Competition Law and Environmental Protection in Europe; Towards Sustainability?
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8.1 Introduction

Article 81 has been the subject of more decisions and judgments than any other substantive competition provision. This should not come as a surprise given the extremely wide-ranging wording of the provision. In many respects it can be called the mainstay of Community competition law. Article 81 reads as follows:

1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition with in the common market, and in particular those which:
   a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   b) limit or control production, markets, technical development or investment;
   c) share markets or sources of supply;
   d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   - any agreement or category of agreements between undertakings;
   - any decision or category of decisions by associations of undertakings;
   - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
     a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
     b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

As a professor of competition law once said: ‘Article 81 (and 82) should be treated as if they are provisions of criminal law; all elements must be proved before anyone can be found guilty of infringing them’. In this paragraph we will
therefore examine closely all the elements that Article 81 is made up off and see what role environmental concerns may play. Article 81 quickly reveals its essentially bifurcated structure: it consists of a broadly formulated prohibition of agreements that restrict competition whereas an exemption may be granted from such a prohibition. This structure has resulted in a number of interesting points with regard to this provision. For one, the direct effect of the prohibition together with the Commission's exclusive right to grant exemptions has had an extensive influence on Article 81's application. The recently adopted Regulation No. 1/2003, which provides for the direct applicability of Article 81(3) EC, will change this to a large extent.¹

8.2 The Albany exception ratione materiae

8.2.1 Introduction

In a number of recent cases, the Court of Justice has created a special exception to the scope of Article 81 for collectively negotiated social agreements. Because this exception exists only with regard to Article 81, it has not been treated as a general limit to the scope of the competition provisions. For the moment, this exception exists only in the social context. However, as the application of comparable reasoning outside the context of social relations cannot be ruled out, we will have a more detailed look at this exception. Below, we will first analyse the Albany exception. After that, the possibilities for the application of the exception in an environmental context will be examined.

8.2.2 An analysis of the Albany exception

In the Albany case the Court was asked to rule on the compatibility with the useful effect rule (Article 3(1) (g) in connection with Article 10 in connection with Article 81 EC) of the decision declaring collectively bargained agreements concerning a sectoral pension scheme generally binding.² For such a decision declaring an agreement generally binding to be contrary to Community competition law, it needs first to be established that the 'underlying' collective agreement itself violates Article 81. It was through this 'detour' that the Court thus had to consider whether Article 81 precluded collectively negotiated agreements in the social sphere.

¹ See, for further information on the possible effects of Regulation 1/2003, infra paragraph 8.9.
The Court started out by analysing the Treaty provisions with regard to such agreements. Thus, it cited Article 81(1). Next, it turned its attention to the Community’s policies and objectives. In this connection, it observed that the Community has not only a policy to ensure that competition in the internal market is not distorted (Article 3(t)(g) EC) but also a ‘policy in the social sphere’ (Article 3(t)(l) EC). Moreover, the Court cited the Community’s tasks as including the promotion of ‘a harmonious and balanced development of economic activities’ and ‘a high level of employment and of social protection’ (Article 2 EC). Furthermore, the Court observed the more precise tasks of the Community and Commission in encouraging collective bargaining (Articles 136-145 EC and the Agreement on social policy).

On the basis of this sketch of the Treaty context, the Court used the following reasoning to justify its exception:

‘It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) [now Article 81(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) [now Article 81(1)] of the Treaty.’

The conflict between the two sets of Treaty principles is solved with the help of contextual, systematic interpretation of the Treaty as a whole. This approach shows resemblance with the ‘praktischer Konkordanz’ principle employed in German (constitutional) law for solving conflicts. However, the Court’s approach has also been classified as being ‘teleological’. It is submitted that the qualification of this solution as teleological ignores the fact that it does not seek to attain some sort of useful effect that is in accordance with a given objective.
On the contrary, the solution employed by the Court in the Albany case follows from the recognition that there is not one objective but rather that there are two potentially colliding objectives in the Treaty.

In any case, the Court formulated a double test that needs to be satisfied for the exception to apply: both the nature and purpose of the agreement should warrant an exception. The Court then went on to consider whether the nature and purpose of the agreement justified the application of this exception in this particular instance. In determining whether the nature of the agreement justified the application of the exception, the Court concentrated on the form and the formal modalities of the agreement. It observed that it was concluded in the form of a collective agreement and as the result of collective bargaining. As regards the purpose, the Court concluded that the agreement contributed directly to the improvement of one of the working conditions. Consequently, the Court considered this agreement to fall outside the scope of Article 81(1). In doing so, the Court largely followed Advocate General Jacobs' opinion. However, the Court applied a slightly different test from that advocated by Jacobs. Apart from the necessity of defining the nature and purpose, the advocate general considered that, as a third test, the exception should also be limited to the core subjects of collective bargaining and conditional on the fact that third parties or markets are not directly affected. The second part of this third criterion can be described as requiring a minimum distance from the market. Whereas the first part of this extra test (limitation to the core subjects) can be said to be inherent or implicit in the Court's test as regards the purpose of the agreement, the 'market proximity test' has, at least not explicitly, been applied by the Court.

Following Albany, the precise extent of the exception was still rather uncertain. In this respect, the status of the third test proposed by the advocate general is only one uncertainty. Two further cases have since then shed some light on the scope of the Albany exception. In the Pavlov case, the Court was asked whether an agreement concerning an occupational pension scheme could qualify for an 'Albany exception'. Although comparable to a sectoral pension fund as regards, inter alia, its social objectives and the fact that it was concluded following collective bargaining, an occupational pension fund is slightly different. In fact, it was sufficiently different for the Court to conclude that the Albany exception did not apply. The Court repeated its Albany case law to conclude that both the nature and the purpose of the agreement would have to justify the application of the exception. The outcome was that, even though the

12 Cf. Loozen 1999, p. 278.
15 Ibid., para. 67.
purpose of the agreement was to improve an element of the working conditions, the agreement was not concluded in the context of collective bargaining.\textsuperscript{16} The Court reiterated the importance of the ‘nature-test’ by recalling the provisions on which it had in the first place (partly) based the \textit{Albany} exception.\textsuperscript{17} These contain no provisions encouraging the conclusion of collective agreements by members of the liberal professions. This lends support to the thesis that the \textit{Albany} exception is of a ‘constitutional’ as opposed to ‘competition law’ nature. With this it is meant that the exception created by the Court is not inherent in competition law \textit{in se} but rather follows, as we have also argued above, from the constitutional and holistic interpretation of the Treaty. The \textit{Albany} exception could only be justified on the ground that the Treaty encourages the conclusion of collective agreements while at the same time it also contained rules that may very well preclude the conclusion of such agreements.

Another case shedding further light on the nature and extent of the \textit{Albany} exception was the \textit{Van der Woude} case.\textsuperscript{18} The collective agreement at issue in this case concerned a health care insurance scheme. This, according to the Court, means that the purpose of the agreement is to improve working conditions thus bringing it within the scope of the \textit{Albany} exception.\textsuperscript{19} Furthermore, Van der Woude argued that the \textit{Albany} exception could not apply by virtue of the fact that the agreement directly influenced third parties.\textsuperscript{20} This, of course, reminds us of the third criterion (the market proximity test) proposed by Advocate General Jacobs in the \textit{Albany} case. The Court pays no explicit attention to the market proximity test. Rather, it appears to consider this issue implicitly when it states that the mere fact that the health insurance scheme was subcontracted cannot exclude the application of the exception.\textsuperscript{21} It would thus seem possible that a collective social agreement in which the market aspects are more pertinent than the social aspects would fall outside the scope of the \textit{Albany} exception by virtue of its non-social purpose. With the limits of the \textit{Albany} exception somewhat clearer, it is now time to turn to the possibilities that the \textit{Albany} exception leaves for environmental agreements.

8.2.3 Environmental concerns and the \textit{Albany} exception

As has been shown in the introduction, the \textit{Albany} exception is considered to be of interest in the environmental sphere as well.\textsuperscript{22} In this

\textsuperscript{16} Ibid., para. 68.
\textsuperscript{17} Ibid., para. 69.
\textsuperscript{18} Case C-222/98, \textit{H. Van der Woude / Stichting Beatrixoord} (Van der Woude), [2000] ECR I-7111.
\textsuperscript{19} Ibid., para. 25.
\textsuperscript{20} Ibid., para. 20.
\textsuperscript{21} Ibid., para. 26. However, see Loozen 2000, p. 303, who appears to argue that the Court doesn’t apply the market proximity criterion at all.
\textsuperscript{22} Supra, paragraph 8.2.
paragraph we will consider whether a widening of the scope of the *Albany* exception to include collective environmental agreements, is possible. In this respect two possibilities can be examined. Firstly, the possibility of applying the *Albany* exception to the situation where a collective agreement in the social sphere also contains clauses pertaining to environmental protection (paragraph 8.2.3.1). Secondly, the possibility of applying the *Albany* exception outside the social sphere to environmental agreements (paragraph 8.2.3.2). These two possibilities differ in their conceptual relation to the *Albany* exception. The first option essentially concerns the conditions for the applicability of the exception (*i.e.* the social nature and purpose of the agreement) whereas the second option involves the constitutional foundations of the *Albany* exception.

### 8.2.3.1 Collective social agreements concerning environmental aspects

As we have seen the scope of the *Albany* exception is limited to those agreements that have both a 'social' nature as well as purpose. As such one may wonder whether collective agreements in the social sphere that also concern some environmental aspects could benefit from the *Albany* exception. It is at this time that Advocate General Jacobs' third requirement, that the agreement be sufficiently far removed from the market and only concern the core subjects of collective negotiation, gains importance. The Court can be said to have taken the first part of this test on board in deciding that the purpose of the agreement is, together with its nature, decisive for the applicability of the *Albany* exception. Furthermore, with regard to determining the purpose of an agreement, Van der Woude shows us that the Court will consider the requirement concerning the purpose of an agreement to be fulfilled whenever the agreement contributes to the improvement of the working conditions. Taking into account the fact that, being an exception to a rule, the *Albany* exception is to be construed narrowly, it would appear improbable that environmental objectives are considered to contribute to the improvement of the working conditions. This would only be otherwise for that category of environmental concerns that directly concern the working conditions (*e.g.* a provision prescribing a reduction in the emissions of certain substances in industrial plants). If a collective social agreement would include such provisions, then these provisions could probably benefit from the *Albany* exception. Environmental provisions in collectively negotiated social agreements that are further removed from the 'working floor' (*such as e.g.* a provision stating that only sustainably logged wood may

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23 See, to this effect, Franssen et al. 2000, p. 331.

24 Cf. the reference in Article 95(4) and (5) EC to the 'working environment' as opposed to the 'environment' in general.
be used for new plant buildings\(^25\)) would probably fall outside the scope of the *Albany* exception.

### 8.2.3.2 Collective environmental agreements outside the social sphere

The second possible role for environmental concerns in connection with the *Albany* exception would be the creation of an exception by analogy, outside the sphere of social agreements, for collective environmental agreements.\(^26\) To see whether such an exception alongside the *Albany* exception is possible, the constitutional foundations of the *Albany* exception need first to be further analysed. After that has been done it will be examined whether an exception for environmental agreements can thus be founded.

We have seen above that the *Albany* exception is of a constitutional nature. Its foundations lie in the fact that the EC Treaty contains two colliding sets of norms. When analysed, it becomes clear that this collision actually consists of two separate moments. Firstly, the Treaty dictates both social as well as competitive objectives and policies for the Community. Secondly, the Treaty prescribes that the Community actively encourages certain actions that may at the same time violate another Community policy. From the constitutional status or nature of the exception it may be deduced that both moments of collision need to be present within the Treaty itself. A conflict between two sets of norms of which only one has Treaty status would be resolved by means of the general rule that the Treaty has primacy over lower (secondary) Community legislation.\(^27\) In such cases there simply is no conflict at all.

When we apply this analysis of the constitutional foundations of the *Albany* exception to the environmental context, the following picture emerges. The Community's objectives are enshrined in Article 2 EC. Reading this provision, it is very clear that the Community has a strong environmental objective as well. Article 2 prescribes that the Community's objectives shall, *inter alia*, include:

> 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence

\(^25\) An example gleaned from Franssen et al. 2000.

\(^26\) An example of such an agreement would be an environmental agreement between a very large part of the industry and the public authorities.

\(^27\) Article 230, second paragraph, EC.
of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States'.

Furthermore, according to Article 3(1) (l) EC, the Community shall have 'a policy in the sphere of the environment'. The conclusion must therefore be that the Community has both a task as well as the means with regard to the protection of the environment. From the Albany case we know that the Community also has an objective as well as a policy with regard to the maintenance of competition. Whether the two sets of objectives and policies thus identified in Article 2 and 3 with regard to competition and environmental protection will collide, depends on the absence of a hierarchy between the two sets. It is presumed that there is no hierarchy between the various Community objectives and policies.\textsuperscript{28} The text of Articles 2 and 3 does not indicate that such a hierarchical relation exists. Moreover, the Albany exception itself clearly shows that even if there is a hierarchical relation between the objectives and policies of the Treaty, there is no general primacy for the market integration objectives of the Community. In fact, the text of Article 2 may even point at a preference for environmental protection goals over competition objectives. Article 2 clearly lists environmental protection as one of the Community's objectives whereas one searches Article 2 in vain for a passage indicating that the maintenance of a certain degree of competition is a Community objective. On the contrary, Article 2 contains a number of objectives that are generally presumed to be best attained through effective competition.\textsuperscript{29} Whatever may be of this, the conclusion must be that, for environmental agreements, the first moment leading to the collision is fulfilled.\textsuperscript{30}

However, with regard to second moment, the case for an environmental exception \textit{ratione materiae} for collectively negotiated environmental agreements appears less clear-cut. In Albany the Court bases the creation of the exception on a number of provisions in the EC Treaty and the Agreement on social policy. According to the Court these provisions instruct the Community and notably the Commission to actively encourage collective bargaining in the social field. The Treaty, or, for that matter, any protocol to it, contains no provisions that could be construed so as to encourage collective bargaining in the environmental sphere in a way that is comparable to the clauses that the Court referred to when it created the Albany exception. The best thing in this respect, with regard to environmental agreements, can be found in a number of pieces of second-
ary legislation and some other instruments. Firstly, some directives explicitly provide for implementation through so-called environmental or voluntary agreements.\textsuperscript{31} These, however, cannot be considered to actively encourage the conclusion of such agreements. Secondly, the Commission, Council and European Parliament have all stated in various documents that they recommend the use of environmental agreements. In, for example, the decision on the review of the Fifth Environmental Action Programme, the European Parliament and Council both agreed on encouraging voluntary agreements as an instrument of environmental policy.\textsuperscript{32} This has returned in the Commission’s proposal for the Sixth Environmental Action Programme.\textsuperscript{33} Moreover, the Commission has issued a recommendation\textsuperscript{34} on the use of environmental agreements whereas the Council has adopted a resolution\textsuperscript{35} in this respect. However, for the purpose of this research two remarks should be made. Firstly, all of these instruments encourage environmental agreements but only insofar as they are in accordance with the Treaty, notably the competition rules therein. This brings us to the second remark, one that has already been made earlier, being that these instruments should, without exception, be characterised as lower (secondary) Community legislation. As such they cannot depart from the Treaty and therefore no collision is possible in the first place. The conditions for the second moment of the collision would thus not seem to be fulfilled. However, the following may be added to this. A close scrutiny of the provisions that the Court relies on to come to the \textit{Albany} exception, reveals that not all of these provisions actually encourage the conclusion of collectively bargained social agreements on the national level. In the \textit{Albany} case the Court bases its exception, \textit{inter alia}, on the fact that Article 118 and 118b of the Treaty and the Agreement on social policy encourage the conclusion of collective social agreements.\textsuperscript{36}


\textsuperscript{34} Commission, Recommendation 96/733 concerning the use of environmental agreements implementing Community directives, OJ 1996 L 333/59.


The reference to Article 118 which, as the Court cites it, ‘provides that the Commission is to promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers’ relates only very indirectly to the actual conclusion of collective social agreements. Interestingly, the Court, in reciting Article 118, omitted the fact that this provision applies, ‘without prejudice to the other provisions of this Treaty and in conformity with its general objectives’.

As second pillar under its reasoning, the Court lists Article 118b according to which the Commission is to endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement. This provision, again, concerns only indirectly to the conclusion of the collective social agreements such as those that were at stake in the Albany case. In this respect it may be pointed out that Article 118b concerns collective bargaining at the European level. Moreover, the Commission is only to encourage the dialogue and not the conclusion of agreements, although such agreements would seem to be the logical consequence of negotiations.

Finally, the Court refers to the Agreement on social policy. In particular it refers to Articles 1, 4(1) and 4(2) of that Agreement. Article 1 sets out the general objectives of the Agreement. Article 4 represents little more than a repetition of Article 118b with the exception that the role of the Commission in encouraging collective bargaining is not to be found in Article 4 but in Article 3 of the Agreement. With regard to Article 4 it must be noted that this provision is again only indirectly related to the conclusion of collective social agreements as it concerns, like Article 118b, negotiations and agreements on the Community level. Moreover, the preamble to the agreement explicitly states that it is ‘without prejudice to the provisions of the Treaty, particularly those relating to social policy [...].’

In sum, the provisions named by the Court as leading to the collision and thus forming the very foundations of the exception, are not entirely convincing. Whether this flawed reasoning could be construed to also provide an opening for an exception ratione materiae for environmental agreements is uncertain. On the one hand, it could be argued that the use of these rather weak arguments by the Court in construing the Albany exception show that this exception is primarily ‘politically’ inspired and not so much the result of sound legal reasoning. In that respect, provided that the political will exists, similar reasoning could be applied with regard to environmental agreements. On the other hand, the Court has been clear about the fact that the Albany exception constitutes an

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37 This provision has moved in essentially unchanged form to Article 140 EC as a result of the amendments to the EC Treaty by the Treaty of Amsterdam.

38 This provision appears to have been split and can forthwith be found in Articles 138 and 139 EC.
exception to the rule and, as such, has to be construed narrowly. In our opinion, this last view probably has more weight. The mere fact that an exception is based on weak arguments cannot lead to the conclusion that even weaker grounds may be used to create similar exceptions. In this respect, it has to be taken into account that the weaknesses in the Court’s reasoning as regards the Albany exception do not involve the hierarchical relation between the provisions leading to the collision inasmuch as it would if an analogue exception for environmental agreements were contemplated. After all, the fact remains that the provisions leading to the collision – *quod non* – resulting in the Albany exception were on the Treaty level whereas the closest thing to lead to a comparable collision in the environmental sphere can only be found in a non-binding document. Moreover, it can be doubted whether Article 6 could lead to a collision since it necessitates nothing more than an integration of environmental concerns and cannot of itself be construed so as to directly encourage the conclusion of environmental agreements.

