Competition Law and Environmental Protection in Europe; Towards Sustainability?
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9.1 Introductory remarks

Where Article 81 is concerned with restrictions of competition that are the result of cooperation between two or more competitors, Article 82 is primarily, though not uniquely, concerned with the repercussions on competition of actions by one undertaking. This undertaking is required, for Article 82 to apply, to be in a dominant position. Moreover, the undertaking in question must abuse this dominant position. These are the two major elements of Article 82. Many more interesting points can further be identified. The dominant position, for example, does not exist in a vacuum but involves an actual market that has to be defined as both a geographically identifiable area and a product market. With regard to the abuse, Article 82 contains an indicative list of abusive behaviour. Doctrine, Commission decisions and judgments have served to further elaborate this list. In short, it can be said that there is no justification clause, such as Article 81(3), with regard to abuse. Abuse is prohibited and cannot be justified. There are, however, situations where abuse simply does not exist in the first place because the behaviour that is alleged to be abusive is objectively justified.

Environmental requirements may come into play at a number of stages. Firstly in defining the relevant product market and the geographical market. It may, for example, be possible that environmentally friendly products (e.g. hybrid cars) are considered not to compete with their environmentally unfriendly counterparts (normal cars with an internal combustion engine). In that case, the environmentally friendly car is in a league of its own and may constitute a separate product market. The result of this will be that the undertaking producing these cars will be much more likely to be in a dominant position. Also with regard to the geographical market environmental considerations may very well reduce the size of the market because nationally differing environmental standards may separate one member states' market from another. As was mentioned above, this relation between competition law and the environment will not be considered as ‘integration’ as defined in the model of integration. However, we will pay close attention to these interactions between environmental considerations and competition law precisely because many environmental innovations actually place the products in a ‘league of their own’ and thus problems involving dominance are likely to occur. Moreover, market definition and the influence of environmental concerns in this respect, also play an important role in the application of Article 81. If the market has been defined, the question of establishing dominance arises. In most cases this is a fairly technical exercise that relies primarily on the market share of the firms on the market. However, in the arena of environmental protection the dust has not yet settled and new

1 Supra, chapter 4.
entrants are eager to enter a developing market. As we have seen with regard to agreements concerning waste recycling, such schemes in many cases actually create markets. Therefore, environmental concerns may introduce new dynamics in this exercise as well. Again, the role of environmental concerns in this respect will be a result of the technical exercise involved and therefore it can be characterised as an interaction rather than integration. The final question arising because of the application of Article 82 to environmental situations involves establishing abuse. In this connection, one can think about the possibility of relying on the environmental aspects as an objective justification. This final question is the only one that could actually involve some integration, as opposed to interaction, of environmental concerns and competition law.

9.2 Market definition

As we have seen in the above paragraph, applying Article 82 starts with defining the relevant market involved. Moreover, environmental concerns may play an – interactive – role in this respect. Below we will differentiate between the definition of the relevant product market and the geographical market. With regard to both, the role of environmental concerns will be investigated.

9.2.1 The relevant product market

Defining the relevant product market involves designing those products that compete with each other. Products may compete with one another from two perspectives: the supply and demand side perspective. From the demand side, the product market is defined by asking the question what products consumers see as substitutes for each other. This can be determined by the ‘SSNIP’ or ‘Small but Significant Non-transitory Increase in Price’-test. In this test the price of the product in question is raised by a small but significant amount for a longer period and those products to which consumers shift are considered to fall in the same product market. From the supply side it is, essentially, asked to what products producers can reasonably adapt their product lines. Such products are deemed to be supply substitutes.

How does this relate to environmental considerations? An obvious example would be an environmentally friendly version of a product (a zero emissions car) that does not compete with the normal (environmentally unfriendly version of a)

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2 See Commission Notice on the definition of the relevant market for the purpose of Community competition law, OJ 1997 C 372/5.

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product and therefore may fall in a separate product market. Whether environmental considerations warrant designating certain products as a product market of their own is unclear. In essence, this depends on demand side substitutability, or how much the consumer is willing to pay for the environmentally friendly version of a product. If the price difference between the ‘green’ and the ‘grey’ car is less than the difference in manufacturing costs, the environmentally friendly and the environmentally unfriendly version of the product are in the same product market. Only if what the consumer is willing to pay for the environmentally friendly version equals or exceeds the extra production costs of that environmentally friendly version compared to the environmentally unfriendly version, can there be a separate product market. This is so because only in these cases is there, from the perspective of the consumer, an added value from the fact that a product is environmentally friendly. In the situation where the consumer is unwilling to pay at least the extra production costs involved in making the green product, the conclusion must be that the environmentally friendliness of the product does not, from the viewpoint of the consumer, distinguish it from the not so green product.

Apart from the demand side, there is also supply side substitutability. Also with regard to this perspective on product markets environmental considerations can play a role in defining separate product markets. Producing an environmentally friendly version a product may in fact require such a completely different method of production that switching becomes increasingly difficult. Take, for example, a farmer who wants to shift from standard to organic cattle rearing. Even though the meat may in many respects be identical, the farmer will have to change his production methods completely (it is for example conceivable that he has to use new cattle because, for example, his old livestock was vaccinated).

The Commission’s perspective on supply side substitutability can be found in the Notice on the definition of the relevant market. Basically, the Commission ascertains whether it is possible to switch production in the short term and whether the producer incurs significant risks or costs offset only by a small change in prices.

