The External Perspective

A Study of Environmental Protection and Competition in Germany, the United Kingdom and the Netherlands
16.1 Introductory remarks

Environmental policy, the search for new instruments of environmental policy and the lacking implementation of the polluter-pays-principle are not unique to the EC. Many if not all of the member states are themselves in some way also caught in the competition and environment conundrum. Furthermore, much of the environmental policy of the member states actually consists of the implementation of environmental Directives. Interestingly a number of these Directives explicitly allow for their implementation through environmental agreements. We have seen in chapter 9.6 above how the Packaging Directive and the German Packaging Ordinance can in many ways be said to have resulted in the DSD system. Moreover, the DSD system has not only been challenged by the Commission on Community competition law grounds, it has also been criticised on the basis of the German competition rules. A comparable situation can be seen in many other member states where the principle of producer responsibility has been put to practice as a guiding principle of environmental policy with regard to waste. DSD can therefore be seen as a competition law problem that was (partly) caused by environmental law. The question thus arising is actually twofold. Firstly, how should competition law react to such environmentally induced restrictions of competition? Secondly, how can environmental policy be changed in order to prevent such competition problems from arising in the first place? This last question is of particular interest because at the foundation of these competition problems lies not so much a legal issue but rather a missed opportunity to make use of what is probably the most efficient allocative mechanism that exists: competition.

We will thus scrutinise with the help of, primarily, the Packaging Directive and the WEEE Directive and the relevant implementing legislation of the member states, the relation between competition and environmental protection from both the environmental and the competition point of view that were identified in the introductory chapter of Part One.

Below, we will study the role that environmental considerations have played in British, German and Netherlands competition law. In particular we will first look at the regimes in place in those states as regards competition and environmental protection. Certainly, this book does not lend itself for an extensive study of the environmental and competition laws of these member states and therefore, we shall restrict ourselves to providing a succinct overview only of the relevant law and concentrating on the areas of law where competition and environmental protection meet. The stage having thus been set, we shall then investigate the relation between these two on the legislative level as well as the case law level.
The choice for these three particular jurisdictions can be explained on practical grounds and because of the purpose of this research. With regard to the practicalities of conducting comparative legal research, language is of course a major limiting factor. Furthermore, time and the pages in this book are not infinitely available. These have been the primary negative factors, i.e. factors used to exclude certain jurisdictions. On the positive side, these jurisdictions have been chosen because of their particular value for the research. In short, the British system will be studied because of the close links between the producer responsibility regime and competition law and policy. Netherlands and German competition law will be studied because they are to a varying extent based on European Community competition law, yet lack the market integration objective and an integration principle. Moreover, quite a lot of experience with the role of environmental concerns and, notably, the cartel prohibition has already been gathered in the Netherlands. Germany and the Netherlands have also been chosen because of the experiences gathered in those jurisdictions with regard to dealing with large-scale producer responsibility organisations such as those that gave rise to the DSD and Eco-Emballages cases.

16.2 Relevance

Again, we must first address the issue of comparability. As was mentioned in the introductory paragraph, the systems of competition law that will be studied in this chapter have been chosen because of their experiences in dealing with environmental concerns in cases involving large scale producer responsibility organisations. This in itself already makes them a valid choice for conducting comparative legal research with regard to both perspectives identified above, for the simple reason that there is something to compare. The comparison, however, is limited as regards both perspectives. The comparability of the national laws as far as the environmental perspective (‘to what extent have environmental legislator and decision makers taken competition into account?’) is concerned, is limited to producer responsibility legislation for the reason that this is an instrument of environmental law with regard to which the competitive mechanism is most explicitly considered to play its environmentally friendly role. In the EC the following examples of producer responsibility legislation exist: the Packaging Directive, the End-of-life-vehicles Directive (ELV Directive) and the Waste of electrical and electronical equipment Directive (WEEE

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1 Further comparative research on this subject can be found in Vedder 2002, p. 163 et seq.
2 Another example is emissions trading.
Directive). In general, these three are set up much along the same lines. They oblige member states to put into place a producer responsibility upon producers and importers of a certain type of good. The Directives then explicitly allow the member states make it possible for the producers to accept the responsibility either individually or collectively. With regard to this collective option member states are left more or less freedom to regulate the practicalities (terms of access to the system, financing etc.) themselves. In the more recent Directives (notably the WEEE Directive) the fact that these collective solutions may be at odds with the use of the competition mechanism as a means to ensure more efficient environmental protection appears to be recognised more explicitly. Indeed, as was shown in the first part, competition, through the system of producer responsibility, may prove to be a very beneficial means to ensure that environmental protection is achieved at minimum costs. At first sight it would seem that cooperation between those made responsible renders this mechanism much less effective. We will therefore closely look at the implementation of these Directives in the member states mentioned above to see if and to what extent this tension between competition and co-operation has been taken into account.

With regard to the competition perspective (‘are environmental considerations taken into account in competition law?’), comparability is limited. This is so because not every instrument of EC competition law has a counterpart on the national level. Provisions such as Article 87 EC and the useful effect rule lack national equivalents simply because they are addressed to the member states. On the other hand, a provision analogous to the second paragraph of Article 86 EC can, for example, be found in the competition law of the Netherlands. Apart from these limitation account should also be taken of the different legal settings and background in which the competition laws function. In chapter 2 of Part Two we have seen that the market integration goals that underlie the EC Treaty have played and continue to play a major role in the interpretation of Community competition law. This objective is irrelevant to the national systems of competition law. Furthermore, the fact that EC competition law has resulted in a spontaneous harmonisation of the national competition laws of the member states introduces an interesting extra dynamic in these national systems. In this respect it may, for example, be wondered to what extent certain European competition law doctrines such as the Albany exception ratione materiae should or even can be applied in a national context? On the one hand it could be argued that such doctrines should be applied by analogy precisely because the aim of the legislator was to establish and maintain parallelism between Community and national systems of competition law. On the other hand it could also be argued that since, essentially, the Albany exception is the result of and contin-

gent upon the interrelated facts that Community competition law is just one of a number of non-hierarchical policies in the Treaty and that there is a conflict between the objectives of these policies, the application by analogy of that exception in national competition laws is not called for because simply because national competition laws do not function in this non-hierarchical system. Furthermore, conflicts between the objectives of national policies and national competition laws can be resolved by other means than the \textit{praktischer konkordanz} type of reasoning that is considered to lie at the basis of the \textit{Albany} exception. In essence, therefore, the question is in how far European doctrines are \textit{communautaire} and therefore unique to European law thus making them impossible to transpose to national laws even if these laws were intended to become and remain mirror-images of Community law? This question has one quite fundamental implication for the purpose of this research that basically comes down to the question to what extent the presence of the integration principle in the EC Treaty renders the integration of environmental concerns and competition law a uniquely \textit{communautaire} thing?

