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

The place of Article 86 in the Treaty, tucked away somewhere between the competition provisions, belies its great importance. For one, a quick look at the second paragraph of Article 86 already reveals the fact that it makes it possible to trump all other rules in the Treaty. However, Article 16 of the EC Treaty has brought the pervasive influence of the second paragraph of Article 86 to the fore. A further general aspect that has already been noted with regard to Article 86 is that it can be seen as a *lex specialis* of the useful effect doctrine in that, contrary to the latter, Article 86 is limited to a closed set of government actions. Article 86 only concerns companies that have been granted ‘special or exclusive rights’. With regard to these companies the general rule of the useful effect doctrine that member states must act loyalty to the Community applies.

From a competition law perspective this brings with it the same problems that were also identified in relation to the useful effect doctrine. By simultaneously regulating both member state as well as private party actions that have an impact on competition difficult questions of causality as well as doctrinal problems arise. To what extent, for example, can there be said to be freedom to compete and hence a possibility to restrict competition in the first place if a company has been given a statutory monopoly? Furthermore, who is responsible?

These problems are considered by some to be reflected in the text of Article 86 itself. Article 86 has been noted for its ‘clear obscurity’ as opposed to the ‘obscure clarity’ of Article 31 EC. This is in turn reflected in the case law and legal writing on Article 86 that is complex to say the least. Basically, Article 86 reflects the layout of any Community provision. In its first paragraph it contains a wide-ranging prohibition whereas the second paragraph allows for a derogation. Below we shall first look at Article 86(1) after which we will turn our attention to Article 86(2). As a reading of Article 86 already shows, it is a so-called *renvoi* provision, which means that in itself it contains no substantive legality standard. For this Article 86 relies on other Treaty provisions. Below, we shall be considering the application of Article 86(1) in connection with Article 82 simply because the vast majority of the case law on Article 86 concerns these two provisions. With regard to the derogation we will consider the application of Article 86(2) with both Article 82 and 81 EC. The latter has been included because of the parallel with the useful effect doctrine. In looking at these provisions we will also address the possibilities for an integration of environmental concerns.

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12.2 Article 86(1)

According to the first paragraph of Article 86 member states shall not enact or maintain any rule contrary to the Treaty with regard to public undertakings and firms that have been granted special or exclusive rights. With regard to the first paragraph of Article 86 a number of things may be noted. For one, it addresses the member states and not firms. In this respect, Article 86(1) prohibits any state measure with regard to an 'undertaking'. This means that the entity with regard to which the state measure is taken must exercise an economic activity. This undertaking can be a 'public undertaking' or an undertaking to which Member states have granted 'special or exclusive rights'. The Commission has defined the concept of the public undertaking in the Transparency Directive as

'the undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'.

What matters, therefore, is control by the public authorities over the public undertaking. A second category of undertakings is those firms that have been granted 'special or exclusive rights'. It is submitted that exclusive and special rights are two different concepts. An exclusive right must by definition be limited to one beneficiary only. Special rights have been defined by the Commission as those rights that are granted to a limited number of firms by a discretionary decision on the part of the public authorities. According to A-G Jacobs, the Court, in British Telecoms, adopted this definition. On the basis of this ruling he considers that a special or exclusive right must fulfil four essential requirements. The rights in question must

- be granted by the authorities of a Member State,
- be granted to one undertaking or to a limited number of undertakings,
- substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under

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1 See, supra, paragraph 7.4.
substantially equivalent conditions, and
be granted otherwise than according to objective, proportional and non-
discriminatory criteria.\footnote{Ibid., para. 87.}

In \textit{Ambulanz Glöckner}, the Court appears to have, \textit{grosso modo}, adopted this test.\footnote{Case C-475/99, \textit{Ambulanz Glöckner}, [2001] ECR I-8089, para. 24. The Court did not explicitly repeat the first and fourth requirement identified by the Advocate-General although it did address these in paragraph 23 of its judgment.} It may be remarked that the Court often takes the concepts of an exclusive and a special right together without really distinguishing between the two.\footnote{For this reason we shall, in the footsteps of Temple Lang, be referring to the companies benefiting from such exclusive or special rights as privileged companies without distinguishing between the two.} Furthermore, the \textit{Sydhavnens Sten & Grus} case shows the remarkable ease with which the Court disregards the distinction between an exclusive and a special right. In this case the fact that a right was given to three companies did not keep the Court from classifying it as an exclusive right.\footnote{Case C-209/98, \textit{Sydhavnens Sten & Grus}, [2000] ECR I-3743, paras. 53, 54. \textit{Cf.} Whish 2001, p. 192.}

If we look at the text of Article 86(1), it would seem that the government measure with regard to the public or privileged undertakings should be a different measure from the act whereby the exclusive or special right is granted. In other words an undertaking is first granted a special or exclusive right and only after that will state measures with regard to that company fall within the scope of Article 86(1). However, later case law has shown that the Court considers it possible that the act whereby an exclusive or special right is granted and the state measure within the meaning of Article 86(1) are actually identical.\footnote{\textit{Cf.} Faull & Nikpay 1999, p. 287, Akyürek-Kievits 1998, p. 25 et seq.} This means that the act itself whereby the exclusive or special right is granted may be 'contrary to the rules contained in this Treaty'

A final point to be noted is that Article 86(1) of itself contains no substantive legality standard but rather refers to the other provisions of the Treaty in this respect. This is why Article 86 is always applied in connection with another provision of the Treaty. As special or exclusive rights correspond roughly with the notions of, respectively, a monopoly and a legal oligopoly, it will not come as a surprise that Article 86(1) has to this date primarily been used in connection with Article 82.\footnote{\textit{Cf.} Faull & Nikpay 1999, p. 282.} However, as the wording of Article 86(1) already shows, it is a \textit{renvoi} provision with regard to all the Treaty rules and particularly the non-discrimination and competition rules. Below, we shall concentrate on the application of Article 86(1) together with Article 81 and 82.
12.3 Article 86(1) in connection with Article 82

Because by far most experience has been gathered with regard to the combined application of Article 86 and 82 we shall start by looking at this area of the case law. This combined application is fraught with difficulties as it governs simultaneously member state actions as well as the abusive behaviour of the firm. The difficult part consists of establishing a causal connection between the grant of the special or exclusive right and the abuse. However, the Court's approach to establishing dominance is also not without difficulties.

In a number of cases the fact that an exclusive or a special right existed was equated with the existence of a dominant position on that market. However, in the more recent Sydhavnens Sten & Grus case the Court fortunately appears to have abandoned the automatism in this respect. The Court stressed the need to define the relevant product and geographical market in order to determine whether the privileged undertaking was in a dominant position. However, in Deutsche Post the Court reverted to its old habit of equating special or exclusive rights with the existence of a dominant position for the privileged undertaking.

Whatever may be of this, with regard to the application of Article 86 in connection with 82, the nettle is in establishing abuse. Essentially, this boils down to whether or not there is a causal connection between the grant of the exclusive or special right on the one hand and the abuse on the other. The Court almost invariably starts its considerations in this respect by referring to the Sacchi case in which it held that ‘Merely creating a dominant position by the grant of special or exclusive rights within the meaning of Article 90(1) [Now Article 86(1)] of the Treaty is not in itself incompatible with Article 86 [Now Article 82] of the Treaty’.

