Competition Law and Environmental Protection in Europe; Towards Sustainability?
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CHAPTER 7

The Fundamentals of EC Competition Law
7.1 Introductory remarks

The fundamentals of EC competition law involve the role and place of competition law in the Treaty, the sectoral scope of application, and several concepts that the provisions have in common. These will receive further attention below starting with the role of the competition provisions in the system of the Treaty. Inherent in this role is the fact that competition law plays a part in the process of integration. These functions of competition law will also involve an attempt at an answer to the question of what concept of competition EC competition law seeks to attain. Following this, the focus of our attention will shift towards the sectoral scope of the European competition rules. In this respect, the scope of the competition rules vis-à-vis the agricultural, transport and defence sectors is studied. Lastly, the concept of an ‘undertaking’ will be examined.

7.2 The role of competition law in the Treaty

In some respects, thinking about the role of competition in the Community can be said to have been influenced by a German intellectual movement even during the Second World War: the Ordoliberals. Just after the Second World War, the competition laws of the European countries were quite unlike those that can now be found in the EC Treaty and most of the member states. Cartels were not generally perceived to be detrimental and most competition laws could hardly be called anti-trust laws. In the words of the Commission: ‘Europe missed a competition spirit’. 1 This changed with the American influences during the occupation of Germany. The US had at that time already an extensive anti-trust culture and brought this to Europe. Moreover, a German group of scholars had during the war developed their own system of, inter alia, competition law. As occupied Germany was seeking to rebuild its economy, the Ordoliberal perception of economy, economic policy and the role of competition in the economy proved successful. Although only after a fierce debate, many of the Ordoliberal ideas found their way into the GWB, the German Act Against Restrictions of Competition. 2 One characteristic of the Ordoliberal conception of competition policy was that, in essence, this should come down to the application of legal norms by an independent institution as opposed to the exercise of political discretion. This view of competition also found its way into the ECSC Treaty’s rules on competition. 3 Despite their relatively limited impact, the inclu-

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2 Gesetz gegen Wettbewerbsbeschränkungen.
3 This may, however, be better explained with recourse to the political circumstances than by the general acceptance of the German (Ordoliberal) ideas. Cf. Gerber 1998, p. 337, 338.
sion of competition rules in the ECSC Treaty in many respects paved the way for the competition rules in the EEC Treaty.

The Spaak-report, which can be considered to contain the *travaux préparatoires* for the Rome Treaty, already made clear that competition rules were considered a vital element of the new Community's legal structure. The establishment of the common market hinged not only on the removal of governmental barriers to trade but required just as much the removal of private barriers to trade. In this last respect competition rules were of vital importance. This functional approach to the competition rules, as an instrument to establish the common market, is now laid down in Article 3(1) (g) EC. This provision contains

'[f]or the purposes set out in Article 2 [...] (g) a system ensuring that competition in the internal market is not distorted'.

Thus the establishment of the common market and the rules on competition are instrumental to the Community's objectives to be found in Article 2 EC. The Court has constantly ruled that the Treaty's competition rules have to be interpreted in the light of these two provisions. This brings with it that the ultimate objective of the European competition provisions has both an economic and political aspect. Economic in that competition as the market-order for the common market is supposed to ensure optimal economic efficiency. Political, in the sense that the goal of creating a common market is a political objective in the end. In the *Consten & Grundig* case, the Court stated that the Treaty aims at abolishing the barriers to trade between states and thus 'could not allow

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5 Gerber notes in this respect that the inclusion of competition rules in the (then) EEC Treaty seems to have been almost certain from the beginning on, Gerber 1998, p. 343.


7 Before the changes by the Treaty of Amsterdam this was Article 3 (g) and before that a nearly identical provision could be found in Article 3 (f).

8 Although they may not be completely identical, the terms common- and internal market will be treated as synonymous. See further with regard to these concepts: Kapteyn & VerLoren van Themaat (Ed. Gormley) 1998, p. 780.

undertakings to reconstruct such barriers'.

10 This is not to say that the objective of the competition rules consisted (or consists) solely in the creation of the common market or European integration in general. Nor can it be said that the maintenance of a certain degree or level of competition was an end in itself. Rather, both goals were fused and considered mutually interdependent. This, as was already touched upon above, has had a thorough effect on the concept of competition and system of competition law as it was developed in the EC. 11

As a result, for example, the Court had to fill the lacunae of European competition law. 12 Contrary to the ECSC-Treaty, the EC Treaty lacked rules on concentrations. In its celebrated Continental Can judgment, the Court of Justice decided that in some cases, the acquisition of another firm could qualify as abuse of a dominant position. 13 In the VCH case, it was established that a cartel spanning the territory of one member state 14

'by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about [...]'.

Another example is the creation of the so-called 'useful effect rule'. Although the Treaty provisions on competition distinguish between those provisions directed at undertakings and those directed at member state authorities, the Commission and Court have created a new, hybrid, rule. In the GB-Inno-BM v. ATAB case the Court rules that, although Articles 81 and 82 (then Articles 85 and 86) EC were directed at private enterprises, member states are prohibited by Article 10 (then Article 5) EC from introducing legislation or introducing measures that may deprive the competition rules of their effectiveness. 15

All these judgments, however different their specific content may be, show the teleological method of interpretation according to which the effectiveness of the provisions is what ultimately counts. It is through this method that competition is firmly put in place in the overarching system of the Treaty.

This teleological interpretation, which ensures that the goals of Community competition law are merged with the objective of market integration, can also be seen in the concept of competition itself. Apart from the preamble to the

12 It has, however, also resulted in the limiting of the scope of the competition rules in certain cases, see infra, paragraph 8.2 on the Albany exception ratione materiae.
Treaty which states that the Community shall be based on ‘free competition’, and Article 3 of the Treaty, no reference is to be found to a specific concept of competition that is to function as a guideline for Community competition policy. However, the functional approach to competition that, as has been shown above, pervades Community competition law has also had an influence on the concept of competition itself.

The Commission and Court have thus defined the concept of competition sought after as ‘effective’ or ‘workable’ competition. This only reiterates that the competition that the Treaty seeks to enact or protect is not an end in itself. In *Metro I* the court made this very clear when it stated:

> ‘The requirement that contained in Articles 3 and 85 of the EEC Treaty [Now Articles 3(1)(g) and 81 EC] that competition shall not be distorted implies the existence on the market of *workable competition*, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.’ [Emphasis added]

Here, we see the influence of the Treaty context on the concept of competition. In this respect it must be noted that the fact that competition is understood functionally does not mean that the primarily economic objectives of competition have been replaced with political objectives. Rather, and this also follows from the observations mentioned above, the political and economic objectives have been merged into a concept of competition *sui generis*.

It is this concept of competition that functions as a guideline for European competition policy: to maintain effective or workable competition. As a result, the seemingly strict wording of, for example, Article 81, has been interpreted in such a manner that not every restriction of competition is forbidden. Only those agreements that restrict competition to an extent that is more than *de minimis* fall within the scope of Article 81. This practice is referred to as the principle of appreciability and should not be confused with the principle that any restriction of competition must also appreciably affect intra-community trade. Logically,
the principle of appreciability has only been applied with regard to Article 81 and 87.\textsuperscript{20} As such the manifestations of the principle of appreciability will only be investigated within the context of these two provisions.\textsuperscript{21}

7.3 The scope of the competition rules

7.3.1 Introductory remarks

As was shown above, the Community's competition rules seek to preserve or enact workable or effective competition. The Treaty accepts competition as the basic market order for the entire common market. However, the treaty recognises exceptions to this rule of competitive markets at the same time. For certain sectors of the economy, the Community's founders acknowledged that competition could not be allowed as the market order. For the agricultural, transport, defence and coal and steel sectors of industry, an exception was laid down in the Treaty.\textsuperscript{22} This resulted in the possibility for a special regime for the application of the competition rules in certain sectors of the economy.\textsuperscript{23} These special regimes exist only where the Treaty allows this and, as with any exception to a rule, they are interpreted narrowly.\textsuperscript{24}

Below, the application of the Community's competition laws to the agricultural, transport and defence sectors of industry will be studied.\textsuperscript{25} Each of these sectoral exceptions will be scrutinised for the role that environmental concerns have played or could play.