### 8.3 Agreements and concerted practices between undertakings and decisions of associations of undertakings

The prohibition of Article 81 applies to ‘agreements between undertakings, decisions by associations of undertakings and concerted practices’. For a detailed analysis of the concept of undertakings in EC competition law, the reader is referred to paragraph 7.4 of above. Article 81 EC concerns cooperative behaviour of undertakings. Purely unilateral measures are thus excluded from the scope of Article 81 but may nonetheless fall under Article 82 EC. In defining any behaviour as an ‘agreement, decision or concerted practice’ it should always be kept in mind that in European competition law, such concepts are interpreted functionally and thus substance, and not form, matters. Furthermore, the dividing line between these concepts is very hard to draw and may very well not exist. In any case, the functional approach to these concepts by the Court has made the precise characterisation of lesser importance. With regard to environmental concerns it may be noted that the very mechanism encouraging the conclusion of environmental agreements will also ensure that restrictions involved are very likely to be legally binding agreements or decisions of associations of undertakings. As we have seen a major driving force behind the conclusion of such agreements is the exclusion of free riders, a task than

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can be much better achieved when using legally binding instruments. In this respect, Community competition law is very unlikely to present many possibilities or problems with regard to environmental agreements.

### 8.4 Which have as their object or effect the prevention, restriction or distortion of competition

Apart from the fact that agreements, in order to fall within the scope of Article 81(1), need to affect trade between member states they must also have ‘as their object or effect the prevention restriction or distortion of competition within the common market’. A number of interesting issues arise in connection with this element. Firstly, the distinction between the object and effect of an agreement. Secondly, the concept of competition and, following from this, the concept of a ‘prevention, restriction or distortion’ of competition. Thirdly, the connection between the object or effect on the one hand and the restriction of competition on the other hand. These three issues and some ancillary notions will be examined in this paragraph.

#### 8.4.1 The object or effect

As the text of Article 81(1) clearly shows, the object and effect of an agreement are listed as alternatives. In this respect, the alternative nature of both conditions must primarily be understood to increase the reach of Article 81. As a consequence, not only the agreements that aim to restrict competition but also those that have the (unintended) effect of restricting competition while having no such objective fall within the scope of Article 81. The alternativity also works the other way around in that the Court considers it unnecessary to establish an actual effect on competition once it has been ascertained that the object of an agreement is to restrict competition. In the environmental context, this distinction and the consequences that have been attached to it by the Court, can lead to essentially two results. Firstly, an environmental agreement having an effect on competition will fall within Article 81’s ambit irrespective of its environmental object. Secondly, the parties to an environmental agreement that has the object of restricting competition (i.e. a ‘disguised cartel’) will plead its envi

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42 See, supra, paragraph 7.5.
43 Hereafter, we will refer to the ‘restriction’ of competition in general.
44 E.g., Case 56/65, LTM v. MBU, [1966] ECR 235.
46 E.g., Joined Cases 56, 58/64, Consten & Grundig, [1966] ECR 299, at p. 342.
environmental object or its only minimal effects on competition in vain. The fact that an agreement having effect on competition falls within the scope of Article 81 despite its environmental objectives cannot be considered very surprising. As we have seen above, the alternative nature of the object and effect test in Article 81 can only be understood as widening its scope.

The fact that environmental agreements that are deemed to have as their object the restriction of competition fall under the prohibition irrespective of the (purely) environmental objectives of the parties or the negligible effects on competition is less obvious. This follows from, one the one hand, the fact that the concept of the 'object of restricting competition' is an objective one and, on the other hand the alternativity of the object and effect. As the alternativity of object and effect has already received some attention, we will now focus on the objective nature of the term 'object' in Article 81(1) EC.

This objective nature is of interest for the purpose of this investigation for two reasons. Firstly, if object is indeed an objective notion, the parties' intent becomes irrelevant. This, in turn, would completely remove the possibility of excluding environmental agreements from the scope of Article 81 precisely because of the lack of subjective intent to restrict competition. Secondly, the case law of the Court is not entirely clear on this point and may leave some room for the interpretation of object as subjective intention.48

Ever since the Miller Schallplatten case49 but probably already in the Consten & Grundig case,50 communis opinio has been that the object of an agreement is an objective concept flowing from the nature of an agreement and not from the parties intentions.51 In the context of agreements that are claimed to be (partly) environmental, the IAZ case is interesting.52 This case is the appeal against the Commission decision in the NAVEWA-ANSEAU case.53 In this decision the Commission prohibited an agreement establishing a system of conformity checks for washing machines. The claimed purpose of the agreement was the protection of the water quality through ensuring the conformity of washing machines with the norms pertaining to water quality. However, closer scrutiny revealed that the agreement also had the object of hindering parallel imports. Before the Court the parties to the agreement argued that the Commission had not established that the agreement's purpose was to restrict competition. According to the Court 'the agreement clearly expresses the intention of treating

48 Cf. Odudu 2001A.
50 Joined Cases 56, 58/64, Consten & Grundig, [1966] ECR 299, at p. 343.
parallel imports less favourably'. To come to this conclusion the Court took into account the content, origin and circumstances of the implementation of the agreement.

This case effectively shows that the absence of a subjective intent to restrict competition does not rule out the possibility of the agreement being considered restrictive of competition by object. This will have as an effect that the (partly) environmental objective of the parties to the agreement will not suffice to keep certain agreements from being deemed to restrict competition by their object.

8.4.2 The concept of a restriction of competition

Article 81 prohibits the 'prevention, restriction or distortion' of competition. As the borders between the concepts 'prevention', 'restriction' and 'distortion' are considered to be fluid and these concepts are used interchangeably, we will hereafter only refer to the general concept of a restriction of competition. Taken literally, Article 81(1) applies to every restriction of competition irrespective of the impact of the agreement on competition. From this perspective, it could be argued that a restriction of competition is inherent in every contract. Such an interpretation of Article 81(1) would clearly be disproportionate and lead to an unworkable situation.

It is for this reason probably that the Court has restricted the scope of Article 81(1) to encompass only appreciable restrictions of competition. This is referred to in doctrine as the requirement of appreciability. Furthermore, the restriction of competition on one level following from an agreement may also be compensated for by increases of competition on other levels. The result of this could be that there is no appreciable restriction of competition as a net result. This is often referred to as the 'rule of reason' in competition law. In general both concepts are closely related and can both be called examples of an economically realistic application of Article 81(1). With regard to the concept of the rule of reason two remarks need to be made. Firstly, there is a considerable amount of semantics involved in the scholarly discussions surrounding this concept. To a large degree these discussions also involve the difference between the concept of appreciability and the rule of reason. We will not attempt to give the final answer to these questions but rather limit ourselves to a description and appreciation insofar as this is necessary for the purpose of this research. Secondly, European law with regard to the free movement of goods also knows a rule of reason. It is very important to clearly distinguish these two rules. Below we will first look at the appreciability requirement and after that the rule of reason will be scrutinised.

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8.4.2.1 An introduction to appreciability

The concept of appreciability found its way in European competition law at an early stage. Already in 1965, in the Völk v. Vervaecke case, the Court decided that only those agreements that have more than insignificant effects on the market fall within the scope of Article 81(1). This case involved an agreement conferring absolute territorial protection between two rather insignificant parties. The parties’ market share was less than 1 per cent. It is interesting to note that in this judgment the Court appears to have introduced an appreciability criterion with regard to both the requirement of an effect on intra-community trade as well as the need for there to a restriction of competition if Article 81(1) is to apply.

The Commission has laid down its view of this appreciability criterion in the Notice on agreements of minor importance. In this notice the Commission distinguishes essentially three types of agreements and corresponding levels of appreciability. With regard to vertical agreements (i.e. agreements between firms on different levels of trade which are not actual or potential competitors) the Commission considers that a combined market share on the relevant market of less than 15 per cent will generally render the agreement de minimis, causing it to fall outside the scope of the prohibition. With regard to horizontal agreements (i.e. those between firms on the same level of trade who are actual or potential competitors on the markets concerned) the bar is put at a market share of 10 per cent. Certain types of restrictions are considered to appreciably restrict competition irrespective of the market share of the parties. These restrictions concern, inter alia, the fixing of prices, market sharing and are often referred to as ‘hard core’ or ‘per se’ restrictions. In general therefore, two types of appreciability criterion may be discerned. On the one hand there is a quantitative notion of appreciability that depends on the market share of the parties and on the other hand there is a qualitative concept of appreciability that hinges on the nature of the restriction involved. As we saw above, the nature of restrictions of price competition results in them being considered to be, qualitate qua, appreciably restrictive of competition. Another way to describe them would be to consider them to be per se quantitatively restrictive of competition. On the other hand, there may be subjects of agreements that will be deemed not to appreciably restrict competition no matter what the parties’ market share is. Particu-

58 See, with regard to the requirement of an effect on trade, supra paragraph 7.5.
59 Commission Notice on agreements of minor importance which do not fall within the meaning of Article 81(1) [De Minimis Notice], OJ 2001 C 368/13. This notice replaces the 1997 De Minimis Notice that placed the bar at 10 and 5 per cent for vertical and horizontal agreements.
60 Ritter, Braun & Rawlinson 2000, p. 102, Faull & Nikpay 1999, p. 82.
larly with regard to this second, qualitative, concept of appreciability and the rule of reason, there appears to be considerable disagreement and confusion among scholars.\textsuperscript{61} Below we will pay further attention to both concepts or notions of appreciability and their importance in the environmental sphere. In the context of the quantitative concept of appreciability we will also try to demarcate the borders between this concept and the rule of reason.

\textbf{8.4.2.2 The quantitative concept of appreciability and environmental protection}

As we have seen above the quantitative concept of appreciability revolves around the parties’ market share. Moreover, it is the earliest recognised concept of appreciability originating in the 1965 judgment in the \textit{Völk v. Vervaek\textaecke} case. As such it is relatively well established. For one, the Commission has laid down, in the \textit{De minimis} notice, precise levels of market share in this respect. In the environmental context the recent Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements are of great interest.\textsuperscript{62} In chapter 7 of these guidelines the Commission indicates its policy with regard to environmental agreements. In doing so, it distinguishes, as regards the assessment of environmental agreements under Article 81(1), between three types of agreements. In section 7.3.1.3 the Commission addresses the third type of agreement that ‘may fall under Article 81(1)’. The central criterion used by the Commission in order to determine whether such agreements actually fall under the scope of the prohibition appears to be the parties’ market share.\textsuperscript{63} In these Guidelines, the Commission does not provide us with a clearly quantified market share cap but rather limits itself to indicating that ‘significant market shares’ will cause Article 81(1) to apply.\textsuperscript{64} Moreover, the Commission appears to have applied the quantitative concept of appreciability in a number of environmental cases. However, these instances were only to the effect that such agreements were considered to appreciably restrict competition. In the case involving an agreement between the importers and producers of washing machines in Europe (\textit{CECED}), the Commission considered that Article 81(1) applied because the parties represented more than 95 per cent of the market.\textsuperscript{65} Similarly, in the case involving an agreement by European association of manufacturers of consumer electronics (\textit{EACEM}) to reduce

\textsuperscript{61} See, for an overview of the debate: Odudu 2001B.

\textsuperscript{62} Commission, Notice Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (Guidelines on horizontal agreements), OJ 2001 C 3/2.

\textsuperscript{63} \textit{Ibid.}, p. 27.

\textsuperscript{64} In any event, the thresholds of the \textit{De minimis} Notice apply.

energy consumption, the Commission granted an informal exemption. This implies that the agreement was considered to fall under Article 81(1) in the first place because the parties held a market share in excess of 64 per cent. This indicates the likely scenario with regard to the application of the appreciability criterion to environmental agreements. As we have noted above, a major driving force behind the conclusion of environmental agreements is the achievement of economies of scale. This in turn will generally result in a large percentage of the market joining an environmental agreement thus effectively ruling out the possibility of an environmental agreement being considered to not to appreciably restrict competition from a quantitative perspective.

8.4.2.3 The qualitative concept of appreciability and environmental protection

A much more recent addition to the appreciability tree is the qualitative concept of appreciability. In this concept whether or not an appreciable restriction of competition exists depends on the nature or quality of the restriction. A good example of the application of this concept of appreciability can be found in the Commission decision in the APB case. This case concerned the agreement by the Belgian association of pharmacists to set up a quality label. The Commission granted a negative clearance for the system setting up this quality label because other quality labels could freely be created and because ‘the quality of pharmaceuticals was only one means of competition among others’ (emphasis added).

In the Servicemaster case, the Commission considered the prohibition in a franchise agreement for the franchisee not to obtain a more than 5 per cent interest in a competing firm not to appreciably restrict competition on the following grounds.

‘Although the prohibition against acquiring non-controlling financial interest in the capital of a competing publicly-quoted company can be a restriction of competition falling within Article 85(1) [Now Article 81(1)], in this particular case it is not

66 Commission notice pursuant to Article 19(1) of Council Regulation 17, EACEM, OJ 1998 C 12/2. The ‘exemption comfort letter’ in this Case was not formally published. However, from the Commission’s annual competition report in 1998, it becomes clear that the decision substantively entailed an exemption. 1998 Competition Report, p. 152.

67 Commission notice pursuant to Article 19(1) of Council Regulation 17, EACEM, OJ 1998 C 12/2, paras. 3-4.


69 Ibid. paras. 41, 42; Commission, 1989 Competition Report, p. 62, 63.

considered to be an appreciable restriction because the franchisees are generally small undertakings for which the prohibition against acquiring more than 5 per cent of a publicly-quoted company does not normally constitute a real hindrance in the development of their own activities. Furthermore, the franchisees are completely free in the acquisition of financial interests in non-competing companies."

In both cases the Commission bases its judgment on the appreciability of the restriction on the nature or content of the obligation in question and analyses this in its factual and legal context.

The abovementioned Guidelines on horizontal cooperation also contain examples of the qualitative concept of appreciability in the environmental sphere. The Commission seems to be referring to what has been deemed per se qualitative appreciability when it speaks of agreements that will almost always come under Article 81(1). More interesting is the fact that the Commission also seems to recognise instances where an agreement is considered not to appreciably restrict competition from a qualitative perspective. In section 7.3.1.1 the Commission is concerned with agreements that do not fall under Article 81(1) irrespective of the parties’ market share. According to the Commission this may occur where there is no precise individual obligation for the parties because, for example, more than one means are available to attain the goals of the agreement. Another example given by the Commission concerns agreements on the environmental performance of products or processes. Insofar as these performance standards do not appreciably influence product or production diversity or only marginally influence purchasing decisions, the agreement will be considered not to appreciably restrict competition. When an agreement results in the phasing out of certain products, the ensuing restriction will be considered unappreciable if these phased out products represent only a minor proportion of the market.

The Commission appears to have used this line of reasoning in a number of cases. In the ACEA case the Commission considered that an agreement among the members of the European association of manufacturers of automobiles to reduce carbon dioxide emissions from cars by the members of that association did not appreciably restrict competition. The reason for this was firstly the fact that they had agreed only on a sector-wide emissions reduction objective. Thus the agreement did not result in a specific obligation for individual members. Furthermore, the technical means by which the parties are to attain this objective were left completely free. The Commission has also granted negative clear-

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71 Commission, Guidelines on horizontal agreements, OJ 2001 C 3/2, section 7.3.1.2.
72 Ibid., para. 185.
73 Ibid., para. 186.
ance to an agreement to improve the energy efficiency of electric motors on the basis of similar reasoning.\textsuperscript{75}

In the \textit{CECED} case the Commission applied the reasoning set out above to come to the conclusion that the restriction was in fact appreciable.\textsuperscript{76} The CECED agreement concerned the phasing out of energy inefficient washing machines. As we have seen above the parties held more than 95 per cent of the market and from the quantitative perspective the agreement was considered to appreciably restrict competition. This did not keep the Commission from investigating whether or not the agreement entailed qualitatively appreciable effects on competition and trade between Member States. Firstly the Commission stated that ‘energy consumption is not negligible as a purchase criterion’.\textsuperscript{77} This reference to the environmental performance not being ‘negligible’ as a purchase criterion appears to be going further than the requirement that the Commission has formulated the Guidelines on horizontal agreements, of it being ‘marginal’ as a purchase criterion. Something that is marginal clearly does not need to be negligible. Furthermore, an interesting nexus between this criterion and the final condition for an exemption may be noted. We shall pay more attention to this nexus in the paragraph devoted to the final condition for exemption.\textsuperscript{78}

Outside the environmental context, qualitative appreciability reasoning has also been applied in the Commission’s decision in \textit{Irish Banks’ Standing Committee}.\textsuperscript{79} Among others, the agreement harmonised the banks’ opening hours. According to the Commission opening hours are an aspect of competition. The Commission goes on to state that, however, only some of the banking services are actually affected and moreover competition between the parties with regard to the affected services is not otherwise impinged upon. As a result the Commission considers that competition is not appreciably restricted.\textsuperscript{80}

The European Court of Justice appears also to be applying a qualitative notion of appreciability. In the abovementioned \textit{Pavlov} case, the pension scheme set up by medical specialists was considered not to be able to benefit from the \textit{Albany} exception.\textsuperscript{81} However, the Court ruled that Article 81(1) did not apply because the agreement was not contrary to Article 81(1). The Court starts its reasoning in this respect by observing that for the application of Article 81(1) it is necessary to take into account the relevant economic and factual circumstances in which the agreement operates.\textsuperscript{82} The Court then sets out to analyse

\textsuperscript{75} Commission press release IP/00/508, see also Martinez-López 2000, p. 24, 25.
\textsuperscript{77} Ibid., para. 42.
\textsuperscript{78} Infra para. 8.75.
\textsuperscript{80} Ibid., para. 17.
\textsuperscript{82} Ibid., para. 91.
the effects of the agreement and comes to the conclusion that these restrict competition with regard to one cost factor, namely that connected with pension insurance.\textsuperscript{83} It follows the opinion of Advocate General Jacobs in that it observes that those restrictive effects are limited because they concern only one cost factor that is insignificant in comparison with the total amount of costs faced by medical specialists.\textsuperscript{84}

Precisely because the Court follows the opinion of the Advocate General in this respect, it is interesting to take a closer look at this opinion. The Advocate General starts his observations in this respect by observing that only in special sectors or with regard to special categories of agreements the factual and economic circumstances need to be taken into account.\textsuperscript{85} He continues by listing four arguments to substantiate his conclusion that competition is not appreciably restricted.\textsuperscript{86} Firstly, only a cost factor and not a price factor is harmonised. Secondly, this cost factor is of relatively minor importance in comparison with other factors. The third reason listed by the Advocate General appears in fact only to repeat the second argument. Fourthly, the Advocate General considers that medical specialists vigorously compete on other factors such as the quality of their services.