The rationale behind this is that Article 82 itself does not prohibit the existence of a dominant position so that the Treaty cannot prohibit member states from doing something that private parties can freely do. This reasoning, it is submitted, is flawed for the simple reason that, ever since the entry into force of the Merger Regulation, private parties cannot create a dominant position. If firms are not allowed to concentrate if the result would be an undertaking

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in a dominant position, then why should member states be allowed to create dominant positions? In fact, despite the steadfast reference to the rule given in Sacchi, the Court's case law may be seen as calling into question the creation of the dominant position (i.e. the grant itself of the exclusive or special right) as an action contrary to Article 82 in connection with 86(1). To explain this, we must look at the second part of the Court's constantly recurring considerations in this respect:18

'A member state is in breach of the prohibitions contained in those two provisions [Articles 86(1) and 82] only if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or when such rights are liable to create a situation in which that undertaking is led to commit such abuses'.

The Court's case law in this respect is not entirely consistent. However, a number of different doctrines can probably be discerned.19 In Höfner v Elser, the Court laid down the basis of the 'Fallow Field' doctrine.20 This case concerned German legislation that reserved the right to act as an intermediary with regard to employment services to the Federal Employment Office. This Office, however, was not quite up to this task and as a result numerous agencies, such as that of Höfner and Elser, were set up and tolerated. According to the Court Articles 82 and 86(1) are infringed where a member state upholds an exclusive right with regard to a company that is 'manifestly not in a position to satisfy demand'.21 A second line of cases concerns the conflict of interests. These cases concern the situation where, for example, the privileged undertaking has both commercial activities as well as regulatory capacities with regard to the same market. In RTT v GB-Inno-BM, the Belgian authorities had given RTT, the public undertaking the power to lay down the technical specifications for telephone equipment as well as the powers to supervise compliance by other companies with these regulations while RTT itself sold telephone equipment.22 According to the Court this was23

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20 Case C-41/90, Höfner v Elser, [1991] ECR I-1979. This name was coined by Ritter, Braun & Rawlinson 2000, p. 764. See also: Whish who speaks of 'manifest inability to meet demand' and Buendia Sierra who refers to 'the demand limitation doctrine', Whish 2001, p. 199. Buendia Sierra 1999, p. 163.
23 Ibid., para. 25.
'tantamount to conferring upon it the power to determine at will which terminal
equipment may be connected to the public network, and thereby placing that under-
taking at an obvious advantage over its competitors'.

The Court held that such regulatory powers had to be carried out by an
entity that was independent from the company that was active on the market.
Similarly, in ERT, the Greek public broadcasting company produced its
own programs but was also the only company that could retransmit foreign
programs. As such there was a conflict of interests whereby ERT might be
tempted to discriminate in favour of its own productions and to the detriment
of the programs originating from abroad.

Connected to the conflict of interests doctrine is the so-called 'extension of
dominant position-doctrine'. According to this doctrine a privileged company
with a dominant on one market may not extent its monopoly position to a neigh-
bouring but separate market. This doctrine was already known from the case
law on Article 82. The Court applied the extension of dominance test in an
Article 86-setting for the first time in RTT v. GB-Inno-BM. In this case it held
that

'[...] the fact that an undertaking holding a monopoly in the market for the estab-
ishment and operation of the network, without any objective necessity, reserves to
itself a neighbouring but separate market, in this case the market for the importation,
marketing, connection, commissioning and maintenance ofequipment for connection
to the said network, thereby eliminating all competition from other undertakings,
constitutes an infringement of Article 86 [Now Article 82] of the Treaty.'

[...]

Accordingly, where the extension of the dominant position of a public undertak-
ing or undertaking to which the State has granted special or exclusive rights results
from a State measure, such a measure constitutes an infringement of Article 90 [Now
Article 86] in conjunction with Article 86 of the Treaty.'

A further interesting point in RTT v. GB-Inno-BM is the Court’s statement that
for an infringement of Article 86 in connection with 82 to have taken place
it is not necessary for there to have been actual abuse. In one of the many

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29 Ibid., paras. 23 and 24.
cases concerning the – at least among competition jurists – famous Port of Genua, Merci convenzionali v. Siderurgica Gabrielli, the Court developed the case law with regard Article 86 and 82 even further.\(^{30}\) In this case it held that the privileged firm had committed several abuses.\(^{31}\) Interestingly, this case had none of the features that had led the Court to apply Articles 86 and 82 in earlier cases. Thus, it has been concluded that the sheer number of and types of abuse committed in this case could only have been the result of the dominant position conferred upon the privileged company in question.\(^{32}\) This ever-stricter case law reached its apogee in Corbeau where the Court seemed to have come to the conclusion that the grant of an exclusive right of itself was contrary to Article 86(1) in connection with Article 82.\(^{33}\) In this case, the Court did not pause at establishing whether or not abuse has taken place or even could take place but rather went straight on to the possibility of justifying the grant of the exclusive right on the basis of Article 86(2). Implicitly, the Court therefore seemed to have come to the conclusion that insofar as Article 86(2) could not justify the statutory monopoly, the monopoly itself was contrary to Articles 86(1) and 82.\(^{34}\) This had been called the automatic abuse doctrine.\(^{35}\) In later cases, however, the Court has retreated from this automatic abuse doctrine and will require that the grant of exclusive rights lead the privileged undertaking to abuse its position.\(^{36}\) Having thus set out the basic doctrines that have been distinguished in the Court’s case law, we shall now turn our attention to the application of Articles 82 and 86(1) in an environmental setting.

### 12.4 The application of Article 86(1) and 82 in an environmental context

Essentially, there are two quite similar cases in this respect: Dusseldorp\(^{37}\) and Sydhavnens Sten & Grus.\(^{38}\) Both cases came before the Court as a result of a preliminary reference. In both cases, national authorities considered


\(^{31}\) Ibid., para. 18.

\(^{32}\) Faull & Nikpay 1999, p. 295.


\(^{34}\) Whish 2001, p. 200, 201.

\(^{35}\) Buendia Sierra 1999, p. 173.

\(^{36}\) Ibid., p. 176, or, as the author puts it in Faull & Nikpay: ‘The pendulum swings back’, Faull & Nikpay 1999, p. 298.


\(^{38}\) Case C-209/98, Sydhavnens Sten & Grus, [2000] ECR I-3743.
that granting an exclusive right to treat a certain type of waste would be only way to guarantee a sufficient inflow of waste into an installation so as to ensure its profitability. In Dusseldorp the installation operated by the privileged undertaking AVR featured a high tech rotary furnace that required a specific mixture of different types of waste to operate optimally. To ensure that this inflow was sufficient, the Dutch authorities granted AVR the exclusive right to treat certain categories of dangerous waste. This exclusive right was complemented by a prohibition to export those wastes without a permit granted by the Environment Minister. Such a permit would only be granted if there was insufficient capacity in the Netherlands and where the treatment abroad was at least an equally high standard as that offered by AVR. When the Dutch company Dusseldorp wanted to export waste oil filters for treatment by the German company Factron, a permit was refused because there was no shortage of capacity with AVR. Dusseldorp appealed against this refusal to grant it a permit and pleaded that, inter alia, it was contrary to Article 86 in connection with Article 82 EC.

In the Sydhavnen’s Sten & Grus case, there was a comparable situation. Under Danish environmental law, local authorities are competent to issue regulations on the collection and treatment of waste. This is why the Municipality of Copenhagen issued in 1992 a regulation concerning, inter alia, the collection and treatment of non-hazardous building waste with a view to the recovery of that waste (1992 Regulation). The 1992 Regulation was issued following a regional plan, which, in turn, was the direct result of a 1988 study that indicated that only a very small percentage of the waste emanating from the Copenhagen region was recovered. This was considered a serious problem because this region produced one third of all building waste, which amounted to 20 per cent of all waste produced in Denmark.

