purpose. The burden of proof rests on the Commission or national competition agency to prove that an agreement infringes Article 101(1) TFEU. These institutions are in the best position to discern the anti-competitive effects on the relevant market. If it is found that Article 101(1) TFEU is infringed, the burden of proof shifts, and it is up to the concerned parties to show that the agreement fulfils the four conditions of Article 101(3) TFEU. The concerned parties are in the best position to show the positive effects of the agreement. This division of the burden of proof will result in a balanced and thorough review of the agreement in question.

I see no need for relying on the ancillary restraint doctrine in relation to environmental agreements. This doctrine is extremely complicated. It appears that there is little consensus among scholars as to what the ancillary restraint doctrine entails when it comes to agreements with public policy objectives. Whish and Kingston seem to share the view that when it comes to performing an environmental regulatory task, it might be relevant. I do not believe that any kind of balancing should occur under Article 101(1)

TFEU. The ancillary restraint doctrine is very complex, and would render competition law very unpredictable. Furthermore, the ancillary restraint doctrine could serve as a way around the four cumulative conditions in Article 101(3) TFEU. It might prove easier to have an agreement accepted under Article 101(1) TFEU than Article 101(3) TFEU. Under the Article 101(1) TFEU assessment, the parties are not obligated to show that the customers receive a fair share of the benefits, nor that effective competition remains on the relevant market. Furthermore, the burden of proof rests on the Commission in Article 101(1) TFEU. I believe that it is important that environmental agreements are carefully reviewed as environmental agreements may serve as suitable fronts for hidden cartels. The review of an agreement's positive effects is best done under Article 101(3) TFEU, where the burden of proof rests on the undertakings and where they must meet each of the four conditions.

One interesting aspect of the consumer welfare test is that it can be argued that environmental benefits may be taken into account naturally already in Article 101(1) TFEU. The consumers will experience reduced surplus, because suddenly they bear the full cost of the relevant market. However, the environmental benefits following the reduced environmental pressure will raise the consumer surplus. It might happen that the increase equates with the decrease, which would render the agreement as falling outside the scope of Article 101(1) TFEU. However, this should normally not be the case. Environmental benefits will occur with delayed effect. Furthermore, an environmental agreement will also involve cooperation and information exchange between competitors. Focusing on the negative competitive effects on the relevant market will in most cases result in environmental agreements infringing Article 101(1) TFEU.

Another interesting aspect of the consumer welfare test is that it could be argued that agreements that are environmentally disastrous, but otherwise not restrictive of competition, could infringe Article 101(1) TFEU due to the reduction in consumer surplus. EU competition law could consequently be used as an instrument not only to accept restrictive agreements that bring environmental benefits, but also to directly prohibit agreements that are bad for the environment. This is in line with the Harvard School theory, where competition law was seen as an instrument available to deal with market failures. However, I join Townley and Kingston in maintaining that this would go against the wording of the competition rules. Article 101 TFEU applies only in relation to "*agreements ... that have as their object or effect the prevention, restriction or distortion of competition"*. Consequently, Article 101(1) TFEU only applies when an agreement is restrictive of competition. Not until Article 101(1) TFEU has been infringed are we able to use Article 101(3) TFEU. Using competition law in another way would be undemocratic and a misuse of power. It would create a situation of unbearable uncertainty, where the Commission arbitrarily could deem an agreement prohibited under Article 101 TFEU, even though the agreement did not affect competition. Consequently, behaviour that is environmentally damaging, but does not harm competition, cannot be prohibited by EU

competition law. In these cases, environmental protection must be attained by direct regulation.

6.3 When should environmental concerns be relevant in Article 101(3) TFEU?

Environmental benefits should be taken fully into account under Article 101(3) TFEU. As we have seen, the Treaty demands that environmental concerns are integrated into the competitive assessment. Furthermore, if EU competition policy should strive to enhance consumer welfare and efficient allocation of resources, it is rational to include environmental concerns. Consequently, the requirement in the first condition under Article 101(3) TFEU to improve "*the production or distribution of goods"* or to promote "*technical or economical progress*" should be interpreted to include environmental benefits, just like the Commission has done in past decisions.