Accordingly, both the Court and the Advocate General reach the conclusion that competition is not appreciably restricted by the agreement to set up a collective pension fund.\textsuperscript{87} The reasoning applied by both the Court and the Advocate General can only be characterised as an application of a qualitative appreciability test whereby they look at the actual content of the agreement and not at the market share held by the parties to determine the impact on competition. In actual fact, the Commission appears to have taken this ruling into account in drawing up the abovementioned Guidelines on horizontal agreements.\textsuperscript{88}

As the Commission’s Guidelines show, the qualitative concept of appreciability may very well result in an environmental agreement being considered to fall outside the scope of Article 81(1) simply because competition is not appreciably restricted. From the Guidelines and Commission and Court practice a number of instances where this might take place, can be discerned.

Firstly, the case where an environmental agreement contains only general and sector wide targets and leaves parties considerable room as regards the means by which they can attain that target. Secondly, an agreement on envi-

\textsuperscript{83} Ibid., para. 92, 93.
\textsuperscript{84} Ibid., para 94, 95.
\textsuperscript{85} Ibid., para 137 of the opinion.
\textsuperscript{86} Ibid., paras 139-142 of the opinion.
\textsuperscript{87} It must be noted that the Court also appear to use the rule of reason in coming to the conclusion that competition is not appreciably restricted.
\textsuperscript{88} Commission, Guidelines on horizontal agreements, OJ 2001 C 3/2, para. 23.
r} enmental aspects may very well only marginally affect production or products. Despite the fact that energy efficiency was considered by the Commission as not being negligible as a purchase criterion, it is certainly possible to argue that an agreement on energy efficiency has no significant effect on product or production diversity. This will hold true all the more when multiple means to attain these energy efficiency goals are available. Where, as a third example, an environmental agreement entails the phasing out of certain products, Article 81(1) will not be concerned whenever the market share of the products that are removed from the market is minor. This example is somewhat paradoxical from an environmental perspective in that the fact that only a minor portion is phased out also limits the amount of environmental gain to come from such a phasing out. This example may, however, be very interesting in connection with the Court's application of the appreciability criterion in the Pavlov case. In this case the Court considered an agreement harmonising only a minor percentage of the parties’ costs not to appreciably restrict competition. When this is taken a bit further, the following reasoning could result. An agreement having a harmonising effect on costs will invariably also have a harmonising effect on the prices, as these are a necessary consequence of the costs. Current Commission competition policy prescribes that any agreement on prices, no matter what percentage of the price is concerned, invariably results in an appreciable restriction of competition. This is so because agreements restricting price competition are deemed to be per se restrictions of competition. However, agreements limiting outputs are also considered to constitute per se restrictions. If the Commission is willing to consider the percentage of products phased out into account in determining whether or not a restriction is appreciable, a similar reasoning could be applied with regard to the percentage of the price affected by an environmental agreement. This could prove to be particularly important with regard to environmental agreements involving an environmental surcharge or a removal fee. Such agreements have occurred in the Netherlands and have met with resistance from the Netherlands Competition authority. We shall pay closer attention to the possibilities that this reasoning offers in chapter 16.

8.4.2.4 The rule of reason and environmental protection

The rule of reason originates in U.S. antitrust law where section one of the Sherman act prohibits ‘every contract [...] in restraint of trade’ without offering the possibility of an exception to that prohibition. Primarily as a reaction to the application of Article 81(1), that was perceived to be overly wide

89 E.g. ibid, paras. 18 and 188.
90 The Stibat and Wit en Bruin goed Cases, see infra, paragraph 16.5.
91 Cf. Jolivet 1967, p. 20 et seq.
and legalistic, some scholars have argued for the creation of a comparable rule in European competition law.94

Whether or not a rule of reason actually exists in the competition rules of the European Community is uncertain for a number of reasons. For one, the concept of the rule of reason is subject to a considerable amount of semantics. Whilst it is often equated with the balancing of pro- and anti-competitive effects in order to establish whether or not there is a (net) restriction of competition within the meaning of Article 81(1), it is also perceived as entailing a ‘bilan économique’ in which a restriction of competition is balanced with offsetting economic benefits. Moreover, it should be said that the existence of a rule of reason in European competition law has neither been formally acknowledged nor rejected by the Courts.95 At the same time, the Commission, in its White Paper on the modernisation of the rules implementing Articles 81 and 82 EC, has explicitly admitted that it has had recourse to the rule of reason.96 Matters are further complicated by the fact that the rule of reason is considered by a number of scholars to have actually been applied by the Commission and the Community Courts.97

The uncertainty and semantics surrounding the debate about the existence of a rule of reason in European competition law are reflected in Métropole II.98 In this case the Court of First Instance held that a number of judgments that are often considered to be the result of the rule of reason, could not be ‘interpreted as establishing the existence of a rule of reason in Community competition law’. In the view of the Court of First Instance, the pro- and anti-competitive effects need to be balanced within the framework of Article 81(3) EC because this provision would otherwise ‘lose much of its effectiveness’.99 The judgments brought forward by the parties as evidence of the existence of a rule of reason were considered by the Court of First instance to be

‘part of a broader trend in the case-law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement

94 See for further references Jones & Sufrin 2001, p. 138 et seq.
97 E.g. Gerven 1997, p. 185-188.
98 See, e.g. Monti 2002, who, at p. 1086, introduces an European rule of reason alongside an US rule of reason.
99 Case T-112/99, Métropole télévision (M6), Suez-Lyonnais des eaux, France Télécom and Télévision française 1 SA (TF1) v. Commission (Métropole II), [2001] ECR II-2459, para. 76.
restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) [now Article 81(1)] of the Treaty. In assessing the applicability of Article 85(1) [now Article 81(1)] to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned.

The Court of First instance's basic argument to reject the rule of reason is the fact that this interpretation of Article 81(1) would be 'difficult to reconcile with the rule prescribed by that provision'. In Métropole II we can see how the parties considered that the pro- and anti-competitive effects needed to be balanced. The Court then considers that this is incompatible with the general scheme of Article 81 as a whole. According to the Court this balancing act should take place as part of the application of the third paragraph of that provision. It is submitted that this reading of Article 81 disregards the actual wording of Article 81 EC. For the applicability of the first paragraph of this provision a 'prevention, restriction or distortion of competition' is necessary. The cases referred to by the parties because they are considered to contain an application of the rule of reason show that the Court is actually establishing whether or not there is a net restriction of competition. A limitation of the intra brand competition, for example, is considered to be compensated for by an increase of the inter brand competition. Where a net restriction of competition has been established, there may be benefits that are not related to the degree of competition that offset the restriction of competition. These non-competition benefits find their place in Article 81(3) EC. Essentially, the rule of reason involves a bilan concurrentiel whereas Article 81(3) is submitted to be a bilan economique. This interpretation of Article 81(1) is by no means incompatible with the wording of that provision and does not deprive Article 81(3) of its effectiveness. In this respect, and because the European Court of Justice has not explicitly rejected the rule of reason and can even be considered to have applied it recently, it is still interesting to further examine the rule of reason in European competition law.

Typically, an application of the rule of reason by the Court is preceded by the statement that

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99 Ibid., para. 73.
100 Because, for example, the restriction of intra brand competition goes beyond what is necessary to ensure the functioning of an agreement in such a manner that ascertains an increased inter brand competition.
102 Cf. Monti 2002, who, at p. 1086, introduces a European rule of reason that, contrary to the US rule of reason, is not about balancing pro- and anti-competitive effects but instead incorporates the rule of reason from the free movement provisions into Community competition law. See further on this incorporation of legal concepts from the free movement provisions: Mortelmans 2001.
'account should be taken of the economic context in which undertakings operate, the products and services covered by the decisions of those undertakings, the structure of the market concerned and the actual conditions in which it functions'.

A good recent example of what may be called an application of the rule of reason can be found in the Pavlov case. As we have seen above, the Court in this case came to the conclusion that the agreement to set up a collective pension scheme did not fall under Article 81(1) because it did not appreciably restrict competition. It reached this conclusion on the basis of two types of reasoning. Firstly, as we have seen above, the Court applied a qualitative appreciability test. Secondly, the Court had recourse to the rule of reason. In this respect the Court observed that the decision to set up a collective scheme enabled the medical specialists 'to share the risks insured against while achieving economies of scale'. From the wording used, it can be inferred that this consideration was to large extent inspired by the Advocate-General's opinion. The Advocate-General, on the basis of this reasoning, comes to the following conclusion:

'Accordingly, the pro-competitive effects of the institutionalised management cooperation are much stronger than any (theoretical) anti-competitive effects. The setting-up of the Fund, like the setting-up of an agricultural cooperative association, improves efficiency. As such it is not caught by Article 85(1) [now Article 81(1)]'

This weighing of pro-competitive and anti-competitive effects, as we have seen above, is precisely what the rule of reason is all about. The result is that only net restrictions of competition end up needing an exemption under Article 81(3).

With regard to the rule of reason and environmental protection the following remarks may be made. The rule of reason as it was identified above is inherently limited to the balancing of pro- and anti-competitive effects. Other positive or negative effects, such as an improvement or deterioration of the environment, cannot be taken into account within the rule of reason as that would run counter to the very essence of the rule of reason.

The European rule of reason that Monti identifies in, inter alia, the Court's judgment in Wouters, is a completely different matter. The European rule of reason can be compared to what Vogelaar and Mortelmans have called the 'inherent restriction-approach'. According to this approach certain restrictions of competition are considered by the Court to be inherent in the regulation

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104 Ibid., para. 96.
105 The Advocate-General uses allmost identical wording in his opinion, ibid., para 146 of the opinion.
106 Ibid., para. 148 of the opinion.
108 Vogelaar 2000, Mortelmans 2001, p. 628
of a certain activity.\textsuperscript{109} As a result, they should be accepted under Article 81(1) provided that the aim of the regulation is acceptable and the restriction does not go beyond what is necessary.

The European rule of reason is in fact a transplantation of a doctrine that was developed as part of the Treaty provisions on free movement (Articles 28, 39, 43, 49 and 56 EC). According to this Court-developed exception, national rules that apply without distinction do not fall foul of the prohibitions on restrictions of the free movement, if they are necessary to protect a mandatory requirement.\textsuperscript{110} As such, it can in principle accommodate any mandatory requirement (the proper practice of the legal profession in \textit{Wouters}) including the protection of the environment,\textsuperscript{111} provided that the restriction of competition is necessary to protect the mandatory requirement. However appealing this European rule of reason may seem at first sight, it is submitted that such an interpretation of Article 81(1) does indeed entail the risk, that the Court of First Instance feared in \textit{Métropole II}, of rendering Article 81(3) superfluous.

Nevertheless, even if we understand the rule of reason as only encompassing a balance between pro- and anticompetitive effects, this in no way precludes the application of the rule of reason to an environmental agreement. Particularly in the environmental sphere efficiency gains from cooperation are obvious. Furthermore, agreements on certain environmental aspects of production or products may very well add a new (environmental) dimension on which competition is possible. Even more importantly, the environmental agreement may result in the creation of an entirely new market. The Commission recognises this in its Guidelines on horizontal agreements. According to the Commission, agreements that lead to genuine market creation will not be considered to restrict competition insofar as the parties are unable to organise the activity independently and alternatives and/or competitors are not present.\textsuperscript{112} This rationale possibly underlies the Commission's positive appreciation of the \textit{Eco-Emballages} scheme.\textsuperscript{113} This case concerned a collective take back and recycling scheme that, not unlike DSD, was set up following legislation laying down a producer responsibility for packaging waste. To a large extent the institutional and operational layout of Eco-Emballages is similar to that of DSD.\textsuperscript{114}


\textsuperscript{111} Recognised as a mandatory requirement in Case 203/86, \textit{Commission v. Denmark} (Danish Bottles), [1988] ECR 4607.


\textsuperscript{113} Commission, Notice pursuant to Article 19(3) of Regulation 17, OJ 2000 C 227/6, Decision 2001/663, \textit{Eco-Emballages}, OJ 2001 L 233/37.

\textsuperscript{114} As the Commission recognised in its press release in this Case; IP/01/850.
Emballages is the company that administers the take back system for which it concludes contracts with the producers that use packaging. This contractual relation revolves around the licensed right for the producer to print a ‘green dot’ on the packaging and the licence fee that has to be paid for this. These license fees constitute Eco-Emballages’ income with which it funds the take back and recycling. Secondly, Eco-Emballages has acquired the right to sub-licence the green dot from the Europe-wide licence holder ‘Pro Europe’. Thirdly, Eco-Emballages has concluded contracts with the local (municipal) authorities. These authorities are under the statutory obligation to ensure the environmentally sound treatment of household waste on their territory. By concluding a contract with Eco-Emballages they receive financial support for this from Eco-Emballages in return for which the municipalities will have to either hand over the collected waste to the take-back company designated by Eco-Emballages (‘designated take back firms’) or to a take-back company chosen by the municipality itself. Fourthly and finally, Eco-Emballages has a contractual relation (so-called sectoral and operational take-back contracts) with the take-back firms. The latter are responsible for the taking back and recycling of the household waste. At the moment there are five so-called sectors (steel, aluminium, paper, plastic and glass) and Eco-Emballages will conclude a sectoral contact with only one firm per sector. These firms are then free to contract the designated take-back firms who will then take care and organise the actual taking back and recycling.

The decision with regard to the Article 81 aspects involved in DSD show that the Commission is willing to go quite far in applying a rule of reason type of approach to cases involving the creation of a new market. Among the types of packaging waste collected through the DSD system are plastic sales packaging and composite packaging containing plastics. The producer responsibility for these materials was included in the relevant German legislation only at a later stage. The Commission sees this as the creation of a new ‘area for business activity’. With regard to plastics and composite packaging containing plastics, DSD has maintained the obligation for the collectors to pass these on free of charge (the so-called zero interface or Schnittstelle Null). The fact that the Commission – ‘in view of the exceptional circumstances and conditions surrounding the establishment of a new, functioning market’ – considered that competition was not appreciably restricted by this rather controversial clause shows that the Commission is willing to take to rule of reason approach to considerable lengths. The Commission indicated that the fact that these

15 For paper, glass, board, tinplate and aluminium packaging waste, a producer responsibility existed from the very beginning.


17 Ibid., para. 113.

18 Ibid., para. 114.
contracts would be put out to tender facilitated this conclusion. This indicates that relatively little weight must be attached to the consideration by the Commission that the zero interface addressed the problem that in the past this type of waste was directed into cheaper (and probably less environmentally friendly) disposal channels. Therefore the Commission's generous application of the rule of reason can probably be traced back to a purely competitive appraisal where environmental considerations have played a relatively unimportant and indirect role.

This short sketch of the Eco-Emballages and DSD systems reveals that DSD's and Eco-Emballages' role can be characterised as that of the 'spider in the web'. The primary competition concerns therefore relate to the upstream and downstream effects of exclusivities granted by or to Eco-Emballages or DSD in any of its four contractual relations. The competition problems posed by these exclusivities will be address in the following paragraph.

8.4.2.5 Exclusivities as restrictions of competition

Environmental protection is a relatively new area of economic activity. As such it is characterised by the presence of certain risks as well as the need to make considerable investments in order to establish the necessary infrastructure. Often, the parties concerned will want to minimise these risks by, for example, agreeing upon certain exclusivities and thereby possibly preventing free rider type of problems. This can be seen in the cases dealing with large scale take back and recycling systems set up pursuant to producer responsibility obligations such as DSD and Eco-Emballages. The competitive appraisal in these cases predominantly concerns the exclusionary effects that follow from the relatively strong market position of these organisations. This is confirmed by the decision reached by the Commission in Eco-Emballages according to which the agreements setting up the organisation with that name do not infringe Article 81(1). The Commission's appreciation of the Eco-Emballages system focuses primarily on the exclusivity clauses and exclusionary effects that may flow from the system. This approach could also be expected from the Commission's Guidelines on horizontal agreements. In the relevant paragraph the Commission attaches great weight to the exclusivity resulting from a collective system. Finally, the Commission's decision in the Article 81-case

119 An example of such a risk can be seen in the financial crisis that DSD experienced in 1993, see Bastians 2002, p. 60
120 See, with regard to this market position the Commission decision in DSD (Article 82), Decision 2001/463, OJ 2001 L 166/1, infra, chapter 9.
involving DSD is also primarily concerned with the exclusivities that result from the collection and recycling network set up by DSD. Many of the competitive problems could be avoided by the fact that DSD had agreed to amend certain contracts so as to limit the exclusionary effects arising from them. Indeed, the only appreciable restriction of competition in the DSD case could be traced back to the exclusionary effects of the contracts concluded between DSD and the local collectors and sorters. In these contracts DSD agrees to employ only one company to collect and sort the waste in a given region. This self-limitation of DSD together with the fact that DSD is Germany's leading purchaser of such services brings the Commission to conclude that competition is appreciably restricted. In this respect the Commission considers it important that the exclusivity is an 'unusually long lasting one'. Anyone interested in exactly why the duration was considered excessive will have to content himself with the rather general conclusion that, on the basis of a detailed analysis of 2,4 out of more than 500 so-called service agreements, the duration was considered not indispensable to ensure that the investments actually carried out would be recouped. Ultimately, the Commission granted an exemption for this restriction. We shall examine this exemption below.

8.4.3 The connection between the object or effect and the restriction of competition

A problem in connection with the both appreciability tests and the rule of reason is that they are often considered superfluous in cases involving a per se restriction or a restriction by object. This problem follows from the fact that the appreciability and rule of reason tests are considered to be inherent in and limited to the establishment of an effect on competition. The alternative nature of the object and effect of a restriction of competition within the meaning of Article 81(1), as it was interpreted by the Court in Consten & Grundig, then leads to the conclusion that it is unnecessary to prove an appreciable restriction of competition in a case involving a per se or hard core restriction. However, already the Volk v. Vervaecke case shows us that even in the case of hard-core restrictions it is necessary to ascertain whether the object of the agreement

14 Ibid., para. 55.
15 Ibid., section 2.4.
16 Ibid., para. 130.
17 Ibid., para. 55. In this respect, the Court's reasoning with regard to a similar issue on the basis of Article 86(2) in Sydhavnen is more elucidating, see infra, paragraph 12.6.
18 See, for example, the decision of 18 December 1998 of the Netherlands Competition authority in Case 51, Stibat, para. 52.
is to appreciably restrict competition. Furthermore, the Commission has on a number of occasions considered it necessary to prove that competition was restricted to an appreciable extent even when hard-core restrictions were involved. In the Guidelines on horizontal agreements the Commission considers that agreements involving hard-core restrictions will 'almost always fall under Article 81(1) (emphasis added)'. It reaches this conclusion because it 'presumes' that such agreements have negative market effects. This presumption, it is submitted, may never stand in the way of an economically realistic market analysis as to whether or not competition has been appreciably restricted.