To solve this problem, the Municipality considered it necessary to create a large-scale recovery plant capable of recycling the large amounts of waste. This resulted in the creation of the Grøften recovery plant, operated by a company called RGS. In addition, the 1992 Regulation allowed Copenhagen to conclude contracts for the collection and recovery of building waste with only a limited number of business undertakings. In the end only RGS and two other firms were awarded such contracts. This limit on the number of firms allowed to collect and recover the waste was deemed necessary to ensure that the Grøften plant and the other two firms received sufficiently large amounts of waste for them to be profitable. In 1998 a new regulation replaced the 1992 Regulation. The new Regulation differs from the 1992 Regulation in that the export and import of building waste falls outside the scope of the Regulation and therefore seems to be free.

The result of the system put in place by these Regulations was that the claimant in the national procedure, Sydhavnen, which has all necessary permits and already processes building waste from other regions than Copenhagen,
is excluded from collecting and processing waste originating in Copenhagen because the Municipality was unwilling to award it a contract. Sydhavnens appealed against this refusal. In its appeal, Sydhavnens pleaded that the Regulations contravened, \textit{inter alia}, Article 82 in connection with Article 86 EC because the Regulations kept it from offering its services on the market.\footnote{Sydhavnens also wanted to recycle building and construction waste, for which it had obtained the necessary permits from the municipal government.}

With regard to establishing whether or not the privileged undertaking occupied a dominant position in a substantial part of the common market the Court's approach already differs between the two cases. In the \textit{Dusseldorp} case, the Court took the short route to come to the conclusion that the privileged undertaking AVR occupied a dominant position. According to the Court\footnote{Case C-203/96, \textit{Dusseldorp}, [1998] ECR I-4075, para. 60.}

\begin{quote}
'\textit{the grant of exclusive rights for the incineration of dangerous waste on the territory of a Member State as a whole must be regarded as conferring on the undertaking concerned a dominant position in a substantial part of the common market.'}
\end{quote}

This may be contrasted with the approach the Court took in \textit{Sydhavnens Sten \& Grus}. In that case the Court left the decision on whether or not there was dominant position to the national judge but not without making clear that this was no clear-cut matter. Firstly, the Court provided guidance as to how the relevant product market and geographical market should be defined. In particular with regard to the latter aspect of market definition, the Court hinted at the possible influence of the national rules on the definition of the market.\footnote{Case C-209/98, \textit{Sydhavnens Sten \& Grus}, [2000] ECR I-3743, paras. 62 and 63.} With regard to the thus defined market the Court reminded the national judge of the necessity to establish that this area constitutes a substantial part of the common market.\footnote{\textit{Ibid.}, para. 64.}

It is submitted that the test adopted in \textit{Sydhavnens Sten \& Grus} is the correct, economically sound, one whereas the \textit{Dusseldorp}-approach can be characterised as legalistic. Moreover, the Court, by reiterating the need to correctly define the market, explicitly refused to follow the Advocate-General. Advocate-General Léger merely applied the \textit{Dusseldorp} type of reasoning only to come to the conclusion that it need only be established that the area over which the exclusive right extended was a substantial part of the common market.\footnote{\textit{Ibid.}, opinion A-G Léger, para. 71.}

A dominant position, or any restriction of competition for that matter, can only take place on a market. If no such market has been defined, all statements concerning a restriction of competition can at best be called speculative. Despite this step in the right direction with regard to market definition, the Court in
Sydhavnens Sten & Grus did not think it necessary to provide the referring judge with any guidance as to the existence of a dominant position. Certainly, this question should not pose that many difficulties in a situation where one firm has been granted an exclusive right. However, in the Sydhavnens Sten & Grus case not one but three companies had been granted an ‘exclusive’ right. Moreover, what should we think of the fact that the exclusive right ‘should be reconsidered upon expiry of the normal writing-off period of its plant at the Grøften centre’ when considering dominance?

Having addressed the question of dominance, the Court moved on to consider whether the privileged undertakings had led to abuse their dominant position or whether the exclusive rights were liable to create a situation which the privileged undertakings are led to commit such abuses. Again the two cases diverge. In Dusseldorf the claimant wanted to export its waste to a German company but was kept from doing so by the Dutch regulations. According to the Court this:

‘[…] has the effect of favouring the national undertaking [AVR] by enabling it to process waste intended for processing by a third undertaking. It therefore results in a restriction of outlets contrary to Article 90(1) [Now Article 86(1)] in conjunction with Article 86 [Now Article 82] of the Treaty.’

This reasoning appears to be an application of the follow field doctrine. However, as Whish rightly points out, the Court seems to have gone a bit further than it had in Höfner & Elser or any other case applying this doctrine. From the facts stated in the Court’s judgment, it does not appear that the privileged undertaking in the Dusseldorf case, AVR, did indeed fail to satisfy the demand for its services. A strict application of the follow field doctrine in this case would have meant that for the doctrine to apply, the Dutch regulations, for example, would have to preclude exports even in cases where AVR was unable to meet demand. Indeed, in Dusseldorf, the privileged undertaking in question does not appear to have committed any abuses (e.g. its prices were not excessive and the quality of the treatment offered by it was at least equal to that offered by the German company Factron). The only action that infringed Articles 82 and 86(1) was the fact that the Dutch government applied the Dutch regulations, an action in which the privileged undertaking had no part. It is therefore submitted that the Court applied the automatic abuse doctrine in Dusseldorf in the form of a so-called ‘extended follow field doctrine’. According to this extended follow

45 Whish 2001, p. 198.
46 This name indicates that the reasoning behind it is similar to that underlying the follow field doctrine (i.e. the privileged undertaking precludes potential competitors from becoming active on the market for which the privileged undertaking has been granted an exclusive right) whereas it also recognises the fact that in Dusseldorf the Court has clearly gone beyond its ruling in Höfner & Elser.
field doctrine, the mere fact that third undertakings are kept from offering competing services due to the exclusive right, is already contrary to Article 86(1) in conjunction with 82. Furthermore, the Court seems to have been aware of this broadening of the fallow field doctrine and immediately provided for the possibility of an objective justification by analogy to the doctrine of the extension of a dominant position. In the paragraph 68 of *Dusseldorp* the Court holds that Article 86 in conjunction with Article 82

‘[…] precludes rules [that] require […] undertakings to deliver their waste […] to a national undertaking on which it has conferred the exclusive right to incinerate dangerous waste unless the processing of their waste in another Member State is of a higher quality than that performed by that undertaking if, without any objective justification […] those rules have the effect of favouring the national undertaking and increasing its dominant position.’ [Emphasis added]

This consideration is mysterious for several reasons. Firstly, the possibility of an objective justification appears to add another escape route to Article 86 in conjunction with 82 alongside the possibility of a justification contained in Article 86(2). It is far from certain how the two relate to one another. Secondly, the objective justification appears like a *deus ex machina* right at the end of the Court’s considerations without having been mentioned at all in any of the preceding paragraphs. Thirdly, with regard to the fact that the Court speaks of rules that have ‘the effect of favouring the national undertaking and increasing its dominant position’ one may wonder how the dominant position in *Dusseldorp* can be increased. In this respect it may be recalled that the privileged undertaking AVR enjoyed an exclusive right and thus found itself in a position of absolute dominance. It would seem more correct to say that those rules have the effect of ascertaining that the privileged national undertaking processes all waste and thereby establish its dominant position. That this in itself may be contrary to Article 86(1) in conjunction with Article 82, as it would be under the extended fallow field doctrine, is confirmed by the *Sydhavnens Sten & Grus* case. In this case the Court considers that

‘In that regard, it should be pointed out, first, that the grant of an exclusive right over part of the national territory for environmental purposes, such as establishing the capacity necessary for the recycling of building waste, does not in itself constitute an abuse of a dominant position.’ [Emphasis added]

This consideration is important for two reasons. Firstly, it proves that the Court considers it possible that the grant of an exclusive right does indeed of itself

constitute abuse of a dominant position. Interpreting this consideration as a mere repetition of the Court's standard reference to the rule given in Sacchi does not make any sense because this consideration (as the words 'in that regard' show) is actually the implementation of the preceding paragraph. In that preceding paragraph the Court summarised its case law according to which member states may grant exclusive rights provided that the privileged firms do not abuse their dominant position or are not led to necessarily commit an abuse. Secondly, the consideration that the grant for environmental purposes of an exclusive right does not in itself constitute an abuse, seems to mirror the general interest exception that exists with regard to the useful effect doctrine. The precise extent and impact of this consideration remain, however, still rather uncertain.