It is submitted that a number of doctrines, such as the \textit{Albany} exception are indeed unique to the setting of Community competition law in the EC Treaty. Insofar it is of a \textit{communautaire} character and therefore transposition of this doctrine to the national context should not be impossible but still be subject to a thorough motivation. The integration of environmental concerns and competition law, on the contrary, is submitted to be all but unique to Community competition law. As was shown in chapter 1 of Part One, the integration principle in the EC Treaty is of itself of rather limited value because of the undefin-edness of the concept of integration. Indeed, the concept of integration could only be given a usable content with the help of the polluter pays principle and the internalisation of environmental costs and the price mechanism. These are everything but limited to Community law and can validly be applied with regard to any situation where competition laws and environmental protection requirements meet.

In sum, the relevance of the role of environmental concerns in national competition laws is limited only to the extent that certain doctrines and certain areas of Community competition law do not exist in or hardly lend themselves to transposition into national competition laws.

With the help of this background we will now turn our attention the experiences gathered in Germany, the United Kingdom and the Netherlands with regard to competition and environmental protection.
16.3 Competition and the environment in Germany

Collective agreements either among entire branches of industry (Selbstverpflichtungen) or between such branches and the government (Verträge) have existed for a long time in Germany. Moreover, several of these agreements have been concluded with regard to some environmental protection objective. Examples are the agreements for the taking back and recycling of car-wrecks, used batteries and accumulators, the reduction of carbon-dioxide emissions from cars and the taking back and recycling of packaging waste. The latter has become particularly well known and perhaps even notorious under the name DSD. Below, we will study German practice with regard to competition and the environment from the perspective of the Packaging Ordinance and the concept of product responsibility on a more abstract level. After that we will examine German competition law and its application in cases involving environmental protection.

16.3.1 The Packaging Ordinance and DSD

DSD can be said to be the direct result of the German Packaging Ordinance (Verpackungsverordnung). According to this Ordinance producers and importers of packaging are responsible for their packaging once this reaches the waste stage. The Ordinance allows for two options with regard to the actual implementation of this responsibility: setting up a so-called self-management solution and joining a collective exemption system.

The basic obligation is laid down in Section 6(i) of the Ordinance according to which:

‘Retailers are under an obligation to take back free of charge from the consumer used and emptied sales packaging at the point of sales or in the direct vicinity. The sales packaging must be forwarded for recycling. The retailer must alert the consumer to this take-back possibility. The take-back obligation is limited to sales packaging of the type, form and size that the retailer has in his assortment. Retailers that have less than 200 square meters only have to take back packaging of the brand that they carry.’

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7 The Ordinance distinguishes between: transport, secondary and sales packaging. (section 3(i)). Because the competition problems have arisen primarily with regard to the collective systems set up for the take back and recovery of sales packaging, we will not address the issues surrounding secondary and transport packaging any further.
8 Translation by the author.
The individual systems set up pursuant to this provision are referred to as: self-management systems (Selbstentsorglerlösungen). Thus, sales packaging must be taken back, free of charge, in the direct vicinity of the sales point by the retailer. The producers/importers have a similar take-back obligation vis a vis the retailer pursuant to the second paragraph of section 6 of the Ordinance. This effectively turns the basic obligation into one where the producer, distributor and retailer must take back and recover the waste packaging that was marketed by them or similar to the packaging marketed by them from every retailer or consumer. It will not take a great amount of imagination that such an obligation upon producers to take back packaging waste from every household in Germany through self-management solutions involves setting up a highly developed infrastructure and thus prohibitively high costs.

In this respect, it must be recalled that the weakest link in any take-back and recovery system is the consumer who needs to do the initial separation and the actual taking back to the shop. Whether the recovery-quota are actually met, thus depends to a large extent on the consumer. The German legislator was therefore completely right in recognising the fundamental importance of centring the system around the consumer. This only serves to reiterate the importance of a clearly communicated and uniform take-back scheme. Needless to say, a multitude of self-management solutions will most probably result in a large part of the packaging waste ending up with the household waste anyway. Additional problems arise on the side of the retailers/producers. For one, the Ordinance has implemented the consumer-friendliness in a way that can be characterised as bottom-up. The starting point is the take back obligation at the outlets. The required further infrastructure is actually the opposite (centralising to a limited number of recyclers) of that with which producers have experience (decentralising from a distribution centre to shops), therefore only increasing costs of setting up this infrastructure. Furthermore, reasons connected to hygiene strongly plead against the storing of empty sales packaging in the stores or at least mean investments in separate facilities to store this waste without any danger to new products. All of these factors result in considerable extra costs for retailers and producers.

Moreover, the bottom up nature of the system presupposes a certain degree of 'solidarity' among retailers and producers/importers as the retailers are under an obligation to take back packaging of the size, type and sort that he carries in his own assortment. This may very well mean that the retailer actually takes back packaging of another brand than the one he sells. This in turn means

9 In the terminology of the Ordinance these are called distributors (Vertreiber, Section 3(8) Packaging Ordinance)
10 Cf. with further references, Bastians 2002, p. 46.
11 See, for further references in this respect, Velté 1999, p. 79 and 94.
that the producers/importers may similarly take back packaging waste that was never actually marketed by them. This may be particularly problematic in the case of producers that have ceased to be active on the market (leading to so-called orphaned waste) but a number of other situations involving extra costs for certain producers could also be envisaged. The only way to prevent an undue allocation of these costs is through a mechanism ensuring that a producer will indeed take back and recycle the waste that was marketed by himself. Any producer not taking back and recycling sufficient amounts of waste would then have to purchase additional amounts from other producers. This, however, will require an exchange of information. Moreover, this works only if there is an obligation to take back all the waste that was marketed. All in all, the bottom up approach and resulting high costs and solidarity requirements are all arguments in favour of a collective approach to meeting the product responsibility.

This was also realised during the preparation of the Ordinance and has resulted in the possibility to be exempted from the individual product responsibility obligation by joining a collective 'exemption scheme' (Freistellungssystem). According to Section 6(3)

'The take-back and recovery obligation does not apply to producers and retailers participating in an extensive system that covers the territory of one Land and which guarantees that throughout the retailers' sales area that waste sales packaging is regularly collected from the consumer or in the vicinity of the final consumer.'

Collective exemption schemes have to meet the same recovery quota as the self-management solutions. Furthermore, collective exemption schemes must be recognised by the authorities of the länder. Finally, producers and retailers are under an obligation to make known their participation in a collective scheme. All the above factors, together with the fact that to this date only the DSD collective exemption scheme has been approved, has led to approximately 70% of all sales packaging being marked with a 'green dot'.