With regard to the rule of reason, the Court of First Instance appears to be following a slightly different course in this respect. In a number of cases involving hard-core restrictions the Court of First Instance has held that recourse to the rule of reason is precluded. In the more recent Métropole II case, the Court of First Instance explicitly rejected the rule of reason. This approach, it is submitted, cannot be reconciled with that followed by the hierarchically higher placed European Court of Justice. The fact the obvious or per se restrictions are involved may very well lead to the conclusion that the pro-competitive effects are insufficient to offset the restrictive effects but it can never obviate the need for a comprehensive market analysis to establish that competition has (as a net result) been appreciably restricted. It is furthermore submitted that the qualitative and quantitative appreciability test and the rule of reason test are cumulative tests in that all three need to be fulfilled before a restriction can be considered appreciable. This means that, for example, even in cases involving the absolute majority of an industry (therefore quantitatively appreciable) regard must be had to both the qualitative concept of appreciability and the rule of reason. This holds true just as much as that, the other way around, quantitative appreciability needs to be shown even in cases where there are no or insufficient pro-competitive effects and where the restriction is considered to be qualitatively appreciable as the Court held in the Volk v. Vervaecke case.

130 Commission Decision 1999/210, British Sugar et al., OJ 1999 L 76/1, para. 77 with regard to price fixing and decision 98/273, VW, OJ 1998 L 124/60, para. 147 with regard to a restriction on parallel imports. Also the Commission’s De Minimis notice allows for the possibility of agreements not having as their object an appreciable restriction of competition falling outside the scope of Article 81(1). OJ 1997 C 372/13, para. 2.  
8.5 The concept of the compulsory cartel and environmental concerns

8.5.1 Introductory remarks

As was shown in the above paragraphs, the restriction of competition presupposes the presence of competition. If parties had no freedom to conclude an agreement, then no restriction of competition can be said to have taken place. Even though the term is not used in English language writing on competition law, this doctrine can be called that of the ‘mandatory’ or ‘compulsory cartel’ in accordance with the German concept of the ‘Zwangs-kartell’. In the environmental context this doctrine is of particular importance as the overwhelming majority of environmental agreements show considerable government involvement. Below, we will first take a closer look at the concept of the compulsory cartel in European competition law. After that we will shift our attention to the role that this concept may play in connection with environmental agreements.

8.5.2 The concept of the compulsory cartel

The concept of the compulsory cartel has played a role in Community competition law primarily in connection with the notoriously over-regulated agricultural sector. However, a very useful definition of what constitutes such a compulsory cartel can be found in one of the judgments in the Ladbroke saga:

‘Articles 85 and 86 [now 81 and 82] of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative [...]. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings [...]’. [Emphasis added]

This definition relies predominantly on the presence of a legislative framework eliminating all possibilities for competition. Therefore this, as it will be called, Ladbroke test can be classified as rather strict. As such it may be contrasted with

135 See, however, Bellamy & Child 2001 who, at p. 113 et seq. devote an entire paragraph to 'State authorisation or compulsion'.

the apparently wider test applied by the Court of First Instance in the Asia Motor France III case: 137

'In the absence of any binding regulatory provision imposing the conduct at issue, the Court considers that the Commission is entitled to reject the complaints for want of autonomy on the part of the undertakings in question only if it appears on the basis of objective, relevant and consistent evidence that that conduct was unilaterally imposed upon them by the national authorities through the exercise of irresistible pressures, such as, for example, the threat to adopt State measures likely to cause them to sustain substantial losses.'

The Court of First instance, in accordance with the approach adopted by the Court, requires unilateral conduct on the part of the government authorities. However, the requirement that this conduct have a purely legislative origin is dropped and replaced by a criterion that seems to also accommodate 'economic pressure' as a factor leading to a compulsory cartel. This could be called the 'economically compulsory cartel' approach. Given the fact that the Ladbroke case was decided later and by a hierarchically higher court, the Ladbroke test can be assumed to currently stand as the law. It has to be pointed out that in the appeal against the Asia Motor France III case, the European Court of Justice upheld the judgment of the Court of First instance without, however, having to rule explicitly on the criterion itself. Moreover, in the Irish Sugar case, the Court of First Instance applied the European Court of Justice's Ladbroke test. 138

8.5.3 The compulsory cartel and environmental concerns

The concept of the compulsory cartel in itself leaves no room to take environmental concerns into account. Moreover, this would not make sense, as an agreement does not become any more or less compulsory upon parties when there are some environmental aspects involved. However, as was already alluded to above, many environmental agreements are characterised by some form of government involvement. For example, the ACEA agreement was not only concluded between the Commission and the European automobile manufacturers association, the former has also stated that it will consider legislation, which can be presumed to be more costly for the manufacturers than the agreement, if the agreement fails to deliver. Furthermore, the Eco-Emballage and DSD agreements, although concluded between private parties, both are a reaction to obligations imposed by national legislation adopted pursuant to the Packaging directive. 139


Although the legal framework in these cases generally falls short of the legislative measures that ‘eliminates any possibility of competitive activity’ within the meaning of the Ladbroke test, the reactions of industry can hardly be called surprising when this framework is scrutinised. If we take the legislation implementing the packaging directive as an example, it will become clear that cooperation on as large a scale possible is the only economically rational outcome from industry’s point of view. Generally, this legislation lays down a ‘producer responsibility’ according to which the producer is responsible for the waste generated once his products reach their end of life. Thus there is a nexus between the producer and ‘his’ waste. To fulfil the producer responsibility producers are offered two options. They may decide to collect and recycle their waste individually, which of course is horribly inefficient and prohibitively expensive in most cases. For this reason, such legislation generally offers the second option of fulfilling the producer responsibility by joining a collective scheme. Economies of scale almost inevitably result in the largest possible scale of collection and recycling activities in these schemes.\(^{140}\)

As was said above, such legislation most probably cannot be considered to exclude any competitive activity within the meaning of the Ladbroke test. However, the test adopted by the Court of First Instance in the Asia Motor France case seems to be capable of being fulfilled in these cases. Certainly, legislation leaving the choice between expensive individual solutions and much less expensive collective solutions can be considered to exert ‘irresistible pressures’ on industry to cooperate.\(^{141}\) Such reasoning of course only takes the cooperation itself outside the scope of Article 81(t). It would still have to be established whether the further restrictions of competition are also the result of the government’s pressure.

### 8.6 An increased role for environmental concerns in Article 81(t)\(^3\)

As we have seen the role of environmental concerns in terms of an integration of environmental concerns is limited to the role that environmental concerns have in the economic process. To be fair, this role is still rather minor. In this respect, all that is called for is an economically rational application of competition law. There is, for example, no reason to completely do away

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\(^{140}\) Cf. Lehman 2000, paragraph 6. Moreover, as the current chaos with regard to the deposit and return system for one way beverage containers in Germany shows, the environmental benefits of cooperation are also significant, FAZ 25 July 2003 ‘Entsorger sagen weiteren Streit um Dosenpfand voraus’.

\(^{141}\) See, with regard to dominant position held by the collective system that may thus the result, paragraph 9.6.
with the appreciability test in cases involving a hard-core restriction. Furthermore, in these (and other) cases recourse should be had to the quantitative as well as the qualitative appreciability test.

In this connection, the VOTOB case may be mentioned as an interesting example.\textsuperscript{142} The VOTOB agreement was concluded between the six independent firms offering tank storage capacity for chemicals in the Netherlands.\textsuperscript{143} These firms had signed an agreement with the local government to bring down emissions from their installations. The necessary investments in this respect exceeded the financial capacities of the individual firms but could be partly subsidised on the basis of a general investment scheme.\textsuperscript{144} When after concluding the agreement with the government, suddenly, the Dutch government withdrew this investment scheme altogether, the firms were faced with a budget deficit. The firms decided to finance their investments by laying a uniform ‘environmental surcharge’ on the price of their services. This surcharge varied per product to be stored (depending on the polluting potential) and had to be passed on completely to consumers and moreover, had to be mentioned separately on the invoice. The Commission considered the agreement to pass a fixed charge on to consumers to be horizontal price fixing and therefore prohibited. In doing so the Commission apparently took no account of the fact that this charge amounted to less than 5 per cent of the total costs.\textsuperscript{145} The Commission thus clearly refused to take into account the economic (and ecologic) background of the case

It may, however, be wondered whether, on a somewhat more general level it can be argued that an environmental agreement falls outside the scope of Article 81(1) because of its environmental objective and the presence of the integration principle? In other words, can the presence of an environmental aspect lead to a new or a wider exception to the scope of Article 81(1)? As far as the scope of the competition rules in general is concerned, we have seen the answer to this question to be negative. With regard to the particular requirements of Article 81 – the presence of an appreciable restriction of competition – much the same holds true. The objective of achieving sustainable development requires that some competitive pressure remains with regard to the environmental aspects. This demands that some sort of check on the restriction of competition involved remains. This is best achieved through the exemption clause, which of course

\textsuperscript{142} Unfortunately, this case, although often being considered a ‘landmark case’ never resulted in a formal decision and has had to contend itself with a mere mentioning in the Annual Competition Report, Commission, XXII\textsuperscript{nd} Competition report 1992, paras. 177-186.

\textsuperscript{143} They were independent in that they were not connected to up- or downstream (chemical) companies.

\textsuperscript{144} This remains unclear in the Commission’s account of the case but can be found in the article by Vogelaar describing the case, Vogelaar 1995, p. 550 et seq.

\textsuperscript{145} Ibid., p. 551.
presupposes that Article 81(1) is applicable in the first place. On the basis of this reasoning, Article 6 EC – the integration principle – cannot be relied upon to take environmental agreements a priori outside the scope of Article 81(1). Similarly, the broader ‘European rule of reason’ identified by Monti should also not be used to restrict the scope of Article 81(1). An agreement that restricts competition cannot be taken outside the scope of Article 81(1) simply because it is necessary to protect a mandatory requirement. As the wording of Article 81 clearly shows, restrictions – that can be the result of the anti-competitive impact that outweighs the pro-competitive effect – of competition are prohibited by Article 81(1) without any room in that provision for an exception or justification. This exception (or, at the moment, exemption) can be found in Article 81(3) EC.

A slightly different question is whether negative environmental effects may result in an agreement being considered to fall within the scope of Article 81(1) by virtue of these environmental effects alone. Take, for example, a research and development joint venture that set up to develop a new, but very energy inefficient product. Furthermore, because of the parties’ market shares (well below 5 per cent), this agreement would normally be considered de minimis and therefore fall outside the scope of Article 81(1). Could it be argued that, on the basis of the integration principle, such an agreement would fall within the scope of the prohibition just because of the negative environmental impact of the agreement? This becomes all the more interesting once we notice that there is currently no European legislation prescribing minimum energy efficiency criteria.

We would argue against this for a number of interrelated reasons. Firstly, the (negative) implications of any activity are or should be governed by environmental legislation. In the context of the example above this would mean that the agreement setting up the joint venture is subject to competition scrutiny. The actual activities and the products developed on the basis of the agreement should conform to environmental regulations. The absence of environmental legislation (which is the case with, for example, energy efficiency) cannot be an excuse to pursue environmental policy through the application of competition law. It has to be observed that environmental legislation is a matter of the Council (i.e. the member states) acting together with the Parliament. Either way, if the Commission were to use competition policy as a de facto environmental instrument to act in the absence of European legislation, it would bypass the Council and Parliament. Secondly, legal certainty and the connected principle of equality stand in the way of this. In this connection it must be observed that there is no obligation, except for when the parties want to obtain legal certainty, to apply for a negative clearance. The result of taking negative environmental effects into account within Article 81(1) could therefore be that those who voluntarily apply for a negative clearance are worse off than the parties that do not apply for such clearance. A third reason that would seem to argue against taking environmental degradation into account in interpreting Article 81(1) is the inte-
gration principle itself. As we have seen above, the integration principle applies only to the activities and policies listed in Article 3 EC. These policies and activities all presuppose some positive action involving the exercise of discretion. Within Article 81, this discretion is exercised in applying the third paragraph whereas the interpretation of the prohibition in the first paragraph is a matter of interpreting the law.\textsuperscript{146} This is evidenced by the Court's attitude when it checks the legality of a Commission decision. In this respect only a manifest error of appraisal by the Commission will infringe 81(3) whereas the Court will stick closely to the wording of the first paragraph in judging whether the Commission has applied Article 81(1) correctly. The conclusion must therefore be that only the application of the exemption clause contains a policy element that justifies the application of the integration principle.

8.7 Article 81(3) – the possibility of an exemption

8.7.1 Introductory remarks

If a restriction of competition is appreciable and all the other requirements of Article 81(1) are fulfilled, the second paragraph of Article 81 declares an agreement to be automatically null. The only way to have an enforceable agreement even though Article 81(1) is violated is to qualify for an exemption. The starting point for an exemption must be Article 81(3) that provides that Article 81(1) may be declared inapplicable if four requirements are satisfied.

Firstly, the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. In short, the agreement has to result in a benefit. Hereafter we will refer to this as the requirement of technical or economic progress. Secondly, the consumers must receive a fair share of this benefit. Thirdly, the restrictions must no go beyond what is necessary to attain the benefits. This is often referred to as the proportionality requirement. Fourthly, the agreement may not allow the firms the possibility to restrict competition in respect of a substantial part of the products in question. This requirement seeks to ascertain that sufficient residual competition remains despite the agreement. Currently only the Commission can apply Article 81(3) in what is called an individual exemption.\textsuperscript{147} When the Commission has gained enough experience with a particular type of agreement, it may lay down this experience in a so-called group exemption. With regard to these exemptions the Court has held that the application of Article 81(3) involves an

\textsuperscript{146} Cf. Schröter 1999, p. 2/29, rr. 25.

\textsuperscript{147} This will change from 1 May 2004 onwards when Article 81(3) becomes directly applicable by virtue of Regulation 1/2003. See further, infra, paragraph 8.9
assessment of complex economic facts so that judicial review is limited to cases involving a manifest error of assessment.\textsuperscript{145} The result of this limitation of the judicial review is that we will have to concentrate on the Commission's decision practice in this respect. Nevertheless, the following considerations of the European Court of Justice are of some interest.\textsuperscript{149}

'As the court pointed out in its judgment in Metro I, the powers conferred upon the Commission under Article 85(3), [Now Article 81(3)] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market.'

This shows that the third paragraph of Article 81 is all about balancing the restriction of competition on the one hand with the non-competition advantage of the agreement on the other hand. The Court of First Instance's judgment in Métropole I echoes this view of Article 81(3) where it states that:\textsuperscript{150}

'Admittedly, in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) [Now 81(3)] of the Treaty.' [Emphasis added]

For the reasons indicated above, we will concentrate on the Commission's practice with regard to Article 81(3). Moreover, we will first study the application of Article 81(3) in individual cases. After that the group exemptions will be looked at in more detail. In both cases we shall pay particular attention to the possible implications of the integration principle. Essentially, the integration principle can have two different effects. Firstly, it may play its role with regard to environmental agreements in that it could result in an exemption in cases that could not be exempted on pure competition considerations. This effect will be referred to as the positive effect of integration in that it result in a positive act namely the adoption of an exemption decision. Secondly, the integration principle could play its role in the appreciation of agreements that have no particular environmental objective. In this connection the integration principle could be interpreted so as to preclude an exemption of an agreement that has a negative environmental impact. This will be called the negative effect of integration since the result will


\textsuperscript{149} Case 75/84, Metro v. Commission (Metro II), [1986] ECR 3021, para. 20.

be the refusal of an exemption decision. In both cases the Commission will be prone to criticism that it abuses competition law to conduct environmental policy. As will be shown, this criticism is unjustified in that it departs from the false premise that the Community has a number of completely separate policies that do not interrelate. Moreover, it fails to recognise the integrative framework provided by the Treaty. Below, we will first look at the first type of situation, i.e. the positive effect of the integration principle with regard to the competitive assessment of environmental agreements. This will take place individually for the four specific requirements to be found in Article 81(3). After that we shall concentrate on the negative effect of the integration principle with regard to Article 81(3) as a whole. Finally, the effects of the direct applicability that Regulation 1/2003 will bestow upon Article 81(3) will be examined.

8.7.2 The requirement of technical or economic progress and the protection of the environment

Taken literally, Article 81(3) would never allow for an exemption on environmental grounds. The first requirement refers only to economic benefits. Not unlike the Court, which created an environmental exception to the free movement provisions when the Treaty was silent on this matter, this silence has not kept the Commission from taking the environment into account in applying this requirement. However, before we move on to this core issue, it is useful to first indicate the general concepts involved in establishing economic and technical progress. In one of the very first competition cases to come to it, the Consten & Grundig case, the Court gave the following consideration with regard to this requirement:151

'The question whether there is an improvement in the production of distribution of the goods in question, which is required for the grant of exemption, is to be answered in accordance with the spirit of Article 85 [Now Article 81]. First, this improvement cannot be identified with all the advantages that the parties to the agreement obtain from it in their production or distribution activities. These advantages are generally indisputable and show the agreement as indispensable to an improvement as understood in this sense. This subjective method, which makes the content of the concept of 'improvement' depend upon the special features of the contractual relationships in question, is not consistent with the aims of Article 85 [Now Article 81]. Furthermore, the very fact that the Treaty provides that the restriction of competition must be 'indispensable' to the improvement in question clearly indicates the importance which the latter must have. This improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.'

[Emphasis added]

This paragraph confirms the objective nature of the benefits required to satisfy the first part of the exemption clause. In general the following remark in a Commission exemption decision may shed some light on the Commission's perception of the function of this criterion.  

‘For the agreements to contribute to the improvement of production or distribution, or to promote technical or economic progress, they must objectively constitute an improvement on the situation that would otherwise exist. The fundamental principle in this respect, established at the time the common market was formed, lays down that fair and undistorted competition is the best guarantee of regular supply on the best terms. Thus the question of a contribution to economic progress within the meaning of Article 85(3) [Now Article 81(3)] can only arise in those exceptional cases where the free play of competition is unable to produce the best result economically speaking.’

Furthermore, in the Matra case already referred to above, the Commission made the following statements concerning the first requirement for an exemption.