Further below, out attention will focus on the scope \textit{ratione personae} of EC competition law. This is defined by the concept of an 'undertaking'. This concept and the role of environmental considerations in this respect will be studied in

\begin{itemize}
\item\textsuperscript{20} It is inherent in the fact that Article 82 sees only to 'abuse' by undertakings in a 'dominant position' that such abuse necessarily appreciably restrict competition.
\item\textsuperscript{21} See with regard to Article 81. infra, chapter 8 and with regard to Article 87. infra chapter 13.
\item\textsuperscript{22} The coal and steel sector is subject to the competition provisions in the ECSC Treaty (by virtue of Article 305(1) EC which fall outside the scope of this book and will therefore not be treated in any detail. Suffice it to say that the competition rules of the ECSC Treaty are comparable to those of the EC Treaty.
\item\textsuperscript{23} Article 83(2) (c) EC. The fact that these rules concern the application \textit{ratione materiae} of Community competition law distinguishes them from the so-called block exemptions; below paragraph. However, as the block exemption for the insurance insurance sector (Commission Regulation 3932/92, OJ 1992 L 398/7) shows, clear, the border between the sectorial regimes and block exemptions may not always be that clear-cut.
\item\textsuperscript{24} Case 209-213/84, Ministère Public v. Asjes et al. (Asjes), [1986] ECR-I425, paragraph 40 et seq. Gerven, Gyselen, Maresceau & Stuyck 1997, p. 13, 14
\item\textsuperscript{25} \textit{Infra}, paragraph 7.3 et seq.
\end{itemize}
paragraph 2.4. As for the scope *ratione loci* our attention will be limited to the jurisdictional scope referred to by the 'effect on trade between Member States' that is required for the application of the Treaty's competition provisions to any restriction of competition. In this respect, some attention will also be devoted to the extraterritorial application of the Community competition rules and its implications in an environmental context.

7.3.2 Agriculture

The agricultural market has traditionally been fraught with problems. This is primarily due to two causes: the fact that supply is to a very large degree dependent on factors other than market forces (climate, biological factors) and the fact that agricultural products and production factors are strongly interrelated. This has lead to intensive governmental interference in the agricultural market. These governmental interferences were continued under the Community rule in the common agricultural policy. The extensive influence of the (public) authorities on the agricultural sector resulted in a special regime for the competition rules in the agricultural sector.

According to Article 36 EC the competition provisions of the EC shall apply to the production of and trade in agricultural products only to the extent determined by the Council taking into account the objectives of the common agricultural policy. The last sentence of Article 36 specifies this with regard to the granting of aids. Apart from governmental interferences such as the granting of aids or the fixing of prices or quota, the economic actors themselves may also wish to act in a manner that is contrary to competition law but necessary for the attainment of the objectives of the common agricultural policy.

Pursuant to Article 36 EC the Council has issued Regulation (EEC) No. 26 of 1962. This Regulation declares Articles 81 to 86 applicable. The Articles governing state-aids are thus excluded from the scope of this Regulation. Article 2 of this Regulation declares Article 81(1) EC inapplicable to certain agreements where these agreements are, *inter alia*, necessary for the attainment of the objectives of the common agricultural policy. On a more general level, the European Court of Justice has recognised the priority of the agricultural policy

26 *Infra*, paragraph 7.5.
27 See on this subject and for further references Kapteyn & VerLoren van Themaat (ed. Gormley) 1998, p. 112 et seq.
28 See Article 33 EC for these objectives.
29 According to Van Gerven et al. this is where the derogation is most significant: Gerven 1997, p. 34.
over the objectives of the Treaty in the field of competition. It has also ruled that, as an exception to a general rule, it should be interpreted strictly.

Apart from the possibility of an exemption according to Article 81(3) EC, Article 2 of Regulation 26/62 provides for two exceptions from article 81(1). A final possibility for an exception exists for those agreements that follow from a Community measure pursuant to the common agricultural policy. With regard to Regulation 26 an exception is firstly envisaged for agreements that form part of a national market organisation. Secondly agreements that are necessary for the attainment of the objectives of the common agricultural policy are removed from the ambit of Article 81. It may be argued that the second sentence Article 2 of Regulation 26 contains a third possibility for an exception with regard to agricultural cooperatives. However, the wording of the abovementioned Article 2 could be taken to show that it is in fact only a more specific example of the application of the criteria of the first sentence.

Regulation 26 is in fact only one of many instruments that have been based on Article 36 EC. This basis has also been used to issue the Regulations laying down the common market organisations. A fourth exception exists in that practices that restrict competition and were prescribed by such common organisation will fall outside the scope of the competition provisions of the Treaty.

With regard to the first exception, a problem arises because of the absence of a definition of the concept 'national market organisation'. The concept of a 'national market organisation' was defined by the European Court of Justice as the

'totality of legal devices placing the Regulation of the market in the products in question under the control of the public authority, with a view to ensuring, by means of an increase in productivity and of optimum utilisation of the factors of production, in particular of manpower, a fair standard of living for producers, the stabilisation of markets the assurance of supplies and reasonable prices to the consumers.'

The objectives of the national market organisations are thus the same as those of the EC's common agricultural policy as laid down in Article 33. It appears

33 Cf. Cockborne 1988, p. 306. However, Ottervanger considers this opinion (which is shared by the Commission) to be incorrect: Ottervanger 1990, p. 218 et seq. See also Gerven, Gyselen, Maresceau & Stuycck 1997, p. 39.
34 It did this in Case 48/74, Charmasson v. Ministre de l'Économie et des Finances, [1974] ECR 1383, para. 26 at p. 1396.
that the conditions for the two exceptions are therefore comparable. The practical importance of this exception is further limited by the fact that such national market organisations have been almost completely replaced by common organisations. Moreover, in the apparently only decision to date in which this provision was applied, the Commission appears to have ‘reintroduced’ the condition that competition is not reduced below what is considered workable. All these reasons have limited the scope of the first exception and have as a result greatly diminished its importance for the purpose of this research.

The second exception provides that Article 81 EC is inapplicable to agreements that are necessary for the attainment of the goals listed in 33 EC. To our knowledge, this exception has not been applied to exclude an agreement from the scope of Article 81 to this date. For the purpose of applying Regulation 26, the goals listed in Article 33 should be considered indivisible. As a result it is presumed that agreements have to be necessary to attain all the goals of the common agricultural policy for them to fall outside the scope of Article 81. Furthermore, the necessity test applied by the Commission is rather strict.

Irrespective of whether or not the second sentence indeed contains a separate third exception some general remarks will be made. As a result of its perception of this exception, the Commission requires that the conditions of both exception in the first sentence are fulfilled as well as the conditions provided for by the second sentence itself. The exception appears rather limited because it applies only to horizontal agreements between farmers in one state. Furthermore those agreements may only concern the production or sale of agricultural products or the use of certain joint facilities while not involving any restriction of price competition. Interestingly, the burden of proof has been reversed in that it is for the Commission to show that competition is excluded or that the attainment of the objectives of Article 33 is put in peril.

The conclusion with regard to this exception for the agricultural sector should be that it is rather limited. This flows from the fact that it only shields this sector from Article 81 whereas Articles 82 to 86 EC and the Merger Regu-

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20 Cockborne 1988, p. 303.
21 Supra, footnote 37.
lation are still applicable to the agricultural sector. However, with regard to the competition rules on state aid the second sentence of Article 36 EC allows for the Council to authorise the granting of aid for certain goals. The regime on state aid in the agricultural sector is laid down in the so-called Rural Development Regulation and the guidelines for agricultural aid. These instruments will receive closer attention in the paragraph devoted to the rules on state aid.