This explains the apparent success of the DSD scheme. What, then, explains the structure of the Ordinance that can be said to have contributed to the success of DSD? In this respect, models developed as part of the neo institu-
tional economics and political sciences may be of assistance. With regard to the interaction between two actors, essentially two behavioural options can be identified: exit and voice. Applied to the situation at hand, the two actors are on the one hand the German legislator and on the other industry. In exercising the exit option, industry members simply move to another jurisdiction in order to avoid the effects of the legislation imposed upon them. The voice-option entails an effort to influence the action by, inter alia, submitting comments during the preparatory stages of the legislative process. For economic entities, exercising this exit option generally involves less cost than it would for natural persons. However, with respect to the Packaging Ordinance, exercising the exit option is no realistic option for the industry because of the market structure and the legislation itself. As we have seen, the basic obligation is imposed upon the retailers and exercising the exit option in a large country such as Germany would involve an increase of the distance for consumers to such an extent that consumers would simply stop coming. The constituents are thus only left with the voice option. In accordance with their own (economic) interests, the German industry sought to minimise the costs arising from the producer responsibility while at the same time remaining conscious of the importance of having a 'green image'. The dynamics of the ensuing negotiations between the government and industry reflect this point of departure for industry as well as government awareness of the fact that forcing product responsibility legislation would probably mean greatly increased enforcement costs. The result of these factors was the creation, even before the entry into force of the Packaging Ordinance, of DSD.  

16.3.2 The Act Against Restrictions of Competition and environmental agreements

Above we have seen how the DSD-system was considered by the Commission to violate Article 81 EC and fell within the scope of Article 81 EC. However, apart from these encounters with European competition law, DSD has also been scrutinised on the basis of German competition law. This was done by the German Federal Competition Authority, the Bundeskartellamt, pursuant to the Act Against Restrictions of Competition (Gesetz gegen Wettbewerbsbeschränkungen; hereafter referred to as the Act or GWB). Section 1 of the Act prohibits cartels in a way that is reminiscent of Article 81(1) EC. Sections

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16 Hirschman 1970, introduces a third concept (loyalty). However, as the status of this third concept is rather controversial, cf. Dowding et al. 2000, p. 476, and it is of limited use for this study we shall not pay any further attention to it.


18 Supra, chapter 3 and 4.

19 It may be noted, however, that Section 1 applies only to horizontal restrictions of competition.
2 through to 7 contain exemptions from this prohibition. At the time when the Federal Competition Authority examined DSD, there was no applicable exemption clause. As a result DSD could therefore only be tolerated (geduldet) on the basis of the Act concerning minor administrative offences (Ordnungswidrigkeitengesetz). Partly with a view to addressing this problem, the GWB was amended in 1998. The changes introduced by this amendment, commonly referred to as the Sechste Novelle (sixth amendment) encompassed, inter alia, the introduction of a new Section 7 that was in part introduced precisely to address the problem of large-scale product responsibility organisations. This provision was very much modelled on Article 81(3) of the EC Treaty and the experiences gathered in applying this provision. The result was the introduction of a general exemption clause that was hitherto absent in enumeration-system that lies at the foundations of the GWB. According to the enumeration system the grounds for an exemption from Section 1 GWB are listed exhaustively in the Act itself. Thus, up till the sixth amendment, the Act contained no general exemption clause along the lines of Article 81(3) EC and only a Ministerial Exemption (Ministererlaubnis) on the basis of Section 8 could be used to exempt an agreement that fell within the scope of Section 1 and did not qualify for an exemption pursuant to Sections 2-7 of the GWB. By introducing a general exemption clause, the sixth amendment has to some extent changed the entire system of the GWB. Section 7(1) GWB provides:

‘Agreements and decisions which contribute to improving the development, production, distribution, procurement, taking back or disposal of goods or services while allowing consumers a fair share of the resulting benefit, may be exempted from the prohibition under Section 1 provided the improvement cannot be achieved otherwise by the participating undertakings and is of sufficient importance when compared with the restraint of competition connected with it and the restraint of competition does not result in the creation or strengthening of a dominant position.’[Emphasis added]


Transliterated from the German in Heidenhain, Satzky & Stadler 1999. The German text is: ‘Vereinbarungen und Beschlüsse, die unter angemessener Beteiligung der Verbraucher an dem entstehenden Gewinn zu einer Verbesserung der Entwicklung, Erzeugung, Verteilung, Beschaffung, Rücknahme oder Entsorgung von Waren oder Dienstleistungen beitragen können vom Verbot des § 1 freigestellt werden, wenn die Verbesserung von den beteiligten Unternehmen auf andere Weise nicht erreicht werden kann, in einem angemessenen Verhältnis zu den damit verbundenen Wettbewerbsbeschränkung steht und die Wettbewerbsbeschränkung nicht zur entstehung oder Verstärkung einer Marktbeherrschenden Stellung führt.’
The introduction of Section 7, being a major departure from the initial logic of the GWB, received considerable attention in the statement of reasons (Gesetz-esbegründung). Indeed, introducing a general exemption clause constitutes a significant departure from the enumeration system that was followed up till then and has been critically referred to as a Systembruch by the German Monopolies Commission (Monopolkommission). The importance of this change of the GWB can hardly be overstated as it fact constitutes a departure from an approach to competition law that dates back to the nineteen twenties. Furthermore, the introduction of Section 7 effectively boils down to an introduction of non-competition concerns in competition law, something that has always been regarded very critical by German competition scholars and practitioners alike. These factors were probably at the roots of a number of important differences between Article 81(3) EC and Section 7 of the GWB.

For one, the environmental advantages are explicitly mentioned and not considered to constitute ‘technical or economic progress’ through an interpretation of Article 81(3). This explicitness is only one side of the coin that is the result of the enumeration system. The other side is the fact that the environmental benefits thus referred to are construed rather narrowly and relate only to take-back and recycling systems. This reference to ‘taking back or disposal of goods’ must, according to this statement, be taken to refer to exemption systems set up pursuant to producer responsibility legislation. This brings with it an extra difficulty that follows from Section 7’s rather awkward place in the enumeration system. According to the subsidiarity clause contained in the second paragraph of Section 7, an exemption pursuant to Section 7(1) can only be granted if Sections 2 – 6 are inapplicable. Moreover, section 7 may not be used to widen the scope of Sections 2 – 6. Thus, Section 7 must be understood to allow only for an exemption of producer responsibility organisations in cases where none of the other exemption possibilities are applicable. Moreover, even within Section 7 there are potential demarcation problems. In this respect, we refer to what has been said in Part three with regard to environmental considerations and Article 81(3) EC according to which environmental improvements may also be considered to constitute technical or economic progress. In this respect

21 Monopolkommission, XII. Hauptgutachten (1996-1997), Bundestag Drucksache 13/11291, p. 60.
24 The Monopolkommission is an advisory board to the government in competition matters set up on the basis of Sections 44-47 of the GWB.
28 Bundestag Drucksache 13/9720., Begründung, 3. Teil under ee.
29 Ibid.
30 Supra, chapter 3.7.2.
it may further be recalled that Section 7 also refers to the improvement of the production or development of goods. Accordingly, environmental improvements related to the production of goods will have to be exempted on the basis of this part of Section 7 rather than under the heading of agreements contributing to the improvement of the taking back or disposal of goods. However, even then certain environmental agreements will fall outside the scope of Section 7. It is doubtful whether, for example, an agreement to reduce the energy consumption of products could qualify for an exemption pursuant to this provision.