By saying "*taken fully into account*", I mean first of all that the aggregated benefits to society as a whole should be weighed against the restrictions of competition on the relevant market. This is the only way to deal with external costs. The "*pass-on*" requirement under the second condition should, according to my view, simply entail that the consumers on the relevant market must "*feel*" some of the benefits arising from the agreement. It is consequently not necessary to show that the consumers on the relevant market have an individual positive rate of return from the benefits arising solely from the relevant market. We have seen that the Commission has already exercised this line of reasoning in *CECED*. As a result, if the aggregated benefits to society out-weigh the negative effects of competition in the agreement, the agreement fulfils the second condition. Of course, if we are to include all aggregated benefits under Article 101(3) TFEU, we must also take into account all aggregated negative effects of the agreement. Consequently, while the assessment under Article 101(1) TFEU only concerns the relevant market, the assessment under Article 101(3) TFEU is broadened to encompass the whole society.

By "*taken fully into account*", I also mean that not only should environmental benefits that are subsumed into "*objective economic benefits*" be taken into account, but also non-economic benefits. The teleological interpretation of the Treaty and the EU courts judgement in *Métropole Télévision,* do in no way imply that objective economic benefits are necessary for an exemption under Article 101(3) TFEU. This is the Commission's view, and as long as new jurisprudence from the EU court says otherwise, the legal position is unchanged, no matter what soft law documents such as *Article 101(3) Guidelines* might say.

However, in most cases, environmental benefits will in fact constitute "*objective economic benefits*". Environmental benefits can be valued using the different indirect evaluation techniques developed in environmental

economics. Where the environmental benefit has a market price, such as fish or woodland, the evaluation is straightforward. When it comes to pollution and environmental damage, such as CO_2 emissions, a cost-benefit analysis can be performed where the cost of reducing CO_2 in the atmosphere is valued. Even where neither a market price nor where cost estimations can be utilised, there are still several alternatives for evaluating environmental goods, such as the revealed preference approach. Consequently, environmental benefits should, in most cases, be taken into account even with the Commission's new standard, because in most cases the environmental benefits can be calculated into "*objective economic benefits"*. However, the difficulties in evaluating environmental benefits should not be underestimated. It might prove difficult to value the exact magnitude of an environmental benefit. Eco-systems are interrelated and negative/positive effects on one system can have a great impact on another system. The environment provides us with a manifold of services and a simple cost-benefit analysis will often prove inadequate to quantify such gains. A related problem is that environmental effects often must be viewed long-term, while anti-competitive effects are visible in the short-term. How are we to compare avoidance of future environmental disaster with present anti-competitive effects? How much "*environmental benefits*" does it take to offset a loss of competitive effectiveness? A valid argument is that using environmental evaluation techniques, and balancing these benefits against efficiency losses, will make the Article 101 TFEU assessment uncertain and unpredictable. Nevertheless, one thing should be certain; preventing environmental damage is much less costly than restoring environmental damage. Cases such as *CECED* show that it is possible to balance positive and negative effects deriving from an environmental agreement. Even when environmental evaluation proves difficult, an approximation of the environmental benefits and the efficiency losses is far better than excluding environmental benefits altogether.

What I have said so far does not imply that I find the competition goal as something that should be easily overridden. Economic efficiency remains the core goal of the EU competition law, and will only submit to environmental consideration where it is truly necessary. The third condition involves a proportionality test, and will be applied restrictively. The environmental agreement should be under close review in the Article 101(3) TFEU assessment. Environmental agreements may be misused and serve as fronts for hidden cartels. Just like in *IAZ,* the actual purpose with the agreement may be to establish entry barriers. It is in the third condition where the balancing of environmental benefits and restrictions of competition takes place. Restrictive agreements that are not indispensable for attaining the environmental goal should fail to fulfil this condition. Competition is the motor of economic progress, and no unnecessary restrictions should be allowed. I will not go as far as Townley and hold that in order for the restrictions to be indispensable for the attainment of the objectives, the objective must not be possible to be obtained by anyone in any other way, which includes other actors such as the state. This is going too far. I think that the third condition should be limited to test in what other

ways "*the parties to the agreement*" can attain the objective. If the parties can enter into a less restrictive agreement, which may achieve the same positive effect, then the restrictions are not indispensable. The fourth condition is the ultimate guardian of competition. No matter what environmental benefits the agreement might render, the elimination of competition on a substantial part of the relevant market will never be accepted.