7.3.2.1 The role of environmental concerns

Environmental concerns have certainly played and continue to play their role in the agricultural law and policy of both the EC and the member states. That, however, is not the subject of this research. As regards the role of environmental concerns in connection with this exception, it was already remarked above that the exception is limited indeed. In fact, Regulation 26 only offers some protection from Article 81. As a consequence, all other restrictions of competition remain subject to the 'standard' competition rules. The application of the exceptions is in itself already rather limited. Again, to the author's knowledge, none of these exceptions has to this date been applied on (partly) environmental grounds.

The question whether these exceptions could function as a vehicle for the integration of environmental concerns and competition law in fact comes down to the question whether they may be used to create an exception, on (partly) environmental grounds, for agreements that would otherwise restrict competition. In this connection the following remarks may be made. Firstly, the short sketch of the exceptions has revealed that by and large the primary requirement for the exception to apply is that this is in accordance with the objectives of the common agricultural policy. Although Article 33(1) EC does not contain any reference to the protection of the environment, the objective listed under (a) can

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42 The eighth recital to the Merger Regulation (infra chapter 10) explicitly states this.
43 Cf. Cockborne 1998, p. 295 who, in footnote 11, cites a minority dissenting opinion with regard to the applicability of Article 81 EC.
46 See, on the integration of environmental concerns into the Common Agricultural Policy, Dhondt 2003, p. 199 et seq.
47 Cf. Gerven, Gyselen, Maresceau & Stuyck 1997, p. 34 and Waelbroeck & Frignani 1997, p. 53. However, only the rules on state aid seem to be of interest in this respect and it is therefore only to these rules and the role that environmental concerns can play in their application, that some attention will be devoted in chapter 13 below.
probably be interpreted so as to incorporate environmental protection considerations.\(^4\) This is confirmed by the fact that the Rural Development Regulation envisages a clear environmental competence while being based on 36 and 37 EC and aiming at the attainment of the objectives listed in Article 33 EC.\(^4\) It should be kept in mind, however, that the agreement would have to satisfy all the objectives of the common agricultural policy.

Secondly, it has become clear that much of the organisation of the market has taken place on a Community level. As a consequence, the exception for national market organisations has lost much of its importance. Furthermore, common organisations generally involve an exhaustive harmonisation of the sector concerned. As such, member states are precluded from enacting measures in those areas.\(^5\) Insofar as environmental concerns have not been harmonised by the common market organisation, member states are, subject to the rules of the Treaty, still free to enact national measures.\(^6\) This holds true by analogy on the level of private action with regard to agreements with an environmental objective in an agricultural sector governed by a common market organisation. It will, however, be difficult to establish that the agreement is indeed necessary for the attainment of the objectives of Article 33 (i.e. the second exception). In the presence of a common organisation, it is generally to be expected that the attainment of these goals has already been adequately secured. Measures going further in this respect will therefore be extremely difficult to uphold.\(^7\) With regard to the relevance of the third (cooperative) exception in connection with environmental considerations, it has to be pointed out that the exception offered is quite limited. It should, however, be possible to take environmental aspects of cooperative agreements into account, as these are very likely to concern the ‘production or sale of agricultural products’. As regards the possibility to apply the fourth exception as a vehicle for the integration of environmental concerns, the conclusion must be that it falls outside the scope of this research. Only where the common organisation requires a certain agreement the exception will apply. The initiative to integrate environmental concerns resides therefore with the Community legislature and not with private parties or member states.

\(^5\) Case C-1/96, The Queen v. Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming (Compassion in World Farming), [1998] ECR I-1251, para. 41.
\(^6\) Ibid., paras. 56, 64, 65.
\(^7\) Ottervanger 1990, p. 216.
7.3.3 Transport

Not unlike the agricultural sector, the Transport sector was also one of intensive governmental interference. Within the framework of the Treaty, transport, being one of the pillars of the common market, is also granted a special sectoral regime as regards Community competition policy. Shortly after Regulation 17 granted the Commission wide ranging and exclusive powers to apply Community competition law, Regulation No. 141 of 1962 temporarily suspending the application of the competition rules to the transport sector, was enacted. The preamble to this Regulation already indicates that two sectors can be distinguished within the transport sector. On the one hand transport by rail, road and inland waterway and, on the other hand, transport by sea and air. This bifurcation will be followed in the treatment of the sectors below. Firstly, inland transport will be studied. After that maritime and air transport are examined.

As was envisaged by the Council, rules on the application of the competition provisions to transport by rail, road and inland waterway proved relatively easy to attain. With the enactment of Council Regulation (EEC) No. 1017/68 a regime for this area within the transport sector was put in place. This Regulation governs the application of the competition provisions on concerted practices, abuse of dominant positions and public undertakings in the transport sector. A first thing to be noted when reading the Inland Transport Regulation is that the Council made an effort not to apply the Treaty provisions on competition themselves to the transport sector. Instead, it formulated, with the Treaty provisions as an obvious example, new substantive provisions.

Article 2 of the Regulation prohibits concerted practices in a way that is similar to Article 81(1) EC. Articles 3, 4, and 5 of the Regulation then continue by providing for, respectively, the exception from, exemption from and non-applicability of the prohibition in Article 2 of the Regulation. Article 3 created an exception for agreements and concerted practices the object and effect of which is to apply technical improvements or to achieve technical cooperation. This

53 If transportation is insufficient, free movement becomes useless.
55 Seventh recital of the preamble that states that the introduction of rules on competition as regards transport by rail, road and inland waterway are 'possible to envisage within a reasonable period' whereas the introduction of rules on competition for transport by sea and air 'are impossible to foresee'.
57 Blanco & Houtte 1996, p. 59 et seq.
58 Hereafter referred to as 'technical agreements'. In this respect it is interesting to note that the relevant (eighth) recital in the preamble speaks of the 'exemption' as opposed to 'exception' of agreements that seek technical improvements.
can be through, *inter alia*, standardisation of equipment, transport supplies, vehicles or fixed installations. Such agreements do not fall under the prohibition of Article 2 of the Regulation and in this respect it may be called a 'block negative clearance'. An important thing to note is the fact that the English version of Article 3 does not require the technical improvement to be the *sole* object and effect of the agreement. This is most probably a translation error as other language versions do require the technical improvement to be the agreements' only object and effect. As a consequence Article 3 should be read to include the word 'sole'.

Since the *French Seamen* case it is clear that Article 2 of the Regulation is to be understood as a representation of Article 81(1) EC. In secondary legislation based partly on Article 83 EC, the Council cannot deviate from the substantive provisions of the Treaty when the Treaty itself does not foresee such special rules. It is then submitted that Article 3 of the Regulation is to be understood as providing an exception only for those technical agreements that are unrestrictive of competition. If the prohibition of Article 2 of the Regulation is to be read in the context of, and should be understood as hierarchically lower than Article 81(1) EC, the exception in Article 3 must fulfil the requirements that are necessary for an exception from the Treaty rules. Article 253 EC requires that the reasons on which legislation is based, shall be stated. With regard to Article 3, the Regulation's eighth preamble merely states that the technical agreements are exempted 'since they contribute to improving productivity'. This further reinforces the interpretation of Article 3 as a 'block negative clearance'. Following this interpretation, Article 3 is understood as merely summing up the agreements that are deemed not to restrict competition in the first place.

Article 5 of Regulation 1017/68 provides for non-applicability of the prohibition of Article 2. This provision appears similar to Article 81(3) but there are some differences. These differences are of minor importance, however, now

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59 Article 3(1)(a). Article 3 lists six other means which are not included because they appear to be of little interest for the purpose of this work. This list of means (a-g) is limitative but Article 3(2) states that it may be reviewed. This, however, hasn't happened since 1968: Blanco & Houtte 1996, p. 70.


66 Schröter calls this an 'allgemeines Negativatust' which he compares with Article 4(2)(3) of Regulation 17: Groeben, Thiesing & Ehlermann 2000, p. 2/1001.

that the Commission has interpreted Article 5 as the equivalent of the third paragraph of Article 81(3) EC. Notwithstanding this, an important difference appears to exist in the fact that 'improving the quality of transport services' is an extra positive requirement compared to Article 81(3) EC.

