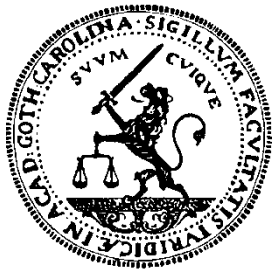

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A Company's Guide to Environmental Action

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Contents

Summary

While industries stand responsible for many of the emissions leading to global warming, tackling climate change seems to fall upon individuals and states. The limited course of corporate action may in many ways be traced back to competition law. Corporations that collaborate with the aim to reduce their environmental pressure will run the risk of breaching Article 101 TFEU, as such collaborations often qualify as illegal horizontal agreements or 'cartels.' Environmental agreements between undertakings may be an essential tool for combating the prevailing environmental crisis. With an economic approach to competition law it however seems unlikely that environmental objectives would receive exemption from the prohibition pursuant to Article 101 TFEU. Meanwhile, the Commission has taken a positive approach to standardisation agreements, which also may take the form of horizontal agreements between competitors. Standardisation agreements are, in contrast to traditional horizontal environmental agreements, provided with an unofficial safe harbour that stipulates defined criteria for compliance with competition law. Horizontal environmental agreements and standardisation agreements many times overlap to an extent that makes it difficult to distinguish between the two; an overlap that perhaps enables the usage of standardisation regulations for environmental purposes. This paper carries out an exploration of horizontal environmental agreements and standardisation agreements respectively in an attempt to map a lawful path to horizontal collaboration between undertakings. The paper first examines how horizontal environmental agreements are currently assessed under Article 101 TFEU. It then carries out the same investigation with regard to standardisation agreements, before comparing and contrasting the two in order to demarcate and display differences relevant to their legal assessments. Finally, the paper deduces a guide for constructing environmental agreements that are compliant with current competition law regulations. The paper argues that horizontal agreements have a greater chance of compliance if constructed and assessed as standardisation agreements, rather than traditional horizontal agreements. To fall under the regulations for standardisation agreements, environmental objectives must be declared in the form of limits rather than action. Agreements are required to have unrestricted access and be transparent, fair, reasonable and non-discriminatory. Adopting this format allows parties to agree upon defined terms and construct compliance mechanisms, as long as the agreement does not give rise to commercial liability. It also allows the agreement to affect product or production outcome, which probably would be prohibited if assessed as a traditional horizontal agreement. Further, the format allows firms to collaborate despite holding large market shares. Finally, the paper finds that although the European rule of reason provides a means to include public policy consideration, it is too uncertain to rely on when constructing environmental agreements. Ultimately, the paper aims to map a guide for undertakings wishing to construct horizontal environmental agreements to target climate impact.

Sammanfattning

Trots att industrier står för många av de utsläpp som leder till klimatförändringar verkar ansvar för att vidta åtgärder tillfalla privatpersoner och regeringar. De begränsade företagsåtgärderna kan på många sätt spåras till konkurrenslagstiftningen. Företag som samarbetar i miljösyfte riskerar att strida mot Artikel 101 i FEUF, eftersom sådana samarbeten kan kvalificeras som olagliga horisontella avtal eller karteller. Då fokus i nuläget ligger på att bibehålla ekonomisk effektivitet verkar det osannolikt att horisontella miljöavtal skulle undantas från konkurrensförbudet i Artikel 101 FEUF. Samtidigt har kommissionen intagit en positiv inställning gentemot standardiseringsavtal, som också kan upprättas i form av horisontella avtal mellan konkurrenter. Standardiseringsavtal är, till skillnad från traditionella horisontella miljöavtal, försedda med en inofficiell ”säker hamn” som fastställer definierade kriterier för överensstämmelse med konkurrenslagstiftningen. På många sätt har horisontella miljöavtal och standardiseringsavtal gemensamma nämnare till den grad att det kan bli svårt att skilja mellan de två. Dessa gemensamma nämnare kan möjliggöra användningen av standardiseringsregler för att inkorporera miljöändamål i företagssamarbeten. Miljöavtal mellan företag kan vara ett viktigt verktyg för att bekämpa den rådande miljökrisen. Därför undersöker denna uppsats både horisontella miljöavtal och standardiseringsavtal i syfte att kartlägga en laglig väg till horisontella samarbeten mellan företag. Uppsatsen undersöker först hur horisontella miljöavtal i nuläget utvärderas enligt Artikel 101 i FEUF och utför sedan en motsvarande undersökning för standardiseringsavtal. Därefter jämförs de två för att påvisa skillnader som är eller kan vara relevanta för deras rättsliga bedömningar. Slutligen lägger uppsatsen fram ett förslag på hur man bäst går tillväga för att konstruera horisontella miljöavtal i enlighet med gällande konkurrenslagstiftning. Uppsatsen hävdar att horisontella avtal har större möjligheter att påvisa laglighet om de konstrueras och bedöms som standardiseringsavtal, istället för traditionella horisontella avtal. För att omfattas av reglerna för standardiseringsavtal måste miljömål anges i form av gränser snarare än åtgärder. Avtal kan inte ålägga någon skyldighet att följas och bör ge öppet tillträde till standarden på transparenta, rättvisa, rimliga och icke-diskriminerande villkor. Genom att anta detta format kan parter avtala om definierade avtalsvillkor samt konstruera tillsynsmekanismer, såtillvida avtalet inte ger upphov till kommersiellt ansvar. Det möjliggör också för avtalet att påverka produkt- och produktionsresultat, vilket förmodligen skulle vara otillåtet om bedömningen skedde i enlighet med reglerna för traditionella horisontella avtal. Vidare tillåter formatet samarbete mellan företag även om de besitter stora marknadsandelar. Slutligen finner uppsatsen att det, även om *rule of reason*-principen ger en möjlighet att inkludera allmänpolitiska mål i dess intresseavvägning, är för osäkert att förlita sig på denna vid upprättande av miljöavtal. Det är uppsatsens huvudsakliga ändamål att kartlägga en guide för företag som önskar upprätta horisontella miljöavtal i syfte att främja miljön.

Preface

Till skillnad från många andra innebär detta examensarbete inte att jag tar examen. Det innebär inte heller, som tur är, mina sista kvällar på borgen eller något avsked till vänner. Lund kommer jag tillbaka till och vännerna tar jag med livet ut. Det innebär dock slutet på min studietid i Lund; den sista juridiska inlämningen, mina sista timmar på trean och mina sista kaffekoppar i repan. Därför vill jag tacka trion, som funnits med sedan dag ett, de osköna juristerna och mina andra vänner i den här lilla staden för att ni har förgyllt mina studentår.

Tack till Filip, som utmanar mig att tänka större. Utan dig hade detta halvår inte varit detsamma.

Biggest thank you to my supervisor, the legal genius Julian Nowag. Your input has been motivating, helpful and sharp.

Slutligen – tack mamma, pappa, Agnes, Chris, Bror och Tea, för vägledning, motivation, stöd och hem.

Lund, 24 maj 2019

Alexandra Teorell

Abbreviations

Charter	Charter of Fundamental Rights of the European Union
Commission	European Commission/EU Commission
Court	European Court of Justice
EU	European Union
Member States	Current EU member states: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TEC	Treaty Establishing the European Community
Treaties	TFEU, TEU

1 Introduction

While industries stand responsible for many of the emissions leading to global warming, tackling climate change seems to fall upon individuals and states.[1] Possibly, such a course of action would be more efficient if reversed, and the companies were the ones taking action instead. An increasing number of firms seek to do business in a way that minimises their environmental impact by focusing on corporate social responsibility or adapting a sustainability niche as a competitive advantage.[2] Yet, companies that strive to create a lasting positive impact on the environment will most likely have to collaborate. Collaboration is essential not only to avoid what economists call "the first mover disadvantage,"[3] which essentially says that pioneering change is costly, but also to have a broader and more powerful reach. Currently, there is little room for corporate industries to take climate action, and the limited course of action can in many ways be traced back to competition law. Horizontal collaboration agreements between competitors constitute cartels and are likely to be illegal under competition regulations. Large corporations are carefully watched as to not harm consumers, based on a strict economic perspective. However, there is a fine line between harming consumers and protecting the environment, as environmentally focused solutions might stand in contrast to consumer benefits. For example, environmentally beneficial products may lead to higher prices, less consumer choice or less product variety. Sometimes the balance between environmental and consumer objectives is unclear and provides us with contrary opinions about what is 'best' for the consumer and for society as a whole. Motivated by a concern that competition may encourage firms to offer unsustainable products, it has been suggested that exempting horizontal agreements from cartel liability may be another way to promote sustainable consumption and production.[4]

The inspiration to write about environmental integration in relation to competition law stems from the idea of environmental cartels – could they be legal anyway, if sufficiently beneficial to the environment? – but was disrupted by the realisation that standardisation agreements, which also regulate collaboration between competitors, seemed to be differently assessed than traditional horizontal agreements. Therefore, this paper investigates the options for environmental integration under horizontal environmental

[1] Riley (2017).
[2] Holmberg (2014), p. 4.
[3] Boulding et al (2001).
[4] Schinkel et al (2016), p. 2.

agreements and standardisation agreements correspondingly, as well as the grey zone in which the two combine.

The paper is written in the light of a prevailing environmental crisis. It is its view, that environmental agreements can be an essential tool for combating the crisis we are in the midst of, which is why it attempts to find a lawful path to horizontal collaboration. A number of diagrams are used for clarification, as to enhance understanding regardless of legal background or education. Ultimately, this paper aims to map a pathway for companies that wish to use the tool of horizontal agreements in their own process towards positive environmental change.

1.1 Background

To understand the topics that this paper concerns, one needs to be familiar with some of EU's fundamental objectives, EU competition law and the general function of standardisation agreements. The process of developing and setting standards is in this paper called *standard setting* and *standardisation* interchangeably.

1.1.1 Environmental Integration

EU's fundamental objectives can be found in Article 3 TEU, which states that the union's aim is to promote peace, its values and the well-being of its peoples.[5] It discusses freedom, security and justice, free movement and an internal market.[6] In its third paragraph, it states that "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."[7] The Article does not disclose any hierarchy between its aims, which suggests that an internal hierarchy between EU aims is not desired. Yet, the absence of an explicit hierarchy may give rise to conflicts.[8] Setting different goals for the EU without it might lead to collusion of those goals.[9] Accordingly, the collusion between competition, economic growth and environmental consideration lays the foundation for this paper.

[5] Article 3(1) TEU.
[6] Article 3(2) TEU.
[7] Article 3(3) TEU.
[8] Townley (2009), p. 48.
[9] Ibid.

In addition to Article 3 TEU, Article 11 TFEU provides that "environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development." The article, where environmental consideration has been stated as one of the main objectives of the EU, is of policy-linking nature. Due to its sharp wording, using the word 'must,' it poses a concrete obligation to integrate this objective into all the Union's policies and actions.[10] In shaping Article 11 TFEU, the inclusion of the phrase "into the definition and implementation of other Community policies" aimed to extend the obligation to integrate environmental consideration not only in the definition of broad policies, but also when the policies are implemented by e.g. directives or regulations.[11] It is clear from the Article 11 TFEU travaux préparatoires that the Member States envisaged an integration obligation, which should be applicable to all areas of EU actions.[12] These intentions are of relevance for the interpretation of EU law as they support a more extensive interpretation of environmental obligations.[13] Therefore, they may provide a further impetus for a broader application of Article 11 TFEU.[14]

The EU has called for further environmental action within Article 37 of the Charter, which states that "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."[15] In 2010 the EU also implemented the Europe 2020 Strategy; a strategy for smart, sustainable and inclusive growth.[16] The 'sustainable' part of the strategy aims to promote a more resource efficient, greener and more competitive economy.[17] The strategy requires a 20 % decrease of greenhouse gases, a 20 % increase in energy efficiency and 20 % of energy derived from renewable sources.[18] In sum, the EU has taken a clear standpoint to support a pro-environmental perspective.

Moreover, researchers argue that the Treaty of Amsterdam[19] makes clear that the protection of environment is no longer a separate objective that can be considered 'second-class.'[20] Instead, environmental protection must be

[10] Holmberg (2014), p. 51.
[11] Nowag (2014), p. 6.
[12] Ibid, p. 9.
[13] Ibid, p. 3.
[14] Ibid.
[15] Kingston (2012), p. 276.
[16] COM(2010) 2020, p. 1.
[17] Ibid, p. 8.
[18] Europe 2020 Strategy website.
[19] Officially the 'Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts' from 1997.
[20] Wasmeier (2001), p. 159.

integrated into all Community[21] actions and policies.[22] This gives rise to an integration principle, which basically says that if possible, preference should be given to an interpretation in line with environmental protection objectives.[23]

Environmental policies may be integrated in two ways.[24] The first form of integration is *interpretation*, whereby regulations are interpreted in a way that subsumes environmental policy within existing regulations. Interpretation can be explained as demarcating the boundaries between prohibited and un-prohibited measures to avoid conflicts with environmental protection.[25] The second form of integration is *balancing*, which can be explained as balancing competition regulations against environmental objectives in cases of conflict between the two.[26] Given the environmental focus of the above-mentioned treaties, the two types of integration will be relevant both to horizontal environmental agreements and standard setting agreements throughout the paper.