In closing, it is evident that there are plenty of ways in which competition and environmental goals can conflict. However, from what I have learned in writing this essay, is that competition law can be highly flexible and adaptable. Competition is a great and powerful mechanism, and can be used to achieve many societal goals. Competition law and environmental protection do not have to conflict but could instead reinforce each other. Competition law should not be a roadblock in the way of sustainable development, but a vehicle for achieving it. Vedder summarises my view by saying: "*In the end we must ask our self what undistorted competition is worth if there is nothing left to compete for*".[245]

[245] Vedder (2003) p. 439.

Bibliography

European Union

Legislation

Consolidated version of the Treaty of the European Union OJ 2008 C 115/13.
(**TEU**)

Consolidated version of the Treaty of Functioning of the European Union OJ 2012 C 326/47.
(**TFEU**)

Charter of Fundamental Rights of the European Union OJ 2000 C 364/1.
(**Charter of Fundamental Rights**)

Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related Acts OJ 1997 C 340/1.
(**Treaty of Amsterdam**)

Treaty of the European Union OJ 1992 C 191/1.
(**Treaty of Maastricht**)

Single European Act OJ 1987 L 169/1.
(**SEA**)

Regulation

Council Regulation 1/2003 *on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty* OJ 2003 L1/1.
(**Regulation 1/2003**)

Communication & Notices

Commission Communication, *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* OJ 2011/C 11/01.
(**2010 Horizontal Cooperation Guidelines**)

Commission Notice, *Guidelines on the application of Article 81(3) of the Treaty* OJ 2004/C 101/08.
(**Article 101(3) Guidelines**)

Commission Notice, *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* OJ 2001/C 3/02.
(**2001 Horizontal Cooperation Guidelines**)

Commission Communication, *GDP and Beyond: Measuring Progress in a Changing World* COM(2009) 433 Final, 2009-08-20, Brussels.
(**COM(2009) 433 GDP and Beyond: Measuring Progress in a Changing World)**

Commission Communication, *Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment* COM(2002) 412 Final, 2002-07-17, Brussels.
(**COM(2002) 412 Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment**)

Commission Communication, *On the sixth environment action programme of the European Community 'Environment 2010: Our future, Our choice' - The Sixth Environment Action Programme,* COM(2001) 31 Final, 2001-01-24, Brussels.
(**COM(2001) 31 Environment 2010: Our future, Our choice**)

Reports, Working papers, White & Green Papers

Council, *Conclusions of 27 November 2003 on the contribution of industrial policy to European competitiveness* OJ 2003 C317/2.
(**Council Conclusions on the Contribution of Industrial Policy to European Competitiveness**)

Commission White Paper, *White Paper on the modernisation of the Rules Implementing Article 85 and 86 of the EC Treaty* OJ 1999 C 132/1.
(**White Paper on the Modernisation of Articles 101 TFEU)**

Commission Green Paper, *Promoting a European framework for Corporate Social Responsibility,* COM(2001) 366 Final, 2001-07-18, Brussels.
(**Commission Green Paper, Promoting a European framework for Corporate Social Responsibility)**

Commission, *XXVIIIth Report on Competition Policy 1998*, Office for Official Publications of the European Union, Luxembourg, 1999.
(**XXVIIIth Report on Competition Policy 1998**)

Commission, *XXVth Report on Competition Policy 1995,* Office for Official Publications of the European Union, Luxembourg, 1996.
(**XXVth Report on Competition Policy 1995**)