Apart from the economic reasons underlying a separate product market for an environmentally friendly product, the impact of environmental regulation must also not be underestimated. For example, different processing requirements for different types of waste may very well result in there being separate product markets for the treatment of those types of waste.⁴

9.2.2 The relevant geographical market

In addition to the relevant product market, the relevant geographical market should also be defined. This, according to the Court, is the area in which the conditions of competition are sufficiently homogeneous for there to be effective competition.\(^5\) Again consumer preferences with regard to the environmentally friendliness and environmental regulation may play a role. Where consumers in one country or region generally attach more weight to environmental considerations than those in other regions a separate geographical market may be the result. Furthermore, differing environmental standards may be very effective in separating geographical markets.\(^6\)

9.2.3 The influence of environmental considerations on market definition

The greater the influence of environmental concerns, the more likely that the environmentally friendly products are in a market of their own. This has consequences for the application of competition law. With regard to Article 82 this means that a dominant position is more likely to occur. Furthermore, in connection with Article 81, restrictions of competition may very well be more significant. All of this means that the scope that the competition rules provide for the environmentally friendly behaviour of enterprises is likely, with respect to market shares, to become narrower.

9.3 The dominant position in a substantial part of the common market

Dominance is, in the first place, the result of the market share. Therefore, market shares are a good indication of whether or not dominance may be said to exist. The Court has held that market shares exceeding 50 per cent normally confer a dominant position on an undertaking.\(^7\) Whether dominance exists for any other market share or in certain exceptional circumstances, is a question of several other factors. Among these are, the market shares of direct competitors, potential competition, structure of the undertakings (high degree of vertical integration). As can be seen from this short outline, establishing dominance, including market definition, is a technical matter that provides

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\(^6\) Commission Decision 2001/463, DSD (Article 82), OJ 2001 L 166/1

for rather limited discretion and therefore leaves very little or no room at all for the integration of environmental concerns.

Moreover, the dominant position must have its effect in a substantial part of the common market. This element of Article 82 is the corollary to the ‘effect on trade between member states’ requirement within Article 81. The Court has held this jurisdictional criterion to be fulfilled where the market of one member state was involved.\(^8\) The farthest going application of this criterion took place in the cases that concerned the Port of Genoa. In these cases the Court held that the port of Genoa constituted a substantial part of the common market.\(^9\) In the more recent Sydhavnens case, the Court appeared to consider it possible that the market for processing building and construction waste in the area of the municipality of Copenhagen was a substantial part of the common market.\(^10\)

Looking at dominance in an environmental context, the following general remarks may be made. Despite harmonisation, disparities in national (environmental) regulations are still likely to lead to, for example with regard to waste processing, geographical markets being defined on a national basis.\(^11\) The remarks of the Court in the Dusseldorp and Sydhavnens Sten & Grus cases, where it held that the free movement of waste destined for recovery could not be obstructed on the basis of the proximity principle and source principle, provide only a beginning of a European market for waste.\(^12\) En the end, many waste processing systems are still set up on a national basis.\(^13\) This includes the so-called green dot systems that, although used in more countries, are still set up for the territory of one member state only.

Moreover, the relevant product market is also likely to be narrowly defined. Again, with regard to waste processing, the technical characteristics of this market will often result in a narrowly defined market. In the Dusseldorp case, the market concerned was that for the processing of waste oil and products contaminated with waste oil. Dutch legislation prescribed that one undertaking, AVR, could only process this waste. Moreover, export of this waste was only

\(^{8}\) E.g. Case C-203/96, Chemische Aflaalstoffen Dusseldorp v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Dusseldorp), [1998] ECR, I-4075

\(^{9}\) Similarly, large airports may also constitute a substantial part of the common market, see, e.g. Commission Decision 98/190, Flughafen Frankfurt/Main, OJ 1998, L 72/30, paras 57 and 58.

\(^{10}\) Case C-209/98, Sydhavnens, [2000] ECR, I-3743, para. 64.

\(^{11}\) See, e.g. Commission decision pursuant to the Merger Regulation in case Case No IV/M.1160 – GKN/Brambles/SKP, OJ 1998 C 117/14, para. 13.

\(^{12}\) Ibid., para. 48 and Case C-203/96, Dusseldorp, [1999] ECR, I-4075.

\(^{13}\) The so-called Basle Regulation, Reg. 259/93, that governs the supervision and control of shipments of waste does not aim to bring about a European waste market. Rather, as the recitals show, the member states must set up waste management installations that will allow the Community as a whole to become self-sufficient.
allowed if AVR's capacity was exceeded and it could be shown that the processing abroad was of at least an equal quality to that offered by AVR. On the basis of this the Court rightly held that AVR occupied a statutory monopoly. From this the Court inferred the existence of a dominant position in a substantial part of the common market for AVR. In the *Sydhavnens Sten & Grus* case the Court appeared more reticent in this respect. In this case there was another statutory monopoly granted to three undertakings for the collection and recycling of building waste emanating from the municipality of Copenhagen. Instead of simply applying the Dusseldorp reasoning *mutatis mutandis*,¹⁴ the ECJ stressed the need of a fully-fledged market definition.¹⁵ In defining this market, the regulatory framework can certainly play a role.

In the *DSD* case, for example, the Commission relied strongly on the regulatory framework applicable. The German Packaging Ordinance, made the producers of packaging responsible for the collection and recycling of waste packaging. Producers were left a choice, by the Ordinance, between, on the one hand, setting up an individual or collective system (so called 'Selbstentsorgungslösung' or self-management system or, on the other hand, joining a so-called 'Befreiungssystem' or exemption system. Such exemption systems may be set up on the basis of Section 6(3) of the Packaging Ordinance. This latter option has been included as a result of pressure by the German industry and has been used by it to create DSD. Because such an exemption system has to cover the entire area of at least one Bundesland and because rather high collection and recycling quota have to be met, the Commission concluded that such systems would be difficult to set up. At least they would be more difficult to set up than the other (collective) option offered by the Packaging Ordinance. As a result the Commission came to the conclusion that there was a separate relevant product market for exemption systems from the Packaging Ordinance.¹⁶ Because DSD is the only undertaking offering such a system in Germany, this resulted in a 100 per cent market share. Moreover, DSD collects and recycles over 80 per cent of the packaging waste in Germany and therefore the Commission held that DSD was also in a dominant position from a turnover-perspective.