The Court's ruling in Dusseldorp may be contrasted with that in the Sydhavvens Sten & Grus case, where the claimant apparently relied on the Court's reasoning in Dusseldorp to establish that abuse had taken place.48

As will be recalled, in Dusseldorp, the undertaking that gave its name to the case wanted to export its waste to have it processed by the German company Factron but was kept from doing so by the same rules that gave AVR its exclusive right. Essentially, Dusseldorp is therefore arguing that the exclusive rights keep Factron, or any other company for that matter, from becoming active on the market for the treatment of waste oil filters. This is reflected in the Court's conclusions with regard to Article 86(1) and 82.49

In Sydhavvens, the claimant itself wants to become active on the market for which the Danish authorities had granted an exclusive right. The Court initially appears to leave the question of whether or not abuse had taken place or was likely to take place as a result of the exclusive rights unanswered by immediately moving on to Article 86(2) EC. However, at a later stage, and, since it had already concluded that Article 86(2) applied, as an obiter dictum, the Court nevertheless considered that there was nothing in the documents before the Court to suggest that the exclusive right would necessarily lead the privileged undertakings to abuse their dominant position.50

However, the Court's refusal in Sydhavvens Sten & Grus to apply the extended fallow field doctrine that it had just developed in Dusseldorp cannot be satisfactorily explained by the fact that in Sydhavvens Sten & Grus the claimant was a potential competitor whereas Dusseldorp was itself a customer of the privileged undertaking. Indeed, the (extended) fallow field doctrine presupposes that and inherently departs from the possibility for competing firms to become active on the market for which the privileged undertaking holds an exclusive right.

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48 Ibid., para. 72, the wording of which ('limiting outlets' and 'favouring the Greften centre to the detriment of competitors') closely follows that of paragraph 63 of the Dusseldorp case.


50 Ibid., para. 82.
Moreover, as we have seen above, the logic that appears to underlie the Court’s ruling in *Dusseldorp* can apply also in the setting that occurred in *Sydhavnens Sten & Grus*.

It is, however, submitted that the change in the Court’s approach between *Dusseldorp* and *Sydhavnens Sten & Grus* can be explained by the facts of the cases. With regard to establishing the existence of a dominant position, it must be taken into account that the exact scope of the exclusive rights in *Sydhavnens Sten & Grus* was far from certain. For one, Sydhavnens and the Municipal government could not agree on whether or not export of the wastes was allowed. Secondly, the fact that three companies had been granted an exclusive right seems to make answering the question whether there was dominant position even less straightforward.

Similarly, the outcome of the two cases as regards the abuse can probably also be explained on the basis of the facts underlying the case even though this does not become clear from the Court’s judgments themselves. Basically, Dusseldorp wanted to export the waste oil filters to Germany. The processing there by Factron was obviously at least just as expensive but probably cheaper than that offered by AVR. Furthermore, the processing offered by Factron was considered by the Netherlands authorities to be of at least an equally high quality as that offered by AVR. However, to our (admittedly layman’s) mind, the process employed by Factron (separating the metal, plastic and paper parts, cleaning these parts and reprocessing the waste oil) seems a bit more environmentally friendly than that offered by AVR (incineration, or as it is also known euphemistically: burning with energy recuperation). These facts, though unmentioned in the judgment, are likely to have influenced the outcome of the Court’s decision in *Dusseldorp*. On the contrary, no such facts appear to be present in the *Sydhavnens Sten & Grus* case. So, even though the Court fails to mention this in its judgment, the lower quality of the services offered by the privileged undertaking could probably be taken to also underlie the extended fallow field doctrine.

### 12.5 Article 86(2) in connection with Article 82 and 81

As was already said in the introduction, a quick look at the second paragraph of Article 86 reveals that it can be used to set aside all other provisions in the Treaty. Therefore, even if an undertaking is led to abuse its dominant position by the grant of exclusive right, all is not lost. According to Article 86(2), the Treaty rules, and in particular the competition rules, apply only insofar as this does not obstruct the performance, in law or in fact, of the particular task assigned to an undertaking entrusted with the operation of
services of general economic interest. The final sentence of Article 86(2) adds the proviso that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community. The relatively recent case law of the Court has put this provision from its obscure place between the competition provisions right at the forefront of European law. Up till Corbeau, Article 86(2)'s importance was considered to be minor but widening the scope of the prohibition in that case (Article 86(1) in connection with 82) had to be accompanied by a corresponding widening of the derogation. Thus, the Court held that

'That provision [Article 86(1)] must be read in conjunction with Article [86(2)]'.

Furthermore, the new Article 16, though of limited legal value, certainly has focussed political attention on the issue of the application of the Treaty rules on companies that provide services of general economic interest. Moreover, the Charter of Fundamental Rights of the European Union solemnly reaffirms the Union's respect for access to services of general economic interest. As we have stated above, both provisions' legal importance may be doubted. For one, both Article 16 EC and Article 36 of the Charter apply without prejudice to Article 86. Furthermore, the Charter's status as a 'solemn declaration' is uncertain to say the least. It is therefore submitted that the importance of Article 16 resides primarily in its character of a political declaration. Finally, the Commission has issued a number of Notices concerning services of general importance.

Essentially, Article 86(2) contains four elements. Firstly, there must be a 'service of general economic interest'. Secondly, a company needs to have been 'entrusted' with the operation of this service of general economic interest. Thirdly, the rules in the Treaty shall not apply to this undertaking but only 'insofar as this does not obstruct the performance of the particular task assigned to this undertaking'. Fourthly, Article 86(2) demands that 'The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'. Before we pay closer attention to these four core elements, two preliminary remarks need to be made. From the short outline of

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51 Below, we shall not be considering the second category of undertakings to which Article 86(a) refers, 'undertakings [...] having the character of a revenue producing monopoly' since these are of rather limited interest for the purpose of this study. See further on this concept: Buendia Sierra 1999, p. 286 et seq.
52 See further Buendia Sierra 1999, p. 273 et seq.
55 See further with regard to Article 16: Ross 2000.
Article 86(2) it will be seen that it concerns undertakings only. Therefore, the same remarks that were made with regard to the concept of an undertaking in general also apply here. Interestingly, the Court, in *Albany*, explicitly recognised the connection between the concept of an undertaking and the applicability of Article 86(2). The Court considered that although certain obligations would render the services performed by the pension fund less competitive compared with private pension insurers, those obligations were insufficient to justify the conclusion that the activities of the funds were non-economic. Nevertheless, these same obligations could very play a role in the applicability of Article 86(2).