‘Finally, according to the Commission, it is possible to take into account, as regards the contribution to economic and technical progress, factors other than those expressly mentioned in those provisions. They include, for example, the maintenance of employment [...]. Accordingly, regional policy concerns may be taken into consideration, for the purposes of Article 85(3) [Now Article 81(3)] of the Treaty, in conformity with the requirements of Article 130A [Now Article 158] of the EC Treaty. That certainly does not mean that the restrictions of competition deriving from the agreement were declared valid solely because of the geographical location of the joint venture. As is apparent from paragraph 36 of the Decision, it is based primarily on the intrinsic merits of the project.’

This, we think, very clearly sets out the Commission's approach with regard to the possibility to take other factors than those listed in Article 81(3) into account. The Commission certainly considers it possible to do so and will do so. However, such factors can of themselves never warrant an exemption. This idea resurfaces in a number of early exemption decisions in the environmental context. In its 1974 decision concerning the selective distribution system set up by BMW, the commission, in granting an exemption, took account of the fact that cars need regular maintenance to prevent them from, inter alia, ‘having a harmful effect

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on the environment'.\textsuperscript{154} Similarly, in the decision on the \textit{Carbon Gas Technologie} joint venture the Commission took into account the fact that the new process of coal gasification would lead to environmental benefits.\textsuperscript{155} This approach was repeated in the \textit{BBC Brown Boveri} case which concerned a joint venture set up to develop new high power batteries. According to the Commission the agreement could be exempted because the development of such batteries would facilitate the introduction of electrically powered cars that are environmentally friendly in that they do not emit noise or exhaust gases.\textsuperscript{156} In the decision in the \textit{Assurpol} case, the Commission exempted an agreement to set up an economic interest grouping for the co-reinsurance of environmental damage risks. In doing so the Commission considered that the cooperation enabled better assessment of the environmental risks and thus the development of industrial processes that are less hazardous for the environment.\textsuperscript{157} In the decision on the \textit{Ford Volkswagen} joint venture to develop a new MPV, the Commission considered, in granting an exemption, that the MPV being developed will be improved with respect to environmental requirements. With regard to these improvements the Commission points out that the use of hazardous materials will be brought down and the recyclability will be increased while the new MPV should lead the pack in terms of low emissions and fuel consumption.\textsuperscript{158} Similarly, when considering the \textit{Exxon Shell} joint venture for the production of polyethylene, the fact that the agreement would obviate the need to transport raw materials and thus avoids health and environmental risks involved in such transports was taken into account by the Commission. Furthermore, the new process used in the joint venture plant would result in a reduction of the amount of raw materials used by customers and therewith reduce the volume of plastic waste.\textsuperscript{159} As a final example we would refer to the \textit{Philips Osram} joint venture decision in which the Commission granted an exemption on partly environmental grounds.\textsuperscript{160}

In none of these cases the exemption was granted on environmental grounds alone.\textsuperscript{161} Rather, these were just taken into account and were clearly subordinate to the economic benefits. This can be deduced from the decisions themselves and becomes even clearer when the Commission's competition report is read with regard to these decisions. Not a single word on the environmental

\textsuperscript{159} Commission Decision 94/322, \textit{Exxon Shell}, OJ 1994 L 144/20, paras. 67, 68.
aspects and their role in granting the exemption is to be found.\textsuperscript{163} However, on other occasions the Commission has stated in its competition reports that it takes environmental considerations into account as a factor contributing to the improvement of production or distribution and technical and economic progress.\textsuperscript{165}

All these decisions show that the discussion on whether environmental protection considerations are taken into account by the Commission in granting an exemption can be closed. The more interesting question in this respect is whether environmental considerations can of themselves and provided that the other three requirements are fulfilled, justify an exemption. Furthermore, it is with regard to this question that the positive effects of the integration principle as implemented through the model of integration should come into play.

To answer this question, we need to look at current Commission practice with regard to 'purely environmental' agreements. The joint ventures that we looked at above simply did not require any role for the environmental concerns other than to just 'green' the Commission's decision-making practice. It is only with regard those agreements that serve primarily or even only have an environmental objective that the true importance of environmental concerns becomes clear.

Under the heading of 'economic benefits' the Commission considers such agreements in its Guidelines on horizontal agreements.\textsuperscript{164} Because of their importance these considerations merit quotation in full.

'193. Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs (55).

194. Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit

\textsuperscript{161} Cf. Eg. Commission, XI\textsuperscript{th}. competition report 1983, para. 116 (Carbon Gas Technologie), XV\textsuperscript{II}th. competition report 1988, para. 64 (BBC Brown Boveri), XX\textsuperscript{II}nd. competition report 1992, para. 140 (Assurpol), XX\textsuperscript{III}rd. competition report 1993, para. 139 (Ford/Volkswagen) and XX\textsuperscript{IV}th. competition report 1994, p. 426 (Exxon/Shell).

\textsuperscript{165} Eg Commission, XX\textsuperscript{VIII}th. Competition report 1998, para. 129.

\textsuperscript{164} Commission, Guidelines on horizontal agreements, OJ 2001 C 3/2, chapter 7, p. 26 et seq.
analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions.'

We can immediately notice that the Commission refers only to the ‘economic benefits’. However, a further point that springs to mind is the fact that the Commission is referring to, in the context of establishing such economic benefits, ‘net benefits in terms of reduced environmental pressure’. This seems to suggest that the Commission was thinking of purely environmental benefits in this respect. Furthermore, these economic benefits can exist on two levels: the individual and the aggregate consumer level. The reference to ‘net’ environmental benefits could be taken to refer to the possibility of certain environmental improvements actually resulting in an environmental degradation.\(^\text{165}\)

It is, for example, possible that increases in efficiency and thus lower running costs of appliances will also lead more intensive use of these appliances, thereby impinging on the environmental improvement. However, the final sentence of paragraph 193 where the Commission appears to be summarising its previous remarks again points at a purely economic approach to the environmental benefits.\(^\text{166}\) Moreover, the fact that the Commission speaks of economic benefits outweighing the costs (in terms of reduced competition) points at the introduction of an extra proportionality criterion within the first requirement for an exemption. It can be doubted whether Article 81(3) allows for such an extra proportionality test apart from the necessity test that forms the third requirement of Article 81(3). A final remark concerns the second requirement, that consumers receive a fair share in the benefit. The Commission appears to take this requirement together with the first in its Guidelines. We will have a closer look at this requirement below but at this stage it can be said that this taking together does little for the clarity of the Guidelines in this respect.

The Commission’s decision in the CECED case may be helpful in this respect.\(^\text{167}\) In this decision the Commission is again taking the existence of the benefit and the fair share for the consumers together. The Commission considered that the CECED agreement entailed benefits that would allow it to be exempted. According to the Commission, the agreement is designed to reduce the energy consumption by at least 20 per cent.\(^\text{168}\) Furthermore, the reduced energy consumption will result in less pollution resulting from the generation of electricity.\(^\text{169}\) The Commission appears to be referring to the contribution of the

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\(^{166}\) Vedder 2001, p. 89 et seq.

\(^{167}\) Commission Decision 2000/475, CECED, OJ 2000 L 187/47. This decision shows a remarkable resemblance to the fictional case given at the end of Chapter 7 of the Guidelines on horizontal agreements.

\(^{168}\) Ibid., para. 47.

\(^{169}\) Ibid., paras 48 and 51.
agreement to technical progress where it considers that washing machines that are more energy efficient while other factors remain constant can be considered 'objectively more technically efficient'. Finally the Commission into account the fact that the agreement could encourage innovation resulting in energy efficiency levels even beyond what is currently possible. This part of the Commission's reasoning seems to fit in rather well with the traditional division of Article 81(3) into four different requirements. When the Commission goes on to establish individual economic benefits and collective environmental benefits it appears to take the first and second test together. According to the Commission, the CECED agreement entails individual economic benefits because the initial increase in purchasing costs will be recouped by the individual consumer in 6 to 40 months because of the lower running costs. Furthermore, the Commission appears to take into account the somewhat speculative effect that the restriction of competition with regard to energy efficiency will trigger increased price competition whereby actually lowering the prices of the more efficient machines. As regards the collective environmental benefits the Commission first quantifies the avoided damages resulting from the reduced emissions. The Commission estimates these to be seven times greater than the increased purchase costs of the more efficient washing machines.

On the basis of all of this the Commission comes to the following conclusion:

"The expected contribution to furthering energy efficiency both within the current technological limits of categories A to C and beyond the limits of category A, the cost-benefit ratio of the standard and the return on investment for individual users point to the conclusion that the agreement is likely to contribute significantly to technical and economic progress whilst allowing users a fair share of the benefits."

All in all the Guidelines and the CECED decision leave the impression that the Commission has not made up its mind entirely with regard to the first requirement for an exemption in connection with environmental agreements. A number of reasons can be given to substantiate this conclusion. Firstly, the Guidelines and CECED seem to be not entirely consistent. For one, the Guidelines expressly state that it is unnecessary to show collective benefits once individual benefits have been shown. This may be contrasted with the fact that the

170 Ibid., para 48.
171 Ibid., para. 50.
172 Ibid., para. 52.
173 Ibid., para. 53.
174 Ibid., para. 56.
175 Ibid., para. 57.
CECED decision shows that there are collective benefits even when it has already been established that the agreement entails individual benefits. Furthermore, the Commission appears to equate the increased purchase costs of washing machines with the costs of the agreement.\textsuperscript{177} This seems far from obvious as the costs of the agreement, as the Commission rightly puts in the Guidelines, include, among others, the effects of lessened competition and compliance costs for economic operators. Secondly, and more importantly, the role of environmental benefits as factors justifying an exemption of themselves can at best be called uncertain. In the Guidelines, the Commission only takes environmental improvements into account as economic benefits. In the CECED decision, the Commission takes the benefits of the agreement into account as individual economic benefits and as collective environmental benefits. With regard to the latter, the Commission is in actual fact referring to economic benefits despite the heading of the paragraph.\textsuperscript{178} At best, the Guidelines and the CECED decision can be taken to show that the Commission will no longer just 'take account of' the environmental improvements in granting an exemption but that these improvements are placed on equal footing with the economic benefits.\textsuperscript{179}

The DSD case concerning Article 81 EC confirms this uncertainty as to what exactly is the role played by environmental concerns. It may be recalled that this case dealt with the nationwide collection and recycling system set up and operated by DSD pursuant to the German Packaging Ordinance. The Commission considered that the exclusivity clause in the so-called service agreements (between DSD and the local collectors/sorters) restricted competition within the meaning of Article 81(1) EC. Accordingly, an exemption pursuant to Article 81(3) EC was the only way to save DSD in this respect. In checking whether the conditions for an exemption were fulfilled the Commission's very first consideration is perhaps telling.\textsuperscript{180}

‘Any positive effects brought about by the exclusivity clause [...] must be weighed against the restrictive effects of the agreements.’ [Emphasis added]

The Commission starts out its considerations by stating that DSD was set up in order to meet the obligations of the German Packaging Order and the Packaging Directive, both of which are examples of environmental legislation and thus 'providing a high level of environmental protection'.\textsuperscript{181} The Commission

\textsuperscript{177} Compare para. 56 of the CECED decision (Commission Decision 2000/475, CECED, OJ 2000 L 187/47) with para. 194 of the Guidelines, \textit{ibid.}


\textsuperscript{180} Commission Decision 2001/837, DSD (Article 81), OJ 2001 L 319/1, para. 142.

\textsuperscript{181} \textit{Ibid.}, para. 143.
then moves on to observe that the service agreements are necessary to make the system work and as a result give 'direct practical effect to environmental objectives'.\(^ {18a}\) Only at the very last stage does the Commission revert to its old habit of bringing some purely economic reasoning into the decision in the form of a recognition of the efficiencies that flow from the organisation.\(^ {18b}\) On the basis of DSD is could possibly be argued that environmental considerations have been the primary justification for this exemption. In this connection it should however be recalled that the Commission is explicitly referring to environmental legislation – by the Community and a member state – that stood at the cradle of DSD. This could be taken as in – albeit implicit – recognition of the sovereignty involved as an other reason for the exemption. The effect of not granting an exemption to DSD with regard to this clause would in effect boil down to greatly impeding the smooth functioning of DSD and thus frustrate its ability to meet the objectives prescribed by the European and German environmental legislator. Following DSD, the role for environmental concerns can therefore certainly be said to have become greater whilst the certainty has not been improved to the same extent.

As to the question of what the role of environmental concerns could and should be in this regard we need to return to the Guidelines and the CECE\(\text{D}\) and DSD decisions once more. In these documents, the Commission extensively refers to many of the Community’s environmental principles. Strikingly absent, however, is the integration principle. Article 6 of the EC Treaty requires that environmental protection requirements must be integrated into the definition and implementation of the Community policies. The word ‘must’ clearly indicates the obligatory nature of this provision.\(^ {184}\) Furthermore, the concept of ‘environmental protection requirements’ is of a more general and abstract nature than the concept of the environmental benefits resulting from an agreement. Article 6 refers in abstracto to the process of integrating environmental concerns in Community policy in general. It would therefore be overly simplistic to say that Article 6 amounts to nothing more than an obligation to interpret ‘economic and technical progress’ so as to also encompass environmental benefits. The outcome of this process of integration should amount to sustainable development. Sustainable development, as we have seen in chapter two, in the context of the application of Article 81 requires the right mix of cooperation and competition between firms. Whether this mix is right and therefore conducive to sustainability, depends ultimately on the proportionality or necessity of the restrictions of competition. Article 6 can therefore, at the very least be said not to oppose an increased role for environmental concerns in the context of the first requirement for an exemption.

\(^{18a}\) Ibid., para. 144.
\(^{18b}\) Ibid., para. 145.
Taken further, the positive effects of the integration principle could, ultimately, result in an exemption being granted on environmental grounds alone. As was said above, this makes the Commission liable to be criticised of pursuing environmental policy through competition law. In the terminology of administrative law: the Commission could be considered to commit détournement de pouvoir. German scholars have voiced such allegations of ‘Instrumentalisierung’ most fervently.\(^\text{185}\) We have already indicated a number of reasons why such criticism is unjustified. Firstly, this criticism simply ignores the presence and purpose of the integration principle the very essence of which is to ensure that environmental considerations play a role in the Community’s other policies. Secondly, it fails to recognise that competition law is not an isolated area administered solely by the responsible commissioner together with the directorate-general for competition. The Commission takes decisions on competition matters as a collegial body. Moreover, competition law and policy exist by virtue of and thus functions within the framework of the EC Treaty. The framework thus provided is integrative in that it lays down one common goal for all activities of the Community in Article 2. As Article 2 contains a clear and unambiguous environmental objective for the Community, all Community policies should contribute to attaining these objectives by virtue of Article 3 EC. Criticism that, by taking environmental considerations into account, the Commission is conducting environmental policy with competition law cannot therefore be upheld because it disregards the constitutional and integrative nature provided by the EC Treaty.

The Commission’s ‘economisation’ of the environmental concerns can be taken to mean two things. Firstly, the Commission could only be economising the environmental benefits and still consider them sufficient to justify an exemption of themselves. Secondly, the Commission could be economising the environmental benefits and still be requiring a ‘truly economic’ (efficiency) benefit alongside. Both interpretations seem compatible with the Commission’s decision in the CECED case. The Commission’s considerations under the heading of the ‘collective environmental benefits’ seem to fit in well with the first interpretation. There, the Commission quantifies the environmental benefits resulting from the agreement in monetary terms and considers that\(^\text{186}\)

\[\text{‘such environmental results for society would adequately allow consumers a fair share of the benefits even if no [economic] benefits accrued to individual purchasers.’}\]

The decision as a whole points at the second interpretation. In this respect it has to be noted that the Commission has explicitly proved that there are ‘individual

\(^\text{185}\) E.g. Immenga 1976 and Möschel 1995 at p. 183, supra paragraph 5.4.

economic benefits' and that these benefits together with the possible technological progress and the collective environmental benefits warrant an exemption.\footnote{\textit{Ibid.}, paras. 52-54 and 57.}

However, from the perspective of our question what the role for environmental concerns should be, this economisation is of limited value. Converting environmental benefits into economic benefits will invariably lead to the outcome that the pursuit of a worthwhile environmental improvement will always coincide with an economic improvement.\footnote{As the \textit{NMa} in a slightly over-generalised manner recognises in its decisions in the \textit{Stibat} and \textit{Wit-en Bruingoed} Cases, infra paragraph 16.5.} The costs of environmental degradation are enormous and become exponentially greater as time passes and the degradation dissipates and spreads throughout the environment. Acting now and possibly even in a preventive manner will therefore invariably result in economic benefits. Furthermore the cooperation between firms that brings conduct within the scope of Article 81 will generally bring efficiency gains with it. These efficiency gains will again be considered as economic benefits. This is of course not to say that the whole process of integrating environmental protection requirements into competition law wouldn't become much easier if these were able to justify an exemption \textit{per se}.

\textbf{8.7.3 The requirement of a fair share for consumers and environmental protection}

Not only will the agreement have to bring about certain benefits, a fair share in these benefits also has to accrue to consumers. The rationale of this requirement is fairly self-evident. Almost any agreement voluntarily entered into between two or more profit maximising firms will result in a benefit for these firms. Otherwise, they would not have agreed at all.\footnote{See, with regard to environmental agreements, Maks 2002, p. 33.} The purpose of Article 81(3), on the contrary, is to allow an exemption for agreements that have some redeeming qualities for society as a whole. With regard to environmental agreements this requirement should not prove to be a stumbling block as environmental benefits inherently accrue to society in general. This is because the environment is a collective good by its very nature. This approach will be referred to as the collective approach.

In the environmental context the 1991 exemption for the joint venture set up by \textit{KSB/Goulds/Lowara/ITT} is interesting. This joint venture concerned the development of new type of pump. In the course of establishing the benefits for consumers the Commission made the following statements:\footnote{Commission Decision 91/38, \textit{KSB/Goulds/Lowara/ITT}, OJ 1991 19/25, para. 27.}

\begin{enumerate}
\item
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'The advantages arising from the cooperation benefit consumers at the very least through the improvement in the quality of water pumps. Moreover, two aspects of the new pumps, i.e. energy conservation and the fact that the fluids handled by the pump are not polluted, are environmentally beneficial. This effect is reinforced by the higher performance capacity of the pumps. This constitutes an improvement in operating characteristics. At least at present, a further advantage is that these pumps are offered to consumers at the same price as cast-iron pumps.'