1.1.2 Competition Law

Economic growth is a cornerstone to the EU, and competition is a cornerstone to economic growth. Hence, the EU has developed a complex competition law framework that furthers economic growth and the internal market. The core of EU's competition law can be found in Articles 101 and 102 TFEU, along with the merger control regulation.[27] 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.[28] The overarching objective of EU competition law is to prevent distortion of competition, with the end goal of achieving a free and dynamic internal market.[29] Since its modernisation of competition law in 2004, the Commission has adapted a stricter economic view, in which economic efficiency has become the paramount goal of EU competition policy.[30] By this, the Commission changed its analytical framework by accepting the consumer welfare standard.[31] The Commission adopted a consumer welfare approach and requirements on 'objective economic benefits;' an approach

[21] European Community, since 2009 referred to as the European Union.
[22] Ibid.
[23] Wasmeier (2001), p. 176.
[24] Nowag (2017), p. v.
[25] Ibid, p. 51.
[26] Ibid.
[27] In particular the EC Merger Regulation No 139/2004.
[28] Holmberg (2014), p. 4.
[29] Honnefelder, (2018).
[30] Holmberg (2014), p. 4.
[31] Monti (2007), p. 21.

which forecloses consideration of other benefits, such as public policy.[32] Consequently, a central question is whether competition law should focus on the single goal of enabling a free internal market, or if it should pursue other values, such as environmental policies, as well.[33]

1.1.3 Standardisation Agreements

On a different note, it has become increasingly important to acknowledge the rise and importance of standardisation agreements, which in line with technological and technical expansion and globalisation have become an essential part of international trade. Standardisation agreements facilitate compatibility between different countries and technologies and may therefore be seen as a natural continuation of a globalised trading system. Standard setting processes are many times carried out by state-owned operators, but sometimes by private entities such as corporations or private organisations. Most often, standards concern technical interoperability, processes, testing, infrastructure, data, safety or health regulations.[34] Sometimes, however, standards concern environmental regulations, which is why they are of interest to this paper. Standards that are set up by private entities many times tangent horizontal agreements as they are constructed in a similar manner.

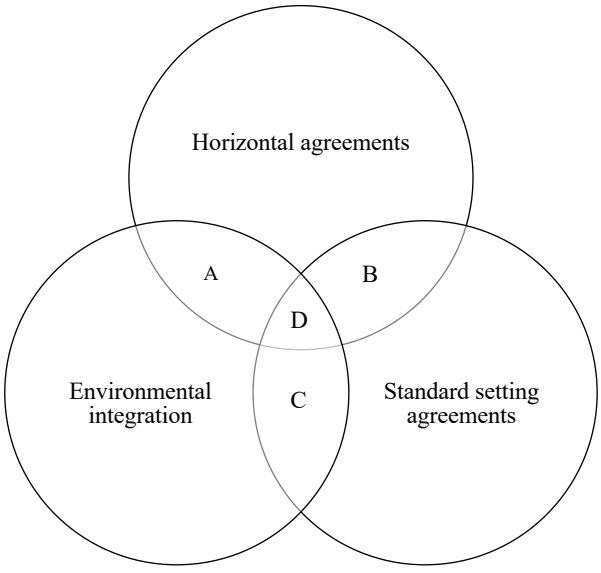

Diagram 1. The relationship between environmental integration, horizontal agreements and standard setting agreements.

[32] Holmberg (2014), p. 40; 'Public policy' is defined as "courses of action, regulatory measures, laws, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives" by Kilpatrick (2000).
[33] Holmberg (2014), p. 4.
[34] ISO classification ISO/IEC Guide 2:1996.

The relationship between environmental integration, horizontal agreements and standardisation agreements may be demonstrated by the diagram above. Area A demonstrates horizontal agreements that integrate environmental objectives (hereby referred to as horizontal environmental agreements). Area B demonstrates how standard setting agreements and horizontal agreements may overlap when standard setting agreements are privately initiated and owned. Area C demonstrates standard setting agreements concerned with environmental standards (hereby referred to as environmental standard setting). Area D demonstrates the core of this paper; namely, the grey zone in which the two agreement types, both of environmental focus, combine.

1.2 Purpose, Aim and Research Questions

The purpose of this paper is to investigate how EU competition law could allow horizontal collaboration between companies, to adapt to an increasing risk of environmental decay. The aim is to investigate and, if possible, establish a guide for companies when constructing collaboration agreements of positive environmental impact. To do so, it aims to examine to what extent environmental consideration may be integrated in horizontal agreements and in standardisation agreements, with regard to Article 101 TFEU.

To fulfil its aim, the following research questions have been examined, of which the fourth research question is particularly relevant:

1. How are horizontal environmental agreements assessed under EU competition law?
2. How are standard setting agreements assessed under EU competition law?
3. What are the differences between horizontal environmental agreements and standard setting agreements, when provided by corporate entities?
4. Based on the findings above, can a guide to constructing environmental agreements be deduced, as to not breach Article 101 TFEU?

1.3 Method and Material

The paper will use the EU legal method, by investigating regulations, cases, precedents, principles and policies of EU law.[35] The paper will analyse published statements by EU's official entities, the Commission's guidelines,

[35] Hettne et al (2011), p. 25.

communications and articles. According to the EU legal method, EU regulations and decisions shall be interpreted in the light of EU's overall aims and purposes.[36] Particular attention has been given to the Commission's 2010 and 2001 Horizontal Guidelines. The 2010 Horizontal Guidelines, currently in force, constitute soft law and provide guidance on the application of both Article 101(1) and 101(3) TFEU. The 2001 Horizontal Guidelines, although not in force, are helpful as they included an entire chapter on environmental agreements.[37] The 2010 Horizontal Guidelines however removed that chapter and now state that environmental agreements are more appropriately dealt with in respective sector of the guidelines, based on what competition issues the agreement may give rise to.[38] In contrast to horizontal environmental agreements, standardisation agreements gained more attention in the revised guidelines than in the previous ones. The 2010 Horizontal Guidelines' chapter 7 is now solely dedicated to standardisation agreements. Hence, the 2010 Horizontal Guidelines are a useful tool in the assessment of standardisation agreements and have given particular attention in the legal assessment section of standardisation agreements.

Cases discussed in this paper will in essence originate from the courts of the European Union. Yet, the area of interest is relatively unexplored, and cases within the topic are not very common. Therefore, case law from Member states has at times been discussed to exemplify or shed light upon situations that have not yet been tested on an EU level. These cases stem mostly from the Netherlands; a Member state much concerned with sustainability issues due to their lowland areas.[39] Moreover, doctrine on competition law, standard setting and environmental integration plays a key role in understanding and clarifying opinions and attitudes towards the different agreement types. Opinions conveyed by the Commission to OECD roundtable discussion will be interpreted as standpoints on the matters of horizontal environmental agreements and standard setting in relation to competition law.

1.4 Organisation

This paper will start by investigating the current legal situation of first horizontal environmental agreements and then environmental standardisation agreements. It will continue by comparing and contrasting horizontal environmental agreements with standard setting agreements, to determine

[36] Ibid, p. 40.
[37] 2001 Horizontal Cooperation Guidelines, § 179.
[38] 2010 Horizontal Cooperation Guidelines, § 17. The Commission has stated that the extraction of the chapter does not imply any downgrading of the importance of environmental agreements; rather, the topic is more important than ever.
[39] United Nations Sustainability Platform (2017).

whether there are any differences in the legal assessments between the two, and if so, what these might look like. The division of chapters will be as follows.

Chapter two addresses the first research question: *"How are horizontal environmental agreements assessed under EU competition law?"*. It will investigate the current legal situation of horizontal environmental agreements by carrying out an analysis of the legislative assessment, including soft law guidance, official communications, case law and doctrine.

Chapter three addresses the second research question: *"How are standard setting environmental agreements assessed EU competition law?"*. In doing so, it will carry out a corresponding investigation with regard to standardisation agreements. It will discuss standardisation agreements in general and environmental standardisation agreements in particular, with respect to the Commission's guidelines, case law and EU communications about standardisations.

Chapter four will assess the third research question; "*What are the differences between horizontal environmental agreements and standard setting environmental agreements, when provided by corporate entities?"*. It will compare and contrast the two previous chapters to determine what the main differences between the two agreement types are, if such differences can be found.

Chapter five holds the final conclusion, which will investigate and determine the fourth research question: namely, if a guide to constructing environmental agreements can be deduced and what it might look like based on the findings above.

1.5 Limitations

The paper will solely focus on EU law. It will not concern itself with national law of Member States, except for certain case law that cannot be found in EU case law. However, conclusions drawn about EU law are directly applicable to Member States due to the supremacy of EU law. Moreover, the paper will focus entirely on Article 101 TFEU. It will not discuss the possible implications of Article 102 TFEU, which prevents abuse of dominant positions. Neither will it discuss block exemptions relevant to Article 101 TFEU. The paper will only consider supportive legislation, which means applying the sectoral rules so as to allow measures that are beneficial for the

policy which is to be integrated.[40] Preventive legislation – which, in contrast, refers to application of the sectoral rules to avoid harm to the policy which is to be integrated – will fall outside the scope of the investigation.[41]

Further, the paper's scope of interest is limited to agreements between undertakings.[42] It will overlook bi- or multilateral environmental agreements, standard setting bodies' agreements (unless purely privately operated) and government action in the area of environmental agreements and environmental standard setting. Therefore, *Regulation No 1025/2012 on European standardisation*, which is the only EU regulation on standards, falls outside the scope of this paper. Instead, standardisation agreements will be assessed using Article 101 TFEU.

The paper will not account for EU law history or the development of EU environmental policy. Neither will it concern competition law theories or the economic reasons for competition law's existence in the first place. Because this paper is concerned with agreements that objectively would promote sustainability or environmental welfare, it will presume that environmental agreements serve the true purpose of protecting the environment. It will not focus on the potential harms of allowing environmental agreements that essentially aim to reduce competition, such as 'hidden cartels' or the like.

[40] Nowag (2017), p. v.
[41] Ibid.
[42] Although the concept of what constitutes an undertaking is somewhat discussed, cf. case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (1999), the concept of 'undertakings' in this paper refers to the general definition as used in competition law, which is described further in Nowag (2017), p. 55 ff.

2 Horizontal Environmental Agreements in Competition Law

This chapter investigates the current legal situation for horizontal environmental agreements. The objective of the chapter is to clarify the contentious legal situation that horizontal environmental agreements make up. The first section provides an introduction to horizontal environmental agreements and the second section investigates the ways in which horizontal environmental agreements may be found compliant with competition law. By the end of the chapter, the reader should have obtained a general overview of horizontal environmental agreements' current legal status and what elements are of importance in the assessment of such agreements. An understanding of this will be useful to the comparison of horizontal environmental agreements and standard setting agreements, which will be carried out in chapter four.

2.1 Background

Most times, firms on the horizontal level are competitors. Firms that collude within the same level of the distribution chain in a given relevant market reach what in legal terms is called 'horizontal agreements,' and in economic terms 'cartels.'[43] The European Commission defines such agreements as "agreements entered into between actual or potential competitors."[44] Cartels allow competitors to function as monopolies, with the inefficiencies that monopolies entail (such as increased consumer prices, reduced output, less product choice and less efficiency).[45] Thus, preventing and eliminating cartels (or horizontal agreements) is one of the main topics of competition law and Article 101 in particular.

In its 2001 Horizontal Guidelines, the Commission defines environmental agreements as "agreements by which parties undertake to achieve pollution abatement, as defined in environmental law, or other environmental objectives […]., in particular, those set out in Article 174 of the Treaty."[46] 'The Treaty' in this definition refers to Article 174 Treaty of the European Community (TEC), which states that the EU policy on the environment shall

[43] Prosperetti (2012), p. 39.
[44] 2010 Horizontal Guidelines, § 1.
[45] Prosperetti (2012), p. 39.
[46] 2001 Horizontal Guidelines, § 179.

contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources and promoting measures at international level to deal with regional or worldwide environmental problems.[47] A definition of horizontal environmental agreements may be found by combining the definitions above into "agreements entered into between actual or potential competitors by which parties undertake to achieve pollution abatement, as defined in environmental law, or other environmental objectives," which is the definition that will be utilised in this paper.

Many Member States experience industries setting up complex schemes with environmental obligations, aiming to make their industries or markets more sustainable by establishing environmental agreements between themselves and their competitors.[48] An example of this could be a meat industry trying to create more sustainable conditions for meat production, washing machine producers deciding to stop production of energy inefficient machines, or electricity producers deciding to close down coal plants in order to switch to more sustainable energy solutions.[49] The usage of horizontal environmental agreements as a means to protect environmental interests has sparked great discussion over the years. By design, they constitute agreements that regulate markets, prices or production output amongst themselves, thus, many times reducing consumer choice, increasing price or synchronising market practices. By object, they aim to promote sustainability or environmentally friendly solutions in line with EU's environmental objectives – sometimes at the price of reduced competition. Agreements between undertakings of this kind, although not aiming to negatively affect competition, will naturally become a matter of EU competition law and in particular Article 101 TFEU.

2.2 Legal Assessment

Article 101 TFEU regulates anti-competitive agreements in EU law. The overall assessment of Article 101 TFEU is divided into two parts.[50] The first part, found in Article 101(1) TFEU, concerns the anti-competitive effect that the agreement may have on market forces, in which case the agreement is prohibited according to Article 101(2) TFEU. The second part of assessment, found in Article 101(3) TFEU, assesses whether the article, despite being of anti-competitive nature, has such pro-competitive effects that they outweigh the negative impact. This is the so-called efficiency defence.[51] If determined

[47] Article 174 TEC.
[48] 2001 Horizontal Guidelines, § 181.
[49] Cf. *Chicken of Tomorrow* (2014); *CECED* (2000)*; Energieakkoord* (2013).
[50] 2010 Horizontal Guidelines § 20.
[51] Kloosterhuis and Mulder (2013), p. 1.

to be beneficial to consumers, agreements may be exempted from prohibition under Article 101(1) TFEU by the regulations in Article 101(3) TFEU.[52] Besides this, the section will discuss the European rule of reason as a possible assessment approach.

The section will first provide a general overview of the Article 101(1) TFEU framework: its relationship with the first and second form of integration, the European rule of reason and different types of horizontal environmental agreements. It will then continue by describing how the assessment of horizontal environmental agreements is carried out under Article 101(3) TFEU.

2.2.1 Assessment under Article 101(1) TFEU

The first kind of environmental integration, interpretation, is accounted for in light of what this paper calls the 'division of agreements.' This division derives from the 2001 Horizontal Guidelines, in which agreements were divided into groups based on their probability to comply with competition regulations, mostly referring to Article 101(1) TFEU. The second kind of environmental integration, balancing, will be discussed with regard to Article 101(1) TFEU in terms of rule of reason. The second form of environmental integration can also be found in the assessment of Article 101(3) TFEU, whereby an interpretation in accordance with the first kind of integration may be said to merge with a balance test, when determining the nature of 'benefits' as stated in Article 101(3) TFEU.