The requirement in Article 81(3) that the consumers are allowed a fair share is replaced by the requirement that the agreement 'takes fair account of the interests of transport users'. This reformulation has two consequences. First, 'consumers' is replaced by 'interests of transport users'. Schröter holds that this change in wording should be considered as an attempt to take the special character of the transport sector into account. Following the Consten & Grundig case, this provision should be interpreted so that there is a general benefit and not just a benefit for the parties only. The fact is that the Commission has interpreted this provision as only including the users of transport and not in a wide sense such as to include consumers in general. Secondly, there is a difference as Article 81(3) requires that consumers are 'allowed' a fair share whereas for the application of Article 5 it suffices when the agreement 'takes fair account' of these interests. Schröter is of the opinion that this part of Article 5 can be interpreted in conformity with the Treaty and thus Article 81(3). Mestmäcker holds that this forms part of the recognition of the interests of the transport sector. As such it constitutes a test that is easier to satisfy than that under Article 81(3). As mentioned above, the Commission has stated that it considers Article 5 to be 'essentially modelled on the rules in Article 81(3)' From this it would seem to follow that the scope for exemptions under the Regulation is probably not much broader than that in Article 81(3) EC.

With regard to the air- and sea transportation sector the regime is somewhat different. As these areas are also governed by international conventions, the room for Community action is limited. The judgment of the Court in French Seamen confirmed that the transport sector was subject to, inter alia, the Treaty's competition provisions. This ruling was further clarified by the Courts' ruling in Asjes. This has resulted in the, albeit belated, adoption of two Regulations concerning the competition rules in these sectors. For maritime trans-

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69 Joined Cases 56, 58/64, Consten & Grundig, [1966] ECR 429 at p. 348.
71 Mestmäcker 1971, p. 693.
ports, Regulation 4056/86 was enacted. With regard to consortia, the Council enacted Regulation 479/92.

The twenty years that passed between the enactment of the Inland Transport Regulation and these Regulations has had a thorough impact on the structure of these Regulations. For example, the first recital of the Maritime Transport Regulation explicitly recognises the fact that the Treaty's competition rules apply to the maritime transport sector Council, thus ending the debate on the applicability of the competition provisions to the transport sector. With regard to the question of integrating environmental concerns, Articles 2 and 3 of the Maritime Transport Regulation seem to be of most interest. These contain substantive differences from the normal rules applicable to agreements. Article 8 of the Regulation only concerns 'effects incompatible with Article 82 of the Treaty' To that effect, direct reference is made to the substantive provisions of Article 82 EC and no substantial differences exist in this respect between the maritime transport sector and industry in general.

Article 2 of Maritime Transport Regulation contains the 'block negative clearance' for technical agreements similar to that in Article 3 of the Inland Transport Regulation. Whatever substantial differences occur between the two exceptions is due to the nature of the activity covered. The remarks made with regard to Article 3 of the Inland Transport Regulation can thus be repeated for the Maritime Transport Regulation. Article 3 contains the block exemption for liner conferences. Article 7(2) of the Maritime Transport Regulation ensures that such liner conference agreements do not have effects incompatible with Article 81(3). It explicitly lists 'acts of the conference which may prevent technical or economic progress (...)'. Article 12 of the Maritime Transport Regulation provides for an opposition procedure as regards the application of Article 81(3) in this sector. The Consortia Regulation adopts the test of Article 81(3) EC for

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79 At least one, probably translational, difference can be found in the German version of the Maritime Transport Regulation which reads that the object or effect of an agreement should be technical. The English version, however, does require both the object and effect to be technical. This appears to have been the intent of the legislator.
80 Article 7(2)(b)(iii) Maritime Transport Regulation.
the exemption of consortia agreements. The same holds for the Commission Regulation adopted pursuant to the Consortia Regulation.

The Air Transport Regulation also allows for an exception for technical agreements. Article 2 of this Regulation creates an exception for technical agreements in a way similar to that in the Inland- and Maritime Transport Regulations. A major difference follows from the fact that the list of technical agreements is not exhaustive. The contents of the list do not differ that much from the lists under the other Regulations. Again, the comments made with regard to the exception for technical agreements under the Inland Transport Regulation can be repeated here.

Finally, it needs to be pointed out that Regulation 1/2003, the new Regulation implementing Articles 81 and 82, envisages a number of extensive changes to, inter alia, the Transport Regulations. Articles 36 to 43 of Regulation No. 1/2003 amend and repeal several Regulations that are relevant to the transport sector. Article 43(2) of Regulation No. 1/2003 repeals regulation No. 141 of 1962. The specific procedural rules contained in those Regulations are repealed whereas the substantive rules are left in place. In Article 36 of Regulation No. 1/2003 amends the Inland Transport Regulation in that, most importantly, Articles 2 and 5 to 29 are deleted. Furthermore, Article 3(1) of the Regulation is changed so as to refer directly to Article 81(1) instead of Article 2 of the Regulation. The amendments to the Maritime Transport Regulation by Article 38 of Regulation No. 1/2003 do not entail any consequences for Articles 2 and 3 of the former, that were identified as being relevant in this context. Similarly, the

81 Article 1(1) Consortia Regulation.
83 Council Regulation (EEC) No. 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ 1987 L 374/1. On the same day another Regulation concerning competition in the air transport sector was adopted. This Regulation (Council Regulation (EEC) No. 3976/87 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector, OJ 1987 L 374/9) enables the Commission to issue block exemptions. None of these are of interest for the purpose of this study. See Bellamy & Child 2001, p. 1081 et seq. for the block exemptions that have been issued in the transport sector.
84 Groeben, Thiesing & Ehlermann 2000, p. 2/1000. One difference, again occurring only in the German text, is the reference to the object or effect (supra note 78). Again, it is submitted that this is probably a translational error.
85 Article 2(1) last sentence Air Transport Regulation.
87 Ibid., explanatory memorandum with regard to Articles 37-40.
amendments to the Air Transport Regulation by Article 39 of Regulation No. 1/2003 would not seem to be of great importance as these relate only to Articles 3 to 19 of that Regulation thus effectively leaving the provisions that have been identified as relevant in this respect, untouched.

7.3.3.1 The role of environmental concerns

Like the agricultural sector, the Community's and member states' transport policies have recently been concerned with environmental protection which is not surprising taking into account the fact that the transport sector is a major polluter. From a general point of view, two provisions that can be found in all Regulations for the transport sector appear to be of interest for the purpose of this research: firstly, the exception for technical agreement and, secondly, the exemption possibility. As the exemption possibility is insofar as it is different from Article 81(3), is in essence a particular application of the general exemption clause contained in Article 81(3) EC, attention with regard to the role of environmental concerns, will also focus on the differences that have been noted to exist between these exemption clauses and Article 81(3).

Firstly, the exceptions for technical agreements. As was shown above, this exception or block negative clearance can apply only if there is no restriction of competition in the first place. As such it seems impossible to have recourse to this provision in order remove a restriction of competition from the competition provisions' scope on environmental grounds. Notwithstanding this rather limited scope, the exception might still be of interest. The pivotal question is of course in how far environmental considerations can be brought under the heading of technical agreements. Undoubtedly, this is possible. With regard to, for example, the exception for agreements involving the 'standardisation of equipment' it is certainly possible that this exception may also be applied with regard to agreements also involving environmental benefits. Or, in another example, an agreement between undertakings to cooperate and pool their transportation means to achieve environmental benefits, is very likely to profit from the exception for technical agreements. For this is it necessary that the environmental benefits coincide with the technical improvements or technical cooperation. Furthermore, these benefits must be its sole object as well as effect of the agreement. The conclusion therefore would have to be that despite the possibility of

88 See, in general with regard to the integration of environmental considerations in this sector: Dhondt 2003, p. 293 et seq.
89 Article 2(1), sub (b) Maritime Transport Regulation.
90 Article 3(1), sub (a) Inland Transport Regulation.
using this exception with respect to certain environmental agreements, its scope is very limited.