This seems to indicate that the Commission is willing to consider environmental benefits arising from agreements to inherently entail a fair share for consumers. This view is substantiated to a certain extent by the Commission's Guidelines on horizontal agreements and the CECED decision. In the Guidelines the Commission distinguishes between an individual and a collective share in the benefit for consumers. According to the Commission there is no need to investigate whether an agreements results in 'aggregate environmental benefits' if it has been shown that the individual consumer will have a 'positive rate of return'. This confirms the line of reasoning of the Commission in the KSB/Goulds/Lowara/ITT decision in that aggregate environmental benefits could be sufficient to satisfy the second requirement. On the other hand, such benefits seem to be considered as secondary grounds and need only to be established once it has been impossible to show a positive rate of return. This last, 'individual', approach to the requirement of a fair share for consumers seems more restrictive than the collective approach. For one, environmental improvements will be costly and, as a consequence, the (partly) passing on these environmental costs to consumers will generally render a positive rate of return impossible. One case where the Commission has accepted a positive rate of return is the CECED case that has already been mentioned several times above. According to the Commission the increase in purchase price of washing machines as a result of the phasing out would be recouped by the average consumer within 40 months because of the lower running costs. In this case the collective environmental and individual economic benefits coincide and thus yield a positive rate of return. There are, however, a number of cases where the collective environmental benefit does not result in or coincide with such a direct individual economic benefit. These will notably be the cases where environmental costs are actually internalised and (partly) passed on to consumers. In these cases the consumer, will never have a positive rate of return because he will invariably be economically off worse than before the internalisation. The mere fact that the environment as a whole benefits does nothing for the individuals'
rate of return as defined by the Commission. This would be otherwise only if it is accepted that the cooperation reduces the amount of internalised costs and that this reduction in itself constitutes a benefit in which there is a fair share for consumers. However, to arrive at that conclusion it would have to be accepted that having to pay less constitutes a 'positive rate of return' To date there have been no cases involving this type of agreement that have concerned this point. However, the Netherlands Competition authority has dealt with a number of such schemes and as such we will pay closer attention to this issue in the relevant chapter.

In the CECED decision the Commission has also – and, if judged by its Guidelines, superfluously – established the collective environmental benefits. In doing so the Commission relied on the fact that the estimated saved (avoided) external costs (the benefits) exceeded the increase in purchase costs of washing machines (the costs) by about seven times. The Commission goes on to state 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' This decision, however, still leaves room for quite some uncertainty with regard to the lower border of the magnitude of the benefits compared to the costs. In this respect, the Guidelines provide no extra certainty whatsoever.

This collective line of reasoning, even though it is adopted as a secondary line of reasoning, shows that purely environmental benefits, even when they do not coincide with individual economic benefits can still result in a fair share for consumers. This last line of reasoning, in our opinion, is the one to be followed primarily whereby the existence of individual economic benefits would constitute a 'nice extra'. The weight currently attached by the Commission to the individual approach, as has been shown above, fits in rather badly with the collective nature of the goods protected by an environmental agreement.

Ideally, a distinction would have to be made between the economic and the environmental benefits arising from an environmental agreement. This distinction would then serve to identify the environmental benefits as such and, as a result, clarify the weight that has been attached to them in the decision. At the same time the environmental benefits would have to be integrated into the elements of Article 81(3) EC. With regard to the environmental benefits, the collective approach to determining a fair share for consumers should be followed because that would be in accordance with and recognise the diffuse.

194 Unfortunately, the Commission chose to deal with VOTOB in an informal way. As a result, nothing is known about the Commission's appraisal of such cases with regard to Article 81(3) apart from the general statement that an exemption is unlikely.

195 Infra, paragraph 16.5


197 Ibid.
nature of this type of benefit. Only with regard to the economic benefits of an agreement, arising, for example, from the economies of scale of cooperation, is closer scrutiny in the form of the determination of an individual fair share called for. This is inherent in the purpose of the requirement of establishing a fair share for consumers, which, as has been said above, is to ascertain that only advantages that not only benefit the parties themselves are exempted. Environmental benefits, by their very nature, cannot be kept for oneself. Economic benefits, on the contrary, may very well not be passed on to consumers. In this regard the Commission's reasoning is not entirely consistent with its previous practice where it relied, in proving a fair share for consumers, on the presence of some competitive pressure.\(^{198}\) The reasoning behind this is that the presence of competitive pressure will force the firms to pass the (economic) benefits on to consumers. In the Guidelines and the CECEP decision, no reference to this reasoning is to be found. Instead the Commission seems to consider only the case where the economic and environmental benefit coincide naturally and therefore the presence of competition is not required to ensure the passing on of the advantages at all. With regard to the passing on of the economic benefits arising from an environmental agreement (for example in the form of lower prices for waste collection services because of cooperation), the ideal situation would rely on the presence of competitive pressure and not so much on the coincidence of economic and environmental benefits that the Commission has found.

Again, the more recent DSD decision appears to entail a certain evolution. With regard to the fair share for consumers, the Commission follows a bifurcated approach. It starts out its appraisal by observing somewhat generally that the operation of the DSD system is consumer friendly.\(^{199}\) Then the Commission observes that DSD's structure and operation will allow for scale and scope advantages and thus efficiencies. According to the Commission, it can be accepted that these cost savings will be passed on the consumers. This observation is formulaic in two respects. Firstly because it is the standard approach to this requirement for an exemption. Secondly, because it cannot be called anything more than a mere statement: the Commission fails to indicate why the savings will be passed on.

The other observation by the Commission is of much more interest for the purpose of this research. Again, it merits quotation in full.\(^{200}\)

'[...] consumers will likewise benefit as a result of the improvement in environmental quality sought, essentially the reduction in the volume of packaging'.

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\(^{199}\) Commission Decision 2001/837, DSD (Article 81), OJ 2001 L 319/1, para. 147.

\(^{200}\) Ibid., para. 148.
With this statement the Commission is coming dangerously close to the reasoning whereby environmental benefits, precisely because of their open and diffuse nature, inherently accrue to an open group and thus always entail a fair share for the consumer. Thus, this aspect of DSD confirms what has already been said above with regard to the treatment of the first requirement for an exemption. By and large the role for environmental concerns appears to have increased. Nevertheless, the presence of an – albeit unsubstantiated – economic argument in this connection does little to really clarify the role actually played by the environmental considerations.

The same obscure clarity can be seen in the recent judgment of the European Court of Justice on the German solidarity fund for illegally transported waste. This case consists of a Treaty infringement procedure (Article 226 EC) against Germany. According to the Commission, the mandatory payments by companies that are active in the waste shipments sector into a fund that would be used to cover the costs of the retrieval of illegally transported waste, amounted to a charge of equivalent effect within the meaning of Articles 23 and 25 EC. According to the German government, the payments were not prohibited by Articles 23 and 25 even though they closely resembled a charge having equivalent effect. One of the arguments brought forward by the German government was the fact that the waste exporting companies would actually benefit from this fund so that the payment could be seen as a remuneration for a service actually provided that. The European Court Justice rejected this argument using, among others, the following reasoning:

‘In those circumstances, compliance by the Federal Republic of Germany with an obligation which Community law imposes on all the Member States in pursuit of a general interest, namely protection of health and the environment, does not confer on exporters of waste established in its territory any specific or definite benefit’.

Here we see the Court qualifying the ultimate goal of the German measure as one that serves ‘the general interest, namely the protection of health and the environment’. Subsequently, the Court is of the opinion that this objective does not confer any ‘specific or definite benefit’. It is submitted that this absence of a specific or definite benefit can be explained by the fact that the Court sees environmental protection as a diffuse benefit that inherently benefits an open group.

201 Case C-389/00, Commission v. Germany, judgment of 27 February 2003, n.y.r.
202 Ibid., para. 29.
203 Ibid., para. 35.
8.7.4 The proportionality requirement and environmental protection

8.7.4.1 Introductory remarks

Even if the benefits arising from an agreement are passed on to consumers, it will have to be shown that the restriction of competition does not go any further than is necessary to attain those benefits. The basic idea behind this test can be said to be that the advantages of the agreement must outweigh the disadvantages arising from the restriction of competition. It is therefore a balancing act of two different objectives. On the one hand the objective of maintenance of effective competition and, on the other hand, the objective of the agreement, which, for the purpose of this research will generally be the protection of the environment. In general, the rule would seem to be that the greater the disadvantages resulting from the restriction of competition, the more important the advantages will have to be. For a start, reference may be made to the judgment of the Court of First Instance in the Matra case where it held that in principle there is no restriction that is a priori unexemptable.\(^{204}\) This obvious statement defines the absolute minimum of what can be said about the proportionality requirement. For more specific information on the application of the proportionality test we need to look at the Commission's decision-making practice and the Courts' case law. In this respect, it may be useful to first set out the different sub-tests identified by doctrine in the proportionality test.

Within the proportionality test, essentially four different sub-tests can be discerned.\(^{205}\) Firstly, a test determining whether the actual aim of the measure is justified. The purpose of this test can be said to sort the wheat from the chaff in order to uncover what the Commission calls 'disguised cartels'.\(^{206}\) Secondly, it will have to be shown that the measure is effective. In other words: the question is asked whether the measure is actually likely to contribute to the attainment of the objective. This could also be called a causality test. Thirdly, it will have to be established that the objective cannot be attained with less restrictive means. This test is commonly referred to as the necessity test.\(^{207}\) In this test the objective of the agreement, and, more precisely in the context of environmental agreements, the level of protection sought, is accepted. Only the means chosen by the agreement are subject to scrutiny in this test. Fourthly and finally, the two objectives must be in balance with each other. In the context of an environmental agreement: the environmental benefit must be proportionate to the restriction of

\(^{204}\) Case T-17/93, Matra, [1994] ECR II-595, para. 85.
\(^{205}\) Gerven 1991, p. 77.
\(^{206}\) Commission, Guidelines on horizontal agreements, OJ 2001 C 3/2, para. 188.
\(^{207}\) Ibid.
competition. Contrary to the necessity test, the, as it will be called, true proportionality test will call into question the actual environmental objective (the level of protection) itself. It has to be pointed out that this distinction is of scholarly origin and is not applied rigorously by the Court or the Commission.

8.7.4.2 The application of the proportionality test to environmental agreements

The wording of the proportionality test in Article 81(3) – the agreement may not 'impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives' – clearly points at a necessity test.\(^{208}\) The objectives ('these objectives' in the wording of Article 81(3)) of the agreement are to be accepted and only the means chosen (i.e. the restrictions of competition) are subject to scrutiny as to whether or not they are necessary or indispensable to attain these objectives. This interpretation is confirmed by the judgment of the Court of First Instance in the Matra case.\(^{209}\) The applicant in this case challenged the legality of the Commission's decision to approve the Ford Volkswagen joint venture to develop and produce a multi-purpose vehicle.\(^{210}\) The Commission granted an exemption in this case because the joint venture would produce a, then new and innovative, type of vehicle. Furthermore, as regards to indispensability, the Commission considered that the Ford and Volkswagen alone could not developed this new product as fast and efficient as the joint venture would allow them to. Among others, the legality of this reasoning was challenged before the Court. Even though the Court first appeared to be embarking on a true proportionality type of reasoning,\(^ {211}\) it ended up confining itself to checking whether there was an alternative to the joint venture (i.e. no joint venture but the parties acting independently) which would also lead to the result.\(^{212}\)

In other cases, the Commission also limits itself to checking whether other, less restrictive, alternatives are available. In, for example, the case involving the Philips Osram joint venture, the Commission limited itself to ascertaining whether or not alternative means were available.\(^ {213}\) Moreover, the Commission has consolidated this approach to the proportionality requirement to a certain extent in its Guidelines in which it made the following statement:\(^ {214}\)


\(^{209}\) Case T-17/93, Matra, [1994] ECR II-595, para. 135 et seq.


\(^{211}\) Ibid., para. 135.

\(^{212}\) Ibid., para. 138.


\(^{214}\) Commission, Guidelines on horizontal agreements, OJ 2001 C 3/2, para. 35.

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'If there are less restrictive means to achieve similar benefits, the claimed efficiencies cannot be used to justify the restrictions of competition.' [Emphasis added]

The reluctance in acknowledging that the Commission in the above statement indeed adopted a necessity test follows from the fact that the Commission refers to 'similar benefits' instead of the benefits as identified in the first criterion for an exemption. This could be taken to mean that the Commission will opt for a lower level of protection than envisaged by the parties if the means necessary to achieve the original level prove disproportionate in the sense of the true proportionality test. However, in the chapter devoted to environmental agreements in the Guidelines, the Commission is referring to a necessity test.215

This is confirmed by the Commission decision in the CECED case. The agreement to phase out the energy inefficient washing machines was considered by the Commission to be indispensable because there are no 'less restrictive alternatives that would be able of delivering similar reductions based on other approaches'.216 In this respect the Commission investigates whether an industry-wide target, information campaigns or an eco-labelling scheme could lead to the same result. The Commission ultimately reached the conclusion that these alternatives would either not lead to the same results or would do so only at higher costs or while being more restrictive.217

In exceptional cases the Commission does not get beyond the first or second sub-test identified in the proportionality test. In, for example, the NAVEWA-ANSEAU case, the Commission considered that the actual objective of the agreement was to create a barrier to entry for the Belgian market for washing machines and dishwashers.218 Similarly, in Ansac the Commission simply considered that the agreement did not contribute to the alleged benefits.219 This case concerned the agreement between the US producers of natural soda ash (an ingredient used to make glass) to set up a joint export company pursuant to the Webb-Pomerene Act. According to the parties, natural soda ash (which is produced primarily in the US) has environmental advantages over synthetic soda ash. Therefore, the U.S. producers argued, the agreement to jointly export this product to the EC would, at least, qualify for an exemption under Article 81(3). The Commission denied the exemption on the grounds that, while it did not dispute the environmental benefits of natural soda ash, the agreement concerned only the setting up of the joint sales agency and was therefore uncon-

215 Ibid., para. 196.
217 Ibid., paras 60-63. See, for a critical but not very convincingly substantiated appraisal: Maks 2002, p. 35.
Conected with the environmental benefit. This can be considered an application of the second sub-test, the causality test.

Finally, the case concerning the VOTOB agreement lays down the principles of the Commission's approach to environmental agreements that also concern the costs of environmental protection. In this case the Commission examined an agreement between the six Dutch firms offering tank storage capacity. These firms had agreed to limit the emissions from their installations and to this end they had concluded a covenant with the local authorities. On the basis of this covenant the parties had to make significant investments in pollution abatement technology. While the project was eligible for subsidisation, the parties had to pay for the investments themselves when the subsidy scheme was withdrawn altogether. The VOTOB members apparently were aware of the risk of future financing problems and decided to recoup the costs associated with the investments from the chemical industry in the form of an environmental surcharge. This charge was uniform and varied according to the polluting potential of the product stored. Furthermore, the charge had to be passed on entirely to the consumer (i.e. the chemical companies seeking storage capacity) and moreover the charge had to be invoiced as a separate item. The Commission identified three restrictions of competition. Firstly, the uniform nature of the charge disregarded the fact that the parties faced different investments and thus different costs in order to meet the environmental obligations. Secondly, the fact that the charge was fixed (i.e. the obligation to pass the charge on to consumers entirely) effectively meant a fixed price increase. Thirdly, the Commission objected to the obligation to invoice the charge as a separate item because this would leave the impression that the charge was government imposed like, for example, the VAT, and thus would reinforce the price-fixing effect. The Commission rejected the exemption on proportionality grounds. In doing so it considered that a system whereby the total price was invoiced while it was stated that this price included the environmental costs, would have been acceptable. Fixing the uniform surcharge, requiring it to be passed on and separately invoiced went, according to the Commission, beyond what was necessary to attain the environmental objectives. In the Guidelines on Horizontal agreements, the Commission considers that an agreement involving a uniform fee irrespective of the parties' individual actual costs could in principle be indispensable. This, however, still rules out the possibility of the passing through and separate billing being considered indispensable. We will have a closer look at cases involving environmental charges in the chapter devoted to case studies in the Netherlands.

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220 Ibid., para 23.
222 Ibid., para. 177.
223 Ibid., para. 185.
224 Infra, paragraph 16.5.4.
One final area where the proportionality criterion is of interest is that of environmental agreements concerning the collection and processing of waste. Environmental agreements in this field have become quite numerous as a result of the producer responsibility introduced by the Packaging and Packaging Waste Directive. The law implementing this directive may leave the industry two options to comply with the producer responsibility. In principle, they have an individual responsibility to collect and recycle their packaging waste. However, they can also become party to a collective collection and recycling scheme and thereby avoid the (relatively expensive) individual obligation. This has lead to the emergence of several nationwide private packaging collection and recovery systems. The collection and recycling of waste needs to involve large volumes for it to be profitable and therefore allows for significant economies of scale. Moreover, free rider problems are to be expected and therefore most systems will involve some sort of exclusivity coupled with control mechanisms. It is this exclusivity that results in competition problems as the collective system will opt for the greatest degree of both ‘upstream’ (i.e. the firms responsible for the waste) and ‘downstream’ (i.e. the firms actually collecting and recycling the waste) exclusivity. The competition authority, however, will want to keep the degree of exclusivity to an absolute minimum. In one of the first of this type of cases to come before the Commission, the IFCO case, the exclusivity was indeed the core issue. The International Fruit Container Organisation (IFCO) is as system for reusable plastic fruit containers set up by a number of German food retailers. Initially, it looked like these founding fathers would consider the IFCO system to be exclusive in that they would only accept fruit in IFCO containers. This was thought necessary to start the system up and get a minimum amount of containers in circulation. The Commission objected to, inter alia, this exclusivity. When this was dropped and some other amendments were made to the


27 Because of the sheer number of companies involved as well as the relative difficulty of identifying the producer of the packaging once it has become waste

28 There is an incentive for upstream exclusivity (i.e. longer duration of contacts by which the producers are bound to the collective system) because that will increase the continuity of the system in view of the considerable investments that need to be done. Similarly, as the actual collection and recycling of waste involves putting into place a considerable fine meshed network, the downstream companies will demand certainty that they will be able to recoup their investments.

system, it was considered no longer to violate Article 81(1) in the first place. In *Valpak*, the case concerning the largest British packaging recovery scheme, the Commission was again concerned with the exclusivity involved. Under the Valpak scheme, the parties wanting to join had to use the Valpak scheme for all of their packaging (the 'all or nothing approach'). Thereby, competition was effectively excluded. Nevertheless, the Commission considered that this 'all or nothing approach' was justified in order to create sufficient momentum. Accordingly, the Commission granted an informal exemption while at the same time reserving itself the right to re-examine the case after three years.