2.2.1.1 Division of Agreements

Based on an interpretation of Article 101(1) TFEU, the 2001 Horizontal Guidelines divided environmental agreements into agreements that were 'not likely to', 'may', or 'almost always' restricted competition.[53] This division may, although the 2001 guidelines are no longer in force, be used to interpret situations where the 2010 Horizontal Guidelines provide insufficient guidance.[54] The division is continued useful as it offers a good first point of reference when determining compliance of horizontal agreements via the first kind of integration.[55] Therefore, the following subsection will start by investigating what agreements are 'not likely to' restrict competition and what agreements 'may' restrict competition. The agreements that the 2001 Horizontal Guidelines defined as 'almost always' restrictive of competition

[52] 2010 Horizontal Guidelines, § 20.
[53] 2001 Horizontal Guidelines, § 184.
[54] Cf. Nowag (2017), p. 73.
[55] Ibid.

essentially consisted of agreements that did not have the true purpose of protecting the environment; hence, falling outside the scope of this paper.[56]

According to the 2001 Horizontal Guidelines, an environmental agreement would be unlikely to restrict competition if

a) it does not place any individual obligation on the parties, or if parties only commit loosely to contributing to a sector-wide environmental target,
b) the agreement stipulates environmental performance with no effect on product and production diversity, or
c) it gives rise to genuine market creation.[57]

Nowag describes that the cases *EUCAR*,[58] *ACEA*,[59] *JAMA* and *KAMA*[60] exemplify agreements that fall under these conditions and thus fall outside the scope of Article 101(1) TFEU. In *EUCAR*, an association of major car producers was put together to establish greater environmental sustainability through research and development. The agreement involved developing new inventions and sharing new IP between manufacturers. This was considered a 'loose commitment' and the Commission accepted the agreement as unlikely to restrict competition.[61] In the cases *JAMA* and *KAMA,* the agreement concerned emission reductions among car producers, but it did not impose a precise obligation about the methods of achieving the reduced emissions. A similar Commission decision as for *EUCAR* was reached.[62] Furthermore, the German case *DSD* concerned collection of plastic waste.[63] Germany had previously lacked a market for recycling plastic waste, which the *DSD* initiative solved by imposing an obligation to collect and recycle plastic waste via contractors. Because the *DSD* agreement gave rise to a new market (plastic waste management), the Commission took the position that the agreement furthered competition, despite setting prices and establishing exclusivity.[64] By following these guidelines, agreements are unlikely to be found to breach Article 101(1) TFEU despite being of collaborative horizontal nature.

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[56] This may refer to e.g. hidden cartels or other aims that are not true to the environment, 2001 Horizontal Guidelines, p. 184. Cf. Chapter 1.6 of this paper.
[57] 2001 Horizontal Guidelines § 186 ff.
[58] *EUCAR* Notice pursuant to Article 19 (3) of Council Regulation No 17 concerning case No IV/ 35.742-F/2 [1997] OJ C185/12; Nowag (2017), p. 74.
[59] XXVIIIth Report on Competition Policy (1998); Nowag (2017), p. 74.
[60] Ibid.
[61] Nowag (2017), p. 74.
[62] Ibid.
[63] *DSD* (COMP/34493) Commission Decision 2001/837/EC [2001] OJ L319/1; Nowag (2017), p. 76.
[64] Cf. Nowag (2017), p. 74.

Agreements that 'may restrict' competition were, according to the 2001 Horizontal Guidelines, agreements that appreciably restricted the parties' ability to devise the characteristics of their products or the way in which they produce them, thereby granting influence over each other's production or sales.[65] The same was true for agreements that substantially affected the output of third parties.[66] The Commission gave three examples of such agreements: the first was when the agreement lead to a significant effect on an important proportion of the parties' sales as regards their product or production processes. The second was where parties allocated individual pollution quotas.[67] The third example was when parties appointed an undertaking as exclusive provider of collection and/or recycling services for their products, provided that actual or realistic potential providers existed.[68] Agreements that may restrict competition either way required a case-to-case analysis, and all such cases depended on their market share. If parties had a 'significant proportion' or a 'major share,' Article 101(1) TFEU would automatically apply.[69] The Commission did not give any indication about when a market share was held to be sufficiently 'significant.'[70] The market share analysis was solely concerned with whether market share was above or below a certain threshold.[71] If above that threshold (although that threshold was not defined), the agreement would breach Article 101(1) TFEU. It therefore gave little to no room for environmental consideration: all agreements of sufficient market power, where the agreement affects outputs, would be subject to Article 101(1) TFEU.[72]

2.2.1.2 Rule of Reason

Rule of reason in this paper refers to a European rule of reason (in contrast to the more widely known American rule of reason), which applies when courts find that although a certain behaviour may have an effect on competition, the behaviour is not subject to the prohibition of Article 101(1) TFEU.[73] It applies to cases where the arrangement considered to be contrary to Article 101(1) TFEU is not prohibited, as it provides a benefit to society.[74] Thus, environmental agreements can be excused from Article 101(1) TFEU if a proportionality test shows that their public policy aims outweigh their

[65] 2001 Horizontal Guidelines, § 189.
[66] Ibid § 189.
[67] Ibid § 190.
[68] Ibid § 191.
[69] Ibid § 190.
[70] Nowag (2017), p. 73.
[71] Ibid, p. 73.
[72] Ibid, p. 74.
[73] Cf. Nowag (2017), p. 216.
[74] Ibid, p. 217; *Wouters* (2002).

negative effect on competition.[75] If so, the assessment does not go into Article 101(3) TFEU at all. This concept has also been referred to as 'ancillary restrains' or 'objective necessity test.'[76] The European rule of reason allows for the second form of integration, balancing, in competition law.[77] A premise for balancing interests in this way it that there is no hierarchy between the aims that are being balanced.[78] If so, the test would not be necessary. As a hierarchy between the EU's aims has not been disclosed, a rule of reason test may be of relevance when examining public policy, such as environmental objectives, under Article 101(1) TFEU.[79]

The European rule of reason is often explained with reference to the *Wouters* case from 2002, which prohibited Dutch lawyers from forming partnerships with other professions.[80] The Court of Justice concluded that despite its hindering of production and technical development within the meaning of Article 101(1) TFEU, in the 'overall context' the agreement was proportionate to its aim of promoting quality of legal services.[81] The Court of Justice hence made use of a rule of reason test to determine that the net effect of the agreement was beneficial to society, and it did not constitute a restriction of competition. Consequently, Article 101(1) TFEU was found not to be breached and the assessment did not go into Article 101(3) TFEU at all.[82]

The precedent from *Wouters* was considered ambiguous.[83] While it was clear that the Court has introduced a doctrine which cut across the express wording of Article 101(1) TFEU, it remained unclear whether that doctrine was a new beginning or an evolutionary dead-end.[84] However, the European rule of reason was confirmed in the case *OTOC,* which concerned a regulation by the Portuguese Order of Chartered Accountants (OTOC) in relation to its members. The order required accountants to obtain a number of training credits per year, of which one third had to be obtained inhouse. Although the Court reached the opposite result as in *Wouters,* it did acknowledge the rule of reason approach in its assessment and thereby established it further.[85]

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[75] Cf. Nowag's reasoning about *Wouters* (2002) and case *Meca-Medina* (2006). It should be noted that the case *Albany* (1999), where the rule of reason did not involve a proportionality test, focused on determining whether the context was of economic nature, rather than weighing different aims against each other.
[76] Ibid, p. 216.
[77] Nowag (2017), p. 217.
[78] Townley (2009), p. 48.
[79] Cf. Nowag (2017), p. 215; *Wouters* (2002).
[80] *Wouters* (2002), cf. § 86 ff.
[81] Ibid, § 97.
[82] *Wouters* (2002), I-1696 – I-1697.
[83] Cleaver (2013).
[84] Ibid.
[85] *OTOC* (2013), § 93.

Case law shows that rule of reason has been applied to horizontal agreements, but its application to horizontal *environmental* agreements has yet to be tried in court. It has been suggested that the European rule of reason only can account for national policies to be justified, while EU policies would be balanced under Article 101(3) TFEU.[86] That would mean that the European rule of reason would require a connection with or link to a state to be applicable. Yet, national policies have been considered under Article 101(3) TFEU and it is often hard to distinguish EU public policies from national policies in the spectra of market-freedoms and shared competences, as they many times are integrated or overlap.[87] Hence, it is unclear why the European rule of reason should not be applied to EU public policies.[88] As Nowag states, The European rule of reason approach is broad and can also be applied to many other areas including environmental protection, even though it may be difficult to demonstrate its support in case law.[89]

2.2.2 Assessment under Article 101(3) TFEU

If an agreement is found to breach Article 101(1) TFEU, a chance of exemption is found in Article 101(3) TFEU. Article 101(3) TFEU puts up four cumulative requirements. It concerns any agreement, decision or concerted practice which

> **1)** contributes to improving the production or distribution of goods or to promoting technical or economic progress, while **2)** allowing consumers a fair share of the resulting benefit, and which does not:
> **3)** impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,
> **4)** afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[90]

The four conditions are cumulative and exhaustive, and goals pursued by other Treaty provisions can only be taken into account to the extent they can be subsumed under the four conditions of Article 101(3) TFEU. Thereby, environmental integration must fall under the above provisions to be exempted.[91] As the purpose of Article 101(3) TFEU is to balance pro- and anti-competitive effects of an agreement, the efficiencies related to the first

[86] Nowag (2017), p. 221.
[87] Ibid, cf. Case C-360/92P *Publishers Association v Commission* [1995] ECR I-23, EU:C:1995:6.
[88] Nowag (2017), p. 221.
[89] Ibid.
[90] Article 101(3) TFEU with author's markings.
[91] Article 81(3) Guidelines § 42.

and second criteria are crucial to determine what those pro-competitive effects are.[92]

According to the Commission only 'objective economic benefits' can be taken into account under Article 101(3) TFEU.[93] Objective benefits means that efficiencies are not assessed from the subjective point of view of the parties.[94] Economic benefits means that they must be economically measurable; undertakings must describe and explain in detail how and why non-cost-based efficiencies constitute an objective economic benefit.[95] With this perspective, an assessment of environmental benefits under Article 101(3) TFEU can be carried out only when the environmental benefits are calculated into economic terms, and compared to the costs for consumers.[96] The Commission clarifies that "the more objectively the economic efficiency of an environmental agreement is demonstrated, the more clearly each provision might be deemed indispensable to the attainment of the environmental goal within its economic context."[97] Thereby, it may seem like decision makers are no longer able to consider non-economic concerns when assessing anti-competitive agreements.[98] Environmental benefits fulfil the first criteria insofar they can be converted into objective economic benefits.

This economic approach to environmental benefits has been demonstrated in the case *Chicken of Tomorrow*, which is a Dutch case from 2014. The case concerned an industry-wide sustainability arrangement between producers and retailers about replacing regularly-produced broiler chicken meat, that is currently part of the standard product range at supermarkets, with a more sustainable chicken option.[99] As part of the assessment, the Dutch Competition Authority Autoriteit Consument & Markt (ACM) looked into how much value consumers attach to the measures for the improvement of animal welfare of broiler chickens, by conducting a 'willingness-to-pay' study which revealed that consumers were willing to pay an extra 68 eurocent per kilo of chicken.[100] ACM also considered the positive environmental effects, which they calculated as 14 eurocent per kilo of chicken. They then compared the sum of what consumers were willing to pay and the positive environmental effects, 82 eurocents, to the increased costs for consumers,

[92] Article 81(3) Guidelines § 11, 59.
[93] Ibid § 33.
[94] Ibid § 49.
[95] Ibid § 57.
[96] Cf. case law, eg. *CECED* (2000); *Chicken of Tomorrow* (2014); Article 81(3) Guidelines §§ 5, 24, 46.
[97] DAF/COMP(2006)30, p. 181.
[98] Kingston (2012), p. 30.
[99] *Chicken of Tomorrow* (2014), p. 1.
[100] Ibid, p. 6.

which was EUR 1.45 per kilo of chicken, and concluded that the benefits of the arrangement did not offset the costs.[101] Thus, the arrangement did not result in 'net benefits' for consumers, and the ACM decided that it was a restriction of competition under Article 101(1) TFEU.[102]

Another Dutch case from 2013 is *Energieakkoord*,[103] in which a group of 40 stakeholders (many who were competitors) entered into an agreement to implement a number of measures to promote sustainable energy by reducing carbon dioxide emissions in the Netherlands. Ultimately, the measures would reduce production capacity and close down eight coal-fired power plants in a coordinated manner.[104] The deal, which had a sole environmental focus, was found to give rise to competition issues due to its coordinated restrictive behaviour that decreased electricity output and increased consumer prices.[105] In order to value the agreement's positive environmental effects the ACM used shadow prices, which is common practice when determining cost of polluting emissions.[106] In their valuation, they found that

> "reductions of NOx and SO2 emissions can be valued at EUR 9.40 per kilo NOx and EUR 5.40 per kilo SO2… [and that] the value of the aforementioned average emissions reductions of 1.5 kton NOx, 2.0 kton SO2 and 0.1 kton particles is thus estimated at EUR 30 million in total per year over the period of 2016-2021 (that is EUR 180 million for the entire period)."

This calculation of pollution savings was then compared to the increased price, which the ACM estimated to

> "an average annual increase in the costs of total electricity consumption in the Netherlands for the period of 2016 – 2021 of EUR 75 million (which is EUR 450 million for the entire period)".[107]

With these calculations, the ACM found the deal guilty of breaching Article 101(1) TFEU. Although the criteria of Article 101(3) TFEU were applicable, the positive economic effects were found insufficient to outweigh the negative impact on competition.[108] Interestingly, the ACM argued that because the Netherlands have a national cap on carbon dioxide emissions, a reduction in emissions deriving from this deal would lead to less incentive from other parties to maintain low emission levels. Moreover, the ACM

[101] Ibid.
[102] *Chicken of Tomorrow* (2014), p. 6.
[103] *Energieakkoord* (2013).
[104] Kloosterhuis and Mulder (2013) p. 1; *Energieakkoord* (2013), p. 7.
[105] Munsch (2018), p. 15.
[106] *Energieakkoord* (2013), p. 4.
[107] *Chicken of Tomorrow* (2014), p. 5.
[108] *Energieakkoord* (2013), p. 7.

argued that reduced carbon dioxide emissions would lead to fewer claims to emissions allowances, which other parties would be able to use through the EU system of emissions trading. Thereby, the carbon dioxide emission reduction would be cancelled out by an increase in emissions elsewhere. Because there was no national cap on the emission of particles, nitrogen oxide/dioxide or sulphur dioxide, the reduction of those emissions were the only positive effects that were included in the assessment.[109] Because the agreement did not fulfil the first requirement of Article 101(3) TFEU, the other requirements were not investigated. Although both *Chicken of Tomorrow* and *Energieakkoord* are national cases from a Member state, they demonstrate how sustainability benefits may be assessed with an economic approach.