Commission, *XXIVth Report on Competition Policy 1994*, Office for Official Publications of the European Union, Luxembourg, 1995.
(**XXIVth Report on Competition Policy 1994**)

Commission, *XXIIth Report on Competition Policy 1992*, Office for Official Publications of the European Union, Luxembourg, 1993.
(**XXIIth Report on Competition Policy 1992**)

Commission, *XXIth Report on Competition Policy 1991*, Office for Official Publications of the European Union, Luxembourg, 1992.
(**XXIth Report on Competition Policy 1991**)

Press Releases

Commission Press Release, *Competition: Commission adopts revised competition rules on horizontal co-operation agreements*, MEMO/10/676, 2010-12-14, Brussels. (Available at: http://europa.eu/rapid/press-release_MEMO-10-676_en.htm. Access: 2014-12-18).
(**Commission Press Release, Competition: Commission adopts revised competition rules on horizontal co-operation agreements, 2010**)

Presidency Conclusions of the Goteborg European Council, 15 & 16 June 2001, Nr: 200/1/01 REV 1. (Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en1.pdf. Access: 2014-12-16).
(**Presidency Conclusions of the Goteborg European Council, 2001**)

Commission Press Release, *Commission approves an agreement to improve energy efficiency of washing machines,* IP/00/148, 2000-02-11, Brussels. (Available at: http://europa.eu/rapid/press-release_IP-00-148_en.htm. Access: 2014-12-18).
(**Commission Press Release, Commission approves an agreement to improve energy efficiency of washing machines, 2000**)

Bulletin of the European Communities "*Statements from the Paris Summit*" No. 10, Office for official publications of the European Communities, Luxembourg, October 1972. (Available at: http://www.cvce.eu/content/publication/1999/1/1/b1dd3d57-5f31-4796-85c3-cfd2210d6901/publishable_en.pdf Access: 2014-12-26).
(**Bulletin of the European Communities "Statements from the Paris Summit" 1972**)

Swedish Preparatory Work

Proposition 2008/08:135 Ny konkurrenslag m.m.
(**Proposition 2007/08:135**)

Literature

Bork, R "*The Antitrust Paradox: A Policy at War with Itself*" The Free Press, New York, 1993.
(**Bork (1993)**)

Bastidas Vengas, V "*Promoting Innovation?: a legal and economic analysis of the application of Article 101 TFEU to patent technology transfer agreements*" Stockholm Department of Law, Stockholm University, Stockholm, 2011.
(**Bastidas (2011)**)

Jones, A & Sufrin B "*EU Competition Law: text, cases, and materials"* 5th ed. Oxford University Press, Oxford, 2014.
(**Jones & Sufrin (2014)**)

Kingston, S "*Greening EU Competition Law and Policy*", Cambridge University Press, Cambridge, 2012.
(**Kingston (2012)**)

Kolstad, C "*Environmental Economics"* Oxford University Press, New York, 2000.
(**Kolstad (2000)**)

Meadows, D. Meadows D.L., Randers, J. Behrens, W. "*The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind*" Earth Island, London, 1972.
(**Club of Rome (1972))**

Montgomery, R. M. "*John Stuart Mill's Road to Leviathan II: The Principles of Political Economy"* in "*Handbook of the History of Economic Thought – Insights on the founders of Modern Economics*" editor Backhaus J.G, Springer, New York, 2012.
(**Montgomery (2012)**)

Monti, G "*EC Competition Law*", Cambridge University Press, Cambridge, 2007.
(**Monti (2007)**)

Odudu, O "*The Boundaries of EC Competition Law: the scope of Article 81"*, Oxford University Press, Oxford, 2006.
(**Odudu (2006)**)

Reicher, J "*EU-Rättslig Metod*" in "*Juridisk Metodlära*", editor Korling, F & Zamboni, M, Studentlitteratur, Lund, 2013.
(**Reicher (2013)**)

Tietenberg, T & Lewis, L "*Environmental & Natural Resources Economics*" 9th ed., Pearson, Boston, 2012.
(**Tietenberg & Lewis (2012)**)