### 9.4 Abuse of the dominant position

Mere dominance will not bring an undertaking in violation of Article 82. Only abuse of the dominant position will result in a violation of

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Article 82. The concept of abuse is an objective one. Whether or not the intention of the enterprise in question was to abuse its dominant position is therefore not relevant for determining if the abuse that Article 82 prohibits, has taken place. Furthermore, the company in a dominant position should be aware of this position on the market and the accompanying special responsibility not to distort competition. In Hoffmann-La Roche the ECJ gave its definition of what constitutes abuse:

"The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

Essentially two different types of abuse exist. Obstructive or exclusionary abuse relates to abuse that seeks to affect the market structure whereas exploitative abuse concerns the abuse that not so much aims to affect market structure but rather wants to exploit the dominant position. An example of the first type of abuse would be the activities of an undertaking in a dominant position in order to keep other competing companies from challenging its position. Exploitative behaviour is not necessarily addressed at competing enterprises but seeks to reap the monopoly benefits by, for example, charging excessive prices. Both types of abuse may occur in an environmental context as the DSD case shows.

The very concept of abuse rules out the possibility of an exemption. However, the absence of an exemption clause like Article 81(3) and the objective nature of abuse do not stand in the way of certain behaviour, though prima facie seeming abusive, being considered not to constitute abuse within the meaning of Article 82. This brings us in the realm of the 'objective justification'. Behaviour that can be objectively justified will not constitute abuse even when it resembles the practices listed in Article 82.

Below we will look at some types of abuse identified by Commission practice and Court rulings. In doing so we will also consider the possibility of an objective justification on (partly) environmental grounds.

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18 Case 85/76 Hoffmann-La Roche, [1979] ECR, 461, para. 91.
9.4.1 Unfair prices

The indicative list of abuses in Article 82 is headed off by abuse consisting of charging 'unfair prices'. Prices may be unfair in three respects. Firstly, a company in a dominant position may ask unfairly high prices. A second, seemingly more far-fetched example of an unfair price occurs where the dominant enterprise charges excessively low prices in order to push a competitor out of the market. The third form of an unfair price is the discriminatory price. The landmark case with regard to excessive pricing is United Brands. In this case the Commission sought to rely on earlier Court case law that stated that price are unfair whenever they are excessive in relation to the economic value of the product. The Commission then presumed that United Brands made a profit on the Irish market. Therefore, the Commission continued, United Brands charged excessive prices on all markets where prices were even higher than on the Irish market. The Court did not accept this reasoning. The result of this is that establishing excessively high prices is no longer a question of straightforward mathematics. The reticence of the Commission in this respect appears to have disappeared with its recent decision in the DSD case.

In this case, the Commission held, inter alia, that DSD abused its dominant position by charging excessive prices whenever it would demand a so-called license fee because a producer had placed a 'green dot' on his packaging whereas this producer would not actually use the DSD system to retrieve and recycle its packaging. The DSD system, already referred to above in general, is funded by license fees paid by producers that have joined the system in order to be exempted from their obligations under the Packaging Ordinance. The contact between DSD and these companies requires the latter to place the 'green dot' sign on their packaging so as to make clear to consumers that this packaging is to separately collected outside the normal system for household waste (hence dual system Germany). Because DSD holds the trademark for the green dot, producers have to pay a license fee whenever they want to make use of the DSD

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20 So-called predatory pricing. The landmark case in this respect is the AKZO case (Case C-62/86, [1991] ECR, I-3439). Since establishing predatory pricing is a technical exercise (according to the ECJ) predatory exist where prices are below average variable costs and, if there is intention to predate, when prices are above average variable costs) that leaves no room for environmental considerations we will not pay any further attention to it. Since the intention of the company that uses predatory pricing is to push a competitor out of the market, it can also be seen as an example of obstructive abuse.

21 As a discriminatory pricing policy is primarily prohibited because of its discriminatory nature and not so much because it will result in unfair prices we shall look at this form of abuse infra, paragraph 9.4.1.


system. The license fees are calculated according to the actual costs incurred in collecting and recycling a particular type of packaging material. Therefore the fees collected for a type of packaging material should represent the costs incurred for this material.

According to the Commission, DSD charges excessively high prices whenever it charges the license fee from companies for products that were not actually collected and recycled through the DSD system. This may occur when a company does not use the DSD system for its packaging in Germany but nonetheless participates in a green dot system set up in another member state and wants to use uniform packaging for the German market and the other market. It may also occur where a company wants to make use of the DSD system for only part of its products for the German market. In both cases, the companies are obliged to pay for the placing of the license fee on the packaging and not so much for the fact that the packaging waste has actually been collected and recycled through the DSD system. Furthermore, the factual situation will make it nigh impossible for these companies to mark only that part of their products with the green dot with which they would actually want to participate in the DSD system. Similarly, it is also impossible and, moreover, it would run counter the very idea of the common market, if these firms would want to ascertain that products using a green dot system in another member state are not exported to Germany. According to the Commission, DSD thus charges excessive prices because the price charged is clearly disproportionate to the costs incurred by DSD.

With regard to this reasoning the following remarks may be made. DSD's cost structure, with very limited cross-subsidisation between the different packaging materials, would seem to warrant the conclusion that DSD faces only minimal costs when it does not actually collect the packaging waste. Therefore disproportionality can be said to exist. However, this would mean that it would actually have to be shown that certain packaging is collected and recycled through alternative systems so that DSD indeed does not incur any costs. This will be very difficult to show in practice as the recycling quota for both self-management and exemption systems are below 100 per cent. This could mean that a system that competes with DSD could very well achieve its quota under the Packaging Ordinance whereas DSD would actually collect and recycle a nearly unchanged amount of packaging waste and hence faces only slightly lower costs. This is likely to occur precisely because DSD is the well established and by far the largest recycling system to which consumers have gotten used

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25 Ibid., para. 101.
26 This would mean that those companies would have to prevent parallel imports from occurring.
27 Ibid., para. 111.
28 Ibid., para. 18.
for nearly a decade. In practice, therefore, meeting the Commission's objections to DSD's financing structure would boil down to obliging DSD to subsidise the entrant.