In our opinion, explicitly recognising this nexus between, on the one hand, exceptions to the concept of an undertaking and, on the other, Article 86(2) represents the first step in a process whereby the exceptions to the concept of an undertaking are interpreted ever more narrowly. A second preliminary remark is of a more general nature. As a derogation from the general rule, Article 86(2) is subject to the same rule that applies to all Treaty provisions; it must be interpreted narrowly. Particularly with regard to Article 86(2) the width of which, as was noted above, is clearly related to the scope of Article 86(1), it should be kept in mind that the Court will always treat Article 86(2) as a derogation from the general rule.

The concept of a service of general economic interest is a Community concept. Notwithstanding this, the Court has always seemed receptive of national ideas of what should constitute such a service. The precise content of this concept is unclear and should probably remain so in that it is a dynamic concept that should be flexible enough to accommodate developments in society. To understand its application of Article 86(2), the Court's considerations in the Electricity cases may be of interest. In, for example, the *Dutch Electricity* case the Court considered that

'[...] in allowing derogations to be made from the general rules of the Treaty in certain circumstances, Article 86(2) [Now Article 86(2)] seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.'

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58 See further, *supra*, paragraph 7.4.
This consideration confirms the fact that essentially Article 86(2) EC is about competences. Thus it seeks a balance between, on the one hand, member state competence to regulate markets in order to reach certain policy goals and, on the other hand, Community competence to establish a common market with undistorted competition. If this is the rationale behind this provision, the concept of a service of general economic interest must necessarily be an open one. Despite this open character, the outer limits of the concept may certainly be charted.

The word 'service' is to be understood as a wider concept than that in Article 50 EC. Indeed the provision of certain goods has also been considered as a service of general economic interest.\(^6^1\) Furthermore, the inclusion of the word 'economic' is of great interest for the purpose of this research because environmental protection requirements are often considered to be of a non-economic nature. Is it therefore safe to conclude that environmental objectives will necessarily fall outside the scope of Article 86(2) EC? Quite the contrary is submitted to be true. Indeed, the Court has frequently omitted the word 'economic' in many judgments concerning this provision.\(^6^2\) Buendia Sierra has interpreted the Court's and the Commission's practice in this regard as follows. In his opinion, Article 86(2) EC is intended to accommodate economic means to attain certain non-economic goals.\(^6^3\) Indeed, in its 1996 Communication on this subject, the Commission distinguishes between 'services of general interest' and 'services of general economic interest'.\(^6^4\) The Commission has maintained this in its 2000 Communication on Services of General Economic Interest\(^6^5\) and in its Report to the Laeken European Council.\(^6^6\) Essentially, the Commission appears to see the concept of 'services of general interest' as an overarching concept that encompasses both market and non-market services which are considered of general interest and subject to specific public service obligations. The notion of 'services of general economic interest', corresponds to this definition but applies only to 'market services'. Therefore, the Commission appears to base the distinction between, on the one hand, services of general interest and, on the other, services of general economic interest not on the objectives that are served with that fact that something is of general interest but rather on the nature of the activity with regard to which the general interest-exception is invoked.\(^6^7\) The distinction

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\(^{6^1}\) E.g. the provision of electricity and gas (in case C-393/92, Gemeente Almelo et al. v. IJsselmij (Almelo), [1994] ECR I-1477, para 28, the Court considered electricity to be a good within the meaning of Article 28 EC), cf. Case C-159/94, French Electricity and Gas, [1997] ECR I-5815.

\(^{6^2}\) E.g. Case C-320/91, Corbeau, [1993] ECR I-2568, para. 16.

\(^{6^3}\) Buendia Sierra 1999, p. 278.


\(^{6^5}\) Commission Communication on Services of General Interest in Europe, OJ 2000 C 17/4, Annex II.


\(^{6^7}\) Cf. Buendia Sierra 1999, p. 278.
between market and non-market services would therefore, in the opinion of the Commission, seem to coincide with the concept of an undertaking.\textsuperscript{68}

As has already been mentioned, the concept of a service of general economic interest is a Community concept. Effectively, this means that it leaves member states free to define what constitutes such a service whilst at the same time ensuring that the Court remains the ultimate arbiter of whether or not a member state was right to do so.

As forthcoming as the Court may be with regard to the question whether or not a service is of general economic interest, when deciding if an undertaking has been entrust\textsuperscript{ed} with the operation of this service, the Court’s approach tends to be formalistic to say the least. In general, the Court will require an act in the exercise of the public function by a public authority of a member state.\textsuperscript{69} Furthermore, this act has to be specific with regard to the privileged undertaking. The result of this act must be that the privileged undertaking is under certain obligations with regard to the service of general economic interest.\textsuperscript{70} In Corbeau the Court stated that postal delivery was a service of general economic interest

‘[...] consisting in the obligation to collect, carry and distribute mail on behalf of all users throughout the territory of the Member State concerned, at uniform tariffs and on similar quality conditions, irrespective of the specific situations or the degree of economic profitability of each individual obligation.’\textsuperscript{71}[Emphasis added]

In the French Electricity and Gas case, the Court clearly indicated the necessity of a link between the obligation for the privileged undertaking and the public act with regard to that undertaking.\textsuperscript{72} General requirements that must be fulfilled by all entities that are active on a certain market will not result in an undertaking being entrusted with observing that these requirements are observed.\textsuperscript{73} Therefore, the Court considered that the obligations regarding environmental protection and regional policy could only be taken into account in this respect ‘if those obligations are specific to those undertakings and to their business’.\textsuperscript{74}

As regards the specificity of the obligations that must concern the undertaking for it to have been entrusted with the performance of a service of general economic interest, the GVL case is also of interest.\textsuperscript{75} In this case, GVL, which is

\textsuperscript{68} Commission Communication on Services of General Interest in Europe, OJ 2000 C 17/4, para. 28.

\textsuperscript{69} Case C-159/94, French Electricity and Gas, [1997] ECR 1-5815, para. 65.

\textsuperscript{70} Cf. Whish 2001, p. 203.

\textsuperscript{71} Case C-320/91, Corbeau, [1993] ECR 1-2368, para. 15.

\textsuperscript{72} Case C-159/94, French Electricity and Gas, [1997] ECR 1-5815, para. 66.

\textsuperscript{73} Ibid. paras. 68, 69.

\textsuperscript{74} Ibid. para. 69.

the only copyright management company in Germany, sought to rely on Article 86(2). In this respect it relied on the German Copyright and Related Rights Management Act.\textsuperscript{76} According to this Act, copyright management companies must, \textit{inter alia}, be officially authorised, are subject to monitoring by the German Patent Office and are obliged to conclude certain management agreements. Despite these obligations imposed on GVL by the Act, the Court considered that: \textsuperscript{77}

'\begin{quote}
[...] the German legislation does not confer the management of copyright and related rights on specific undertakings but defines in a general manner the rules applying to the activities of companies which intend to undertake the collective exploitation of such rights.

Even if it is true that the monitoring of the activities of such companies as provided for by that law goes further than the public supervision of many other undertakings, that is however not sufficient for those companies to be included in the category of undertakings referred to in Article 90(2) [Now Article 86(2)] of the Treaty.'
\end{quote}

The conclusion must therefore be that the mere fact that legislation imposes extra strict requirements on a company because that undertaking exercises a particular activity is insufficient for this company to be entrusted within the meaning of Article 86(2).

The third core element of Article 86(2) essentially involves a proportionality test. It declares the rules in the Treaty applicable only in so far as this does not obstruct the performance of the special task. The words 'in so far' indicate that the attention now turns to the question of whether or not is necessary to exempt a certain company from the application of the Treaty rules. A very considerable amount of literature and case law has been produced on the subject of proportionality.\textsuperscript{78} We will therefore have to confine ourselves to just indicating the basic outlines of the principle's application within Article 86(2).