As regards the role of environmental concerns with regard to the possibility for an exemption under the transport Regulations a first remark concerns the wording used in Article 5 of Regulation 1017/68. The fact that it refers to a fair share for transport users means that the interest of consumers in general are not necessarily or at least not directly taken into account. This could mean that negative environmental effects, that are more likely to affect consumers in general rather than the transport users, are less likely to play a role. Furthermore, two cases appear to be of interest. Firstly, the Trans-Atlantic Conference Agreement or TACA case.\(^93\) In the proceedings against them, the TACA members invoked, inter alia, environmental benefits with regard to the possibility of an individual exemption for the pilot project of the so-called 'hub-and-spoke' system.\(^93\) This system entailed the creation of so-called inland hubs and spokes between, firstly, the ocean port and the hub; the so-called trunk leg and, secondly, between the hub and the shipper's premises. According to the TACA parties, all container transports between the ocean port and the inland hub (i.e. the trunk leg) will take place by rail or inland waterway. As a result of this, the parties claimed that the system would contribute to a reduction in transport by road, thereby reducing congestion and bringing environmental benefits.\(^94\) However, in order to achieve these benefits the parties considered it necessary to collectively fix the prices for their inland transport activities. The Commission, however, did not consider this to be indispensable. Apparently, the parties consider the price-fixing necessary in order to be able to lower the costs so that transportation by rail and inland waterway becomes competitive with road transports.\(^95\) The Commission starts out by stating that it does not address the merits of the hub and spoke system itself nor the necessity of the price-fixing agreements.\(^96\) However, as the parties have provided no evidence at all as to the effectiveness of the system in bringing about the claimed benefits in practice and because the elaboration of the system seems somewhat hypothetical, the Commission considers that an exemption is not warranted. It appears that the Commission might have granted an exemption in this case if the parties had substantiated their claim with (more) evidence. As a result, the possibility for environmental


\(^{94}\) Ibid., para. 47 et seq. See also the Final report of the multimodal group of November 1997, to be found on the Competition DG's website: http://europa.eu.int/comm/competition/antitrust/others/ (20-02-2001).

\(^{95}\) Commission Decision 1999/243/EC, *TACA*, OJ 1999 L 95/1, para. 54 et seq.

\(^{96}\) Ibid., para. 439.

\[^{93}\] Ibid., para. 438.
considerations to play a role in the exemption procedure cannot be ruled out a priori on the grounds of this decision.\textsuperscript{97} Further evidence that environmental concerns may play a role in the procedure for an exemption can be found in the second case, concerning the Hansa-Ferry agreement.\textsuperscript{98} The parties to this agreement had established a new ferry service. In its notice pursuant to Article 12(2) of the Maritime Transport Regulation\textsuperscript{99} the Commission cited the following arguments put forward by the parties:

\begin{quote}
\textit{[...]} The agreement implies that the parties can use their resources more efficiently, rationalising costs and take greater regard to environmental considerations. \textit{[...]} The improved planning will benefit the population at the coast via a lower environmental impact.
\end{quote}

This case ended silently with the Commission issuing an unpublished exemption ex. Article 12 of the Maritime Transport Regulation.\textsuperscript{100} However, this case and the TACA case show that in its application of the exemption possibility under the transport regulations, the Commission appears willing and able to take environmental aspects into account.

As regards the special exemption clause provided for by Article 5 of the Inland Transport Regulation, there is no case law involving environmental concerns. Furthermore, as the wording of Article 5 shows, it closely resembles Article 81(3) EC as a result of which the Commission is of the opinion that Article 5 cannot go beyond what Article 81(3) allows.\textsuperscript{101}

7.3.4 Defence

Not so much a true sectoral exception, Article 296 EC entails the derogation for matters of ‘essential interest of its security which are connected with the production of or trade in arms, munitions and war material’. This derogation, however, is restricted in that it only applies to products that are ‘intended for specifically military purposes’. By analogy, it seems that this exception is also limited to, in general, technology intended for specifically military purposes. With regard to what are called ‘dual use products’ (i.e. products that

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97 However, the Commission does seem to rule out the the necessity of an agreement to fix prices to achieve the (environmental) benefits of another part of the TACA, the EIEIA. \textit{Ibid.}, paragraph 431.
98 Notice pursuant to Article 12(2) of Regulation (EEC) 4056/86 concerning Case IV/MAR/35.488, Hansa-Ferry, OJ 1996 C118/5.
99 Which is comparable with the notice under Article 19(3) of Regulation 17 of 1962, OJ English Special Edition (1962), 87.
\end{footnotes}
\end{footnotesize}
have a civilian as well as military use),\textsuperscript{103} the Commission subjects the civilian use of the products to a normal competition scrutiny.\textsuperscript{103} It follows from the case French State/Suralmo\textsuperscript{104} that the Commission is generally sceptical of the 'military' characterisation of dual use products. When a product is not really primarily intended for military use, it should be subjected to the normal competitive regime. As a result the possibility that this derogation is applied on environmental grounds is very limited if not non-existent as military objectives often rule out other, and perhaps in particular environmental, objectives.

7.4 The concept of an undertaking

7.4.1 Introductory remarks

A core concept of European competition law is that of an 'undertaking'. In fact this concept can be said to define the scope ratione personae of the Community competition rules.\textsuperscript{105} This is exemplified by the fact that part of the substantive provisions of competition law is directed at undertaking whereas the remainder is not directed at but still concerns undertakings. In short, the concept of an undertaking may be equated with an enterprise or a firm. Below this concept will be examined in greater detail. This will involve, firstly, an appreciation of the definition of this concept. Secondly, it will be seen that inherent in this concept are several exceptions. These exceptions will be examined in general. Thirdly, it will be seen to what extent these exceptions are relevant in an environmental context.

7.4.2 A definition of the concept of a undertaking

To anyone familiar with European law it will not come as a surprise that the pivotal concept of an undertaking was left undefined by the Treaty's drafters. As a result, it was up to the Commission and Court to define it. While there was some case law as to the concept of an undertaking as regards the competition rules in the ECSC Treaty,\textsuperscript{106} this concept was clarified for the EC

\textsuperscript{103} Commission merger decision of 23/09/1996 in Case IV/M.820, British Aerospace/Lagardère, OJ 1997 C 22/6.

\textsuperscript{104} See in general on dual use goods: Case C-83/94, Criminal proceeding against P. Leifer et al. [1995] ECR I-3231.

\textsuperscript{105} Commission, IXth. Competition Report (1979), p. 73. This Case concerned systems for diesel engines that were considered not to be specifically (or even mostly) intended for military purposes.

\textsuperscript{106} Cf. Louri 2002, p. 143.

\textsuperscript{107} Joined Cases 17 and 20/61, Klöckner-Werke AG and Hoesch v. High Authority, [1962], 619.
competition rules only in the Höfner & Elser case decided in 1991. In this case the Court gave the following broad and, most importantly, functional interpretation of the concept':

'[...] the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed [...]'

Thus it is function and not the form that matters in deciding whether or not an entity is an undertaking in the context of European competition law. The decisive criterion in answering the question of whether or not an entity is an undertaking therefore depends on whether or not the activity engaged in by that entity is 'economic'. However broad and functional this concept may be, one exception is inherent in it. Entities engaged in non-economic activities fall outside the scope of the competition provisions. Before going deeper into these exceptions some attention will be devoted to the other emanations of the concept of an undertaking.

Apart from the concept of an undertaking, Article 81 EC also refers to 'associations of undertakings'. These consist of nothing more than the sum of a number of undertakings. Again, therefore, the meaning of the word undertaking is decisive. Another element of EC competition law that, although in itself not directly connected to the concept of an undertaking, would seem to be relevant in this respect is the so-called intra-enterprise doctrine. According to this doctrine, agreements between a parent company and its wholly controlled subsidiaries fall outside the scope of Article 81(1). Instead, the behaviour of the concern, formed by the parent and subsidiaries, may constitute abuse of a dominant position.

It is certainly possible that the intra-enterprise doctrine is applied to an agreement between a parent company and a subsidiary on environmental aspects. However, as the application of this doctrine is limited to Article 81, the implications of such an application will be looked at below in the section devoted to Article 81(1).