9.4.2 Limiting production, markets or technological development

A number of practices fall under this category. With regard to technological development it should be noted that, in the section devoted to Article 81(3), environmental improvements were considered 'technological development'. In a number of cases, the Commission has held that Article 82 was infringed because production and technological development were limited. In British Telecom the refusal by BT to participate in a telex forwarding system limited technological progress.\(^{29}\) Similarly, the refusal by Irish broadcasters to give Magill access to their programme schedule prevented Magill from marketing a new product (programme guide) and therefore technological progress was limited.\(^{30}\)

These examples show that behaviour by a dominant undertaking that keeps an environmentally friendly product from being marketed could possibly constitute abuse. An example of such behaviour could be the case where a dominant producer responsibility organisation (e.g. DSD or Eco-Emballages) refuses to use new and more environmentally friendly recycling methods offered to it by a down-stream company.

In an environmental context the Court has considered 'outlets' to have been restricted in the Dusseldorp case. In this case Dutch environmental law prescribed that all dangerous waste (in this case oil filters) had to be processed by one company, AVR. Exportation of this waste was only allowed if there is insufficient capacity in the Netherlands and if it could be shown that the processing abroad would be of an at least equally high quality. These rules, according to the Court, resulted in waste being treated by AVR that was destined for another party. This was deemed a 'restriction of outlets in a manner contrary to Article 90(1) (Now 86(1), HV) in conjunction with Article 86 (Now 82, HV) of the Treaty'.\(^{31}\) Firstly, it should be noted that the Court probably meant that,

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\(^{29}\) Commission Decision 82/861, British Telecommunications, OJ 1982 L 360/36, para. 35. Upheld in Case 41/83, Italy v. Commission, [1985] ECR 873. The Court, however, did not address specifically the question whether there was a limitation of technological progress in this Case.


within the meaning of Article 82 (b) EC, 'markets' were limited to the prejudice of consumers.12

Secondly, it has to be taken into account that this reasoning occurred in an Article 86 case with AVR holding exclusive rights. It is most unlikely that any enterprise, however dominant, will be able to keep someone from going to a competitor.13 The Court's approach to abuse, dominance, legislation and the connection between the three is specific to the provision on public undertakings and will therefore be considered separately.14

9.4.3 Discriminatory or unfair conditions

In a general manner all unfair or discriminating trading conditions are prohibited as an abuse of a dominant position. With the price being one of the – if not the – most important trading condition discriminatory pricing is likely to constitute abuse. In the United Brands case, the Commission argued that United Brands' pricing policy was discriminatory. Generally, discrimination exists where like cases are treated dissimilar and where unlike cases are treated alike. In the United Brands case the Court considered United Brands' pricing policy to be discriminatory contrary to Article 82.15 However, it should be taken into account that the policy of United Brands discriminated on grounds of nationality and therefore ran directly counter to the very essence of the common market.16

A company in a dominant position may want to encourage environmentally friendly products or production processes in upstream or downstream firms. In this case the dominant undertaking may further decide to use its pricing policy as instrument. In other words: it may start to charge higher prices to downstream firms that are environmentally unfriendly. Similarly, it may decide to pay lower prices to upstream firms that supply relatively environmentally unfriendly products. Such a development is not unlikely since the environmental tack record is considered increasingly important by all sorts of firms.17

Such upstream and downstream companies may argue that unfair conditions are imposed or that they are discriminated. As regards the discrimination, an obvious counter-argument is of course that the environmentally unfriendly

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12 The language used by the Court in the Dutch, French and German versions of the judgment (resp. 'afzet', 'débouchés' and 'absatzmarkt') seems to indicate this.
13 Although the dominant company could try to tie other companies to his undertaking, infra, para. 9.4.4.
14 Infra, paragraph 12.5 (concerning Article 86 EC).
16 Ibid., paras. 232-234.
17 Cf. the extensive advertising campaigns by Shell and BP as well as the fact that the three P's (planet, people and profit) play an increasingly important role in the management of firms.
firms are dissimilar to their environmentally friendly counterparts. In that case, the dominant firm would do nothing more than treating unlike cases in an unlike manner which does not constitute discrimination. The central question therefore is whether and to what extent the environmental friendliness can justify different treatment. We shall look closer at this question in the paragraph concerning the objective justification. Similarly, an unfair condition exists only when it is not justified or disproportionate to the interest that it serves.\(^8\) In the DSD case the Commission, relying on *United Brands*, appears to consider the principle of proportionality as a general standard by which all conduct of the dominant undertaking is measured.\(^9\) Again, reference is made to paragraph 9.5 concerning the objective justification for a fuller account.

9.4.4 Tying

The dominant undertaking may want to consolidate its market share by ensuring that its customers are tied to it. This is a good example of exclusionary or obstructive abuse. Such tying, binding or bundling occurs in two forms: *de jure* or *de facto*. *De jure* tying is fairly obvious and will mostly require a factual condition. *De facto* tying, however, is all the more interesting. In its decision in *Van den Bergh Foods*, the Commission came to the conclusion that Van den Bergh Foods had *de facto* tied ice cream retailers to it through so-called freezer exclusivity.\(^40\) This freezer exclusivity comes down to the following. Van den Bergh Food supplies ice cream sellers with free freezer cabinets subject to the widely used condition that only Van den Bergh ice will be sold from those cabinets. Despite the fact that the contract left these retailers were completely free to place another freezer cabinet in their shop or to replace the Van den Bergh cabinet with another one, the Commission considered that it was unlikely that retailers would actually do this. Because of factual constraints (lack of space in the retail shops, extra costs etc.) they were *de facto* tied to Van den Bergh.\(^41\)

The Commission has used the same sort of *de facto*-tying reasoning in the DSD case. The DSD scheme, as we have seen above, is financed through the license fee for placement of the green dot on packaging. The scheme as it currently functions forces producers wishing to join the DSD scheme with only a part of their total amount of packaging to place the green dot on only that part of their total packaging. Furthermore, connected to this need to set up separate packaging lines, the producers would be forced to set up separate distribution channels in order to ascertain that the non-green dotted products do not end


\(^{19}\) Commission Decision 2001/463, *DSD (Article 82)*, OJ 2001 L166/1, para. 112.