Moreover, the decision in *CECED*, in which undertakings in the washing machine industry decided to stop producing certain energy inefficient washing machines, demonstrated that environmental benefits from using less energy were not sufficient to fulfil the exemption criteria in itself, as the Commission converted efficiencies into objective economic benefits before letting the agreement pass the assessment.[110] Nevertheless, the Commission included a generous variety of benefits under their Article 101(3) assessment, such as future price reductions, possible research and innovation solutions and hypothetical emission reduction.[111] They also stated that the energy efficient washing machines might become sold at a lower price in the future.[112] Such a generous line of reasoning suggests that although an assessment might require a conversion of environmental consideration into objective economic benefits, it may be open to including both prospective and immediate economic values. Some researchers argue, however, that the Commission has been reluctant to weigh general public interest considerations in cartel decisions since the *CECED* case.[113]

The balancing of public policy goals has gained support in case law in the past. According to Townley, EU Courts have a tradition of balancing public policy goals using the principle of proportionality within Article 101(3) TFEU.[114] In the case *Métropole Télévision,* the Court of First Instance stated 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

[109] *Energieakkoord* (2013), p. 4-6.
[110] *CECED* (2000), § I, §§ 47-57.
[111] Ibid § 48-56.
[112] Ibid § 52-53.
[113] Schinkel et al (2016), p. 2.
[114] Townley (2009) p. 65.

in order to grant exemption under Article [101(3)] of the Treaty."[115] The Court of First Instance also said 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.[116] Thereby, the Court opened up for an exemption to base itself on considerations of public interest. Further consideration of public policy has been showed in the cases *Metro I* and *Matra*,[117] in which public interests were considered legitimate benefits but translated into cost savings or other efficiency gains before being exempted under Article 101(3).[118] Yet, since the 2004 modernisation of the guidelines,[119] there have been no cases where non-economic environmental benefits have outweighed economic efficiency.[120]

Researchers such as Wasmeier state that environmental protection can no longer be seen as an element outside the common market that may be taken into consideration only if it does not interfere with the achievement of economic objectives.[121] Rather, union law should "be interpreted in a way that renders it consistent with environmental protection requirements, respectively with the objective of protection of the environment."[122] Likewise, Kingston states that the Article 81(3) Guidelines take the approach that Article 101(3) TFEU is concerned with net consumer welfare, in contrast to Article 101(1) TFEU which focuses on solely consumer welfare.[123] The net consumer welfare approach in turn opens up for a broader interpretation as to what should be included within objective economic benefits. She claims that the Commission, in documents such as the *White Paper on the Modernisation of the Rules Implementing Articles [101 and 102] of the Treaty* and 2010 Horizontal Guidelines, adopts a narrow view of the function of Article 101(3) TFEU, "allowing balancing of competitive restrictions against efficiency gains to the exclusion of non-economic factors."[124] Moreover, Monti interprets *CECED* and *DSD* as suggesting that environmental protection is becoming a core value of competition law, along with economic freedom,

[115] Joined cases of T-528, 542, 543 and *Métropole Télévision* (1996) § 118. The case concerned the public interest of broadcasting television between the European Broadcasting Union and its members.
[116] Holmberg (2014), p. 50.
[117] Case T-289/01, DSD [2007] ECR II-1619.
[118] 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.
[119] IP/04/411.
[120] Holmberg (2014), p. 49.
[121] Wasmeier (2001), p. 1.
[122] Ibid, p. 164.
[123] Kingston (2012) p. 262.
[124] Ibid, p. 263.

market integration and efficiency.[125] This approach may however seem doubtful, given the 2004 competition law modernisation.[126]

In the OECD policy *Environmental Regulation and Competition* from 2006 the Commission states that "it must be recognized that it may not always be possible to secure public environmental benefits without affecting the degree of competition in the market," which seems to open up for reduced competition in favour of environmental protection.[127] However, in the same document, the parties, including the EU, declare that special consideration should not be taken for environmental impacts or 'environmental overrides,' and that environmental integration should be designed to achieve its aims without unnecessary restrictions of competition.[128] This line of reasoning gives the impression that there in fact is an internal hierarchy within the EU aims, in which environmental policy is second to competition goals. Ultimately, incorporation of environmental objectives within competition law seems to be called upon by doctrine and the Treaties, but left to policy makers, judges and legislators to implement.[129]

2.2.2.1 The First Condition

The purpose of the first condition – contributing to improving the production or distribution of goods or to promoting technical or economic progress – is to define the types of efficiency gains that can be taken into account and be subject to further tests of the second and third criteria.[130] Hence, the issue of how environmental factors should be taken into account comes down to the interpretation of the first condition of Article 101(3) TFEU: does environmental benefits constitute 'improvement of production or distribution of goods' or 'promoting technical or economic progress'?[131]

There are two alternative approaches to be taken when determining what constitutes objective benefits. The first one is a narrow approach, which can be compared to the first form of environmental integration as one seeks guidance in the paragraph's wording.[132] The other alternative is a broader approach, which may be compared to the second type of environmental integration. With a narrow approach, the received benefits of the agreement in question must improve the production or distribution of goods or be

[125] Monti (2002), p. 1075.
[126] Holmberg (2014), p. 49.
[127] DAF/COMP(2006)30, p. 10.
[128] DAF/COMP(2006)30, p. 10.
[129] Nowag, (2014), p. 12.
[130] Article 81(3) Guidelines, § 50.
[131] Holmberg (2014), p. 44.
[132] Nowag (2017), p. 232.

converted into technical or economic progress.[133] Efficiencies can be either cost efficiencies or qualitative efficiencies.[134] If environmental integration cannot be defined as either of those, the assessment will end without considering the other three exemption conditions as it does not fulfil the first of the cumulative criteria.

In its XXVth report on Competition, the Commission held that improving the environment was to be regarded as a factor that improved production or distribution or promoted economic or technical progress.[135] This view was supported by the 2001 Horizontal Guidelines.[136] The report was however established before the 2004 modernisation on competition policy and the Commission might have changed attitudes since.

Environmental improvements have previously been considered technical progress.[137] This has been the case for example when the environmental benefit constitutes an improvement of production which in turn contributes to technical or economic progress, as happened in the *CECED* case mentioned above.[138] When assessing the *CECED* agreement under Article 101 TFEU, the Commission stated that the agreement indeed lead to increased prices and less choice for consumers, making it prohibited under Article 101(1) TFEU. However, they expressed that "washing machines which consume less energy are objectively more technically efficient,"[139] thereby establishing a close link between energy efficiency and technical development. Hence, the *CECED* case was exempted under Article 101(3) TFEU.

Moreover, the 2010 Horizontal Guidelines state that environmental aspects can lead to increased product quality.[140] When discussing quality improvements of environmental art, one refers to the environmental quality of the product.[141] An environmental quality improvement could be, for example, if all other elements stay the same but production omissions were cut by half. Although some evidence supports the idea that improved environmental performance enhances quality of a product, a product's

[133] Cf. Article 81(3) Guidelines, § 59.
[134] Article 81(3) Guidelines, § 59.
[135] XXVth Report on Competition Policy (1995), § 85.
[136] 2001 Horizontal Guidelines, § 193.
[137] Vedder (2003) p. 210.
[138] Cf. Cases *Exxon/Shell* (IV/33.640) Commission Decision 94/322/EC [1994] OJ L144/20, paras 67–8, P*hilips/Osram* (IV/34.252) Commission Decision 94/986/EC [1994] OJ L378/37, paras 25–6 , and 27 and *Ford/Volkswagen* (IV/33.814) Commission Decision 93/49/EEC [1993] OJ L20/14, para 26. For further information on the topic, see Nowag (2017), p 226 ff.
[139] *CECED,* (2000) § 48.
[140] 2010 Horizontal Guidelines, § 308.
[141] Nowag (2017), p. 232.

'quality' is a subjective term that depends on the extent to which the product meets the needs of the consumer.[142] Therefore, one can assume that some consumers will not consider environmental performance improved quality, while others will. As Nowag describes it, it would in essence be an empirical question whether consumers would see the environmental benefit as part of the environmental quality of the product. When this question is answered negatively, one needs to turn towards a broader interpretation of 'benefits' to find exemption for a horizontal environmental agreement.[143] If environmental quality however can be subsumed under the first condition of Article 101(3) TFEU, it would be included via the first form of integration. It is uncertain if non-economic benefits, such as preserving endangered species and biodiversity or protecting natural resources, can be included in the assessment, unless they are translated into objective economic benefits.[144]

2.2.2.2 The Second Condition

The second condition requires that consumers receive a fair share of the resulting benefits. What constitutes a 'fair share' is determined on a case-by-case basis, but it must at least be proportionate to the cost to consumers.[145] According to the Article 81(3) Guidelines, the benefits from an agreement must fall into the hands of the same individual consumers that were negatively affected by the restrictive measures.[146] Therefore, even if one presumes that an agreement leads to benefits, it is not certain that the benefits of a certain product or service will affect the exact same consumers that suffer from the restrictive disadvantage of the agreement, as efficiency gains many times occur on a different market than the effected one.[147]

If adopting a narrow approach of 'benefits,' it is important that the resulted benefits affect the current final individual consumer. When applying a broader approach, the question is whether benefits that concern others than the affected consumer can come into play; for example, those that fall upon a different consumer group or society as a whole. The Article 81(3) Guidelines declare that negative effects in one market cannot normally be balanced against and compensated by positive effects in another unrelated geographic market or product market.[148] However, benefits that occur on a different market than the restricted one can be taken into account, where the affected

[142] Ibid, p. 233.
[143] Ibid, p. 234.
[144] Vedder (2003), p. 46.
[145] 2010 Horizontal Guidelines, § 49.
[146] Article 81(3) Guidelines, § 43.
[147] Kloosterhuis and Mulder (2013), p 6.
[148] Article 81(3) Guidelines, § 43.

consumers are 'substantially the same.'[149] Exactly what constitutes 'substantially the same' seems to be open to interpretation. There are a number of cases that have passed the assessment in Article 101(3) TFEU, in which the affected consumers were not substantially the same as those enjoying the derived benefits.[150] For example are R&D agreements, purchasing agreements or joint ventures that aim to develop new products more likely to create new markets or affect future consumers, rather than those affected by the restriction.[151] The Commission has, surprisingly, stated in its guidelines that a time lag in the efficiency pass-on does not exclude the application of 101(3) TFEU; however, a greater time lag will require a greater demonstrable efficiency.[152]

In *CECED*, the Commission distinguished between the individual consumer benefits and the collective environmental benefits.[153] For individuals, they found that the washing machines that were still being sold had higher energy efficiency, essentially reducing costs of electricity, water and detergent to the individual.[154] For collective environmental benefits, they found the economic worth of emission reduction of sulphur dioxide, nitrous dioxide and carbon dioxide to be seven times greater than the increased purchase costs or more energy-efficient washing machines.[155] The Commission concluded that "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."[156] Based on this reasoning, it seems that the Commission supports a broader interpretation of the affected consumer group (in this case, the society), given that the collective benefits are sufficiently large and can be economically demonstrated. This view is supported by Vedder, who argues that a holistic interpretation of Article 11 TFEU is required when discussing the affected consumer group.[157]

2.2.2.3 The Third Condition

The third condition is an indispensability test, in which other measures to achieve the same result are tested against the measures presented in the current agreement. The aim is to determine if equivalent benefits can be achieved in a less restrictive manner. The indispensability test applies to

[149] Ibid § 43.
[150] Cf. Nowag (2017), p 234 ff; Case *GlaxoSmithKline Services v Commission* (n 134), para 248; DAF/COMP(2013)17, Paris 2013.
[151] Cf Nowag (2017), p. 234.
[152] Article 101(3) Guidelines, § 87.
[153] *CECED,* (2000) §§ 52-57.
[154] Ibid §§ 22, 52.
[155] Ibid § 56.
[156] Ibid § 56.
[157] Vedder (2003), p. 173.

environmental agreements in the same way as to any other horizontal agreement. According to Kingston, many parties have failed to fulfil this criterion as they have included disproportionately restrictive measures.[158]

Interestingly, conditions one and three seem to be closely correlated in this way: anti-competitive measures are first weighed against beneficial effects in criterion one, before being compared to other restrictive measures in criterion three. Thus, a change in restrictive measures will affect the assessment of criterion one and three respectively.[159] This was the case in *Energieakkoord*, in which the ACM notes that the undertakings could look into providing less restrictive measures in more detail, as a less restrictive solution could result in reduced negative price effects which could lead to a different conclusion.[160] Moreover, Townley advocates a narrow interpretation of 'less restrictive measures' which he states should include an analysis of all possible measures to obtain the objective, including direct regulation.[161]

2.2.2.4 The Fourth Condition

The final condition ensures that competition to some extent remains in the relevant market. The Article 81(3) Guidelines state that "the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. Ultimately, the protection of rivalry and the competitive process is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements."[162] In line with this, Kingston states that it is hard to conceive of a situation where total elimination of competition would be indispensable to achieve the environmental aims of an agreement.[163]

2.3 Conclusion

This chapter demonstrated how horizontal environmental agreements are assessed under Article 101 TFEU. There are two ways in which agreements of horizontal nature can avoid being subject to nullity based on Article 101(1) TFEU. Firstly, an agreement can be constructed in a way that does not constitute a restriction of competition. This would be the case if the agreement does not provide any individual obligation upon parties or only provides loose commitments, has no effect on product or production diversity or gives rise to new market creation. This may also be the case if the parties have small or

[158] Kingston (2012), p. 282.
[159] *Energieakkoord* (2013), p. 6.
[160] *Energieakkoord* (2013), p. 6.
[161] Townley (2009), p. 312.
[162] Article 81(3) Guidelines, § 105.
[163] Kingston (2012) p. 288; Holmberg (2014), p. 49.

insignificant market shares. Secondly, the Court can apply a rule of reason assessment if a proportionality test shows that public policy aims outweigh the negative effect on competition. However, a rule of reason-based approach has received little formal guidance, and although there seems to be no evident reasons against using it, its application remains uncertain.