108 It would rather seem to be connected to the element of Article 81(1) that there be an ‘agreement between undertakings’.
109 Ritter, Braun & Rawlinson 2000, p. 42 et seq.
112 For example an instruction by a parent of a subsidiary to take care of the collection and recycling of its products when they reach their end of life.
113 Infra, paragraphs 8.3-8.6.
7.4.3 The exception for non-economic activities

7.4.3.1 General remarks

The Court’s case law with regard to the concept of an undertaking also involves a slowly but certainly growing body of case law on the – still somewhat undefined – exceptions to this concept. Particularly in the field of (semi) public enterprises have these exceptions been developed. Competition law in this area of the economy is governed mainly by Article 86 EC. This case law has had, essentially, two effects. Firstly, certain market activities by public institutions may fall within the ambit of the competition rules. Secondly, certain activities undertaken by company-like entities are taken outside the scope of the competition rules. For the purpose of this research, the second type of effect is the most interesting and we will therefore concentrate on this effect.

As we have seen, the crucial question is whether an activity can be considered ‘economic’. In AAMS, the Court already concluded that

‘any activity consisting of offering goods and services on a given market is an economic activity’.

A further hint that may help us to determine whether or not an activity is economic was given in Höfner & Elser. In this case it held that the activity concerned, employment procurement, was indeed economic because

‘Employment procurement has not always been, and is not necessarily, carried out by public entities.’ [Emphasis added]

This approach forces us to consider why certain activities are necessarily carried out by public entities. Economically speaking the distinction between economic and non-economic activities comes down to an appraisal of the results of those activities. Whenever an activity yields general or diffuse (non excludable) as opposed to specific benefits, it is unlikely to be taken on by an entity subject to the laws of the market economy. These diffuse results will be difficult to

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quantify (if they are recognised to exist at all) and as a result the possibility of a remuneration and therewith the possibility of an economic relation between the provider and receiver of this benefit disappears.

This reasoning has been applied by the Court in two different settings.\textsuperscript{118} Firstly in those cases that concerned the exercise of a power that is typically one of a public authority. These cases may be summarised as involving a 'state prerogatives test' (the Diego Cali and SAT Fluggesellschaft cases\textsuperscript{119}). Secondly in those cases where an activity involved, essentially, such a high degree of solidarity that it would not be performed by an entity subject to the market economy rules (Poucet & Pistre, FFSA, Albany and Pavlov cases\textsuperscript{120}). Accordingly, this test will be referred to as the 'market economy test'.\textsuperscript{121}

How these two tests relate to one another is somewhat uncertain. It appears that the state prerogatives test is used as sort of a short cut in those cases where the Court does not have any doubts as to the non-economic nature of an activity. Where there is no \textit{prima facie} evidence of the non-economic nature, the court appears to use the market economy test.\textsuperscript{122} The relationship between these tests is further complicated as a result two further problems. Firstly, the market economy test used by the Court in determining whether or not an entity engaged in a particular activity is an undertaking closely resembles and appears to be connected to the test applied by the Court within the application of Article 86(2) EC. Secondly, connected with this problem, certain scholars opine that

\begin{itemize}
\item \textsuperscript{118} Cf. Loozen 1999, p. 274-285, at p. 280, who speaks of a 'two track approach' and Louri 2002, who at p. 169 characterises the exception pursuant to the market economy test as a new category that is to be distinguished from the exception that is governed by the state prerogatives test.
\item \textsuperscript{121} The reader well versed in the ways of EC competition law and notably the state aid provisions will recognise the similarity to the test used by the Commission and Court in relation to investments. This test is referred to as '(private) market economy investor principle'. E.g Jointed Cases T-129/95, T-2/96, T-97/96, Neue Maxhütte Stahlwerke and Lech-Stahlwerke v. Commission (Neue Maxhütte Stahlwerke), [1999] ECR 11-17.
\item \textsuperscript{122} The Commission's Communication on Services of general interest in Europe, OJ 2001 C 17/4, appears to classify the market economy test as a subsidiary test in relation to the state prerogatives test, paras. 28 and 29.
\end{itemize}
the market economy test should not be applied at all in determining the (non) economic nature of an activity.\footnote{Cf. Buendia Sierra 1999, p. 58 and Gyselen 2000, p. 439.}

Below, we will first subject the state prerogatives test to closer scrutiny after which our attention will focus on the market economy test and the problems with regard to this test as they were noticed above.

7.4.3.2 The state prerogatives test

As was mentioned above, the Court appears to use the state prerogatives test in cases where the non-economic nature of an activity is clear at first sight. This approach can be called a short cut because, on a more abstract level, the (more or less implicit) reasoning underlying the state prerogatives test appears to be the diffuse/specific benefits reasoning employed by the Court in the Höfner & Elser. Below we will take a closer look at the only two cases in which the Court used the state prerogatives test: the SAT Fluggesellschaft and Diego Call case.

The SAT Fluggesellschaft case started when Eurocontrol demanded payment by SAT Fluggesellschaft of the so-called ‘route charges’.\footnote{Case C-364/92, SAT Fluggesellschaft, [1994] ECR I-43.} Eurocontrol is an international organisation that was made responsible for, \textit{inter alia}, the control of air traffic over Europe. To finance its activities, Eurocontrol could demand route charges that, according to SAT Fluggesellschaft violated the Community’s competition rules. After citing, among others, the Höfner & Elser case as authority for the functional concept of an undertaking in Community competition law, the Court comes to the following conclusion:\footnote{Ibid. para. 30.}

\begin{quote}
"Taken as a whole, Eurocontrol’s activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition."
\end{quote}

The Court reaches this conclusion by first pointing out the sovereignty that states have over the airspace above their territory after which it refers to the Convention establishing Eurocontrol as evidence of the delegation of part of this sovereignty.\footnote{Ibid. paras. 20-24.} In this respect the Court appears to attach particular weight to Eurocontrol’s tasks and the fact that it may collect charges and has certain rights and ‘powers of coercion’. Finally the Court reiterates the fact the Eurocontrol is
financed by the Contracting States. As Buendia Sierra has pointed out, these criteria are not very helpful in determining the reasons for the Court to consider this activity of a non-economic nature. Rather more helpful would appear to be the reference by the Court to the fact that Eurocontrol is to ensure the territorial security of the Contracting States and the fact that Eurocontrol is to provide its services to any aircraft even where the owner has not paid the route charges. This boils down to the Court stating that Eurocontrol's service entails a general, diffuse benefit (air safety) for which adequate remuneration is not always possible and, in a certain sense, required.

The second case in which the Court used the state prerogatives reasoning is the Diego Cali case. This case concerned a dispute similar to that in the SAT Fluggesellschaft case. Again a company refused to pay charges levied by an entity on grounds that these were incompatible with Community competition law. Interestingly for the purposes of this research, the entity in the Diego Cali case, SEPG, was responsible for the protection of the environment in the Port of Genua. The Court's approach seems reminiscent of that in the SAT Fluggesellschaft case but is slightly more satisfying in that the Court does a somewhat better job of clarifying the reasoning underlying its state prerogatives 'short cut'.

In paragraphs 19 and 20 the Court states that the dispute concerns the payment of levies for anti-pollution surveillance activities by SEPG without any actual pollution having taken place. The Court moves closer to its conclusion when it refers to the fact that the Order concerning SEPG's activities explicitly distinguishes between, on the one hand, the preventive surveillance at hand and, on the other hand, the intervention in cases where actual pollution had occurred. The Court concludes as follows:

'The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the state as regards protection of the environment in maritime areas.

Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition [...]'

127 Ibid. para. 26. Interestingly, the Court had ruled in Höfner v Elser that the legal status and method of financing were irrelevant in determining whether an activity is of an economic nature.