\(^{41}\) Ibid., paras. 158-184, 264.
up in the DSD collection system.\textsuperscript{42} The extra costs involved with this option, as the only alternative to joining both the DSD and another system for the total amount of packaging, according to the Commission result in a \textit{de facto} tie to the DSD system.\textsuperscript{43}

Though not particular to the environmental context of the case, the Commission's reasoning in \textit{DSD} is nonetheless interesting because similar packaging waste collection systems that use the green dot and license fees exist throughout Europe.

9.4.5 Access to essential facilities

Increasingly, environmental requirements are imposed on companies wishing to bring products on the market. The concept of (extended) producer responsibility has played and continues to play a key role in this respect. In the overwhelming majority of cases, the imposition of a producer responsibility in fact comes down to a product responsibility as was shown above. In such cases the only effective and efficient solution for the companies is to cooperate. Such cooperation, as the \textit{DSD} case shows, may very well result in the emergence of a dominant organisation the membership of which is necessary in order to gain access to that market.

In this situation a company that is refused membership of such an organisation will be tempted to plea that the dominant firm refuses to grant it access to an essential facility. This appears to have happened in the \textit{Spa Monopole v. GDB} case.\textsuperscript{44} In this case, Belgian mineral water producer Spa was refused access to the pool of reusable glass bottles and crates set up by the Association of German Sources, (\textit{Genossenschaft Deutsche Brunnen (GDB)}). Initially the Commission rejected the complaint by Spa because it was still allowed and feasible to import mineral water into Germany using other bottles. However, following the entry into force of new German legislation Spa's alternatives were narrowed down to either setting up an alternative pool for reusable bottles of its own (or together with other parties) or ensuring the recycling of its one way bottles. Neither option proved economically viable or practicable due to the costs involved and the unwillingness of retailers to participate in multiple systems. Therefore, the Commission considered that access to the GDB pool was 'essential in order to compete effectively in the mineral water market'.\textsuperscript{45}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{42} Commission Decision 2001/463, \textit{DSD (Article 82)}, OJ 2001 L 166/1, para. 112.
\item \textsuperscript{43} \textit{Ibid.}, paras. 114, 115.
\item \textsuperscript{44} Unfortunately this Case never got beyond a mentioning in the Commission's annual competition report, Commission, \textit{Competition Report 1993}, para. 240.
\item \textsuperscript{45} \textit{Ibid.}, at p. 159.
\end{enumerate}
\end{footnotesize}
Whether a sequel to *Spa Monopole v. GDB* has become more likely due to the proliferation of collective producer responsibility systems depends on a multitude of factors. For one, the producer responsibility systems currently set up are structured in such a manner as to make the abuse of the system as a barrier to entry increasingly unlikely. The institutional structure of, for example, DSD, renders it nigh impossible for German producers to use the voting rights arising from their membership as a vehicle to keep foreign manufacturers from the market.\(^{46}\) Furthermore, *communis opinio* has it that the essential facilities doctrine has become more difficult to invoke as a result of the Court's *Bronner* judgment.\(^{47}\)

### 9.5 The objective justification

Seemingly abusive behaviour that can be objectively justified will not violate Article 82. In some of the paragraphs above, we have already seen some examples of seemingly abusive behaviour that may be objectively justified and will therefore not constitute abuse. The doctrine of the objective justification can be seen as the result of the fine line between, on the one hand, contractual freedom and, on the other, the need to protect competition, that has to be tread when applying Article 82. We have already seen that the dominant company has a special responsibility. However, we may wonder whether this special responsibility should keep the firm in a dominant position from acting in accordance with its commercial interests. In *Télémarketing*, the Court had to rule on the question whether a dominant undertaking that keeps a neighbouring market to itself and in doing so keeps a competitor from becoming active on that market, has abused its position.\(^{48}\) According to the Court this refusal to supply constituted abuse unless there was an 'objective necessity'. Certainly, a company in a dominant position cannot be required to bring itself to ruin and should therefore be allowed to act if this is objectively justified. The dominant firm that requires environmentally friendly behaviour of other companies will consider that its behaviour is objectively justified by the interest of protecting the environment. The Commission has addressed the issue of whether the behaviour by a dominant undertaking was objectively justified in a number of cases.\(^{49}\)

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\(^{46}\) See, further to DSD's institutional structure Lehmann 2000 en Veite 1999, p. 100 et seq.


However, in all of these cases the Commission came to the conclusion that the behaviour was not objectively justified. Similarly, the Commission looked at the arguments put forward by DSD only to come to the conclusion that they did not constitute an objective justification.

DSD brought a number of reasons forward in this respect. Firstly, it sought to rely on the German Packaging Ordinance since that Ordinance would stand in the way of using the green dot for anything less than the total amount of packaging brought on the market for which responsibility is accepted through the DSD system.\(^{50}\) In the light of the principle of supremacy of Community law this first argument may seem awkward. However, it probably has to be understood as a plea by DSD that it was compelled by the Ordinance to act as it did. If this were the case, DSD would have had no freedom to in this respect and therefore its behaviour would not be governed by the competition laws.\(^{51}\) According to DSD the marking is necessary to ensure the transparency of the system and was for that reason included in the Packaging Ordinance. The mark should indicate to the consumer that she can take the packaging home and dispose of it near home. Non-marked packaging (i.e. packaging not covered by an exemption system) should be brought back to or left at the shops for further collection and recycling. If the green dot mark were affixed to quantities of packaging that were not actually collected through the DSD system, the consumer, according to DSD would be misled.