Secondly, the partial application of the enumeration principle approach in Section 7 brings with it another interesting problem. The requirement that there must be a fair share for consumers in Section 7 corresponds literally to that in Article 81(3) EC. With regard to that requirement within the scope of Article 81(3), we have seen that it is possible to distinguish between the environmental and economic benefits that environmental co-operation may have over individual approaches to environmental problems. Moreover, we have come to the conclusion that problems vis-à-vis the possibility of an exemption ex. Article 81(3) EC are unlikely because of the collective nature of environmental benefits. This reasoning is unlikely to apply to the corresponding phrase of Section 7 precisely because of the collective nature of the environmental benefits in combination with the underlying enumeration principle. In this respect it must be pointed out that Section 8(1) of the GWB allows for an exemption by the Minister for Economic Affairs on grounds of 'prevailing reasons concerning the economy as a whole and the public interest'. The collective nature of the environmental benefits together with the fact that the enumeration principle is considered to dictate that the collective nature of environmental benefits effectively restricts their role to Section 8. This will of course not hold true for the economic benefits that will follow from the environmental improvement. Such benefits can very well be passed on to individual consumers in the form of lower costs for the take back and recycling.

A further difference compared to Article 81(3) is the inclusion of a true proportionality test (as opposed to the necessity test enshrined in Article 81(3) EC) according to which the (environmental) benefits must be directly balanced

31 Cf. Schumacher 2002, p. 126
32 Supra, chapter 3.7.3.
33 Translated from the German in Heidenhain, Satzky & Stadler 1999. The full German text of Section 8 is: 'If the conditions of Sections 2 to 7 are not satisfied, the Federal Minister of Economics may exempt agreements and decisions from the prohibition under Section 1 if, exceptionally, the restraint of competition is necessary for prevailing reasons of the economy as a whole and the public interest.' The relevant excerpt from the German text reads as follows: 'überwiegenden Gründen der Gesamtwirtschaft und des Gemeinwohls'.
with the restrictions of competition. This true proportionality test is introduced alongside the necessity test that, although using differing wording, must be considered to be transposition of the necessity test included in Article 81(3) EC.

Finally, the last part of Section 7(1) appears to transpose the residual competition test in Article 81(3). However, despite statements to the contrary by the German government, this test is widely considered among scholars to be much more restrictive than the residual competition test contained in Article 81(3). Furthermore, although it is nowhere explicitly stated in the statement of reasons, this more restrictive condition appears to be directed specifically at DSD and other large-scale producer responsibility schemes. For these schemes an exemption on the basis of this provision seems to be out of the question, as they will often entail ‘the creation or strengthening of a dominant position’.

One further interesting feature of Section 7 concerns the fact that the German government partially based the inclusion of a reference to ‘the taking back or disposal of goods’ on Article 6 EC. This reference nicely illustrates the problem of the communautaire character of certain principles that was already identified in paragraph 10.2. The reference to Article 6 EC as part of the motivation of the inclusion of a provision that mimics European law shows that principles such as the integration and polluter pays principle, even though having a European origin, can certainly play a role in the national context. They are, as was argued above, therefore not of an exclusively communautaire nature.

As far as German practice with regard to the application of the GWB to large-scale producer responsibility organisations is concerned, the DSD case is very much at the heart of the matter. Indeed, DSD more or less stood at the cradle of at least three Ph.D. theses and numerous articles. Alongside DSD, there exist large-scale product responsibility organisations for car wrecks and for old batteries while similar organisations are expected to come about for other products as well.

The mother of all product responsibility organisations, DSD, was considered by the Federal Cartel Office to violate Section 1 GWB. However, as we have seen...
above, it ended up being tolerated on the basis of the *Ordnungswidrigkeitengesetz*. This is far from a satisfactory solution because legal certainty and transparency are the clear losers in this approach. Moreover, it seems uncertain whether DSD would be able to profit from the inclusion of Section 7 as was shown above.\(^{42}\)

Scholars have argued that a Ministerial exemption pursuant to Section 8 of the GWB is probably the only possibility for a legalisation of DSD.\(^{43}\) However, no such exemption has ever come about. Moreover, it is far from certain whether such an exemption will ever materialise as Section 8 involves a balancing of the restriction of competition on the one hand with the prevailing reasons concerning the economy as a whole and the public interest on the other. Velte, however, has convincingly argued that there are no less restrictive alternatives to DSD so that an exemption seems apt.\(^{44}\)

In terms of political involvement in the process of applying and interpreting competition law, the amendment of Section 7 so as to allow for an exemption on environmental grounds, can in many ways be said to run parallel to a Ministerial exemption. For one, both solutions follow from the fact that a solution within the framework of the competition-related justifications (i.e. an application of Sections 2 – 6 before the sixth amendment) proved impossible. Secondly, both solutions require to some extent the involvement of the legislature instead of the specially appointed and independent institution, the *Bundeskartellamt*. Thirdly, neither option allows for a complete and unqualified exception from the prohibition in Section 1. On the basis of Section 10, paragraph 4, of the GWB requires either exemption to be limited in time and, generally, not exceeding five years. What ever may be of this parallelism, the fact remains that DSD is at the moment only tolerated as far as the prohibition on cartels is concerned. Moreover, the Federal Cartel Office has now shifted its attention to applying the provisions on abuse of a dominant position (Sections 19 and 20 of the GWB) to DSD.\(^{45}\) Even before this statement, attempts by DSD to expand into other areas of the packaging recycling business, through the so-called *DEGI-konzept*, have been stopped because objections voiced by the *Bundeskartellamt*.\(^{46}\) This DEGI-system would have entailed a collection and recycling scheme for transport and non-retail sales packaging set up along the lines of the DSD system.

However, is DSD actually such a disaster for competition? If we look at the external competition (i.e. third parties that would like to access the market),

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\(^{42}\) Moreover, in the one case in which Section 7 has been applied to this date, *Stellenmarkt Deutschland*, (Decision B 6 – 22131 – M – 49/99), the *Bundeskartellamt* has adopted a restrictive approach in applying a strict necessity and proportionality test.

\(^{43}\) See, with further references, Velte 1999, p. 215 et seq., Ehle 1996, p. 119 et seq.

\(^{44}\) Velte 1999, p. 222-257.


the situation created by the Packaging Ordinance and DSD is indeed less than totally satisfactory. However, competition is determined by more factors than the number of parties present on a market and the possibility of potential competition. Internally, are a number of factors that assure that competition is not distorted by DSD in the upstream or downstream market. This is assured by the fact that both these industries are represented in DSD’s governing board so as to prevent either of them from using DSD as vehicle for any rent-seeking behaviour. Such rent seeking could come from the upstream (collection and recycling industry) side in the form of excessive prices for or low quality of their services. Rent seeking by the downstream (the producers made responsible) side could take the form of unduly low prices for collection and recovery services. In either case, the wishes of one side would be antagonistic to those of the other side and thus could not be realised through DSD. As a result, DSD is unlikely to behave in a manner that will be to the detriment of consumers or the recycling market in general.