In \textit{Corbeau}, the Court considered that:\textsuperscript{79}

'The question which falls to be considered is therefore the extent to which a restriction on competition or even the exclusion of all competition [...] is necessary in order to allow the holder of the exclusive right to perform its task of general interest and in particular to have the benefit of economically acceptable conditions'.

\textsuperscript{76} Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten.

\textsuperscript{77} Case 7/82, GVL, [1983] ECR 483, paras. 31, 32.

\textsuperscript{78} See, also for further references, Buendia Sierra 1999, pp. 300-341.

\textsuperscript{79} Case C-320/91, Corbeau, [1993] ECR 1-2568, para. 16.
The Court then went on to state that an analysis of proportionality should start from the premise that the privileged firm should be able to compensate the loss generated in non-profitable sectors with the profits made in other sectors. In short, the Court considered that such companies should be able to cross-subsidise and that, in turn, would require keeping out the cherry pickers.\(^8\)

In the later *French Electricity and Gas* case, the Court was able to further develop its case law with regard to the question of what constitutes 'economically acceptable conditions'. In that case the Commission argued that Article 86(2) could apply only when 'the economic viability of the undertaking itself would be threatened'.\(^8\) The Court agreed with the Commission that, being a derogation, Article 86(2) was to be interpreted narrowly. However, the Court did not put the bar as high as the Commission had done. According to the Court, it would be sufficient if the applicability of the Treaty rules would 'obstruct the performance, in law or in fact, of the special obligations incumbent upon that undertaking'. In this respect the Court explicitly pointed out that it would not be necessary for the viability of the undertaking to be jeopardised.\(^8\) Moreover, recent case law of the Court suggests that the Court is applying a proportionality test that leaves more room for the national authorities to restrict competition if this is necessary to ensure the fulfilment of the task of general economic interest.\(^8\)

The fourth and final element of Article 86(2) only adds to obscurity of the already enigmatic Article 86. Buendia Sierra extensively charts the (early) discussions among scholars with regard to the meaning of the second sentence of Article 86(2).\(^8\) A first question that had to be answered was whether the second sentence contained a norm that was independent from that in the first paragraph. This could have important consequences as it was accepted that the defence of the Community's interests is clearly a task for the Commission. Interpreting the first and second sentence as a whole, would therefore effectively rule any direct effect for Article 86(2).

The Court, it is submitted, has not done much to clarify the meaning of this last sentence. Most probably it is little more than a clarification of the proportionality test contained in the first sentence and therefore devoid of any legal meaning independent of the first sentence.\(^8\) In the *French Electricity and Gas* case the Court considered whether or not this final criterion was fulfilled so that Article 86(2) could apply. In this case the Commission had argued that relinquishing the exclusive import and export rights of the French Gas and Electri-

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\(^8\) Ibid., paras. 17, 18


\(^8\) Ibid., para. 59.

\(^8\) *Cf.* Jones & Sufrin 2001, p. 445.

\(^8\) Buendia Sierra 1999, p. 341 et seq.

city monopolists would make it possible and foster the development of trade in the interest of the Community. According to the Court, merely stating this was insufficient in order to prove that the French government had failed to fulfil its obligations under the Treaty.

Whatever, may be of this, the fact remains that since the Gas and Electricity cases, the Court has consistently omitted any reference to this element of Article 86(2). As we shall see below, the Court has, in a number of recent preliminary rulings where it acknowledged the applicability of Article 86(2), not addressed this fourth element at all. With regard to the fourth element the following concluding remarks may be made. As the law stands at the moment, the Court does not attach any particular weight to the last sentence. Rather it appears to, as some have argued, consider it to be nothing more than a repetition of the proportionality criterion in the first sentence specially designed for those occasions where the Commission wants to use Article 86 to liberalise certain sectors of the industry. In these cases, where the Commission acts pursuant to Article 86(3) or, as happened in the Gas and Electricity cases, Article 226 in conjunction with Article 86, the Commission is under an obligation to show that it is defending the Community's interests. This would explain why the Court has not referred to this element on a single occasion in a case that came to it through a preliminary reference.

Now that the basic requirements for the applicability of Article 86(2) have been outlined, let us now look at the consequences that arise from the application of Article 86(2) to an undertaking. In this respect, we must first conclude that Article 86(2) is directly effective. As a result, national courts may decide on whether or not it applies. If it considers that Article 86(2) is applicable, the result is, as the wording of this provision shows, that the firm in question is no longer 'subject to the rules contained in this Treaty, in particular the rules on competition'. With regard to the combined application of Article 82 and 86, this means that even if the privileged undertaking abuses its dominant position, Article 82 will not be of any help to end these abuses in so far as the exclusive rights are necessary for the fulfilment of the task of general economic importance. Article 82 will simply not apply.

It is submitted that much the same holds true with regard to Article 81. As we have seen above, Article 81(1) may only be declared inapplicable by the Commission. Regulation 17 has conferred this exclusive competence upon it. As a Treaty exception, Article 86(2) is hierarchically higher than the rule laid

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88 Article 7(1) of Regulation 17 of 1962. Note that this competence will disappear as a result of the direct applicability of Article 81(3) after the entry into force of Regulation 1/2003, see, supra, paragrap 8.9.
down in Regulation 17. As such the mere fact that Article 81 applies should not stand in the way of a national judge or the Court declaring Article 81 as a whole inapplicable by virtue of the fact that Article 86(2) applies. Therefore, the applicability of Article 86(2) removes the need to notify an agreement in order to obtain an exemption. The Court appears to have confirmed this in Almelo.\textsuperscript{89}

This is an important observation with regard to useful effect doctrine. In Chapter 11 and the introduction to this chapter above, we have noted that Article 86 can be seen as the lex specialis compared to the lex generalis of the useful effect doctrine. In this regard we have further observed that an exception or justification with regard to Article 86 should have a counterpart in the useful effect doctrine.\textsuperscript{90} Moreover, these exceptions should be comparable both substantively as well as procedurally. From a substantive perspective, the general interest exception appears to fit nicely with Article 86(2). From a procedural point of view, the main procedural aspects of the general interest exception to the useful effect doctrine should mirror those of Article 86(2). In this respect, the effects of the applicability of the general interest exception and Article 86(2) should be identical. Therefore, since the applicability of Article 86(2) renders it unnecessary to notify the underlying agreement for an exemption, it is submitted that the applicability of the general interest exception should have the same consequences. Having thus set out the basic elements of Article 86(2), we may now turn our attention to the application of this provision in an environmental context.

\subsection*{12.6 The application of Article 86(2) in an environmental context}

As already became clear in Part One of this book, environmental costs often represent so-called external costs. Therefore, many ‘environmental services’ (such as the environmentally friendly treatment of waste) will be difficult to perform under market circumstances. This, in connection with the fact that the authorities will often consider it very important to ascertain a high level of environmental services, has led many authorities to create ‘environmental monopolies’. Below, we shall look at a number of such environmental monopolies and in particular the application of Article 86(2) to these monopolies. Furthermore, we shall also be addressing the effects on Article 86(2) of ‘environmentally unfriendly monopolies’.


\textsuperscript{90} Supra, paragraph 11.3.
The first reference to Article 86(2) in a case that involved environmental protection requirements, is to be found in the *Inter-Huiles* case. This case concerned the legality of a French scheme for the collection and treatment of waste oils according to which waste oils would have to be collected and treated by a limited number of designated undertakings within a certain territory. One of those designated undertakings was the Syndicat. The Syndicat started proceedings against *Inter-Huiles* for having violated its collection and treatment monopoly. In these proceedings, *Inter-Huiles* challenged the compatibility of this scheme with the EC Treaty. Since the Syndicat essentially was in a monopoly position, both parties invoked Article 86.