Article 101(3) TFEU provides more complex guidance on how to integrate environmental objectives. It seems that the greater and most difficult part of the assessment lies in determining what constitutes 'benefits,' and how to calculate and decide the pass-on to consumers. It has been shown, for example by the *CECED* case, that environmental consideration can be subsumed under the exemption conditions through the first kind of integration. Environmental objectives need to be translated into objective economic benefits to fall under the exemption. The assessment will to a large extent depend on the interpretation of 'technical and economic progress' in the first condition, and 'consumers' in the second. If adopting a narrow approach to the interpretation of benefits, The benefits from the agreement must fall into the hands of the same individual consumers that were negatively affected by the restrictive measures or substantially the same consumer group. If adopting a broader approach, however, it seems to be sufficient for the agreement to benefit a different consumer group or society as a whole. Consumers can then be viewed as a collective, and a 'net effect' is observed. As demonstrated in the *CECED* case, the Commission can take both individual and collective benefits into account. They do however retain an economic approach to validate and value the benefits. In order to carry out a balance test, the benefits must be converted into economic measures and weighed against the costs of the restriction. A broader application does not seem to abandon an economic approach to interpretation or balancing.

It remains unclear how non-economic factors of environmental protection should be assessed in competition law. With reference to Article 11 TFEU, the question arises whether the scope of integration under competition law should be expanded further. Although this standpoint is supported by doctrine, a broader interpretation does not seem to depart from an economic approach. Currently, a tendency exists to exclude environmental considerations from the analysis, contrary to what Article 11 TFEU requires. From a business perspective, it seems difficult to draw clear conclusions on how to construct a lawful horizontal environmental agreement.

3 Environmental Standard Setting in Competition Law

This chapter investigates the current legal situation for environmental standard setting agreements, with the objective to examine if and how standard setting agreements may be used for environmental integration purposes. The chapter will first provide an introduction to the topic of standardisation agreements before investigating how they are assessed under EU competition law. Because standard setting agreements often concern technical standards, these will be included in the investigation and, if possible, applied to environmental standards. By the end of this chapter, the reader should have obtained a general overview of how standardisation agreements can be used for environmental integration, and how standardisation agreements are currently assessed. Further, the reader should have obtained an understanding of what elements are of importance in that assessment, which will be useful when comparing horizontal environmental agreements to standard setting agreements in the following chapter.

3.1 Background

There seems to be varying opinions regarding exactly what constitutes a standard. Standards have been defined by the Commission as "voluntary documents that define technical or quality requirements with which current or future products, production processes, services or methods may comply," which is the definition that will be used in this paper.[164] Standards have also been defined as "technical specifications: a specification contained in a document, which lays down the characteristics required of a product, such as the levels of quality, performance, safety or dimensions […]."[165] Other alternatives include "a structure for a solution to a demand," [166] "permissible limits"[167] and environmental standards in particular as "the permissible limit of human pollution of environmental 'compartments' (air, water, land, ecosystems)."[168] Altogether, common elements of the different definitions are that standards are written documents that outline or define technical or quality requirements or limits.

[164] COM (2011) 311 final, 1.1.1.
[165] Directive 98/34/EC Art 1 § 2.
[166] Lundqvist (2014), p 35.
[167] Nath (2009), Chap. 1.1.1.
[168] Ibid.

Competition regulators pay attention to standard setting because a standard legally constitutes an agreement between companies.[169] Many standard setting agreements are of horizontal nature and can be guided by the 2010 Horizontal Guidelines. According to the guidelines, standardisation agreements have as their primary objective 'the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply.'[170]

Standards can take different forms. They can range from adoption of consensus-based standards by recognised European or national standards bodies, through consortia and fora, to agreements between independent companies.[171] The Commission has divided standards within the EU into two different types: either, they are European standards developed at the request of the Commission,[172] often on the basis of a so-called 'mandate.'[173] The other alternative is that they are developed at the initiative of other actors, such as businesses, national standardisation bodies, stakeholders and so on.[174] The vast majority of European standards are business-initiated.[175] According to ISO classifications, standards may be divided into eight groups: basic/infrastructure standards, terminology standards, testing standards, product standards, process standards, service standards, interface/interoperability standards and standards on data.[176] Basic standards are most often set by SDOs, while e.g. interoperability standards are more likely to be an issue to competition law.[177] From a competition law perspective, it is of fundamental importance to grasp what sort of standard is up for scrutiny.[178] What in this thesis is defined as environmental standards can fall under either of these groups, as long as the standard has a positive environmental impact.

The main focus of standard setting often revolves around the information and communication technology (ICT) sector and other technology standards.[179] Standards have their biggest impact on technology markets, as they provide

[169] Schellingerhout, p. 3.
[170] 2010 Horizontal Guidelines § 257.
[171] Ibid.
[172] Often adopted by the European Committee for Standardisation (CEN), the European Committee for Electrotechincal Standardisation (Cenelec) and the European Telecommunications Standards Institute (ETSI).
[173] Tool #18. The choice of policy instruments, p. 112.
[174] 2011/0150 (COD), p. 2.
[175] Ibid and *Joint Initiative on Standardisation.*
[176] ISO/IEC Guide 2:1996.
[177] Lundqvist (2014), p. 184.
[178] Ibid.
[179] Ibid, p. 1. As stated by Lundqvist, ICT would not be interoperable and unable to communicate without standards, which is why standardisation at the core of such technologies.

the very foundation of interoperability.[180] Therefore, most communications, doctrine and legal guidance on the topic of standard setting focus on technical standards. These legal provisions may however be applied to environmental standards, hence their relevance to this paper.

Lundqvist states that while public standards are on the decline, private standards are on the rise.[181] Standard setting can be seen as a more effective alternative to move an industry towards production of more environmentally friendly products, as it can avoid cumbersome, government-imposed regulations and red tape.[182] According to Schellingerhout, the Commission has a policy of not prescribing in detail the rules that standards bodies must adopt. Instead, they leave the final choices to the industries, and consider different rules appropriate for different bodies and sectors, as "the industries generally will have better knowledge of what works."[183] While this might sound like a surprisingly lenient approach, some researchers argue that it is difficult to ensure compliance with privately initiated standards, and that they must be set and operated within a regulatory framework to be effective.[184]

As for environmental standard setting, the Commission has highlighted the necessity to improve standard setting and usage of standards in Europe in its communication "Europe 2020 Strategy; a strategy for smart, sustainable and inclusive growth,"[185] in which they state that standards are required for long-term competitiveness of the European industry, and for the achievement of important policy goals.[186] The Commission has also stated that "European standards will play a crucial role in a wide variety of areas, wider than today, [… in areas such as] tacking climate change and the resource efficiency challenge."[187] They claim that that standards are more important than ever in a globalised economy.[188]

The Commission portrays an overall positive attitude toward environmental standardisation agreements as a tool for sustainability.[189] They have previously stated that "European standardisation can support legislation and policies on climate change, green growth and can promote the transition to a low carbon and resource- efficient economy."[190] They further point out that

[180] Schellingerhout (2011), p. 3.
[181] Lundqvist (2014), p. 184.
[182] DAF/COMP(2010)39, p. 12.
[183] Schellingerhout (2011), p. 3.
[184] Cf. COM(2011) 311 final, 1.1.2.
[185] COM(2010)2020.
[186] 2011/0150 (COD), p. 2.
[187] COM(2011) 311 final, 1.1.2.
[188] Schellingerhout (2011), p. 3.
[189] Cf. COM(2011) 311 final, 1.1.2.
[190] COM(2011) 311 final, p. 10.

standards encourage resource efficiency by integrating requirements related to end-of-waste criteria, durability and recyclability; areas in which standards can be used to promote environmental sustainability.[191]

3.2 Legal Assessment

EU regulations on standards concern standards that are adopted by EU standardisation bodies, which falls outside the scope of this paper. As previously mentioned, standards setting agreements that are not adopted by the standardisation bodies are horizontal agreements relevant to Article 101 TFEU, and the general regulatory framework for horizontal agreements applies. Therefore, this section will start by investigating how the assessment of standardisation agreements is carried out under Article 101(1) TFEU before highlighting how standardisation agreements can be exempted under Article 101(3) TFEU.

The two kinds of environmental integration will be included as follows. The first kind, interpretation, is accounted for in the safe harbour discussed below, as well as the general rules for collaboration set out in the 2010 Horizontal Guidelines. The second kind of environmental integration seems to be more unusual when it comes to standard setting agreements, but might be found when assessing Article 101(3) TFEU and partly in the general rules for collaboration. This section will show that standard setting agreements primarily rely on the first kind of interpretation in Article 101(1) TFEU.

In general, the Commission has taken the view that there are clear benefits associated with standard setting.[192] Standardisation agreements frequently give rise to significant efficiency gains, such as the facilitation of market integration, encouraged competition on the merits, reduced costs and improved product quality.[193] Further, standardisation plays an important role for innovation by allowing companies to build on top of agreed solutions.[194] The initial assumption in the 2010 Horizontal Guidelines is therefore that standard setting agreements are pro-competitive.[195]

[191] Ibid.
[192] Ibid, 1.1.1 and Schellingerhout (2011), p. 3.
[193] 2010 Horizontal Guidelines § 308.
[194] Ibid.
[195] Lundqvist (2014), p. 198.

3.2.1 Assessment under Article 101(1) TFEU

The Commission has seldom found standardisation agreements to be restrictive agreements on their own.[196] Only in specific circumstances may standardisation agreements give rise to restrictive effects on competition.[197] This occurs mainly through reduction in price competition, hindering of innovative technologies and exclusion of or discrimination against certain companies by preventing their effective access to the standard;[198] in essence, when the standard reduces product diversity. Hence, there are a number of ways in which standardisation agreements can avoid falling foul of Article 101(1) TFEU.[199]

3.2.1.1 The Safe Harbour

In paragraph 280 of the 2010 Horizontal Guidelines, the Commission formulates an unofficial safe harbour for standardisation agreements. The paragraph states that standard setting will normally not restrict competition if the following four principles are met:

1. Participation in standard setting is unrestricted,
2. The procedure for adopting the standard in question is transparent,
3. There is no obligation to comply with the standard,
4. Access to the standard is on fair, reasonable and non-discriminatory terms (*FRAND* terms).

Firstly, standard setting members need to guarantee that all competitors in the market affected by the standard can participate, so that the standard does not impose any barriers to entry.[200] They need to have objective and non-discriminatory voting rights.[201] The standard setting process cannot be binding on parties in the sense that they must be able to enter or leave the standard as they please. To join a standard, businesses simply sign up, and to leave they announce their departure. Public pressure is many times the only means of monitoring compliance with the commitment.[202] Often a certificate is used to allow firms to publicise its compliance to potential buyers.[203] If the standard were binding, it would be presumed to negatively affect competition,

[196] Lundqvist (2014), p. 207.
[197] Ibid, p. 198.
[198] Ibid, p. 199.
[199] Schellingerhout (2011), p. 4.
[200] Ibid, p. 6.
[201] Ibid, p. 6.
[202] Roht-Arriaza (1997), p. 207.
[203] Ibid, p. 207.

and perhaps give rise to a restriction of competition by object.[204] Consequently, any standardisation agreement that is binding upon parties will fall foul under Article 101(1) TFEU.

Secondly, due to the transparency requirement, procedures need to be in place to inform about upcoming, on-going and finalised standardisation work.[205] Transparency implies that the standard must be open and *de facto* inform all stakeholders of upcoming rule making.[206] The Commission refers to the case *X/Open Group*[207] when stating that if the standard is closed to competitors and stakeholders in the affected market, the safe harbour will not apply, and it might result in a breach of Article 101(1) TFEU.[208]

Thirdly, whether standardisation agreements may give rise to restrictive effects on competition may depend on if the members of a standard-setting organisation remain free to develop alternative standards or products that do not comply with the agreed standard.[209] Signatories must be able to develop products outside the technology standardised under the agreement.[210] If the agreement binds members to only produce products in compliance with the standard, the risk of a negative effect on competition is significantly increased.[211] For each standardisation agreement, the assessment must take into account its likely effect on the markets concerned, on the one hand, and the scope of restrictions that possibly go beyond the objective of achieving efficiencies, on the other.[212] In this sense the second form of integration plays a part in the assessment. Finally, standardisation agreements would have to ensure effective access to the standard on fair, reasonable and non-discriminatory terms. If the standard closes off third parties, it will also affect competition negatively.[213]

According to Lundqvist, standard setting agreements must fall within the safe harbour if the standard represents a *de facto* natural monopoly.[214] By nature, standards cannot include all specifications or technologies. In some cases, it might be necessary to have only one technological solution.[215] If the market only can hold one standard due to for example network effects, or because the

[204] Schellingerhout (2011), p. 6.
[205] Ibid, p. 6.
[206] Lundqvist (2014), p. 200.
[207] Case IV/31.458, *X/Open Group* § 42.
[208] Lundqvist (2014), p. 200.
[209] 2010 Horizontal Guidelines §§ 280, 293.
[210] Lundqvist (2014), p. 207.
[211] 2010 Horizontal Guidelines § 293.
[212] Ibid § 315.
[213] Schellingerhout (2011), p. 6.
[214] Lundqvist (2014), p. 205.
[215] Schellingerhout (2011), p. 6.

standard reflects a basic technology, the signatories must apply the above criteria of transparency and open access.[216] Lundqvist also worries that the safe harbour is too big and should be more nuanced. His suggestion is that only interoperability standards should be catered by the harbour, as he argues it is too lenient in its current form.[217]

An interesting example of a business-initiated standardisation agreement is the *Voluntary Industry Agreement to improve the energy consumption of Complex Set Top Boxes within the EU* (Set top boxes agreement), which aims to increase energy efficiency of set top boxes in the EU, while encouraging innovation and competition.[218] The agreement sets permissible limits regarding energy efficiency levels and power management for complex set top boxes, and parties commit to reduce energy consumption through cooperation between Member States and the EU.[219] The Set top boxes agreement is non-binding, as parties are free to join and terminate the agreement with 28 days' notice.[220] The parties to the agreement control its implementation and signatories agree to be responsible to and monitored by the Commission in partnership with the signatories.[221] Compliance and monitoring is carried out by an internally appointed steering committee in cooperation with the Commission. The agreement carries a whole chapter on compliance, monitoring and revision, but it also states that is not of commercial art and shall not give rise to any commercial expectations or liability between the signatories.[222] The obligation to comply cannot be enforced in other ways than termination of the signatory status. Parties do however remain bound by its statutes while part of the agreement.