As product responsibility has also been enacted with regard to other types of waste than packaging waste, product responsibility organisations have also come about. With regard to spent batteries and accumulators, the industry concerned has set up the GRS, Gemeinsame Rücknahmesystem Batterien (Common Take back system for batteries). This system functions within the framework of the Battery Ordinance that implements the Directive on batteries and accumulators. Pursuant to this Ordinance, producers and importers of batteries can only market their products when they provide for a possibility for the consumer to return spent batteries in accordance with the Ordinance. As could be expected, the Ordinance provides for a collective as well as an individual solution for the take back and recycling obligation. Interestingly, the basic obligation is one to either set up or join a collective recycling and take-back scheme on the basis of Section 4(2) of the Ordinance whereas Section 4(3) allows for an individual system (Selbstentsorgung, Selfdisposal) as an alternative method of meeting the take back and recycling obligation. Manufacturers opting for the selfdisposal method may contract third parties to do the actual taking back and recycling.

48 See website for further information: http://www.grs-batterien.de.
49 Verordnung über die Rücknahme und Entsorgung gebrauchter Batterien und Akkumulatoren (Ordinance on the take back and disposal of used batteries and accumulators), BGBl. I 2001, p. 1486.
51 Section 3 of the Battery Ordinance.
52 The wording of Section 4(3) indicates this alternative character: ‘Paragraph 2 (i.e. the obligation to set up or join a collective system, HV) does not apply insofar as the producer is able to show that he has set up his own take back system for the batteries marketed by him’. Translated from ‘Absatz 2 Satz 1 gilt nicht, sofern ein Hersteller (...) nachweist, dass er ein eigenes Rucknahmesystem für die von ihm in Verkehr gebachten Batterien eingerichtet hat.’
This legal framework has led to the foundation of the GRS whose members represent approximately 80% of the batteries imported into or manufactured in Germany. The remaining 20% are taken back through an individual system. Concerning the report of the Federal Cartel Office over 1999/2000, the German government has expressed its contentment over the fact that the Battery Ordinance has resulted in a certain degree of competition on the market for the take back and recycling of waste accumulators. In this respect, it considered the possibility of selfdisposal (carried out by third parties) to be of considerable importance.\(^3\) However, the framework of the Battery Ordinance is also considered to distort competition in that a number of these selfdisposers are in actual fact taking back, through a third party, spent batteries that were taken back by way of the municipal waste collection system. In that way they do not face the extra costs of setting up and running their own collective take back and recycling system and thus are able to achieve return quota that are 2.5 times higher at nearly identical costs to that of the GRS.\(^4\) Apparently, the Environment Ministry has sought to amend the Battery Ordinance in order to neutralise this distortion of competition. However, these attempts met with objections from the Bundeskartellamt. Moreover, the Bundeskartellamt noted in its report over 1999/2000 that GRS had approached a number of private and municipal companies and implicitly required them to hand over any collected batteries to it because handing them over to a third party would be illegal.\(^5\)

With regard to electronics waste, the WEEE Directive must be implemented in Germany as well. As will be seen below, when we examine the experiences in the Netherlands with regard to product responsibility for WEEE, it is likely that a collective product responsibility organisation will be the result.\(^6\) Moreover, as part of what can probably be called a pre-emptive strike, the Federal Cartel Office has already prohibited DSD from becoming active on the market for the take back and recycling of WEEE.\(^7\)

Finally, the End-of-life-vehicles Directive\(^8\) has been implemented in Germany through the Altfahrzeug-Gesetz that amends the Altauto-Verordnung and renames it to Altfahrzeug-Verordnung.\(^9\) Under this Ordinance, importers and producers are under an obligation to take back, free of charge, the end-of-life vehicles of their own brand only.\(^6\) This take-back obligation is further substanti-

\(^{53}\) Bundeskartellamt, Tätigkeitsbericht 1999/2000, Bundestag Drucksache 14/6300, p. V.
\(^{54}\) Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit 2001, p. 2.
\(^{56}\) Infra, para. 10.5.1.
\(^{57}\) Ibid, p. 178.
\(^{59}\) Gesetz über die Entsorgung von Altfahrzeugen, BGBl. 1 2002, p. 2199.
\(^{60}\) Altfahrzeug-Verordnung (as amended by the Altfahrzeug-Gesetz), Section 3(1).
ated in Section 3(3) of the Ordinance where producers are obliged to collectively or individually set up a take back infrastructure. Moreover, they may decide to conclude contracts with third parties to meet these obligations. Whatever solution is adopted, the distance between the place of residence and the take back location may not be more than 50 kilometres. The result of this product responsibility has been the creation of Arge-Altauto. This organisation was set up by the industry through a so-called voluntary pledge (Freiwillige Sebstverpflichtung) and represents the overwhelming majority of the industry.\(^61\) Much attention has been devoted to the financing of this product responsibility. In this respect, it must be pointed out that the product responsibility also covers the historical waste. However, since the product responsibility and thus the financial responsibility relates only to the producers own brand, solidarity related problems are not to be expected. Indeed, collective fund solutions – which are quite common in the Netherlands\(^62\) – have not been adopted in Germany.\(^63\) In the end, the Bundeskartellamt has exempted the voluntary pledge, albeit after some amendments to the agreement, on the basis of Section 2 of the GWB.\(^64\) Section 2 allows for an exemption of so-called conditions-cartels that prescribe uniform conditions of trade provided that they do not concern prices.\(^65\)

All in all, the competition controversy surrounding the collective solutions set up pursuant to the Battery and Packaging Ordinances seems to boil down to a cherry-picking problem in that, with regard to spent Batteries, the co-operating self-disposers are skimming the cream of the cake after which GRS is left with the uninteresting bits.\(^66\) DSD's competition problems can similarly be said to be the result of its wish to prevent cherry picking as well as free riding. These two problems, cherry picking and free riding, are symptomatic of the situation that results from the introduction of competition in sectors that were up till then considered to be the domain of public undertakings such as waste collection and disposal.

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\(^61\) Cf. website of Arge-Altauto: http://www.arge-altauto.de/.

\(^62\) Cf. Onida 2000, p. 283 et seq., who considers the Netherlands – as he calls it – 'scrap fee'-model as a viable financing method throughout Europe.

\(^63\) *Ibid.*, under ‘forum’ (30-7-2002). See, furthermore, the statement of reasons (Begründung) by the German government with regard to the Altfahrzeug-Gesetz (can be downloaded from the website of the German Federal Ministry for the Environment: http://www.bmu.de), p. 14.


\(^65\) See further: Immenga & Mestmäcker 2001, p. 220 et seq.