In this case Article 86(2) did not make it beyond the Advocate-General's opinion. In her opinion, Rozés considered that it that the firm in question, the Syndicat, could probably be taken to have been entrusted with the performance of a task of general economic interest. However, she considered the French scheme in question was not necessary to ensure the fulfilment of this task. The Court did not address any of the substantive issues of Article 86 but confined itself to stating that Article 86(2) could not create individual rights that the national courts must protect.

Article 86 played a similarly minor role in the *Vanacker* case. This case concerned the same French scheme that gave rise to the *Inter-Huiles* case. This time, two Belgians, Vanacker and Lesage were accused of having collected and transported waste oils within the meaning of the French legislation, however without having obtained the necessary permits. Again, only the Advocate-General considered whether Article 86 could apply. According to Advocate-General Lenz, Article 86(2) was irrelevant since the measure at hand, the creation of regional collection and treatment monopolies by the state, was unconnected with any behaviour by an undertaking. This time the Court does not address Article 86 at all.

This silence with regard to Article 86(2) changed with the *Almelo* case. This case concerned, *inter alia*, the applicability of Article 86(2) to a scheme that prohibits a local electricity distributor from importing electricity. In this case the regional electricity distributor, IJsselmij, had prohibited the local distributor, the municipality of Almelo, from importing electricity. With regard to IJsselmij, the Court observed that it had been entrusted with the performance of a task of

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92 Ibid., opinion of A-G Rozés, at p. 581.

93 Ibid., para. 15.

94 Case C-37/92, *Criminal proceedings against José Vanacker et al.* (Vanacker), [1993] ECR I-4947.

95 Ibid., opinion of A-G Lenz, para. 40 and 41.

general economic interest (the supply of energy in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers). As a result, the Court held that 97

'Restrictions on competition from other economic operators must be allowed in so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject.' [Emphasis added]

Even though Almelo does not concern an environmental monopoly; it is very significant for the purpose of this study because the Court here explicitly takes into account environmental considerations as part of the proportionality test under Article 86(2). If, in deciding whether an electricity distribution company can rely on Article 86(2), environmental requirements play a role, then, it is submitted, such requirements should be of even greater importance in determining the proportionality in connection with an environmental monopoly. This, of course, subject to the proviso that such an environmental monopoly is considered to constitute a task of general economic importance.

Whether or not environmental services could constitute services of general economic importance within the meaning of Article 86(2) was considered in the Dusseldorp case. As was set out above, the Court considered that the Dutch government had acted contrary to Article 82 in connection with Article 86(1) by conferring the exclusive right to process certain types of waste on AVR. The Court then went on to consider whether Article 86(2) could be relied upon. 98 The Dutch government had pleaded that the exclusive right was necessary to ensure a sufficiently large flow of waste to AVR. This was considered important because the rotary furnace that AVR uses to treat the dangerous wastes apparently needs a rather specific blend of waste in order to operate effectively. Should, therefore, the amount of waste oil filters be insufficient, then AVR would have to buy a replacement fuel, which would increase its operating costs and thus jeopardise its profitability.99

The Advocate-General in the Dusseldorp case, Jacobs, considered it unnecessary to address the applicability of Article 86 in great detail. 100 As such he

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97 Ibid., para. 49.
98 Case C-203/96, Dusseldorp, [1998] ECR I-4075, para. 64.
99 Ibid., para. 66, from the report of the hearing it appears that the Netherlands government considered this issue to be unimportant as well, para. 77.
100 Ibid., opinion of A-G Jacobs, para. 98.
confined himself to indicating that in his opinion 'a waste management function might well be said to constitute a service of general economic interest'.\textsuperscript{101} Furthermore, he also considered it likely that AVR was actually 'entrusted' with the performance of this service of general economic interest. Since he considered them to be questions of a factual nature, he left the final word on this to the national judge.

Similarly, Jacobs restricts himself to indicating the basic tenor of the Court's judgments with regard to the proportionality test.\textsuperscript{102} Having repeated the Netherlands government's economic profitability argument, he concludes that it is for the government to show to the satisfaction of the national judge that there are no alternative means by which the objective cannot be achieved equally well.\textsuperscript{103}

The Court was even less forthcoming with regard to Article 86(2) when it considered that\textsuperscript{104}

'Even if AVR's task could constitute a task of general economic interest, however, it is for the Netherlands Government [...] to show to the satisfaction of the national court that that objective cannot be achieved equally well by other means.'

The Court hardly conceals its scepticism in this respect. Firstly, it doubts whether, as Jacobs called it, the waste management function could qualify as a task of general economic interest. Secondly, the Court does not leave the impression of being completely convinced by the economic profitability reasoning brought forward by the Netherlands. Apparently, the Court's scepticism was also apparent to the national judge, the Raad van State (Council of State). In a short and straightforward judgment, the Council did little more than repeating the Court's considerations in this respect only to come to the conclusion that the government had not convinced it of the necessity of the measure.\textsuperscript{105}

Quelle surprise, when the Court pronounced its judgment in the Sydhavnens Sten & Grus case. As we have seen, the differences in the Court's approach with regard to Article 86(1) and 82 can probably be explained on the basis of the different facts of the two cases.\textsuperscript{106} Probably much the same holds true with regard to the differences in the Court's approach to Article 86(2) in both cases. However, again, these differences in the facts are nowhere mentioned in the judgments themselves.

\textsuperscript{101} Ibid., opinion of A-G Jacobs, para. 103.
\textsuperscript{102} Ibid., opinion of A-G Jacobs, para. 106-108.
\textsuperscript{103} Ibid., opinion of A-G Jacobs, para. 108.
\textsuperscript{104} Ibid., para. 67.
\textsuperscript{105} Afdeling Bestuursrechtspraak Raad van State 28 January 1999 in Case No. E03.95.0106-A, AB 1999, 154.
\textsuperscript{106} And the fact that the representative of the Netherlands government apparently thought the issues concerning Article 86(2) EC of little importance.
Sydhavnens Sten & Grus' first surprise is to be found in paragraph 75 of the judgment, a consideration that merits quotation in full.

'The management of particular waste may properly be considered to be capable of forming the subject of a service of general economic interest, particularly where the service is designed to deal with an environmental problem.'

Gone is the reticence that pervades the Dusseldorp case. The Advocate-General in the Sydhavnens Sten & Grus case did not get beyond repeating the Court's considerations in the Dusseldorp case\textsuperscript{107} whilst, admittedly, adding a few critical remarks.\textsuperscript{108} The full Court (as opposed to the sixth chamber in Dusseldorp) made a 180-degree turn compared to Dusseldorp. The statement by the Court, even though it is couched in cautious terminology, is clear and straightforward: environmental management services constitute services of general economic interest. The last part of the above consideration seems somewhat nonsensical in that it is very difficult to imagine a waste management function that is not 'designed to deal with an environmental problem'. It is therefore submitted that the Court seems to have wanted to make it clear beyond doubt that it were the environmental protection requirements in this case that led the Court to this conclusion.