The Commission did not share DSD’s interpretation of the Packaging Ordinance in that consumers had no freedom to choose where to leave packaging (near the shops or near home).\(^{52}\) The transparency required by the Ordinance only served to make clear to the consumer whether he should leave the packaging near the shop or take it home and dispose of it there. Therefore, the Packaging Ordinance did not compel DSD to abuse its dominant position.

Secondly, DSD relied on trademark law. According to DSD the green dot trade mark would lose its meaning if packaging that was not part of the DSD system and therefore had to be collected otherwise would nonetheless be marked with the green dot.\(^{53}\) Ultimately, this would render the green dot meaningless and would lead to less packaging flowing into the DSD system and thus bring about DSD’s demise.

The Commission applied the Court’s standard case law with regard to exclusive rights.\(^{54}\) This means that the exercise of an exclusive right could constitute abuse. This is only not so where the exercise of the exclusive right is necessary


\(^{51}\) By analogy to the ‘Zwangskartell’ hypothesis this could be deemed ‘Zwangsmißbrauch’, supra, para. 3.5


\(^{54}\) *Ibid.*, para. 144.
to fulfil the essential function of the exclusive right. The pivotal question is therefore what constitutes the 'essential function' of the green dot trademark. In line with what the Commission considered above with regard to the Packaging Ordinance, the Commission considered that the essential function of the green dot was to inform consumers that they have a choice to dispose of the packaging waste through the DSD system. Therefore, the essential function of the green dot is not jeopardised when the total amount of packaging has the green dot on it whereas the producer participates in the DSD system with only a partial amount. Similarly, the Commission rejects DSD's argument that the option whereby the green dot is placed on all packaging including the portion for which the producer does not participate in DSD may lead to misuse. DSD brought forward that is very likely that consumers will make use of the DSD system for larger quantities than that which the producers have contracted with DSD. This is indeed likely to happen as consumers have gotten used to using the DSD system for nearly 10 years. Therefore, DSD considers that obliging it to grant partial licenses effectively imposes on DSD an obligation to finance costs in advance and all the risks that go with that obligation. The Commission counters this by pointing to the fact that competing exemption systems as well as self-management solutions will have to comply with the same collection and recycling quota as DSD. Should one of these systems therefore fail to achieve these quotas, it would have to join the DSD system for the remaining quantity. The Commission proposes a system whereby at the end of the year the amounts of collected and recycled waste for each system are compared to the quota. If the quotas have not been met by a competing exemption system or self-management system, compensation should take place.

As part of its plea based on trade mark considerations, DSD advances the argument that it cannot be obliged to provide a service that it has not provided before (i.e. the granting of isolated licenses to use the trade mark) since the difficulties that Commission classifies as abuse are not caused by DSD but by the organisation and activities of the producers. The Commission simply refers to the fact that it has already established that it is DSD financing structure that is at the root of the problems. Moreover, the producers could avoid such problems only at disproportionate costs.

Finally, the Commission puts aside DSD's contention that the balance between license fee income and costs of collectors and recyclers would be

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55 Ibid., para. 145.
56 Ibid., para. 147.
57 Ibid., para. 148.
58 Ibid., para. 149.
59 See also Case C-7/97, Bronner, [1998] ECR 1-7791, where, at para. 28, Mediaprint seems to be forward- ing a similar argument that appears to have been accepted by the Court.
disturbed.\textsuperscript{60} The Commission simply points at the fact that the companies that do the actual collecting and recycling on behalf of DSD will also do less collecting and recycling. Accordingly, DSD will have to pay a lower fee to the recycling and collection companies.

On the basis of the abovementioned arguments, the Commission reaches the conclusion that there is no objective justification for DSD’s behaviour. As a result, the Commission is of the opinion that DSD abuses its dominant position.\textsuperscript{61}

It is submitted that DSD’s financing structure could very well be objectively justified on environmental and efficiency grounds. Producer responsibility places the responsibility on the producers’ shoulders. However, it should not be forgotten that it is the consumer who in the end is expected to hand in and to some degree sort the packaging waste. Moreover, the consumer is often considered to be the weakest link. The emergence of multiple systems (marked with, for example, green, red and pink dots) is likely to confuse the consumer and may even lead to ‘recycling fatigue’.\textsuperscript{62} Furthermore, the Commission’s proposal for a compensation system can hardly be expected to increase the efficiency of the system. It will, for example, be interesting to see how the compensation will work if there are multiple (self-management and exemption) systems that do not reach their quota.\textsuperscript{63} Another interesting difficulty is the result of the fact that the collection and recycling quota are currently at around 75 per cent. This makes it perfectly possible that one system actually meets the quota whereas DSD also meets its goals. In that case, DSD will not be able to ask for compensation (since the other systems have met their quotas) while it will have to pay for the total amount of packaging collected for which it, in turn, will not receive the full amount of license fees since some of the producers may have joined competing systems. Taking into account that DSD is the well-established player, it is likely that consumers will keep on using the DSD system relatively more than other systems. All in all, the Commission’s decision may have some unpleasant side effects for DSD. The question what we should do with such monopolistic systems from a competition point of view is addressed in the following paragraph.

\textsuperscript{60} \textit{Ibid.}, para. 151.

\textsuperscript{61} \textit{Ibid.}, para. 153.

\textsuperscript{62} Empirical evidence can be found in the chaos that currently exists with regard to the \textit{dosenpfand} (deposit and return for one way beverage packaging), see www.pfandpflicht.info.