Again, the exclusivity of the scheme featured prominently in *DSD*. The long duration of the exclusivity granted to collection and sorting companies in the service agreements meant that they restricted competition within the meaning of Article 81(1) but did not keep the Commission from granting an exemption. Above, we have already looked at the way in which the Commission dealt with the first two requirements for an exemption. The outcome above was that in general the Commission appears to have awarded greater weight to environmental considerations whilst at the same time it has not clarified exactly how much importance has been attached to the environmental protection requirements. In determining whether the exclusivity is indispensable the uncertainty as to what role the environmental concerns have played has increased. For one, the Commission writes not a word about the indispensability (or not) of the exclusivity in view of the environmental benefits that were identified pursuant to the first requirement. On the contrary, the Commission is solely addressing the economic and legal backgrounds of the decision to invest considerable sums at significant risk and to what extent these factors necessitated the exclusivities. This approach is not unsatisfactory from the perspective of the model of integration because essentially the Commission is checking to see whether the restriction of competition is necessary in order to allow for the erection of an infrastructure that will as a consequence enable the internalisation of external costs. However, this aspect of the decision does indicate that *DSD* cannot be said to be a purely environmentally motivated decision.

In general, the interpretation of the third requirement for an exemption as a necessity test is satisfactory from the perspective of the integration of environmental concerns and competition law. The criterion of necessity accepts the level of protection chosen and only checks on whether or not the means chosen are indispensable. This will preclude the Commission from substituting its own

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231 Ibid., p. 152-153.
232 Commission Decision 2001/837, *DSD* (Article 81). OJ 2001 L 319/1. Indeed, the word 'environment' is not to be found in paragraphs 150-157 that are devoted to the indispensability.
233 See for an equally cautious approach in this respect: Monti 2002, p. 1074.
vision of a sufficient level of environmental protection for that of the parties in cases where the means necessary to attain the latter are more restrictive of competition than those necessary to attain the level that the Commission would consider sufficient. In general, therefore, this test involves a greater 'respect' for the environment than a true proportionality test would. Moreover, the purpose of Article 6 and the model of integration, the attainment of sustainable development, also require the presence of some competitive pressure. In this respect, the proportionality requirement fulfils an essential role.

8.7.5 The requirement of sufficient residual competition and environmental protection

8.7.5.1 Introductory remarks

The fourth and final requirement for an exemption can be said the represent the outer limits of what Article 81 can take. Whatever the compensating benefits may be, the cooperation between the parties may never completely annihilate competition. Basically, there are two ways of looking at whether or not there is sufficient residual competition. Firstly, the amount or intensity of competition between the parties to the agreement (internal competition) may be ascertained. Secondly, one may look at the amount of competition between the parties on the one hand and the third parties (external competition) on the other hand. These two ways of looking at the remaining competition can be described as communicating vessels in that internal competition needs to be more intensive when external competition is diminished to a larger extent and vice versa. Furthermore, the requirement of sufficient residual competition has already played an important role in the second requirement for an exemption; establishing a fair share for consumers. This connection with the second requirement partly explains the limited attention that the Commission generally devotes to this requirement. This short outline of the test applied with regard to the fourth requirement also signals the parallelism between the appreciability test within the scope of Article 81(1) and the residual competition test. After these introductory comments we shall now look at the Commission's decision-making practice and the Court's judgments with regard to this criterion.

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334 See, for a true proportionality test and the effects that the application of this test has on the level of protection, Case C-302/86, Commission v. Denmark (Danish Bottles), [1988] ECR 4607.

8.7.5.2 The application of the residual competition test to environmental agreements

The two views on determining sufficient residual competition involve two different tests. When the internal competition between the parties to an agreement is concerned, the test applied shows a great resemblance to the qualitative appreciability test described above. On the other hand, the external residual competition test relies primarily on the market share of the parties to the agreement (i.e. the quantitative appreciability) and the general conditions of competition on the market. Practice with regard to this test reveals no particular order or preference for either one of the views on residual competition.

As regards the external residual competition the basic criterion is that of market power of the parties involved in the agreement. It can be said that this requirement also functions to some extent as a nexus between Article 81 and Article 82. Given this function, the Commission's practice in this regard becomes easier to understand. Basically, the purpose of the requirement of sufficient residual competition is to rule out any agreements that will reinforce a dominant position or that will lead to such a position coming about.\textsuperscript{236} From the case law on dominance the following rules of thumb can be inferred. Market shares below 30 to 40 per cent will generally not confer a position of dominance.\textsuperscript{237} On the other hand market shares over 75 per cent are very likely considered to bring dominance with it.\textsuperscript{238} Whether anything in between these two extremes will be considered to confer a dominant position will rely strongly on the actual situation of the market.

From these rules of thumb it may be concluded that an aggregate market share below 30 to 40 per cent will generally not be a problem from the point of view of ensuring sufficient external competition. However, in the United Reprocessors case\textsuperscript{239} the Commission has allowed an agreement between parties that had very significant market share well exceeding 40 per cent.\textsuperscript{240} United Reprocessors was a joint company established by the major European reprocessing firms with a view to coordinating the parties' reprocessing capacity.\textsuperscript{241} As can be guessed the initial investments involved in this type of operation are quite high. As a result such facilities require a high degree of efficient utilisation (load factor) for them to be profitable.

\textsuperscript{236} Commission, Guidelines on horizontal agreements, OJ 2001 C 3/2, para. 36.
\textsuperscript{237} Commission Decision 85/404, Grundig, OJ 1985 L 233/1.
\textsuperscript{239} Commission Decision 76/248, United Reprocessors, OJ 1976 L 51/7.
\textsuperscript{240} According to Portwood the market share was in excess of 90 per cent. Portwood 1994, p. 156.
\textsuperscript{241} Reprocessing is an operation whereby the useable fissile materials are recovered from spent nuclear fuels.
On the basis of the exceptional nature of the market involved the Commission came to the conclusion that the fourth requirement would also be fulfilled despite the very high market share of the parties. In this respect the Commission took into account the fact that the parties would have to compete after a certain transitional period had passed. Moreover, the Commission expected sufficient pressure from the electricity generating companies, the consumers of the joint company, was considerable. In its competition report the Commission made an extra effort at ensuring that United Reprocessors could not be construed as setting a precedent in this connection.242

Environmental concerns may play a particular role with regard to the market share test employed in this respect. It is not entirely unconceivable that environmental considerations may actually prompt a narrower market definition than otherwise would have been the case. This, in turn, will result in a higher market share for the parties involved on the market for environmentally friendly products and thereby an increased likeliness that residual competition is found to be insufficient.243

Generally speaking the market share approach itself adopted by the Commission is a fairly technical exercise that leaves little or no room for an increased role for environmental concerns. However, an indirect role is possible that involves taking the environmental backgrounds of the case into account not so much in establishing but rather in judging the market share. In this connection the concept of the economically compulsory cartel could come into play.244 As a reminder, according to this hypothesis, a cartel agreement could also be considered compulsory by government act if the conclusion of the cartel is the only economically rational approach to a government-imposed obligation. Short of accepting that such economic pressure keeps these agreements wholly outside the scope of Article 81(1), the inherent incentive to achieve economies of scale could nevertheless lead to larger market shares still being considered acceptable. It has to be taken into account that determining whether or not there is sufficient residual competition is task that cannot take place in abstract terms but, on the contrary, should take into account the actual economic situation on the markets. If this situation is such as to inherently lead to large scale operations with the accordingly large market share, the test whether or not sufficient residual competition remains should take this fact into account. Moreover, as the Commission's practice shows, it can and will take such special features of markets into account.245

243 We will return to and have a closer look at the influence of environmental concerns on market definition issues in the paragraph concerning Article 82, infra, paragraph 9.2.3.
244 Supra, paragraph 8.5.
With regard to the second view on determining sufficient residual competition the following can be said. Intuitively, and on the basis of the parallel with the appreciability test it may be concluded that agreements on environmental aspects are very likely to leave internal competition intact to a sufficient degree. This is evidenced by the Commission’s decision in the CECED case. The Commission’s basic approach in this case recognises that coordination with regard to environmental concerns leaves many other (more important) factors on which competition is possible, untouched. Moreover, the Commission took into account that the technical means by which parties are to achieve the sector-wide energy efficiency target were left open. It did this in a manner that is very much reminiscent of the reasoning adopted in the Guidelines on Horizontal Agreements in connection with agreements that do not fall under Article 81(1). Finally, the Commission relied on the fact that, although the machines to be phased out represent ‘account for a significant volume of final sales’, parties are free with regard to 90 per cent of the market.

The Guidelines on Horizontal Agreements, unfortunately, address a different point in this respect. The Commission starts by setting out the basic purpose of this requirement. It then moves on by giving the example of the exclusive rights granted to an operator providing down stream services (such as collection and recycling). According to the Commission the duration of this exclusivity should take into account the possibility of new competitors entering the market. Of course this type of restriction involves a vertical relation. Moreover, this type of reasoning concerning the duration of exclusive rights seems more appropriate in connection with the proportionality test. In general there is a clear incentive for the upstream parties (in the Commission’s example, the producer responsibility organisation) to keep the duration of the exclusivity limited. Moreover, the contracts could be awarded on the basis of public tender. As with the qualitative notion of appreciability, the integration principle requires little more than an economically sound appraisal. As the CECED case shows, there are generally few problems to be expected in this regard. This is confirmed by the decision in the DSD case. With regard to the exclusivity in the service agreements the Commission firstly observes that the collectors excluded by DSD remain free. Secondly, the Commission addresses the real problem

247 Ibid., para. 65.
248 Commission, Guidelines on horizontal agreements, OJ 2001 C 3/2, para. 185, supra para. 3.4.2.3.
251 Commission Decision 2001/837, DSD (Article 81), OJ 2001 L 319/1, para. 159. This, of course, cannot be the measure by which the existence of sufficient remaining competition is judged as – one would hope at least – firms that have no contractual relation are not impeded in their freedom by a contract to which they are no party.
that concerns the ‘free and unimpeded access to the collection infrastructure set up by collectors contracted to DSD.’ Since the Commission has managed to ascertain this access, competition is not eliminated and thus the fourth and final requirement for an exemption satisfied. Accordingly, the Commission is able to grant an exemption to DSD.

In sum, the fourth requirement for an exemption is unlikely to stand in the way of most environmental agreements. Even if the parties to the agreement have a high aggregate market share, the characteristics of the market could well be taken into account and thus make the restriction palatable from a competition perspective. However, as DSD shows, ensuring sufficient remaining competition may sometimes involve imposing rather far-going obligations upon the parties.

8.7.6 Negative effects of the integration principle

8.7.6.1 Introductory remarks

In the paragraphs above we have looked at the positive effects that the model of integration may have on the application of the exemption clause. Furthermore, we have already noted that there is no negative role for the model of integration with regard to the interpretation of the third paragraph of Article 81. In this paragraph we shall look at the negative effects of the model of integration. Essentially this comes down to the question to what extent negative environmental effects stand in the way of an exemption. Using the example of the joint venture for the research and development of the new but energy inefficient product, what would happen if Article 81(1) was to apply and from a competition point of view the agreement would qualify for an exemption? With regard to taking negative environmental effects into account, three different sub-questions can be discerned. Firstly, can negative environmental effects be taken into account in the first place? Secondly, if so, how do we take them into account? This is a more technical matter and involves determining exactly with regard to which of the four criteria of the exemption clause these effects can play their role. Thirdly, the effects of taking the negative environmental impact into account need to be determined.

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252 Ibid., para. 162.
253 The Commission has attached obligations in this respect in order to further ensure the free access, ibid., para. 182, 183.
254 Ibid., para 165 et seq. where the Commission addresses the objections that DSD has formulated against the obligations. See further with regard to the possible competition and tendering problems arising: Lotze & Pape 2003.
255 This paragraph is written on the basis of the current system where the Commission has the sole power of exemption. The effects of the direct applicability of Article 81(3) will be examined infra in paragraph 8.9.
8.7.6.2 Is there a role for environmental degradation in Article 81(3)?

The question whether there is a role for negative environmental effects in the application of the exemption clause is the mirror image of the question asked above with regard to the positive effects of the integration principle in connection with the exemption clause. As a result, it would be expected that the outcome of the question is identical, yet mirrored. These effects should be taken into account however, instead of increasing the possibilities of obtaining an exemption, negative effects should lessen or preclude this chance. Essentially the same arguments that were put forward in that respect can also apply here. However as we have seen there are a number of reasons that plead against taking negative environmental effects into account in interpreting Article 81(1). It can therefore be asked whether these reasons apply analogously to the application of the exemption clause.

To start with the last argument that was brought forward above: the nature of the model of integration and the integration principle. As we have seen, the application of the integration principle presupposes the existence of some discretionary power, i.e. the power to engage in a policy of some sort. Moreover, we have also seen that such discretion is inherent in the application of Article 81(3). Secondly, the problems of legal certainty and equal treatment are not insurmountable in that the exemption clause can only be applied upon notification. Of course the policy chance that follows from taking negative environmental effects into account will have to comply with the constitutional demands imposed by the Treaty. If these requirements are satisfied, the fact that an agreement has to be notified to obtain an exemption effectively precludes problems such as the ones identified above. This leaves us with only one reason pleading against taking negative environmental effects into account: the fact that doing this will lead to competition policy becoming an environmental instrument. Essentially, two opposing arguments can thus be identified. On the one hand, the constitutional argument that competition policy cannot function as an environmental policy instrument. On the other hand, the obligation for the Commission, as an institution conducting a policy that is subject to Article 6 EC, to integrate environmental considerations in all its policy areas. We would argue that on the whole the constitutional problems that follow from the Commission pursuing an environmental policy that has not been attributed to it and thus bypassing the Council and Parliament, would in general stand in the

256 Supra, para. 8.7.1 and 8.7.2.
257 The implications of the direct applicability of Article 81(3) after the entry into force of Regulation 1/2003 will be discussed infra in paragraph 8.9.
258 E.g. it will have to be made public and retroactivity is in principle not allowed.
way of taking negative environmental effects into account. How this would work in an actual case, however, relies strongly on the form in which the Commission takes these negative environmental effects into account. Accordingly, in our opinion, as will be shown below, this problem can be overcome if the Commission identifies environmental degradation as an explicit and external factor but at the same time integrates it into one of the four conditions for an exemption. Consider, for example, an agreement that may lead to economic progress within the traditional meaning of Article 81(3) as well as environmental degradation. This agreement may very well be considered not to fulfil one of the criteria of Article 81(3) in the first place. This leads us to the second question.

8.7.6.3 Where does environmental degradation enter into the picture?

Now that it has been established that negative environmental effects should play a role in the application of the exemption clause just as positive environmental effects have to be taken into account, the question arises how these effects should play their role. In this respect a number of solutions have been put forward. Jacobs has argued that the integration principle should lead to the addition of an extra, fifth, criterion to the four requirements listed in Article 81(3). Geradin proposes to take negative environmental effects into account in analysing the proportionality of the measure.

In our opinion, the most appropriate place within Article 81(3) to take negative environmental effects into account would seem to be the first requirement: establishing economic and technical progress. Interpreting Article 81(3) so as to introduce an extra, fifth, criterion would run counter to the clear and – in this respect – unambiguous wording of Article 81(3) which contains only four requirements for an exemption. Furthermore, the explicit addition of an extra criterion is very likely to lead to the constitutional problems described in the above paragraph. With regard to the solution proposed by Geradin the following remarks may be made. Within the four criteria for an exemption the proportionality test is only about balancing, on the one hand, the advantages with, on the other hand, the restrictions of competition. It can therefore be called a bilan économique. This balance should only include the (environmental) advantages of the cooperation and the detrimental effects on competition.

The most logical alternative is thus to interpret the first requirement; the presence of ‘economic and technical progress’ so as to include only ‘net economic and technical progress’. In the words of Advocate-General VerLoren

\[259\] Jacobs 1993, p. 58.

\[260\] Geradin 2001, p. 123 et seq.

\[261\] See also Vedder 2000, p. 374.

\[262\] Cf Schröter 1999, p. 270, fn. 298.
van Themaat in the *Book prices* cases: the 'bilan économique' should take place within the first requirement. Commission decisions reveal that it will require objective (net) benefits to arise from the agreement in order for the first requirement to be fulfilled. The result of negative ecological effects in combination with positive economic effects could be that the Commission would have to make an, admittedly difficult, balancing act the outcome of which could be that there are simply no net benefits to warrant an exemption. In the context of the example of a joint venture to develop a new but energy inefficient product it can thus be argued that the new product is simply not an improved product let alone that it involves technical progress.

If at this point we look back at the previous paragraph we are faced with the question whether this runs counter to the constitutional lay out of the Treaty. In our opinion that does not necessarily have to be the case. If the Commission is explicitly prescribing a certain level of environmental protection below which the compensating (economic) benefits will not be considered to lead to a net benefit, the constitutional problem could be said to arise. In the context of the joint venture for the development of the energy inefficient product, the Commission will probably not be allowed to state that there is no technical or economic progress because the energy efficiency of the product to be developed is below a certain value. Such a finding would amount to the Commission effectively imposing (in this case) a minimum level of energy efficiency level. On the other hand it could probably consider that, in the specific case at hand, the benefits inherent in the development of a new product are compensated by the negative fact that the new product is energy inefficient. The result of this finding would be that this agreement is considered not to bring with it any advantages. The difference between the two approaches is that in the first the Commission is laying down a general rule whereas in the second approach it merely applies (a part of) the exemption clause to the broader (because the environment is included as well) facts of the case. This leaves us with the third question identified above: what are the effects of it all?

### 8.7.6.4 What are the effects of taking environmental degradation into account?

The possible effects manifest themselves on three levels that correspond to the three stages of the process of applying Article 81. Firstly, the notification form A/B. Currently, agreements have to be notified to the Com-

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mission in order to be eligible for an exemption. Such notifications must use the so-called form A/B.\textsuperscript{265} The Commission could include in the form A/B a section on the environmental impacts of the agreement. The impact of this could range from a simple question whether any negative environmental impacts are expected to an obligation for the notifying parties to attach as an annex a complete environmental impact assessment. The second stage is the notification itself. Depending on what the Commission requires in its form A/B, the parties could suffice with a simple statement that the agreement is expected not to have any negative effects or they may be under an obligation to submit a full-blown environmental impact assessment. The third stage is that where the Commission actually checks to see whether or not an exemption can be granted. It is at this point that the Commission will actually have to balance the (economic) advantages with the negative environmental effects to see whether there is economic and technical progress. If there is no such progress then one of the four conditions for an exemption is not fulfilled. Because these conditions are cumulative, no exemption can be granted.