\(^66\) Cf. Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit 2001, p. 2 where this is referred to as ‘Rosinenpickerei’.
16.4 Competition and the environment in the United Kingdom

In the UK the principle of producer responsibility has been implemented or is considered for a number of sectors. One of the most interesting applications of the producer responsibility has taken place with regard to packaging waste. In the United Kingdom, the Packaging Directive was implemented through the Producer Responsibility Obligations (Packaging Waste) Regulations 1997. These Regulations have been adopted by the Secretary of State for the Environment pursuant to the Environment Act 1995. As the name already indicates, these Regulations enact a producer responsibility for packaging waste. The Regulations apply only to businesses that handle more than 50,000 kilograms of packaging materials and have a turnover of more than GBP 1,000,000. These undertakings are referred to as so-called obligated companies. The actual producer responsibility takes the form of percentages of the amount of packaging material handled in the preceding year that must be recovered and recycled. These percentages depend on the involvement in the packaging industry (raw material manufacturing 6%, converting raw materials into packaging 9%, filling/packing 37% and selling 48%). Because of this it is also referred to as a shared responsibility.

The obligated companies have two options through which they can fulfil the producer responsibility. They can choose an individual solution or they may choose to join a collective compliance scheme. Just as in other cases where a producer responsibility has been enacted, joining a collective scheme has proven to be the most popular method of meeting the producer responsibility. However, where the choice between the individual and collective solution has in other member states resulted in the creation of large-scale monopolistic systems, it has resulted in the coming about of a flourishing market in the UK. Indeed, there exist 19 such collective schemes at the moment. These vary from nationwide multi-sectoral schemes to regional and single sector schemes. Interestingly, such collective schemes have to meet a 'competition scrutiny' on the basis of the Regulations.

From a competition-and-the-environment-perspective essentially two interesting points may be discerned. Firstly, there is the question why the market for recovery and recycling of packaging in the UK can be described as

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67 SI 1997, 648, amended since. Hereafter referred to as 'the Regulations'.
68 Section 93(1) of the Environment Act 1995.
69 Such as, for example, Valpak and Wastepak that operate through the UK and cover all sorts of packaging material.
70 Such as Pennine Pack that operates in areas of Calderdale and Kirklees in West Yorkshire.
71 An example of this category is the Difpak scheme set up by the dairy industry and will cover only the packaging used by that industry.
flourishing and competitive whereas other producer responsibility laws have resulted in monopolistic systems. Secondly, there is the ‘competition scrutiny’ according to which there is an *ex ante* appreciation of the competitive impact of a collective scheme. Both points will be further investigated below.

16.4.1 The creation of a market for the recovery and recycling of packaging waste

What exactly lies at the basis of this stunning difference between producer responsibility regimes on the continent and the one implemented with regard to packaging waste in the UK? In a nutshell it all boils down to the difference between, on the one hand, a product responsibility and, on the other, a true producer responsibility. It can be said that the German Packaging Ordinance establishes something that must actually be characterised as a *product* responsibility rather than a producer responsibility. As could be seen above, the basic obligation is primarily attached to the products marketed and not so much to any entity that is made responsible. This was characterised as the bottom up approach as the point where the consumer feeds the waste into the system functions as point of departure. The products thus fed into the system must be taken back and be recycled.

The Regulations, however, impose upon the producers an obligation to take back a portion of waste expressed as a percentage of the amount of that substance handled by a company during the preceding year. Furthermore, the take-back obligation is not material-specific (e.g. an obligated producer using glass packaging can fulfil the take-back obligation by taking back paper) whereas the recycling obligation is material specific. Proof of having met these obligations can take either of two forms: firstly, by providing ‘documentary evidence’ or, secondly, with the help of so-called Packaging Recovery Notes or — in short — PRNs. These PRNs are certificates that are sold by the companies that perform the actual recycling and represent a certain amount of packaging waste that has been recycled. Although the normal situation will be that the PRNs are handed over to the company supplying the waste, there is no obligation to do so, leaving the PRNs freely tradable. As the documentary evidence option involves considerable costs, most companies have embraced the PRN option. Indeed, the existence of these PRNs, can be said to have greatly aided the creation of the market for take-back and recycling services by turning these services into a tradable commodity. The obligated companies can thus freely purchase whatever recycling services they need in order to meet the targets imposed by the Regula-

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74 It may be added that there is actually an on-line exchange for these PRNs.
tions. All in all the Regulations lay down a true producer responsibility or, in other words, have taken a top down approach to producer responsibility. In this approach the point of departure is the producer who has to meet certain goals as he sees fit. In market terms this means that demand was created for the (new) collection and recycling services. This demand was met by a number of parties offering such services thus creating a market. This is not to say that there were never or are no longer any fears surrounding competition in the British market for packaging waste recycling services.  

16.4.2 Competition scrutiny

As could already be seen in Part Two, many collective producer responsibility schemes actually operate as a ‘spider in the web’, bringing together the producers that have been made responsible, transporters, collectors and companies offering recovery and recycling services. As a result, competition concerns relate primarily to foreclosure effects stemming from the vertical relations and the need to prevent the coming about of large-scale organisations. The approach to such competition concerns is, as we have seen above, to a large extent *ex post* in that competition problems first have to actually arise before the competition authorities enter into the picture. The Commission’s Article 82 EC case against DSD is in many respects symptomatic for this *ex post* approach.

This situation may be contrasted with that in the UK following the Regulations. During the preparatory phase of the Regulations it was envisaged that all sorts of contacts concluded as part of the operation of a collective scheme could be subject to the Restrictive Trade Practices Act 1976. The resulting essentially *ex ante* control was considered inappropriate and inefficient replaced by an *ex ante* review of the competition effects pursuant to Regulation 31. This Regulation, insofar as relevant, reads as follows:

'[*T*he requirements of competition scrutiny in relation to a scheme are that](a) the scheme does not have, and is not likely to have, the effect of restricting, distorting or preventing competition or, where it appears to the Secretary of State that the scheme has or is likely to have any such effect, the effect is or is likely to be no greater than is necessary for achieving the environmental or economic benefits mentioned in section 93(6) of the Act; and  

(b) the scheme does not lead, and is not likely to lead, to an abuse of market power.'  

75 Moreover, and more importantly, this does not include any judgment on the environmental effectiveness of the British solution.  
76 Now replaced by the Competition Act 1998.  

In practice, a scheme must apply to the Director General of Fair Trading who gives advice to the Secretary of State for the Environment with regard to the competition scrutiny. In the end, the Secretary of State decides on the basis of the Director General’s advice. To this day the Director General has conducted a competition scrutiny in relation to 19 schemes. Of these 19 schemes, only one scheme, *Glaspak*, was considered not to meet the requirements of the competition scrutiny.77 *Glaspak* was set up by the British glass container industry and centres around Glasmol, a company set up to function as a ‘spider in the web’, and five glass reprocessing companies that represent approximately 95% of the market for reprocessing glass. As part of the Glaspak scheme, these five companies will pass on all the PRNs that they generate on to Glasmol free of charge. Glasmol will, in turn, sell the PRNs, at a fixed price, to third parties. These third parties will primarily be those parties that need glass-recycling PRNs so that only the remaining PRNs will be sold as non-specific recovery PRNs.