Sydhavnens Sten & Grus holds a second surprise when it comes to the proportionality test adopted by the Court. The exclusive rights in the Sydhavnens Sten & Grus case were granted for much the same reason as those in the Dusseldorp case: to ensure profitability or economic viability. Admittedly, the reasoning of the Danish authorities was a bit more straightforward than that employed by the Netherlands government. In Sydhavnens Sten & Grus it was simply argued that a high-capacity centre needed to be set up to ensure sufficient recycling capacity and thus a high degree of recycling. Logically, a high-capacity centre needs a large flow of waste to operate profitably.\textsuperscript{109} The Danish authorities thus avoided the somewhat strenuous reasoning employed by the Dutch government. The reasoning employed by the Netherlands government hinged on the need to buy more expensive replacement fuels. Thereby an extra element is added to establish the causal connection between the profitability on the one hand and need to ensure sufficient inflow of waste on the other hand. Thus the profitability argument of the Dutch authorities was less direct. However, the mere fact that the profitability-type of reasoning in the Dusseldorp was less direct, does not detract from the underlying logic which is that to ensure profitability it is sometimes necessary to ensure a large flow by means of an exclusive right. Indeed, the


\textsuperscript{108} Ibid., opinion of A-G Léger, para. 104.

\textsuperscript{109} Ibid., para. 78.
Court in the Sydhavnens Sten & Grus case accepted precisely this argument.\textsuperscript{110} However, as will be shown below, the profitability reasoning used in \textit{Dusseldorp} has quite a different environmental impact from that used in \textit{Sydhavnens Sten \& Grus}.

In any case should it be noted that the Court does not accept the profitability reasoning unqualifiedly. The Court clearly indicates in \textit{Sydhavnens Sten \& Grus} that it also considered it important that the exclusive right was granted only for the duration of the amortisation period of the installations.\textsuperscript{111}

How, then, are we to explain the 180 degree turn in the Court's case law that occurred in Sydhavnens Sten \& Grus? Again, it is submitted that the environmental facts of the case have been, though implicitly, decisive. In her case note on the \textit{Dusseldorp} case, Denys concludes by stating that\textsuperscript{112}

' [...] whether it is right to state that Dusseldorp has surrendered the environment to the merciless commercial logic of the internal market ultimately depends on the final word of the Raad van State [...]'

As was said above, the case was already decided when the Court gave its sceptical considerations on the applicability of Article 86(2). The Raad van State merely 'got the hints'. We may, however, wonder whether the 'merciless commercial logic' that Denys fears so in her case note is actually such a bad thing. The fact is that the processing by Factron was of at least an equally high quality and at a lower cost. In \textit{Dusseldorp}, the merciless commercial logic would rather appear to actually work in favour of environmental protection. In \textit{Sydhavnens Sten \& Grus}, the Court rightly recognised that in order to \textit{create} a market, temporary exclusive rights may be necessary. After such a market is established, the commercial logic will force the market participants to make their best effort at providing environmental services at the lowest possible price.\textsuperscript{113}

Furthermore, the different treatment of the profitability arguments brought forward in \textit{Dusseldorp} and \textit{Sydhavnens} can probably also be explained on the basis of the environmental impact.\textsuperscript{114} In \textit{Dusseldorp} the Dutch government effectively sought to attain a cross subsidisation between waste that is difficult to incinerate and waste that is highly flammable. The highly flammable oil filters that Dusseldorp wanted to export were needed in order to make the

\textsuperscript{110} \textit{Ibid.}, para. 80. See, however, for a critical view of the necessity of the exclusive rights: Van Rossem \& Vedder 2000, p. 216.

\textsuperscript{111} \textit{Ibid.}, para. 79.

\textsuperscript{112} Denys 1999, p. 30.

\textsuperscript{113} Naturally, a minimum level of environmental protection has to be ascertained but exclusive rights are not the way to do this.

\textsuperscript{114} See also Vedder 2003.
rotary furnace of AVR operate most effectively because other wastes incinerated would not burn as well thus leading to more and more dangerous incineration residues. Moreover, the oil filters were also necessary in order to ensure the profitably because primary fuels would have to be bought in the absence of oil filters for the other, less flammable wastes, to be incinerated anyway. This type of profitability reasoning can thus be called a 'cross subsidisation profitability' in that, essentially the relatively low costs of incineration of one type of waste (e.g. oil filters) are used to cross subsidise the relatively high costs of incineration of another type of waste (e.g. the no so flammable waste).

We may contrast this with the profitability that the Copenhagen municipal government sought to achieve in Sydhavnens Sten & Grus. In the case of the Grøften recycling centre, the profitability was the result of the high capacity. The sheer volume of building and construction waste handled in that centre, reduced the costs to such an extent that the initial investments could be recouped. This type of profitability argument can be characterised as an 'economies of scale profitability'.

If we compare both types of profitability reasoning from an environmental perspective it becomes clear that the cross subsidisation profitability actually leads to a distortion of the waste treatment costs to the detriment of waste that is relatively cheap to treat. In Dusseldorp, the oil filters were used to cross subsidise the incineration of dangerous wastes that were less flammable. This cross-subsidisation directly runs counter to the polluter pays principle and is for that reason already environmentally objectionable. If a given type of waste is so dangerous that incineration is the only acceptable method of disposal and this is difficult because the waste is inflammable, the disposal costs should be so high as to constitute an effective incentive to reduce the production of this type of waste. The economies of scale profitability that lay at the foundations of Sydhavnens Sten & Grus has no such environmentally unfriendly distorting effects.

Finally, in both the Dusseldorp and Sydhavnens Sten & Grus case the Court does not address the fourth element of Article 86(2) that trade must not be affected to an extent that is contrary to the Community's interests. The importance of this criterion, in general and in an environmental context, therefore remains uncertain.

In sum, Article 86(2) can now save the day for environmental monopolies. Since its effect is to basically remove such a monopoly from the scope of the Treaty provisions altogether, such companies and the governments granting them special or exclusive rights need not worry about, among others, Article 81, 82 and 87 EC. The other way around, it may be wondered what the effect on the application of Article 86(2) is if the public undertaking is environmentally unfriendly. In this respect two different cases must be discerned. The easier of the two is the case where the authorities or the public undertaking itself rely on Article 86(2) because of the environmental task of the public undertaking.
If such an 'environmental monopoly' turns out to be not so environmentally friendly, then we are likely to see a repetition of the (Court's proportionality reasoning in) the Dusseldorp case. The Court will simply not consider the disapplication of the Treaty rules to be necessary in order to ensure the environmental task. The other case is slightly more difficult and involves the situation where a public undertaking has a non-environmental task the exercise of which leads to damage to the environment. An example of such a situation would be an authority that refuses to allow a new electricity generator using a new environmentally friendly production process to become active on the market because it has granted an exclusive right to an existing producer that uses an environmentally unfriendly production method. The proportionality reasoning in the Dusseldorp case is not likely to apply simply because the privileged undertaking was not awarded that position because of environmental objectives. However, the Almelo case may be of relevance. In that case, the Court took into account, among others, the environmental obligations that an electricity-producing firm was under in assessing the proportionality of the exclusive rights. However, in cases where the privileged undertaking is not even indirectly under any environmental obligations, the situation becomes more difficult. In these cases, the wording of Article 86(2) together with the fact that it is directly effective and therefore not the sole dominion of the Commission would probably rule out a negative role for environmental concerns. If the task assigned to the privileged firm in no way encompasses any environmental aspects, than these remain outside the Article 86(2) equation altogether as the only test laid down in Article 86(2) is whether the disapplication of the Treaty rules is necessary for the fulfilment of 'the particular tasks assigned to them'. This would only be different if the (national) court, in applying Article 86(2) would consider itself to be under an obligation to integrate environmental protection requirements. Since Article 6 EC has no specific addressee and is only limited with regard to legal context, this should be possible.