128 Buendia Sierra 1999, p. 51.

129 This charge was not related to, for example, the safety record of a specific aircraft.

130 Case C-343/95, Diego Cali, [1997] ECR I-1547.

131 See, however, Buendia Sierra 1999 who, at p. 52, considers the lack of reasoning 'deplorable'.

As regards the levying of the charges by SEPG, the Court considers this to be an integral part of its surveillance activities. The Court’s reasoning shows, much less implicitly than in the SAT Fluggesellschaft case, that the activities concerned (preventive surveillance) involved diffuse benefits only for which no remuneration would be possible. As can be expected, we will come back to this case in the paragraph below when we will examine the role played by environmental concerns in determining the scope of the concept of an undertaking.

7.4.3.3 The market economy test

Where the exercise of state prerogatives is out of the question because, for example, there is competition on the market, the Court appears to use the market economy test. In the Poucet & Pistre, FFSA, Albany and Pavlov cases this involved a complex appreciation of several criteria resulting in a rather diverse and heterogeneous concept of undertaking. This test has to this date only been applied in the cases involving entities active in the field of social security. Its application is, however, not necessarily confined to this area alone, as closer scrutiny of these cases will show.

All of the cases mentioned above show a remarkable resemblance as to the facts underlying them. In all of them, the dispute started when an individual refused to pay contributions to a social security scheme on the grounds that this entity violated Community competition rules. As the Court’s reasoning in the Albany and Pavlov cases provides us with a good summary of the earlier case law (i.e. the Poucet & Pistre and FFSA cases), our attention will focus on the Pavlov case.

The Court started out by summarising its judgment in Poucet & Pistre and in particular pointing out the role that solidarity had played in that case. The following factors were considered to be relevant by the Court:

- The benefits were uniform despite the fact that the contributions were proportional to income,
- Pensions were financed by the active workers,

133 Ibid. para. 24.
136 Perhaps Advocate General Jacobs did an even better job at providing an overview, Opinion of the A-G, paras. 306-348.
Pensions were not dependent on the contributions and Funds with a surplus helped finance funds with shortages. It then reiterated its judgment in the FFSA case where the degree of solidarity was considered insufficient to remove the entity’s activities from the scope of the competition rules on the following grounds:

- Membership to the scheme was optional,
- The scheme functioned according to the capitalisation principle,
- Benefits depended on contributions and the performance of investments by the scheme.

The scheme’s social objective, non-profit making nature, limited solidarity requirements and the fact that, in its investment policy, the scheme was subject to certain restrictions were insufficient for this to be otherwise.

The Court’s approach in Pavlov is quite comparable to that in the Albany case. The Court lists the following facts as grounds for considering that the schemes at hand in Pavlov and Albany were engaged in an economic activity:

- The schemes themselves determined the contributions,
- The scheme functioned according to the capitalisation principle and Membership was optional.

In sum, the case law of the Court with regard to solidarity as ground for qualifying an activity as non-economic shows that the bar is high indeed. Any, if not the slightest, presence of market mechanisms (i.e. optional membership and operation according to the capitalisation principle) is sufficient for the Court to conclude that activity is at least in principle governed by the competition rules. Apparently, this is otherwise only in those cases where there is unmitigated solidarity. Does this fit in well with the diffuse/specific benefits reasoning that was identified above as underlying the Court’s approach? The answer has to be in the negative as these social security schemes do provide a specific benefit. That, in an individual case, this benefit is to a greater of lesser extent unrelated to the specific, individual, contributions cannot detract from this. Only if one were to consider income redistribution (which is, in essence, the result of solidarity) as the benefit of the scheme, would this be different as redistribution is indeed a diffuse benefit. As a result, the solidarity considerations would fit in better in the test of Article 86(2) as the Court explicitly stated in the Albany case.
7.4.4 The role of environmental concerns

The overview of the case law on the concept of an undertaking in EC competition law has shown that in essence both exceptions involve similar reasoning. As the Diego Cali case has furthermore made clear, an application of this diffuse/specific-benefits reasoning in an environmental context seems fairly obvious. Environmental benefits are, by their very nature, diffuse benefits even when they may occasionally also involve a specific benefit for an individual. The diffuse character is, however, limited to certain environmental activities or services. The Diego Cali case has provided us with an example of such a service and may also serve to indicate the limits to the activities that can be considered to yield sufficiently diffuse benefits. In this regard it is important to consider that, in itself, the concept of a benefit already involves a weighing of costs and results. Therefore, the mere fact that (clearly quantifiable) costs are involved (in that, for example a fee is to be paid) does not preclude the existence of a diffuse benefit. Of course, determining exactly how diffuse a benefit should be in order for the provision of this benefit no longer to constitute an economic activity is far from clear. In this respect the borders of this doctrine are uncertain.

The application of the diffuse/specific-benefits reasoning to activities in the social sphere is subject to the same uncertainty. A number of relevant factors can be distilled from the Court’s case law. However, the weight to be accorded to these factors is unclear.

On a general level, however, the room for the non-economic activities doctrine appears to be shrinking. The increased internalisation of environmental costs will ultimately result in the conclusion that the environment no longer represents a non-economic sphere of activity. As we have seen above, the Court is generally more reluctant to apply the diffuse benefits reasoning and openly links this reasoning to the possibility of an exception pursuant to Article 86(2) EC. The most important message is therefore be that, notwithstanding the Court’s simple and straightforward reasoning with regard to the state prerogatives exception in Diego Cali, the border between economic and non-economic activities is on the move. Moreover, it appears to be moving towards a more narrowly defined exception for non-economic activities as the market mechanism is applied to more sectors of the economy.

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141 In this regard it may actually be better to speak of a positive net result.
7.5 Effect on intra-community trade

EC competition law applies only when the distortion or restriction of competition has an effect on trade between the member states. The Court has given this element a very wide meaning in two early cases.

"In this connexion, what is particularly important is whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential, to freedom of trade between member states in a manner which might harm the attainment of the objectives of a single market between states."

The broad concept given in these cases seems like a precursor to the so-called Dassonville-formula with regard to the free movement of goods. In a later case the Court ruled that Community competition law applied only where the trade between member states is appreciably affected, thereby effectively introducing a de minimis rule. This appreciability-criterion applies to the effect on the intra-Community trade as well as to the restriction of competition. The notion of appreciability in connection with the restriction of competition has received some attention above and will be further dealt with below.

The result of a restriction of competition not affecting intra-Community trade is that European competition law doesn't apply but national competition laws may. Accordingly, the criterion that the restriction should have an effect on intra-community trade can be described as a jurisdictional criterion. Put differently, it may be considered to indicate the scope ratione jurisdictionae.

The effects of this jurisdictional clause are, in essence, twofold. It may, firstly, serve to allow or to rule out the application of Community competition law to a restriction of competition involving enterprises established in part of the common market. This may be deemed the intraterritorial jurisdictional effect. Secondly, it may determine the extraterritorial application of the Community competition rules to restrictions of competition involving enterprises from outside the common market that nevertheless have an effect within the common market.

Similarly, it may also rule out the application of the Community

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148 Infra, paragraph 8.4 of this chapter.
149 This is referred to as the 'effects doctrine' or 'implementation doctrine'. It is considered to have been accepted by the European Court of Justice in the Woodpulp case, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Åhlström Osakeyhtiö and others v. Commission [1988] ECR 5193. Cf. Ritter, Braun & Rawlinson 2000, p. 61, Bellamy & Child 2001, p. 142.
competition rules to restrictions of competition involving European firms yet having an effect on the competition in a non-Community market. With regard to the extraterritorial effect it needs to be noted that this criterion hinges not only on the effect on intra-community trade but also on the effect on 'competition within the common market'. Below, the role and influence of environmental concerns on these two jurisdictional effects will be examined.

7.5.1 Environmental concerns and the jurisdictional clause

Two jurisdictional effects have been identified above. Firstly, it may rule out the application of Community competition law to restrictions that take place within the Community. Secondly, it may enable the extraterritorial application of Community competition law. With regard to the first, intraterritorial, effect the most interesting situation is that where the application of Community competition law is ruled out because of the lack of effect on intra-community trade. In general this could occur in two situations. Firstly, there may be a transboundary restriction of competition (i.e. involving entities in two member states) that is, however, of minor importance. Secondly, the restriction of competition could have no transboundary element at all (i.e. taking place within one member state) whilst having no or only a very remote connection to intra-community trade.