As could be expected, *Glaspak* met with concerns pursuant to Regulation 31(i)(b).78 Firstly, the five reprocessing companies would form a buyer’s cartel on the market for the purchase of glass cullet (glass that has already been recovered but still needs to recycled). The market position of this buyer’s cartel will certainly enable abuse of the collective dominant position. Secondly, the obligation on the five reprocessing companies to pass all their PRNs on to Glasmol will confer upon the latter a dominant position on the market for the sale of glass PRNs. As the wording of Regulation 31(i)(b) already shows there is no possibility to justify an abuse of a dominant position. However, *ex abundancia cautela*, the Director General addresses the arguments forwarded by Glaspak with respect to the environmental and economic benefits of the scheme within the meaning of Regulation 31(i)(a).79 In this respect, the Director General considers that only one of the five arguments brought forward by Glaspak cuts ice. This argument addresses the weakest link of any producer responsibility scheme, namely consumer participation. According to the parties, consumers need to be educated in order to ascertain that larger amounts of glass are returned to bottle banks. In this regard, Glaspak argues that free-rider problems will effectively prevent this education from coming about.80 Assuming that increasing the amount of collected glass from the public can be done most effectively through public bottle banks, the Director General accepts that a co-ordinated effort with regard to publicity and education will increase the environmental as well as economic benefits of the scheme. However, as the wording of Regulation 31(i)(a) shows, it must be shown that the restrictions of competition do not go beyond

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78 Ibid., para. 6.5 et seq.
79 Ibid., para. 6.26 et seq.
80 Ibid., para. 6.49 et seq.
what is necessary to bring about these benefits. In this respect, the Director General is of the opinion that the co-ordinated approach to publicity and education could just as well be achieved without the restrictions of competition that were identified on the market for the purchase of cullet and that for the sale of PRNs.\textsuperscript{81} Again, we see that foreclosure-type problems are at the heart of the matter.

On a more general level, two interesting observations may be made with regard to the competition scrutiny mechanism. Firstly, the fact that environmental legislation encompasses such a test that can result in the non-application of the competition rules. This is proof of a much more conscious attitude towards producer responsibility than the one adopted on the continent that essentially comes down to a ‘wait and see’-approach.\textsuperscript{82} Secondly, there is the content of the competition scrutiny. The first paragraph, under (a), of Regulation 31 explicitly recognises the possibility to offset restrictions of competition with environmental and economic benefits in the case of environmental agreements. No such mechanism is present with regard to an abuse of a dominant position (Regulation 31(r)(b)) as it is impossible to justify an abuse.

The direct balancing of environmental with competition concerns as part of the Regulations may be compared with the appraisal on the basis of Section 7 of the German GWB.\textsuperscript{83} A first similarity stems from the fact that both are according to their wording and context specifically geared to the competition problems arising in connection with producer responsibility organisations. Furthermore, both envisage an explicit balancing of environmental (and economic) benefits on the one hand with the restriction of competition on the other. However, Section 7 and Regulation 31 are different with regard to the type of balancing act that is to be conducted. In the case of the competition scrutiny pursuant to Regulation 31, the restriction of competition must be necessary for the attainment of the environmental and economic benefits. Thus competition and environmental protection are placed on the same level when they are weighed. Section 7 of the GWB, on the contrary, encompasses both a necessity test where the restriction of competition is balanced with the economic and environmental benefits that flow from taking back and disposing goods as well as a true proportionality test. In the latter test, the level of environmental protection sought is also subject to scrutiny on the basis of its impact on competition. The inclusion of a proportionality test effectively places the maintenance of competition above the environmental and economic benefits arising from collective take-back and recycling schemes.

\textsuperscript{81} \textit{Ibid.}, para. 6.55 et seq.

\textsuperscript{82} Although, as will be seen below, the Netherlands have introduced a sort of \textit{ex ante} competition review mechanism.

\textsuperscript{83} \textit{Supra}, paragraph 10.3.2.
16.5 Competition and the environment in the Netherlands

Producer responsibility has been a mainstay of Netherlands environmental law with regard to waste for a long time. On the basis of the Environmental Management Act (Wet milieubeheer), which functions as the framework Act for environmental protection legislation, secondary legislation may be adopted in the interest of waste reduction. Pursuant to this Act a number of Orders in Council (Algemene maatregel van bestuur) have been adopted. These may lay down producer responsibilities for certain categories of products. Interestingly, no such legislation exists for a number of areas because the relevant industry has been able to prevent the enactment of such legislation by accepting producer responsibility ‘voluntarily’. However, the degree of voluntariness in such producer responsibility schemes can be doubted given that they are in many cases actually the result of the threat of legislative activity.

Below, we will start with a short description of producer responsibility in the Netherlands. After that we will look at the relation between environmental protection and competition law in general. Finally, we concentrate on an aspect of the Dutch approach to producer responsibility that is rather controversial from a competition point of view: the removal or disposal fee (verwijderingsbijdrage) or – as it is now called – waste management fee (afvalbeheersbijdrage). We will first describe this removal fee in general and after that move on to the competition aspects of this fee.

16.5.1 Producer responsibility in the Netherlands

Interestingly, producer responsibility, whether imposed or accepted voluntarily, has without exception resulted in large-scale producer responsibility organisations. With regard to packaging waste, the industry concerned has concluded an environmental agreement, the Environmental Agreement on Packaging II (Convenant verpakkingen II). With regard to, for example, car wrecks, batteries and accumulators, PVC pipes and waste electrical and...
electronical equipment, the industry have similarly accepted producer responsibility collectively.

If we take the interim conclusion reached above in paragraph 10.4.1 then this should not come as a surprise since the legislation in fact establishes a product responsibility rather than a true producer responsibility. Pursuant to, for example, the Disposal of Batteries Order (*Besluit verwijdering batterijen*) or the White and Brown Goods Order (*Besluit verwijdering wit- en bruingoed*) producers are basically responsible for collecting and recycling the products that they have brought on the market. The actual collection takes place as follows. If we take the example of the White and Brown Goods Order, retailers are under an obligation to take back at least free of charge all waste products from consumers that buy a replacement new product ('old for new') irrespective of the brand. The retailers can then pass the products on upstream to the producers or importers. The economies of scale that can be achieved by co-operating again effectively rule out recourse to an individual system. Moreover, the old for new-rule introduces an element of solidarity into the system that only reinforces the incentives to collectively accept producer responsibility. Indeed, with regard to the White and Brown Goods Order, the Minister for the Environment has stated in letter to the Parliament 'co-operation cannot be prescribed by law but the Order contains many incentives for a collective approach'.

Thus, as could be expected, the overwhelming majority of the industry concerned decided to accept the product responsibility collectively. Essentially, the Orders allow for two different ways in which producer responsibility can be collectively accepted. Firstly, producers may collectively notify their system and secondly, they may decide to conclude an environmental covenant. Because the collective notification is subject to less procedural requirements than the covenant, the White and Brown Goods Order and Batteries Order have both resulted in a collective notification. The Minister for the Environment must

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92 Two organisations: the *Stichting Witgoed* (White goods foundation) and *Stichting Bruingoed* (Brown goods foundation), hereafter the Foundations, have been set up. The scheme is managed by the *Nederlandse Vereniging Verwijdering Metaelektro Produkten* (NVMP), and will hereafter be referred to as *Wit-en Bruingoed*.