8.8 Group exemptions

8.8.1 Introductory remarks

Once the Commission has gained sufficient experience with a specific type of agreement it can decide to adopt a so-called group- or block exemption. These take the form of Commission Regulations. At the moment there is one general Regulation for vertical agreements whereas there are two block exemptions concerning horizontal restrictions. The vertical block exemption Regulation basically consists of what is called a 'safe haven' market share of 30 per cent below which the exemption applies except for when certain hard-core restrictions are present.\textsuperscript{266} For horizontal agreements there are two Regulations that also adopt the 'safe haven approach' combined with a 'black list' consisting of hard-core restrictions that will preclude the applicability of the block exemption. These Regulations cover specialisation agreements and research and development agreements.\textsuperscript{267} These Regulations confer an advantage on those agreements that fall within their scope because they are exempted from Article 81(1) without any need for an individual exemption and the corresponding need to notify the agreement. With regard to environmental agreements a simple look

at the legislation confirms that there is no group exemption for environmental agreements as such. Therefore our research can concentrate on the effects of the integration principle on the group exemptions. In this connection we shall first look at the positive effects of the integration principle. In this regard two questions may be asked. Firstly, does the integration principle lead to the applicability of the group exemption to an agreement that would otherwise not qualify for such an exemption? Secondly, is it possible to adopt a group exemption for environmental agreements? With regard to the negative effects of the integration principle it may be asked whether negative environmental effects can lead to the refusal or withdrawal of block exemption benefits.

8.8.2 Group exemption benefits and environmental protection

A clause extending the block exemption benefit to agreements that would, if it were not for their environmental beneficial impact, fall outside the scope of the group exemption, is firstly expected to be found in the Regulations themselves. However, close scrutiny of these Regulations reveals that no such clauses are present. Moreover, past Commission practice reveals that it is unwilling to enlarge the scope of then applicable block exemption Regulations in cases where it did acknowledge the environmental advantages in granting an individual exemption. In the BBC Brown Boveri case\(^6\) the Commission denied the applicability of the old research and development group exemption Regulation\(^6\) because one of the parties was not allowed to market the new products after the expiry of the five-year limit laid down in the Regulation.\(^7\) In the later KSB/Goulds/Lowara/ITT case the Commission again ruled out the applicability of old research and development Regulation this time on the ground that the market share cap (which at that time was put at 20 per cent) may be exceeded.\(^8\) In both cases the fact that the Commission did take the environmental advantages into account in granting an individual exemption apparently kept it from extending the block exemption benefit.

It may then be asked whether it is sensible and possible to argue that, on the basis of the integration principle and the model of integration, block exemption benefits may be extended even when the Regulation itself, does not provide for this possibility. We would argue that this is neither possible nor sensible. The impossibility follows already from the text of Article 6 EC itself. This refers to the integration of environmental protection requirements into the definition and implementation of the Community policies and activities. In the case of

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170 Ibid. Article 4(1)(f).
block exemptions the block exemption Regulations themselves are the Commission's policy. Therefore the model of integration can at the most – and in our opinion does – result in the requirement on the part of the Commission to consider, when it is drafting the Regulation, the possibility of introducing into it a mechanism extending automatically the block exemption benefit to environmental agreements that would normally fall outside its scope. Of course, certain limits (for example, a second, higher market share cap) may be imposed in this respect. Requiring the Commission, as the author of the block exemption Regulation, to do anything else than taking environmental protection requirements into account in drafting the Regulation would not make any sense. Arguing that Article 6 and the model of integration have any effect vis à vis the Commission at a later stage than the drafting stage could only mean that the Commission is under an obligation to extend the group exemption benefit upon application. This would greatly reduce the block exemption benefit because parties are again burdened with administrative necessities. As a result, the whole idea behind the block exemption would be negated.

Would it then be possible to argue before a national court (and, ultimately, the European Court of Justice) that the block exemption benefit has to be extended to an agreement that would normally fall outside the scope? Consider the following case involving the KSB/Goulds/Lowara/ITT research and development. This agreement was considered to fall outside the scope of the Regulation because of the parties' market share. Suppose that the parties, because they exceeded the market share cap only marginally and because of the environmental objective of their agreement, decided not to notify the agreement in order to obtain an individual exemption. Suppose, furthermore, that before a national court someone invokes the nullity of the agreement because it violates Article 81(1). In that case it could be argued that, since the Regulation itself is Commission policy and Article 6 EC contains an unconditional obligation ('must be integrated') concerning Commission policy, a national court is under an obligation to extend the group exemption benefit to the agreement in question. It is submitted that this would fail primarily because Article 6 is insufficiently clear in that it contains vague concepts such as for example 'environmental protection requirements'. Apart from the fact that Article 6 can probably not be invoked before a national court, this would also fail on the basis of the Court's judgment in Delimitis where it held that national courts could only apply the group exemption regulations, not modify their scope.


273 This is not to say that a national court cannot consider itself to be an addressee of the integration principle and as a result under an obligation to integrate environmental protection requirements in his application of Community legislation, see infra paragraph 8.9.

Since there is no group exemption regulation for environmental agreements and the scope of the existing Regulations cannot be extended to encompass such agreements the question remains whether it is possible to adopt such a Regulation for environmental agreements. This would certainly seem possible. The general rules laid down by the Commission in the Guidelines on horizontal agreements could very well be elaborated to the effect that they become sufficiently clear to warrant legal certainty. The horizontal, sector-wide nature of environmental protection does not have to stand in the way of such a Regulation as the currently existing safe-haven block exemptions exemplify. What could stand in the way of the practicability of such an exercise is the diffuse nature of the restrictions involved. These, as we have seen, range from vertical to horizontal, research and development to exclusivities, phasing in and phasing out of products. This diversity in restrictions and clauses will greatly hamper such efforts.

As to the negative effects that the integration of environmental concerns may have, thoughts centre around the possibility of withdrawing the group exemption benefit in cases where the environmental disadvantages outweigh the benefits. Much of what was said in connection with the individual exemption also applies here. Interestingly, the current block exemption Regulations all contain a mechanism by which block exemption benefits may be withdrawn. As these read, none of them explicitly offers the possibility of withdrawing the benefits on environmental grounds. However, this reading will reveal that essentially, the Commission or, in the case of the Vertical Block exemption Regulation the national authority, can withdraw the benefit when the conditions of Article 81(3) EC are no longer fulfilled. This, in turn, means that environmental protection requirements may play the same role here as they play within the scope of the application of Article 81(3) in individual cases.

8.9 The effects of the direct applicability of Article 81(3) EC

On 1 May 2004, Regulation 1/2003 will enter into force. On the basis of Article 1 of this Regulation, the third paragraph of Article 81 will become directly applicable. This means that national courts may apply Article 81 directly.


276 As has happened in, inter alia, Case T-7/93, Langnese-Iglo v. Commission, [1995] ECR II-1533, paras. 173 et seq.

277 Supra, paragraph 8.7.

81 in its entirety.\footnote{Note that the wording of Article 6 of Regulation 1/2003 suggests a choice for national courts whether or not to apply Article 81(3), cf. Vogelaar 2002, p. 23.} As a result, they may declare an agreement that falls within the scope of Article 81(1) not to be prohibited, if they consider the requirements of Article 81(3) to be fulfilled. A necessary corollary to this is the relinquishing of the exclusive right to grant an exemption by the Commission. After the entry into force of Regulation 1/2003, the Commission can only issue group exemption regulations\footnote{The Commission can continue to do this on the basis of the Regulations that currently empower it to do so.} and issue, in the Community public interest, decisions in which Article 81(1) is stated not to apply or decisions in which the requirements of Article 81(3) are considered to be fulfilled for a certain agreement or decision.\footnote{Regulation 1/2003, Article 10.} As a result, Article 81(3) will no longer be an exemption but rather an exception. This new setting does not necessarily have to affect the integration of environmental concerns to a large extent.

We have seen above how the model of integration is based on a number of foundations that are not specific to any particular system of competition law and policy. The mutually reinforcing relationship between competition and environmental protection that the model of integration seeks to attain can by definition be applied to any system of competition law that allows for a disapplication of the prohibition of cartels. As a result, the change of character that Article 81(3) undergoes by reason of Regulation 1/2003 should not be such as to completely rule out the possibility of an integration of environmental concerns.

What will change is the legal framework in which Article 81(3) is to be applied. If the Commission applies it in so-called landmark cases,\footnote{These are the decisions that the Commission can take in the Community public interest pursuant to Article 10 of Regulation 1/2003.} it will as a Community institution enacting a Community policy, be bound by Article 6 EC. Moreover, the Commission will have to take into account the fact that Article 81 is part of the EC Treaty and must therefore, even without any particular reference to Article 6 EC, be interpreted with the objectives of Article 2 EC in mind. This is of interest because the in the White Paper preceding Regulation 1/2003, the Commission stated that Article 81(3) could not allow 'the competition rules to be set aside because of political considerations'.\footnote{White Paper on Modernisation of the Rules implementing Articles 81 and 82 of the EC Treaty, OJ 1999, C 132/1, para. 49.} This appears to signal that the Commission is opting for an interpretation of Article 81(3) that will restrict the role that non-competition (e.g. environmental) considerations can play in that provision.\footnote{Cf. Wesseling 2000, p. 105, 107.} Such a changed interpretation of Article 81(3) is submitted to
be contrary to the integration principle as well as the fact that Article 81, as any Treaty provision, is to be interpreted in the light of the objectives listed in Article 2 EC. Moreover, as we have seen in this chapter, it would mean a departure from the Commission’s current practice pursuant to Article 81(3).\textsuperscript{285}

Finally, another important reason for a continued role for environmental considerations in Article 81(3) relates to the legal character of these 'landmark cases'. The Commission has been enabled to act in these cases in order to clarify the law and to ensure a consistent application and development of the law throughout the Community particularly in cases that have not been dealt with.\textsuperscript{286} These decisions then bind the national courts and authorities in that they cannot take decisions that run counter to decisions already taken by the Commission.\textsuperscript{287} Moreover, the national authorities must avoid giving decisions that would conflict with decisions that the Commission is ‘contemplating’.\textsuperscript{288} Furthermore, the member states are under an obligation to ensure that decisions and judgments of their national authorities in which Article 81 is applied, are sent to the Commission.\textsuperscript{289} The decentralisation of the application of Article 81(3) is thus to a large extent subject to the Commission’s guidance. Implicit in this is the fact that national authorities are not completely free to interpret Article 81(3) as they like. In doing so, these national authorities will have to follow the guidance provided by the Commission. This in turn means that the Commission is, much more than in the current situation, under an obligation to give this guidance. Guidelines, such as the Guidelines on horizontal agreements that were examined above and well-reasoned and published decisions are necessary in this respect. It is submitted that the current Guidelines and decisions are insufficient in this respect. As was shown above, the Commission’s practice cannot be said to be consistent or overly clear.

A second change relates to the disappearance of the notification procedure. As a result of this, the integration of environmental considerations can no longer take the form of an ‘environmental impact statement’ that needs to accompany the notification. However, this procedural change does not mean that, substantively, the Commission is no longer able to refuse an exemption if the negative environmental impact outweighs the (economic) advantages of an agreement.

The position of national authorities and courts that apply Article 81(3) is more complicated. If they apply Article 81(3), it is uncertain whether and to what extent they will be bound by Article 6 EC or the fact that this provision is part

\textsuperscript{286} Regulation 1/2003, 14th recital of the preamble.
\textsuperscript{287} Ibid., Article 16.
\textsuperscript{288} Interestingly, it remains uncertain exactly how the national authority or a national court is going to find out that the Commission is contemplating a certain decision and what this decision is going to be.
\textsuperscript{289} Ibid., Article 11(3) and (4) and Article 15(2).
of the EC Treaty and thus subject to Article 2 EC. The most interesting situation for the purpose of this book would be one where the Commission would refuse to integrate environmental protection requirements whereas a national authority or judge is willing to do so. We could, for example, think of a ‘green dot’ system in the Netherlands that is comparable but not identical to the DSD system. As has been shown above, the latter has already been the subject of a Commission decision. The question is whether the duty pursuant to Article 16 of Regulation 1/2003 not to decide in conflict with a Commission decision applies only to a Court before which there is a specific case involving the actual DSD system and the same restriction or, more generally, to cases before national courts that involve ‘DSD-like’ parties and restrictions? Regulation 1/2003 provides that in this situation, the decision of the national body may not run counter to a Commission decision.\(^\text{290}\) Depending on the answer to the question formulated above, the Dutch court that has to rule on the applicability of Article 81 to the Dutch green dot system is either free to apply Article 81 or bound by the Commission decision in, inter alia, the DSD-case.

It is uncertain what the effect is pursuant to Article 16 of Regulation 1/2003 of Commission (landmark) decisions. The text of Article 249 EC makes it clear beyond doubt that a decision is only binding upon its addressees. Since national courts are not the addressees of Commission decisions (whether or not of the landmark type), they are not bound by them. This is also evidenced by the fact that Commission decisions are authentic only in the language of the proceedings and the parties. Finally, a binding effect upon all national courts that deal with comparable cases would endow the decisions of the Commission with effects that are normally reserved for Regulations. It is submitted that such an effect would render the distinction that Article 249 EC makes between decisions and regulations useless.\(^\text{291}\) These considerations all plead in favour of a relatively narrow binding effect for Commission decisions.\(^\text{292}\) On the other hand, the logic behind the landmark decision is to ensure a Community-wide uniform interpretation of the law. This would be jeopardised if any national court could simply ignore a Commission decision with regard to a case that is comparable to the one before that court. Furthermore, the wording of Article 16 that does not refer to a particular case, parties and restriction as the subject of the Commission decision but instead uses the more abstract wording ‘agreements, decisions or practices’, also hints at a more general binding effect.

Moreover, if the binding effect of the Commissions decisions under Article 16 of Regulation 1/2003 is more general, the interesting situation could arise

\(^{290}\) ibid., Article 16.


\(^{292}\) I.e. limited only to cases before national courts that involve the addressees of a Commission decision and the same restriction of competition that was also subject of the Commission decision.
in which the Dutch court that has to judge on Dutch green dot system considers itself obliged by the integration principle to award a more important role to environmental concerns than the Commission had done in DSD.

As we have seen, Article 6 EC is not limited with regard to its addressees. As a result, it could be said that any national court that is applying Community law, such as Article 81 EC, is under an obligation to integrate.293 Further a contrario evidence for the fact that Article 6 can be invoked by a national court in the application of Community law can be found in the fact that other ‘integration clauses’ do explicitly refer to Community institutions as their addressees.294

The question that then arises is to what extent a national court that departs from a previous Commission decision is thus actually deciding on the legality of this decision and thus comes within the realm of Foto Frost.295 Since the decision is not addressed to the national court, that court is not bound by the decision. As a result, the court would not be putting it aside or ruling on the validity of that Community act thus keeping out of Foto Frost’s way. Moreover, any decision involving Article 81(3) necessarily involves a complex appraisal of factors that are very much specific to the case at hand. As such, it should not be difficult to distinguish the situation before the national court from that on which the Commission has decided. Depending on the degree of integration adopted by the Commission and the willingness of the national court to actually integrate environmental concerns to a greater extent, the result of the direct applicability for the integration of environmental concerns may actually benefit. The Commission’s suggestion that it wants to narrow the scope of Article 81(3) so as to exclude political considerations is expected to only increase the incentive for national courts to go further in this respect. These national courts, even though they may not be obliged on the basis of Foto Frost, may well want to make a preliminary reference in this respect.

Moreover, there is something to be said for also allowing such a departure from the Commission’s interpretation of Community law in cases where that interpretation is in the form of a block exemption regulation. Above, we have seen that the Court held in Delimitis that national courts could only apply such regulations; not extend their scope.296 This limitation of the national courts’ powers with regard to a block exemption regulation was based on the fact that:

‘Any such extension, whatever its scope, would affect the manner in which the Commission exercises its legislative competence’.

293 Supra, paragraph 5.3.
294 E.g., Article 151(4), 153(2) and 157(3) EC.
296 Case C-234/89, Delimitis, [1991] I-935, para. 46.
297 Ibid.
This legislative competence was, as the Court explained in that case, in turn the result of the exclusive competence of the Commission to adopt decisions that implement Article 81(3). After the entry into force of Regulation 1/2003, the Commission will no longer possess the exclusive competence to apply Article 81(3). On the contrary, the Commission will share this competence with; inter alia, the national courts. As a result of this, the rationale behind the Court's reasoning in Delimitis disappears. The national authorities should thus be able to actually interpret the provisions of a block exemption regulation in order to achieve an integration of environmental concerns. They should do this in a manner analogous to the way in which the national courts are required to interpret national legislation in conformity with directives. This would ensure sufficient respect for legal certainty. Since most of the provisions of the currently existing block exemption regulations have been formulated in such a way that the room for interpretation is very limited indeed, national courts would in practice thus only be left with the option of setting the group exemption regulation aside. This, of course, is not allowed by the principle that Community legislation must be interpreted uniformly throughout the Community as established by the Court in Foto Frost. In these cases, the national courts are obliged to make a preliminary reference. For national competition authorities, which are also addressees of Article 6 EC if they apply Community legislation, making preliminary references to the European Court of Justice is impossible. They are left only with the possibility under Article 11(5) to consult the Commission. Interestingly, the Commission does not appear to be under any particular duty of cooperation aside from the general statement that it 'shall apply the Community competition rules in close cooperation' with the national authorities.

The dangers to the consistency and uniformity of the interpretation of Article 81 throughout the Community that result from this interpretation of Article 6 in connection with the direct applicability of Article 81(3), is a problem that must firstly be resolved by the Commission and not by a rule precluding 'dissenting opinions' by member state authorities. The obvious solution is of course for the Commission, in providing guidance, to correctly integrate environmental concerns. If this does not happen, the result is very likely to be yet another increase in the number of preliminary references to the already overburdened European Court. The fact is that Article 81(3) is and remains

298 Ibid., para. 44.
301 Article 11(1) of Regulation 1/2003.
302 Cf. Vogelaar 2002, p. 27. Of course, the Commission, as amicus curiae pursuant to Article 15(3) of Regulation 1/2003 and institution that is going to receive a copy of every judgment from a court in the Community that involves Article 81 or 82 EC (Article 15(2) Regulation 1/2003), can also expect to be kept busy.
an open-worded provision that allows for a certain degree of political discretion in its application.\textsuperscript{303} As a result, declaring it to be directly applicable is inevitably going to lead to different interpretations across the Community. The risk of these divergent interpretations can at the most be restricted to purely economic reasons if Article 81(3) is interpreted narrowly but it can never be completely ruled out.\textsuperscript{304} It is submitted that a narrow interpretation of Article 81(3) (thus excluding environmental benefits) is not the solution to the problem.\textsuperscript{305} It deserves repetition that such an interpretation of Article 81(3) would run counter to the current interpretation of Article 81(3) that does take environmental considerations into account. More importantly it would also be contrary to the integration principle Article 6 EC and the model of integration. As such the possibility to bring about sustainable development through Article 81(3) is foregone.


\textsuperscript{304} Whish suggests a narrowing of Article 81(3) to purely economic benefits. Whish 2001, p. 128.

\textsuperscript{305} See Monti 2002, p. 1096 et seq. for an interesting solution.