Moreover, and also on a general level, the test applied by the Commission and Court in determining whether or not intra-community trade is appreciably affected has both a quantitative and a qualitative aspect. The Commission has adopted a primarily quantitative approach to this appreciability criterion. In its notice on agreements of minor importance, the Commission primarily relies on the parties' market shares. The Court refers, apart from the market share, in general to the need to take into account the economic reality of a case. In practice, this means that the Court will take into account the nature of the restriction of competition. In this respect, there could be an opening for environmental concerns. An environmentally inspired restriction of competition involving a transboundary element may be considered not to appreciably affect intra-community trade because the environmental aspects concerned are themselves of limited importance. A possible example of such a situation could

150 Commission Notice on agreements of minor importance which do not fall within the meaning of Article 85(1) of the Treaty establishing the European Community Commission Notice on agreements of minor importance which do not fall within the meaning of Article 85(1) (De Minimis Notice), OJ 2000 C 368/13.

be an agreement between firms in different member states to reduce certain emissions. Provided that such an agreement remains confined to these environmental aspects, no effect on intra-community trade is likely.

As regards the situation where the restriction of competition has no transboundary element, the Courts’ case law clearly indicates the application of Community competition law is not ruled out merely because the restriction of competition involves only parties in one member state.\textsuperscript{52} However, in such cases there will need to be a connection between the restriction of competition and intra-community trade.\textsuperscript{53} This connection can be present because the restriction directly concerns intra-community trade (e.g. discrimination of imports)\textsuperscript{54} or because the restriction covers the entire territory of a member state and thus ‘by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis’\textsuperscript{55} Again, a role for environmental concerns seems possible. An agreement between firms in one member state on environmental matters may very well lack any influence on intra-community trade. This appears to have happened in the \textit{Stibat} case.\textsuperscript{56} In this case, an agreement on the take back and recycling of waste batteries involving over 90 per cent of the industry in the Netherlands was considered by the Commission not to affect intra-community trade. The Commission thus issued a comfort letter in which it indicated that intra-community trade was not affected.\textsuperscript{157} Apparently, the fact that the market for batteries is in fact Community-wide (a large percentage of batteries is imported from other member states) together with the fact that this agreement involved some far-going restrictions of competition, did not stand in the way of a finding that intra-community trade was not affected. This approach may be contrasted with the stance taken by the Commission in the \textit{VOTOB} case.\textsuperscript{58} \textit{VOTOB} concerned an environmental agreement between the independent\textsuperscript{59} Dutch firms active on the market for the storage of chemicals. The agreement

\textsuperscript{52} Case 8/72, \textit{VCH}, \textsuperscript{(1972) ECR 977}, para 26 et seq.
\textsuperscript{53} Ritter, Braun and Rawlinson refer to a ‘nexus’ in this respect, Ritter, Braun & Rawlinson \textit{2000}, p. 53 et seq.
\textsuperscript{55} Case 8/72, \textit{VCH}, \textsuperscript{(1972) ECR 977}, para 29.
\textsuperscript{56} \textit{NMa} decision of 18 December 1998 in Case 51, \textit{Stibat} and decision of 31 May 1999 on administrative appeal in Case 51, \textit{Stibat}. See further, \textit{infra} paragraph 16.5.2
\textsuperscript{57} In the original decision of the \textit{NMa}, thus was not entirely clear. In the decision on administrative appeal, however, it became clear that the Commission had based the negative clearance (which is a decision stating that Article 81(1) is not applicable) on the absence of an effect on intra-community trade, \textit{NMa} decision of 31 May 1999 in Case 51, \textit{Stibat}, para. 51.
\textsuperscript{58} Commission XXIIInd. Competition Report (1992), paras. 177-186. See further, \textit{infra} paragraph 8.7.4.2.
\textsuperscript{59} \textit{i.e.} unconnected to any chemical company.
and the purely national scope of the VOTOB case are in many respects comparable to those in the Stibat case. The change on the part of the Commission in this respect can probably be attributed to the fact that at the time of the Stibat case, the Netherlands had an active competition authority whereas the competition laws in place during the VOTOB case were applied at best only infrequently, if at all.\textsuperscript{160} This signals the only marginal role for environmental (or any other) concerns in this respect. Even if environmental concerns result in the exclusion of a certain restriction from the scope of the Community competition rules, national competition laws may still apply.

This is equally true for the extraterritorial effect of the jurisdictional clause. As was mentioned above, the extraterritorial effect depends not only on whether or not intra-community trade is affected but also on whether or not competition within the common market is restricted. An agreement between non-Community enterprises having an effect on competition within the common market will fall within the scope of the Community's competition rules. This may be called the positive extraterritorial effect. Vice versa, the negative extraterritorial effect occurs where Community competition law will not govern restrictions between firms based in the Community having an effect outside the common market. However, such restrictions may very well fall within the ambit of the competition laws of the country where the agreement has its effect.

The positive extraterritorial effect of the Community competition laws is based purely on the effect on competition of a certain restriction. As such, a role for environmental concerns is certainly conceivable. It may, for example, be considered that an environmental agreement between foreign car manufacturers involving vehicles destined for, \textit{inter alia}, Europe has a very small or no effect on competition on the common market because of the inappreciability of the effects on competition.\textsuperscript{161}

The negative effect is based on the absence of an effect on competition within the common market but is limited by the requirement that there may be no effect on intra-community trade.\textsuperscript{162} In this respect, the same observations that have been made above with regard to the intraterritorial effects may be repeated.

\textsuperscript{160} See further \textit{infra} paragraph 8.7.4.2

\textsuperscript{161} See, for such an environmental agreement the agreement on the reduction of carbon dioxide emissions from cars by the Japanese Auto Manufacturers Association (JAMA) and the Korean Auto Manufacturers Association (KAMA), press release IP/00/381.

7.6 Environmental concerns and the scope of the competition rules

The above paragraphs show that the scope of the Community's competition rules can be characterised as rather wide. At the same time, it is inherently limited to the economic arena thus excluding many areas that are considered to be non-economic. Moreover, environmental considerations have been used and probably could be used to take certain entities and activities outside the scope of the competition provisions. However, on the basis of the research conducted above, it is also fair to assume that the mere presence of environmental aspects does not suffice in this respect. This begs the question what the role of environmental concerns in this respect should be. Should, for example, the presence of environmental concerns lead to the inapplicability of the competition rules? Moreover, could the integration principle, when applied according to the model of integration, lead to this result?

From the perspective of the model of integration developed in Part One, the answer must be in the negative. It was seen that competition and environmental protection could operate in a mutually reinforcing relation. It is precisely this relation that will with the greatest certainty lead to both better environmental protection and economic growth, in short: sustainable development. As we have seen, Article 6 is geared toward achieving sustainable development and since the creation of an exception for environmental concerns is unlikely to lead to such sustainable development – in fact it may very well be counterproductive in this respect – Article 6 cannot have this effect.

Simply placing all environmental restrictions or distortions of competition outside the scope of competition law cannot therefore be the result of Article 6 EC when it is applied in accordance with the model of integration.

The fact that certain areas of the economy and certain activities, including environmental ones – see Diego Cali –, have been placed outside the scope of the competition provisions is therefore not welcomed. Provided, however, that it is recognised that the boundaries of these exceptions may vary with time and place, the harm done in terms of the bypassing of chances to achieve a competition for the environment is limited. The Court's stout, straightforward and slightly legalistic reasoning in Diego Cali should not be taken as written in stone in this respect. In this connection it may be interesting to note that the Court appears to have become more reluctant to declare certain activities outside the scope of the competition provisions altogether. Rather, the Court addresses...
the tensions that arise from the unmitigated application of the competition rules in these situations with the help of much more fine-tuned instruments such as Article 86(2) EC.\footnote{Cf. Case C-67/96, Albany, [1999] ECR I-5751, para. 86.}