\textsuperscript{63} Furthermore, DSD will, for example, probably have to reserve funds for the advance financing-risks.
9.6 Producer responsibility organisations as natural monopolies or universal service providers

Even though the Commission has characterised the behaviour of DSD also as a form of exploitative abuse (excessive prices), it in fact did little more than recycling the reasoning that underlies the exclusionary abuse. Thus, in the end the Commission only reproaches DSD for keeping an effective competitor from entering the market. In this respect the Commission recognises that it is highly unlikely that a viable competitor for DSD will emerge from one moment to another. Therefore the Commission argues that the market for a regional exemption system or a self-management solution could act as a springboard for the market for exemption systems. Certainly, DSD’s yearly turnover of DEM 4.2 billion may make it quite tempting to want to jump on the recycling bandwagon but it must be kept in mind that turnover is not profit. If we take into account that DSD calculates the license fees so that they only cover the costs, the sheer magnitude of the costs involved becomes clear.

Moreover, the requirements imposed by the Packaging Ordinance on exemption systems would also seem to inhibit the chances of a viable competitor for DSD entering the market for exemption systems. According to this Ordinance, an exemption system must cover at least one Bundesland. In this area the system must guarantee so-called haushaltsnahe collection or collection in the vicinity of the consumers’ house. All in all these requirements will require setting up an extensive and costly infrastructure. This is true to a much lesser extent for regional exemption systems of self-management solutions. The only actual potential competitor that the Commission mentions in its decision is the system for professional hair-care products. This is set up to take back and recycle the packaging waste from hairdressers (empty shampoo bottles). The fact in itself that such as system is set up by economically rational undertakings shows that it is possible to put in place a take back and recycling system for a niche market at lower costs than those involved in joining the DSD system. However, it must surely be recognised that organising the collection and recycling of one relatively homogeneous sort of packaging waste from a limited number of hairdressers is something quite different from the system run by DSD. The difference in the number of collection points (i.e. hairdressers v. households) alone is enormous. This appears to have been recognised by the Commission in its decision on the basis of Article 81 EC concerning DSD when it considers that:

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64 Commission Decision 2001/463, DSD (Article 82), OJ 2001 L 166/1, paragraph 2.2.1.
65 Set up by the Industrieverbund Friseurbedarf (Hairdressing Supplies Industrial Association) and disposal contractor Vfu, ibid., para. 6.
‘[T]here are considerations of spatial economics, collection logistics and traditions of waste collection established among consumers which make it economically difficult in many cases to duplicate the arrangements for collection from households.’

More generally, the parameters set by the Packaging Ordinance have been identified as impediments to effective competition.67 Firstly, it can probably be said that under the requirements imposed by the Ordinance, the choice between and individual solution or a collective approach should not be that difficult to make. Setting up or joining one collective system is in fact the only economically rational reaction to producer responsibility in these circumstances.68 Secondly, the demands placed on such collective systems are such to effectively lead to one collective system for the overwhelming majority of packaging waste.

In the course of looking at the DSD case, we have already hinted at the possibility of characterising the DSD system as a natural monopoly. Could it not be argued that the demands in the Ordinance have created a market that can bear only one company?69 The notion of Zwangsmißbrauch or compulsory abuse mentioned above is in certain respects closely connected to the concept of a natural monopoly.70 It can be said that a firm that has a natural monopoly cannot avoid committing exclusionary abuse. By its very nature the firm in such a position will always act contrary to the interest of potential competitors as the market simply can bear only one company. Moreover, the exploitative abuse that the Commission reproaches DSD for actually consists of nothing more than the behaviour by a natural monopolist that sees itself unable to cater to the needs of ‘cherry-pickers’.

Taking the ‘cherry-picking reasoning’ a bit further, the emerging picture of the legal obligations with which an exemption system must comply, shows some resemblance to the definition of a service of general economic interest given by the Court in Corbeau.71 This brings the concept of the universal service or, in the terminology of Article 86(2) EC, the service of general economic interest into the picture. If this exception applies, Article 82 is no longer applicable. We shall be looking closer at this provision below. However, as we will see, the obvious difference with Corbeau is that the ‘natural monopolist’ in that case had in fact a statutory monopoly. For Article 86(2) to apply there will need to be, as the law

68 Cf. in this respect the remarks by the Dutch environment minister with regard to the producer responsibility for waste electrical and electronic equipment in the Netherlands, Vedder 2002, p. 86.
69 Cf. Bonus 1997, p. 31. Furthermore, this option was also considered by the Swiss Competition commission in relation to take back and recycling systems. cf. Wettbewerbskommission und Preisüberwacher 1996, p. 56. See also: Commission 2003, p. 32.
70 Supra, p. 35 and 39.
71 Case C-320/91, Criminal proceedings against Paul Corbeau (Corbeau), [1993] ECR 1-2533, para. 15.
stands today, some sort of regulatory instrument that confers the monopoly position. With regard to DSD, however, it seems unlikely that the legal framework created by the Packaging Ordinance will be considered as entrusting DSD with a task of general economic interest within the meaning of Article 86(2) EC.

Staying in the realm of the universal service obligation, a parallel with the 'standard' utilities may be drawn. These were also once considered to be natural monopolies. This, however, changed when, after liberalisation, 'the market' showed that separate markets existed on which vigorous competition was possible. All of this requires the presence of some sort of regulator or government authority to not only monitor competition but also to take into account the requirements flowing from the universal service character of the sector concerned. In many cases, liberalisation will effectively come down to the government shaking the tree so that picking the cherries will become easier to pick for entrants to the market. However, to use the other common analogy in this field, you need the cream to make the rest of the cake taste good.

The more general point underlying the observations made above with regard to the character of a natural monopoly or universal service is actually threefold. Firstly, unleashing standard competition law as opposed to market liberalisation laws may not be the best method to tackle the competition problems that are perceived to take place. Undoubtedly, other players may occupy niche markets but whether these markets can actually function as springboards is far from clear and nowhere substantiated by the Commission. Furthermore, taking the example of the system set up for professional hair-care products, what is going to happen to the license fee for shampoo bottles not destined for professional hairdressers but the normal consumer? It seems likely that this license fee would actually increase and, as other niche markets are discovered, license fees in general may go up. This is the standard problem encountered in liberalising utilities markets. Such liberalisation takes place on the basis of the standard competition laws but simultaneously takes into account the fact that it is liberalisation and not (yet) competition that we are talking about.