Townley, C "*Is there (Still) Room for Non-Economic Arguments in Article 101 TFEU Cases?"* in "*Aims and Values of Competition Law"* editors Heide-Jorgensen, C. Bergqvist, C. Neergaard, U & Troels Poulsen, S., Djöf Publishing, Copenhagen, 2013.
(**Townley (2013)**)

Townley, C "*Article 81 EC and Public Policy*" Hart Publishing, Oxford, 2009.
(**Townley (2009)**)

Vedder, H "*Competition Law and Environmental Protection in Europe: Towards Sustainability?*" Europa Law Publishing, Groningen, 2003.
(**Vedder (2003)**)

Whish, R & Bailey, D "*Competition Law*" 7th ed. Oxford University Press, Oxford, 2012.
(**Whish & Bailey (2012)**)

Articles

Casey, D "*Disintegration: Environmental Protection and Article 81 EC*" European Law Journal, Vol. 15, No. 3, 2009, p. 362.
(**Casey, European Law Journal (2009)**)

De Búrca, G "*The Principle of Proportionality and its Application in EC Law"* Yearbook of European Law, Vol. 13, 1993, p. 105.
(**De Búrca, Yearbook of European Law (1993)**)

Kingston, S "*Integrating Environmental Protection and EC Competition Law: why competition isn't special"* European Law Journal, Vol. 16, No. 6, 2010, p. 780.
(**Kingston, European Law Journal (2010)**)

Kjolbye, L "*The new Commission guidelines on the application of Article 81(3): an economic approach to Article 81*" European Competition Law Review, Vol. 25, 2004, p. 566.
(**Kjolbye, European Competition Law Review (2004)**)

Lugard, P & Hancher, L "*Honey, I shrunk the Article! A critical assessment of the Commission's Notice on Article 81(3) of the EC Treaty"* European Competition Law Review, Vol. 25, 2004, p. 410.
(**Lugard & Hancher, European Competition Law Review (2004)**)

Monti, G "*Article 81 EC and Public Policy"* Common Market Law Review, Vol. 39, 2002, p. 1057.
(**Monti, Common Market Law Review (2002)**)

Odudu, O "*The Wider Concerns of Competition Law*" Oxford Journal of Legal Studies, Vol. 30, Num. 3, 2010, p. 599.
(**Odudu, Oxford Journal of Legal Studies (2010)**)

Table of Cases

The Court of Justice of the European Union

Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)* [1966] ECR 235

Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR-215

Case 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875

Case 283/81 *CILFIT v Ministero della Sanità* [1982] ECR 3415

Joined cases 96-102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission* [1983] ECR-3369

Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1986] ECR-3021

Joined cases 96-102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission* [1983] ECR-3369

Case C-49/92 *Commission of the European Communities v Anic Partecipazioni SpA* [1999] I-4125

Case T-17/93 *Matra Hachette SA v Commission* [1994] II-595

Joined cases T-528/93, T-542/93, T-543/93 and T-546/93 *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission* [1996] ECR II-649

Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] I-5751

Case C-379/98 *PreassenElektra v Schleswag AG* [2001] ECR I-2099

Case T-112/99 *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission* [2001] ECR II-2459

Case C-309/99 *JCJ Wouters, JW Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577

Case T-165/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969

Case T-289/01 *Der Grüne Punkt - Duales System Deutschland GmbH v Commission* [2007] ECR II-1619

Joined cases 154 & 155/04, *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health* [2005] ECR I-6451

Case C-519/04 P *Meca-Medina and Majcen v Commission* [2006] ECR I-6991

Case C-297/05 *Commission v Netherlands* [2007] ECR I-7467

Joined cases C-468/06 & C-478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton* [2008] ECR I-7139

Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527

Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291

Case C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* [2013] ECR-00000

European Commission decisions

Commission decision *Carbon Gas Technologie* OJ 1983 L376/17

Commission decision *Exxon/Shell* OJ L144/20

Commission decision *CECED* OJ 2000 L187/47

Commission decision DSD OJ 2001 L319/1