In order for the Set top boxes agreement to be legal, requirements included for example "openness to participation by all companies active on the CSTB[223] market; coverage of a large majority of the relevant economic sector; clarity and unambiguity of its terms and conditions; transparency; well-designed monitoring system; and no disproportionate administrative burden."[224] Although not explicitly referred to, the requirements closely resemble the criteria set out in the safe harbour for standardisation agreements. Hence, the Set top boxes agreement could be said to demonstrate efficiency of an environmental standardisation agreement without a legally

[216] Lundqvist (2014), p. 205.
[217] Ibid, p. 213.
[218] Set top boxes agreement, p. 4.
[219] Ibid, p. 4 ff.
[220] Ibid, § 6.2.
[221] European Commission website, set-top boxes (2019).
[222] Set top boxes agreement, chapters 5–6.
[223] CSTB stands for Complex Set Top Boxes.
[224] COM(2012) 684 final, p. 5.

binding framework.[225] The Commission considered the voluntary agreement a legitimate alternative to mandatory requirements, and the agreement was deemed more efficient and agile than legislation.[226] Therefore, the voluntary business-initiated agreement was preferred, and the Commission refrained from establishing legal provisions on the matter.[227]

3.2.1.2 The General Rules for Collaboration

The Commission has laid down collaboration rules for agreements that fall outside the safe harbour, but still should not be addressed under Article 101(1) TFEU.[228] For example, the Commission states that standardisation agreements that do not fulfil the safe harbour criteria can still be allowed if they do not constitute a negative effect on competition, if there are several competing standards in the market, or a standardised solution competing with a non-standardised solution.[229] If competition between standards exists, standard setting organisations can depart from the safe harbour criteria and instead try to compete with each other. In fact, the Commission encourages competition on the market for standards.[230] When there is room for competition, the Horizontal Guidelines state that the standard setting procedures may uphold competition by, in contrast to the safe harbour, *limiting* transparency and access to membership of the standard.[231] In other words, a less 'democratic' order may suffice if there is competition on the relevant market, e.g. between different standard setting organisations or technology providers.[232] Therefore, restrictive effects are unlikely in a market with genuine competition between a number of voluntary standards.[233]

The greater market impact of the standard, the more important that it allows for equal access to the standard setting process.[234] With this in mind, it does not seem to be an issue if the parties have large market shares. Although market shares should be taken into account, large market shares will not necessarily lead to the conclusion that the standard is more likely to give rise to restrictive effects on competition.[235] Instead, the 2010 Horizontal Guidelines state that the effectiveness of standardisation agreements is often proportional to the share of the industry involved in setting up and/or applying

[225] COM(2012) 684 final, p. 6.
[226] Ibid, p. 2 and regulation 107/2009.
[227] Ibid, p. 2.
[228] Lundqvist (2014), p. 205.
[229] Schellingerhout (2011), p. 6.
[230] Lundqvist (2014), p. 205.
[231] Ibid, p. 205.
[232] Ibid, p. 205.
[233] Schellingerhout (2011), p. 4.
[234] Ibid, p. 6 and 2010 Horizontal Guidelines, § 295.
[235] Lundqvist (2014), p. 184 and 2010 Horizontal Guidelines, § 296.

the standard.[236] The standard is legitimate even if parties jointly or separately hold a dominant position on the market, as long as the standard is free for other competitors to adopt and influence.[237] Finally, standard setting agreement is unlikely to have a negative effect on competition in the absence of market power.[238] If a 'permissible limit' is adapted by a company without market power – regardless of the other safe harbour criteria – ultimately, that company is not affecting anything but itself.

3.2.1.3 Rule of Reason

The second kind of environmental integration can, as described above, be found through the European rule of reason as well as in Article 101(3) TFEU. In theory, standardisation agreements – in essence being horizontal agreements – have the same chances of approval under a rule of reason-based approach as horizontal environmental agreements do. In practice, it seems unusual to apply rule of reason to standardisation agreements, as they are mainly addressed via interpretation in the Article 101(1) TFEU assessment. A rule of reason approach to assessing standardisation agreements has not been found in either case law or doctrine.

3.2.2 Assessment under Article 101(3) TFEU

The conditions of Article 101(3) TFEU were described in chapter 2.2.1 above and will be discussed with regard to standardisation below.

3.2.2.1 The First Condition

As previously mentioned, horizontal standardisation agreements are likely to give rise to efficiency gains due to their important role for innovation and market integration.[239] The information necessary to apply the standard must be effectively available to those wishing to enter the market.[240] Although standards are assessed on a case-by-case basis, standards creating compatibility between different technology platforms are considered likely to give rise to efficiency gains.[241] Further, paragraph 308 in the 2010 Horizontal Guidelines states that

> Standardisation agreements frequently give rise to significant efficiency gains. For example, Union wide standards may facilitate market integration

[236] Lundqvist (2014), p. 184 and 2010 Horizontal Guidelines, § 296.
[237] Ibid.
[238] Schellingerhout (2011), p. 6.
[239] 2010 Horizontal Guidelines, § 308.
[240] Ibid § 309.
[241] Ibid § 311.

> and allow companies to market their goods and services in all Member States, leading to increased consumer choice and decreasing prices. Standards which establish technical interoperability and compatibility often encourage competition on the merits between technologies from different companies and help prevent lock-in to one particular supplier. Furthermore, standards may reduce transaction costs for sellers and buyers. Standards on, for instance, quality, safety and environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality. Standards also play an important role for innovation. They can reduce the time it takes to bring a new technology to the market and facilitate innovation by allowing companies to build on top of agreed solutions.[242]

As Lundqvist mentions, it is not difficult to come up with a reason why a standard should be exempted under the first condition of Article 101(3) TFEU.[243]

3.2.2.2 The Second Condition

The second condition states that the agreement has to allow consumers a fair share of the resulting benefit. Efficiency gains must be passed on to an extent that outweighs the restrictive effects on competition.[244] The 2010 Horizontal Guidelines declare that "where standards facilitate technical interoperability and compatibility or competition between new and already existing products, services and processes, it can be presumed that the standard will benefit consumers."[245] Further, the guidelines state that a relevant part of the analysis is which procedures are used to guarantee that the interests of standards and end consumers are protected. Besides this, standardisation agreements will be assessed in the same way as all horizontal agreements. It is difficult to tell whether the presumption will benefit environmental standardisation agreements in particular. Standards will be addressed on a case-by-case basis and if the standard contributes to competition or improves compatibility, it will fall under the stated presumption. Otherwise, it will have to demonstrate its pass-on effects to consumers as per usual.

3.2.2.3 The Third Condition

As for the third criterion, restrictions cannot go beyond what is necessary to achieve the efficiency gains.[246] The Commission once again stresses the relevance of open access to standards, unless parties demonstrate significant

[242] 2010 Horizontal Guidelines § 308.
[243] Lundqvist (2014), p. 206.
[244] 2010 Horizontal Guidelines § 321.
[245] Ibid § 321.
[246] Ibid § 314.

inefficiencies of such participation.[247] Restrictions in standardisation agreements that make a standard binding and obligatory are in principle not indispensable, except for specific cases when it is necessary to the attainment of the efficiency gains.[248] For example, the *X/Open Group* case involved a collaboration between very large EU-based firms that wanted to limit the number of members developing an operation system. The collaboration was exempted under Article 101(3) TFEU as the members agreed to give access to the result.[249]

3.2.2.4 The Fourth Condition

Regarding elimination of competition, the Commission states that "while market shares are relevant for that analysis, the magnitude of remaining sources of actual competition cannot be assessed exclusively on the basis of market share except in cases where a standard becomes a *de facto* industry standard."[250] Hence, the greatest risk for elimination of competition is if third parties are foreclosed from the effective access to a standard that becomes an *de facto* industry standard, either by choice or by majority usage.[251] Competition is not likely to be eliminated if the standard only concerns a limited part of the product or service, or if access is open and transparent.[252]

3.3 Conclusion

This chapter provided a general overview of how standardisation agreements are legally assessed under EU competition law. In sum, the unofficial safe harbour protects standardisation agreements, in particular those within the ICT sector, from breaching Article 101(1) TFEU. The safe harbour requires that agreements are non-binding, transparent, fair, reasonable, non-discriminatory and provide unrestricted participation. Knowing this, parties could possibly conduct or alter standardisation agreements to fall under the given legal framework. The general rules for collaboration declare that if there is competition between different standards, parties can depart from the safe harbour and act more freely within the given frames of collaboration. Also, parties of insignificant market power will not breach Article 101(1) TFEU.

[247] 2010 Horizontal Guidelines § 316.
[248] Ibid §§ 318, 320.
[249] *X/Open Group* (1987), § 42.
[250] 2010 Horizontal Guidelines § 324.
[251] Ibid.
[252] Ibid.

As for the assessment in Article 101(3) TFEU, standardisation agreements are expected to pass the first condition as they usually produce significant positive economic effects and are beneficial to competition and innovation. The 2010 Horizontal Guidelines give a thorough description of possible efficiencies deriving from standardisation agreements, which opens up for exemption under Article 101(3) TFEU. The third and fourth conditions of Article 101(3) TFEU may be compared to the safe harbour criteria of openness and transparency. In short, the indispensability condition of Article 101(3) TFEU requires that restrictions are indispensable to the attainment. When standard setting is open to all competitors and standards are not binding, the conditions are often considered indispensable. Therefore, this condition may be compared to the safe harbour's criteria of transparency and non-restrictiveness. The fourth condition of Article 101(3) TFEU requires that competition is not eliminated. When standards fulfil the safe harbour terms, competition is not considered restricted despite large market shares. Given this, it seems likely that standardisation agreements that would be exempted under Article 101(3) TFEU would also be allowed under the safe harbour – in which case the assessment would not go into Article 101(3) TFEU in the first case.

The overall attitude towards standardisation agreements seems to be strongly positive. Although the Commission also holds a positive attitude to environmental standardisation agreements, the guidelines and presumptions discussed above favour standardisation agreements within the ICT sector. Environmental standards are not as common or widely acknowledged as technical standards, but might benefit from the safe harbour protection and the legality presumptions in Article 101(3) TFEU either way. For most part, however, it seems that the assessment of standardisation agreements stays within Article 101(1) TFEU and does not get into issues of Article 101(3) TFEU at all.

4 The Differences Between Horizontal Environmental Agreements and Standard Setting Agreements

This chapter compares and contrasts horizontal environmental agreements to standardisation agreements, with the objective to highlight any differences in the legal assessments between the two. It starts by providing an analysis of the nature of the agreements, which looks into the different elements of the agreement types and their definitions. It then examines the differences in legal assessments using the findings from chapters two and three. This chapter will focus on organising and clarifying information discussed in the previous chapters. By the end of the chapter, the reader should have obtained a better understanding of what differences can be found between the two agreement types and their respective legal assessments.

4.1 Nature of Agreements

Many times, EU law treats horizontal agreements and standardisation agreements as two different agreement types with two very different functions.[253] This may be true, if one solely considers standardisation agreements as tools for creating a unified internal market within technological development, or as exclusively belonging to standardisation bodies or governments. The same is true if one adapts a narrow view of horizontal agreements as collusions or cartels that merely focus on economical profit, at the expense of consumer efficiencies and welfare. However, when standardisation agreements are privately initiated, industry-wide agreements concerning topics such as emission regulation, environmental protection or safety requirements, they start to resemble horizontal agreements. If both are used as tools for environmental sustainability, their differences are no longer evident. In fact, both horizontal environmental horizontal agreements and standardisation agreements are or can be

- of horizontal nature,
- between undertakings,

[253] Cf. How they are portrayed in the 2010 Horizontal Guidelines or in OECD's roundtable discussions DAF/COMP(2010)33.

- privately initiated and implemented,
- promoting cooperation and/or collusion between competitors, and
- likely to affect the outcome of products, processes and markets.

To a large extent, the building blocks of horizontal environmental agreements and standard setting agreements are the same. Being horizontal agreements, they risk becoming subject to competition law regulations via disruption or violation of market forces. However voluntary, they require participation or adoption of a set of rules, and coordinates behaviour with their competitors.

Horizontal environmental agreements are defined as "agreements entered into between actual or potential competitors by with parties undertake to achieve pollution abatement, as defined in environmental law, or other environmental objectives, in particular, those set out in Article 174 of the Treaty."[254] From this, one can see that horizontal environmental agreements by definition can be divided into a) pollution abatement, and b) other environmental objectives, referring to e.g. preserving, protecting and improving quality of the environment, protecting human health and promoting measures on an international level to deal with worldwide environmental problems.[255] Besides this are the general requirements 1) that the agreement is entered into between competitors, and 2) that is has an environmental objective. Standard setting agreements are defined as "voluntary documents that define technical or quality requirements with which current or future products, production processes, services or methods may comply".[256] Thus, standardisation agreements can be divided into a) defining technical requirements, or b) defining quality requirements. The general requirements include 1) written format, and 2) setting out requirements for products, production processes, services or methods. Through a comparison of these definitions, an overlap is found where environmental agreements are set out to preserve, protect or improve quality or human health, and standardisation agreements are developed to define quality requirements.