Secondly, and this relates to the fact that we speak of 'perceived' competition problems, authorities could better concentrate on upstream and downstream effects of DSD's dominant position rather than trying to create competition. The emergence of a viable competitor to DSD for the entire territory of Germany is not only unlikely it may also very well be inefficient (effectively doubling the investments in infrastructure and thus increasing costs). Efficiency gains and more effective competition are more likely if competition authorities would concentrate on the effects of DSD's behaviour on upstream and downstream

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72 Cf., with regard to the telecommunication market: Nihoul.
73 Moreover, the environmental effectiveness of a situation where multiple systems function alongside each other may be doubted.
markets. Through, for example, keeping exclusivities granted to upstream companies (i.e. companies that provide the actual collection and recycling services) to a minimum and ensuring that such contacts are concluded following public tenders, efficiency losses are likely to be minimised. With regard to downstream markets (i.e. the producers that want to place the green dot on their packaging) it has to be ascertained that the license fee does not exceed the costs. To a large degree both issues can be efficiently addressed by means of DSD's institutional structure. Moreover, evolutions in DSD's institutional structure have indeed solved this problem to a large extent. These evolutions mean that at the moment both upstream as well as downstream industries are represented in DSD's board. Moreover, both industries' presence can be called atomistic. The fact that upstream as well as downstream industries are represented effectively rules abuse of DSD as vehicle to either increase license fees (to the detriment of consumers) or to lower license fees (to the detriment of the collection and recycling companies). Moreover, the atomistic representation makes it impossible for members of upstream or downstream industry to use the license fee as an instrument to put certain types of packaging at a disadvantage.

The third observation is that the emergence of DSD as a monopolistic system as well as the emergence of similarly monopolistic systems almost throughout Europe as a result of the imposition of producer responsibility may very well be the direct result of the environmental laws prescribing producer responsibility. With the exception of the UK, producer responsibility for packaging waste has led to the setting up monopolistic systems. Moreover, the producer responsibilities introduced in the Netherlands for batteries and accumulators and waste electronical and electrical equipment have also resulted in nationwide monopolists. The Directive laying down a producer responsibility for waste electrical and electronical products is very likely to lead to a proliferation of monopolistic systems such as the one that emerged in the Netherlands. With regard to the Packaging Ordinance we have identified the individual product responsibility as opposed to producer responsibility as a factor leading to the creation a large-scale exemption systems. Furthermore, the requirement of blanket coverage

74 Cf Lehmann 2000.
75 Currently, about 400 parties hold shares in DSD.
76 One could imagine a case where, for example, part of the dairy food industry (that mainly uses carton aseptic packs) wants to increase the license fee for plastic bottles because these are used by a competitor. The idea behind this would be to increase the competitor's costs and thereby push him out of the market.
77 See, further, Vedder 2002, p. 169 et seq.
79 See, further, Vedder 2002, p. 3.
of at least one Bundesland, together with the obligation to ensure collection in the vicinity of households, can be identified as factors hindering the emergence of anything else than one monopolistic system in which all the parties cooperate. In the proposed WEEE directive, the so-called ‘old-for-new obligation’ can be identified as a factor likely to lead to the creation of large scale, monopolistic producer responsibility organisations.\(^8\) Furthermore, the discussion in Europe on whether or not a visible fee should be introduced in the Directive shows that environmental regulation takes into account competition concerns and, moreover, actively interferes with competition on a market. The visible fee effectively rules out any competition with regard to the passing through of the environmental costs.\(^8\) In many respects, the plans to allow for a visible fee for ten years following the entry into force of the Directive can be seen as a transitional measure that is necessary in the liberalisation process.

The old-for-new obligation takes into account the fact that the producer responsibility extends to the so-called historical waste. This is the waste that will be generated when the products that are already on the market before the entry into force of the directive, will be discarded. Consumers are likely to want to get rid of their old products when they buy the replacement product. This has led to the old-for-new obligation whereby retailers (and ultimately producers and importers) must accept, irrespective of the brand, the old product free of charge when the consumer buys a similar new appliance. It is generally accepted that the old-for-new obligation can lead to a distortion of competition particularly for those producers that have a rather high market share at the moment but were not present on the market a few years ago. For this reason, the producers have always advocated a visible fee. This is a fee that should be passed on through the retail chain to the consumer and be mentioned separately on the invoice. The fee should cover the costs for the recycling of a particular type of product. Such a visible fee, it is submitted, is akin to a transitory arrangement in a liberalisation measure.\(^8\)

Particularly if we take into account the fact that waste management was – and in many respect still is – a government task, the liberalisation nature becomes even clearer.

It is submitted that the Community’s and member states’ current environmental policy should take more account of competition considerations in draw-

\(^8\) Proposal for the WEEE Directive COM (2001) 314 final, Article 4(2). See further, Commission 2003 where, at p. 32, it is recognised that ‘the implementation of the ELV (end of life vehicles, HV) and WEEE directives may give rise to further cases (involving producer responsibility schemes and Article 82 EC, HV)’.

\(^8\) See further, supra. Paragraph 16.5.4.

\(^8\) A parallel may be drawn with the postal dues that were levied in the TNT Traco case for the universal service, Case C-340/99, *TNT Traco v. Poste Italiane* (TNT Traco), [2001] ECR I-4109.
ing up environmental legislation laying down producer responsibilities. Furthermore, the Commission's competition policy with regard to large-scale producer responsibility organisations should focus on the upstream and downstream effects of these organisations rather than try to create competition. All in all, the circus surrounding DSD reminds one of the exclamations of Dr. Frankenstein: 'Abhorred monster! (...) come on, then, that I may extinguish the spark which I so negligently bestowed.'

This ends our observations with regard to Article 82 and its application in an environmental context. It is now time to turn our attention to the Merger Regulation.