[254] 2001 Horizontal Guidelines, § 179. "The Treaty" in this definition refers to Article 174 Treaty of the European Community (TEC), which states that the Community policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems; see chapter 2.1 of this paper.
[255] Cf Article 174 TEC (no longer in force).
[256] COM(2011) 311 final, 1.1.1; see chapter 3.1 of this paper.

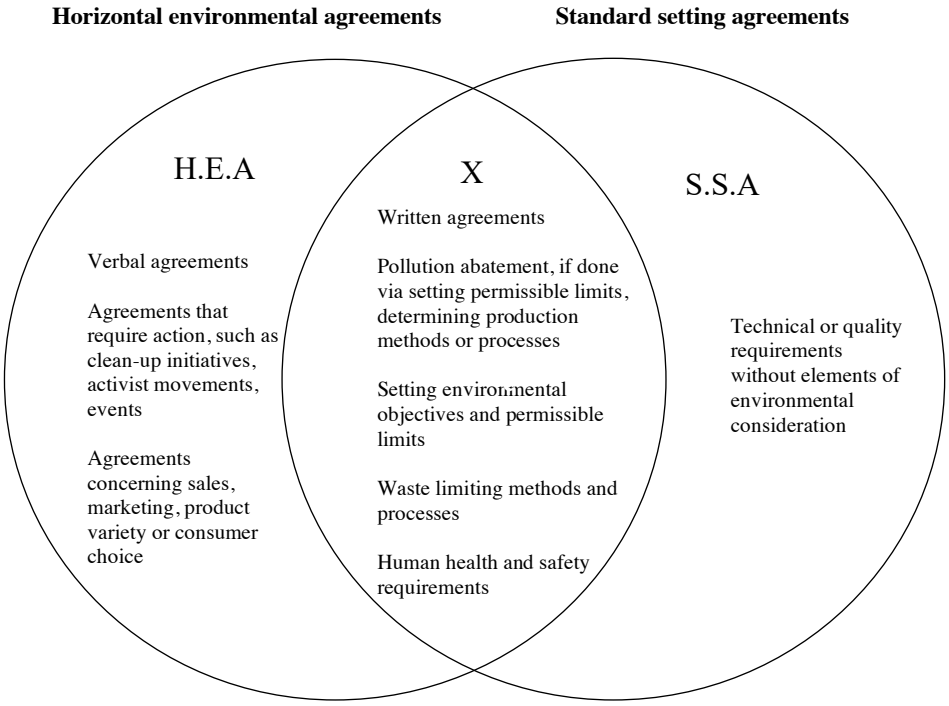

Diagram 2. Venn Diagram displaying the sets of horizontal environmental agreements and standard setting agreements.

Diagram 2 shows how the content of horizontal environmental agreements and standardisation agreements to a great extent overlap when comparing definitions. Area H.E.A demonstrates the part of horizontal environmental agreements that cannot fall under standardisation regulations. This is for example horizontal environmental agreements that are verbal or implicit. Further, agreements that require or encourage action, such as joint ventures, clean-ups, participation in events, activist movements or the like, fall outside the scope of standardisation agreements. The same is true for agreements that regulate marketing, product variety or consumer choice. In sum, horizontal environmental agreements that regulate anything other than permissible limits automatically fall outside the scope of standardisation agreements. Area S.S.A displays standardisation agreements that fall outside the environmental scope: these are agreements that solely regulate technical or quality requirements, without elements of environmental consideration, protection or improvement.

Area X displays the area where horizontal environmental agreements and standardisation agreements overlap. To do so, horizontal environmental agreements must be in the form of written documents. They must convert environmental topics into permissible limits, for example, via determining

pollution or waste limits, by defining environmentally friendly production methods or other environmentally friendly solutions that improve (environmental) quality of a product or service. Agreements that define limits in favour of human health and safety also falls under the scope of both agreements. Ultimately, any agreement that defines environmental objectives using limits rather than action is likely to be convertible between the two agreement types and fall under their respective regulatory framework.

Both agreement types find guidance in the Commission's guidelines for horizontal agreements. As mentioned, the 2001 Horizontal Guidelines provided a chapter on environmental agreements which was removed in the 2010 Horizontal Guidelines. In the 2001 Horizontal Guidelines, the *CECED* case exemplified a situation that passed competition scrutiny with regard to Article 101(3) TFEU in the special chapter on environmental agreements. In the renewed guidelines, the case is presented as an example of an environmental standardisation agreement in the chapter dedicated to standardisation agreements.[257] This change of format substantiates the definition overlap in area X and suggests that environmental horizontal agreements and standard setting agreements in some cases are interchangeable or at least difficult to distinguish between.

4.2 Legal Assessment Analysis

This section provides an investigation of the differences in each element of the agreements. It begins by demonstrating and discussing the important elements of the assessments under Article 101(1) TFEU before moving on to Article 101(3) TFEU, where a comparison between the two agreement types is carried out for each exemption condition.

4.2.1 Article 101(1) TFEU

The assessment of horizontal environmental agreements can be displayed by a diagram in which the elements of importance to the assessment are mapped out (below). The purpose of the diagram is for the reader to obtain a clearer picture of how and where the different elements are taken into consideration in the assessment.

[257] Cf. 2010 Horizontal Guidelines, § 329; chapter 3 of this paper.

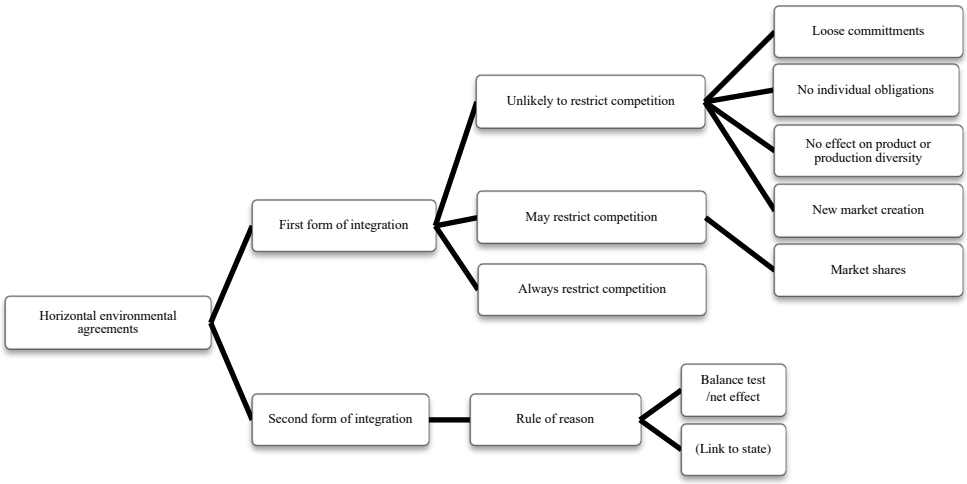

Diagram 3. Elements considered in the assessment of horizontal environmental agreements under Article 101(1) TFEU.

Starting with the first form of integration, it seems that the assessment of horizontal environmental agreements begins by determining whether the agreement might fall into the category 'unlikely to restrict competition' or not. To do so, the agreement must only bind parties to loose commitments or sector-wide aims with no obligation upon the individual parties. It must provide no effect on product or production diversity or give rise to new market creations. If the agreement does not fulfil those terms, one will turn to investigating the parties' market shares to determine whether the agreement may or may not restrict competition. If signatories have significant market shares, the agreement is likely to result in a breach of Article 101(1) TFEU. As mentioned before, agreements that always restrict competition are those with an untrue purpose when constructing the agreement. Therefore, the elements of relevance to that particular assessment are not included in the diagram. As for the second form of integration, the Court will have to assess through a balance test whether the net effect of the agreement is sufficiently beneficial to let the objective to be allowed either way. It is unclear whether a link to the state is required or not.

In the same manner, the assessment of standardisation agreements may be displayed via a diagram in which the elements of importance to the standardisation assessment are mapped out (below).

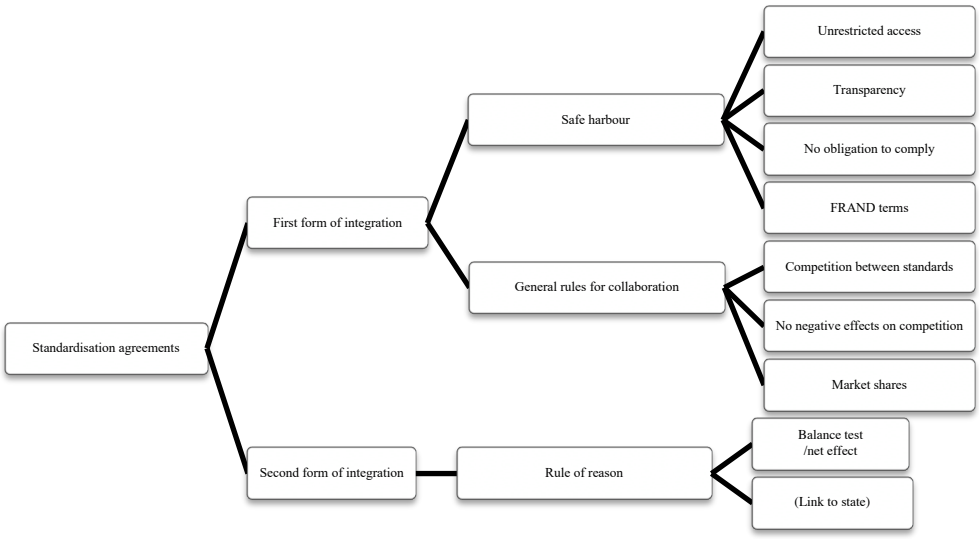

Diagram 4. Elements considered in the assessment of standard setting agreements under Article 101(1) TFEU.

Starting with the first form of integration, the assessment begins by determining whether the agreement will qualify under the safe harbour or not. To fall under the harbour, the elements of unrestricted access, transparency, no obligation to comply and the FRAND (fair, reasonable, and non-discriminatory) terms are assessed. If the agreement fulfils those terms, it will most likely to be legal under Article 101(1) TFEU. If it does not, the general rules for collaboration might come into play. When assessing the general rules for collaboration, one looks at whether competition between standards exists, if the agreement has any negative effect on competition and its market shares. A rule of thumb regarding market shares seems to be that the greater market share, the mort important that it falls under the safe harbour. The second form of integration allows for a similar assessment as for horizontal environmental agreements – at least in theory. In practice, the usage of rule of reason for standardisation agreements lacks precedent.

When comparing the assessment of horizontal environmental agreements under Article 101(1) TFEU to that of standardisation agreements, it is clear that a number of elements differ between the two.

In the first form of integration for standardisation agreements, the guidelines provide an unofficial safe harbour. Although horizontal environmental agreements do not have an equivalent to the safe harbour, the 'unlikely to restrict competition' agreement group also provides some sort of legal domain to move within when constructing agreements. In that sense, one can suggest that both the safe harbour and the 'unlikely to restrict competition' criteria increase legal predictability. The elements of importance to these domains are however significantly different. For horizontal environmental agreements, it

is important that the agreement does not assign individual obligations or formulate defined rules: a defined collusive behaviour is unlawful in itself. Horizontal environmental agreements cannot conduct compliance mechanisms to make sure that parties comply with the provisions. As stated, adopting loose commitments or sector-wide aims is allowed, but defined terms or compliance controls would lead to most likely reduce competition and lead to a breach of Article 101(1) TFEU if the parties have market power.

For standardisation agreements, individual obligations and defined rules are at the core of standardisation agreements' functionality. Standardisation agreements cannot stipulate an obligation to comply in the sense that the agreements give rise to commercial liability or limit the right to enter and leave the agreement, but parties can be obliged to comply with standard regulations by threat of exclusion from the standard. The Set top boxes agreement, for example, shows that parties are free to set out terms, conditions, revision, monitoring and compliance sections. The 'no obligation to comply' criterion refers to the freedom of entering and terminating their signatory status as they please. In contrast, 'no obligation to comply' for horizontal environmental agreements hinders setting out defined provisions in the first place. Therefore, horizontal environmental agreements may be said to be tighter held than standardisation agreements are. Further, the guidelines accentuate that standardisation agreements require unrestricted access, as to not create any barriers to entry. Interestingly, it seems that the criteria of 'unrestricted access' and 'loose commitments' in one way can be contrasted against each other. The more unrestricted or open access the agreement provides, the more defined terms it seems to be allowed to stipulate, and vice versa.

Horizontal environmental agreements that fall under 'unlikely to restrict competition' are required to stipulate environmental performance that has no effect on product or product diversity or gives rise to new market creation or competition. For standardisation agreements, one might say that a change in the product or product diversity to which the standard relates is inevitable, given that the very point of standardisation is to alter the product or production diversity in line with the given standard. Presumably, if the 'change' in itself is accepted, the safe harbour instead emphasises how to carry out that change in a fair and reasonable manner. Thus, the focus lies on transparency, reason, fairness and non-discrimination.

Apart from the safe harbour, the 2010 Horizonal Guidelines set out general rules for collaboration that fall outside the safe harbour. These rules outline situations in which a restriction of competition is unlikely, either because competition is retained or strengthened as a result of the standard (such as

when competition between standards exists), or because competition is not affected by the standard (for example if the signatory parties have insignificant market shares). Horizontal environmental agreements that 'may' restrict competition are also largely dependent on their market shares when determining their effect on competition. In contrast, however, the market share analysis for horizontal environmental agreements is solely concerned with whether the market share is above or below a certain threshold. If above that threshold – although that threshold is not defined – the agreement will breach Article 101(1) TFEU.

The second form of integration under Article 101(1) TFEU is similar for both agreement types. While rule of reason has been tested in connection with horizontal agreements, it has yet to be tested in connection with standardisation agreements. This perhaps suggests that the second form of integration is more plausible when it comes to horizontal environmental agreements than environmental standard setting agreements. Yet, for both agreement types, the rule of reason approach is uncertain and will require more guidance or case law before it will be reasonable for undertakings to rely on when constructing environmental agreements.

4.2.2 Article 101(3) TFEU

4.2.2.1 The First Condition

The first condition of Article 101(3) TFEU demonstrates a significant difference in the starting points for the assessments. First of all, horizontal environmental agreements must be able to convert environmental objectives into 'technical or economic progress,' by establishing a close link between the environmental benefit and the technological or economic benefit (as done in the *CECED* case). It is possible that environmental horizontal agreements can constitute quality improvements, as some may argue that environmental impact is part of the goods or services characteristics. Yet, quality is subjective and will depend on the consumer's perspective, which makes it difficult to rely on when making a case for environmental collaboration. Secondly, horizontal environmental agreements must transform environmental efficiency into objective economic benefits, and demonstrate how the trade-off economically benefits the consumer; a task that might be difficult to succeed with if the environmental benefit is of non-economic art. It is uncertain, but unlikely, that non-economic benefits such as the preservation of species or biodiversity can be included in the assessment, unless translated into objective economic benefits.

Standardisation agreements, on the other hand, are presumed likely to give rise to efficiency gains due to their important role for innovation and market integration, and even more so if the standard concerns compatibility between different technology platforms. Standard setting parties must ensure that the standard is effectively available to all parties. As the guidelines state, standardisation agreements frequently give rise to significant efficiency gains, for example by reducing transaction costs, encouraging competition on the merits, prevent lock-ins, facilitate consumer choice, increase consumer quality, enhance innovation and bring new technology to the markets.[258] Although standardisation agreements also must display their efficiency gains in objective economic terms, both guidelines and doctrine on the subject refrain from discussing issues this might incur.

4.2.2.2 The Second Condition

The assessment of the second condition is similar for horizontal environmental agreements and standardisation agreements. The biggest difference is that standardisation agreements have a legality presumption if the standard facilitates technical interoperability and compatibility or competition, while horizontal environmental agreements do not. Moreover, for standardisation agreements, an important part of the assessment relates to which procedures are in place to guarantee the interests of end consumers. This aspect cannot be found in the guidelines or doctrine for horizontal environmental agreements (although this does not necessarily signify its irrelevance to the assessment). Allowing a time lag in the efficiency pass-on is particularly relevant to combating climate change, as it is reasonable to believe that actions taken today might benefit future generations more than current ones.

Both agreement types contain a case-by-case assessment regarding what constitutes the affected consumer groups: whether 'consumers' can be interpreted as society as a whole, or if it must fall upon substantially the same consumer group. That specific assessment would depend on whether the Court applies a narrow or broad interpretation approach. The *CECED* case showed that it is possible to consider individual and collective benefits, both individually and in combination. The case, which seems to alternate between being assessed as a horizontal environmental agreement and a standardisation agreement, supports the view that an interpretation of 'consumers' in Article 101(3) TFEU is similar for both agreement types.

[258] 2010 Horizontal Guidelines, § 308.

4.2.2.3 The Third Condition

For both agreement types, restrictions cannot go beyond what is necessary to achieve the efficiency gains. Neither horizontal environmental agreements nor standardisation agreements have special guidelines when it comes to indispensability. With standards however, the Commission stresses the relevance of open access and non-obligatory standards. For both types – although mostly addressed in conjunction with horizontal environmental agreements – condition three might correlate with condition one, in which negative effects are balanced against positive effects before indispensability is assessed in condition three.

4.2.2.4 The Fourth Condition

Neither horizontal environmental agreements nor standardisation agreements have any special rules for the fourth condition. The greatest risk for elimination of competition seems to be industry standards foreclosing access to competitors, which the Commission emphasises in its 2010 Horizontal Guidelines. In sum, the third and fourth conditions are assessed in a similar manner for both agreement types.

4.3 Conclusion

The first form of integration for horizontal environmental agreements shows that agreements unlikely to restrict competition may, in loose terms, be compared to the safe harbour for standardisation agreements as both provide a safe domain for horizontal agreements. The elements of importance to the assessments are however significantly different. The safe harbour enables agreements to have a greater effect on the product, production or end consumer, but also states more direct demands for standardisation agreements to fulfil. Horizontal environmental agreements, in contrast, cannot stipulate defined rules or affect product or production, unless they have insignificant market shares. One key difference between the two is that horizontal environmental agreements are presumed to have closed access to the agreement and standardisation agreements are presumed to have open access. Continued, standardisation agreements are allowed to stipulate defined terms, while horizontal environmental agreements can only provide ‘loose commitments’ or sector-wide aims. By extension, it seems that having open access allows for defined commitments, while closed access only allows for loose commitments. In this sense, the consideration given to new market creation for horizontal environmental agreements stands out. On the one hand, it enhances competition as it gives rise to new markets and thus new competition. On the other hand, it is probably one of the rare situations in

which horizontal environmental agreements are allowed to impact products or production, set prices, define terms and/or establish exclusivity.

The first form of integration is more commonly utilised than the second form of integration for environmental horizontal agreements in Article 101(1) TFEU. The first form of integration leaves less scope for discretionary interpretation, which also makes is subject to less debate. In general, the application of rule of reason to horizontal environmental agreements is said to be quite contentious and does not have much support from case law. The same is true for standardisation agreements, for which a rule of reason approach seems almost superfluous given the many options for compliance in line with the first form of integration. The focus of standardisation agreements under Article 101(1) TFEU hence seems to fall in its entirety upon the first form of integration.

As opposed to this, it seems that the assessment of horizontal environmental agreements in general is mostly carried out under Article 101(3) TFEU. Agreements that have an impact on products or production and in some way define terms or apply individual obligations upon parties are likely to breach Article 101(1) TFEU if the parties have significant market shares or market power. Hence, environmental consideration can only be taken under the Article 101(3) assessment, and the discussion of 'benefits' is of essence. In contrast, it seems that the assessment of standardisation agreements is mostly carried out under Article 101(1) TFEU. Many standardisation agreements are likely to fall under the safe harbour and if they do not, they might still rely on the general rules for collaboration. Furthermore, standardisation agreements could, unlike horizontal environmental agreements, adapt to the rules set out by the Commission. Given that the safe harbour is clearly defined and easy to grasp, undertakings that aim to set up a standard could simply follow the guidelines to avoid prosecution in a way that would be difficult for horizontal agreements to do.

As for Article 101(3) TFEU, is seems that the greatest difference between the assessments lies in the first and to some extent the second condition of the article. While horizontal environmental agreements must demonstrate efficiencies in objective economic means, it seems that the demands on standards to do so are less strict as the starting point of the assessment is of a more positive nature. Many of the topics presented as problems for horizontal environmental agreements are left untouched in relation to standardisation agreements. In sum, the assessment for standardisation agreements seems to be more lenient than that of horizontal environmental agreements.

5 Final Conclusion: A Guide to Environmental Agreements

The purpose of this paper was to investigate how EU competition law can allow environmental collaboration between companies, to adapt to an increasing risk of environmental decay. The aim was to investigate and establish a guide for companies when conducting collaboration agreements of positive environmental impact. Chapter two and three have been dedicated to the assessment of environmental integration in horizontal environmental agreements and standardisation agreements. Chapter four strived to compare and contrast the two in order to ascertain differences and similarities in their respective legal assessments, that could be useful to the final conclusion. Finally, this chapter will account for the guide for companies that wish to conduct collaboration agreements of positive environmental impact.

In short, standardisation agreements, which just as traditional horizontal environmental agreements can be horizontal agreements between private parties, were found to generally be more leniently assessed than horizontal environmental agreements. Supposedly, this is due to the fact that current standards are primarily focused on technology and considered beneficial to competition and economic growth; a line of thought in accordance with the economic approach to competition law. The Commission has shown a positive approach to environmental standards, but implementation of such seems to remain uncommon. Yet, environmental standard setting does not seem to deviate from the more lenient assessment approach that standards in general enjoy. Therefore, this paper finds that agreements have a greater chance of compliance with Article 101 TFEU if they can be found to fall under the standardisation assessment, rather than the traditional horizontal agreement assessment. Hence, it argues that environmental agreements should be constructed as standard setting agreements and strive to fall under the safe harbour provided by the 2010 Horizonal Guidelines. If agreements succeed in doing so, they will not breach Article 101(1) TFEU in the first place and avoid the Article 101(3) TFEU assessment entirely. On that account, this paper concludes that contracting parties should apply the following provisions.

First of all, the agreement should stipulate its terms, conditions and environmental objectives in the form of *limits*. This can be in the form of, for example, product or production requirements, ingredient or content quality limits or pollution and waste limits. In contrast can agreements *not* stipulate

terms that call to action (such as clean-ups, events or activist movements), change sales or alter product variety and consumer choice. By setting environmental limits, parties are allowed to provide defined terms to comply with. Secondly, the agreement should provide unrestricted access to participation. All parties that want to join or leave the agreement should be able to do so, as to not constitute a barrier to entry. Unrestricted access is one of the key differences between standardisation agreements and horizontal environmental agreements. Thirdly, the parties should adapt a transparent standard setting procedure. They need to inform about upcoming, ongoing and finalised standardisation work and stakeholders should be kept informed and consulted on the work in progress. Transparency regarding procedure, clauses, signatories and purpose of the agreement is essential to its compliance. Fourthly, the agreement cannot stipulate any obligation to comply with the agreements. Parties must be free to join and leave as they choose. It is however accepted to demand compliance with the agreement once a party has joined, by threat of terminating the signatory status. On a side note, it might be interesting for companies to look into the opportunities for creating a certificate that displays membership in and compliance with the standard. A certificate might add pressure on parties to comply with the given set of rules, as it will be publicly evident if the undertaking no longer lives up to the criteria. Moreover, a certificate might be especially relevant if the standard becomes a competitive advantage to conscious consumers and can be used for marketing purposes as well.

Furthermore, when constructing an environmental agreement, parties should be allowed to develop alternative standards or solutions that may or may not compete with the current one. It cannot provide exclusivity clauses or other binding measures. Rather, if several standards are developed in parallel, it will increase the chances for compliance as competition between standards in encouraged and considered to reduce the restrictive effect. Nor can the agreement give rise to commercial liability or commercial obligations. The only way to ensure compliance with the agreement is through self-appointed compliance mechanisms and (threat of) terminating the signatory status. The self-appointed compliance mechanisms may, as was the case in the Set top boxes agreement, consist of for example third-party revisions or an appointed monitoring committee. According to the Set top boxes case, the agreement shall not give rise to any disproportionate administrative burden. This requirement is unspoken of in the guidelines, but the paper finds it highly relevant given that a disproportionate administrative burden possibly could lead to some parties' impracticability of joining the standard, which might be considered a barrier to entry. Moreover, the agreement will have to provide access to the standard on fair, reasonable and non-discriminatory terms, with objective and non-discriminatory voting rights. It might also be beneficial to

have procedures in place that guarantee that the interests of the end consumers are protected, as this is an important element to the assessment under Article 101(3) TFEU.

Supposedly, these provisions are sufficient to comply with the demands set up for standard setting agreements. Although the goal is to pass under these demands, an agreement might benefit further from trying to adapt to the requirements for horizontal agreements as well. To be on the safe side, additional measures can be taken so that *if* the agreement does not fall under the safe harbour, it still has a chance of compliance based on the findings for horizontal agreements. With regard to the exemption conditions, the parties can, if possible, try to calculate in objective economic means its effect on consumers: both any negative, cost-inducing effects and of course the positive environmental effects that the agreement gives rise to. If these positive effects can be demonstrated to outweigh the negative, the parties can rest assured. In the same vein, it might be interesting to look into whether the agreement gives rise to new competition. If the standard, for example, reduces the usage of plastic – does it strengthen competition on the market for plastic substitutes? If so, the agreement might have a stronger point of departure, even if it were to fall outside the safe harbour. The same seems to be true of the agreement leads to increased trade within the union. For example, if the agreement leads to a reduction in plastic, but increases cross border trade with sea weed, it might be said to give rise to new competition as well. Moreover, standards that improve compatibility are presumed efficient. If the new solution or standard enhances digitalisation or gives extended access to innovative solutions or other means of compatibility between Member states, the agreement might benefit from this provision as well. In sum, parties should:

- Set environmental objectives in the form of limits.
- Provide unrestricted access to participation.
- Have a transparent and open procedure.
- Contain no obligation to comply.
- (Create a standard certificate.)
- Provide no exclusivity clauses.
- Provide no commercial liability.
- Provide no disproportionate administrative burden.
- Provide access on fair, reasonable and non-discriminatory terms.
- Stipulate objective and non-discriminatory voting rights.
- Set up procedures to guarantee protection of consumer interests.
- (Investigate the economic benefits derived from the agreement.)
- (Investigate if the agreement can give rise to new competition.)
- (Investigate if the agreement can improve compatibility.)

The presented findings are based on a wide application of the safe harbour that allows all types of standardisation agreements. If the safe harbour were to become more nuanced or specific to for example interoperability standards, as suggested by Lundqvist, the abovementioned provisions for environmental standards would no longer be applicable. The paper also suggests that parties do not rely on rule of reason. Even if the rule of reason approach allows for consideration of public policy is it too uncertain to plan and construct an agreement thereafter. Moreover, the parties' market shares are, based on these findings, not necessarily relevant to the assessment. Large market shares simply incur stricter demands on parties to follow the criteria of transparency and openness. It remains unclear how non-economic factors of environmental protection are to be assessed under competition law. Hopefully, future case law or other legal sources will provide the answer to this before such non-economic factors are depleted.

Until environmental consideration is an end goal in itself, the usage of standards and the wide application of the safe harbour might be a functioning temporary solution to constructing collaboration agreements between firms that seek to combat environmental decay. While corporate environmental action of this kind is unusual, it is my firm belief that environmental agreements can form a solution to tackling climate change. Of course, opening up for the opportunity to allow horizontal environmental agreements would have provided a simpler path to environmental integration, but until then, standardisation agreements can be a useful tool. Even if change many times is hindered, delayed, postponed and tardy, the possibility to act has never been greater nor more acute. As the sustainability trend turns into a norm, companies will have to challenge their existing cultures and procedures. With this guide, I wish to influence, encourage and help companies to do better and do more. I hope to have given clarity to the ambiguous and debated subject that environmental agreements compose, and how to make use of the existing regulations in a helpful manner. In closing, a lawful and concise path to environmental integration through collaboration has been mapped out - the next step is to make use of it.

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