95 The collective acceptance through a covenant is explicitly made subject to extra constraints because of extra competition implications, see further: Guidelines for the White and Brown Goods Order (Environment Ministry, 14 July 1998) Chapter 2, p. 5.

96 With regard to electronic and electrical waste the White and Brown Goods Foundations were set up whereas the Stibat organisation administers the collective scheme set up pursuant to the Disposal of Batteries Order.
then approve such a notification before the underlying individual responsibility disappears.

The fact that industry has responded collectively to producer responsibility is in itself not that surprising or interesting and merely confirms the interim conclusion that a product rather than producer responsibility will result in a collective acceptance of the responsibility. What is interesting and of particular relevance to this research is the fact that these collective notifications envisage that the collection and recovery costs are financed through a so-called removal fee. This removal fee would thus have to compensate the so-called chain deficit. This chain deficit consists of the income from the recycling activities with the costs for collection and recycling deducted. Put differently, the removal fee quantifies and internalises the environmental costs associated with the waste stage of production and consumption. In many of the cases involving collective product responsibility organisations that have been scrutinised on the grounds of Netherlands competition law, the removal fee has played a pivotal role. This is so because the whole idea behind the removal fee, as will be shown below, is to make the environmental costs arising from the product responsibility more transparent. From a competition point of view this increased transparency with regard to costs, together with the horizontal character of the product responsibility organisation, comes dangerously close to horizontal price fixing.

16.5.2 Environmental concerns and competition law in the Netherlands

As may be inferred from the above outline of environmental agreements and collective notifications, the authority responsible for the enforcement of competition law in the Netherlands, The Netherlands Competition authority (Nederlandse Mededingingsautoriteit, NMa) has been quite busy applying competition law to cases that involve environmental concerns. To this date, it has ruled on seven such collective schemes.\(^97\)

However, before we move on to examine these decisions we shall first look at Netherlands competition law in general and notably the provisions that

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\(^97\) There can be said to be an internalisation because the costs are as a consequence being paid by an actor in the production and consumption process.

\(^98\) NMa Decision of 23 July 1999 in Case 12, FKS, Decision of 18 December 1998 and 31 May 1999 in Case 51, Stibat (Decision in first instance as well as Decision following administrative appeal), Decision of 5 April 2000 in Case 115, ARN, Decision of 30 September 1998 in Case 139, SPRN (Stichting Papier Recycling Nederland, Foundation Paper Recycling Netherlands), Decision of 18 April 2001 in Case 1153, Wit-en Bruinoged, Decision in Case 1982 VKG (Stichting Recycling VKG, Foundation Recycling Plastic Façade Cladding) (has not been officially published) and Decision of 22 October 2001 in Case 2026, ARN II.
concern the role of environmental protection requirements in it. Firstly, it may be observed that the Competition Act (Mededingingswet) is fairly recent and very much based on European Community competition law.²⁹ Perhaps as a result of its predecessor, the Act on Economic Competition (Wet economische mededinging), which was generally considered to be much more corporatist, a number of concerns were voiced during the parliamentary debates with regard to the Competition Act. Most of these concerned the fear that 'non-economic' objectives would be – to put it dramatically – completely overrun once unrestrained competition would be unleashed in the Netherlands. These concerns were voiced most fervently in connection with the services of general interest and the cartel prohibition. As the rule enshrined in Article 86(2) EC was transposed into the Competition Act by analogy,¹⁰¹ concerns centred primarily on the implications of the cartel prohibition for all sorts of agreements that were concluded for the furtherance of so-called non-economic objectives. Environmental agreements featured prominently in these fears.¹⁰² Such agreements, if they restrict competition, fall within the scope of Section 6 of the Competition act. This provision closely mirrors Article 81(1) EC. Apart from the possibility of the agreement being considered de minimis¹⁰³ or the applicability of Sections 11 or 16, the only option is an exemption pursuant to Section 17 of the Competition Act. Section 11 of the Competition Act transposes Article 86(2) EC by analogy in the specific context of agreements.¹⁰⁴ Section 16 of the Competition act provides for a non-applicability of the Competition Act to agreements that are subject to supervision on the basis of other legislation. This provision thus applies only in cases of a conflict of supervision between the NMa on the one hand and another authority on the other hand. We will address both provisions in greater detail further below.

Section 17 reflects Article 81(3) EC and contains broadly the same four criteria for an exemption subject to a notification requirement. With regard to the so-called non-economic considerations, the Minister of Economic Affairs stated that since such considerations played a role in the Commission's exemptions, such considerations would play a similar role in the practice pursuant to the new Section 17.¹⁰⁵ However, as parliament feared that the role of environmental concerns in the exemption clause in Section 17 of the Act might prove to be

¹⁰¹ In the form of Sections 11 and 25 of the Competition Act.
¹⁰² Cf. The Advice of the Council of State (Advies van de Raad van State) and the reaction by the Minister, TK 1995-1996, 24 707 A, p. 8, 9. Cultural considerations (fixed book prices) were a good runner-up.
¹⁰³ Either on the basis of Section 7 of the Competition act, that contains an explicit quantitative appreciabili-
insufficient, it proposed an amendment. According to this amendment environmental concerns would be explicitly mentioned in Section 17 as a ground that could justify an exemption instead of ‘just taking them into account’ in granting such an exemption. This was considered to be too grave a departure from the European roots of the Competition Act and therefore unacceptable for the government. Instead, the government proposed to introduce the possibility for the Minister of Economic Affairs to give directions (aanwijzingen) to the authority responsible for the application of the Competition act. This proved acceptable for the MP’s that tabled the amendment and thus the amendment was withdrawn and the Section 4 of the Competition Act was changed to read as follows:

1) Our Minister shall lay down in policy rules general instructions issued to the director general, regarding the performance of the tasks assigned to the director general by this Act

2) General instructions within the meaning of the first paragraph may relate to how the director general should take into account non-economic considerations in his decisions pursuant to Section 17 of this Act.

Section 4, however, has remained unused. Indeed, already during the parliamentary debates, the Minister indicated that Section 4 should and would be used only with the utmost reluctance. Effectively, therefore, the role that non-economic considerations have played and continue to play in Netherlands competition law is up the Netherlands competition authority. The authority, as was mentioned above, has taken a number of decisions with regard to collective product responsibility organisations and thus created a consistent policy with regard to the role of environmental concerns and competition law. Essentially two types of environmental agreements can be discerned: those that involve a co-ordination of the behaviour of the parties with regard to the costs of the environmental protection in the form of an agreement involving removal fees and those that do not involve such co-ordination.

With regard to the latter, the concerns from the competition perspective are identical to those that we have already identified with regard to EC competition law in Part Two. For example, the ADMES case concerned an agreement between a number of companies (members) that produce waste by which they set up ADMES to advise them with regard to waste collection and treatment. The NMa characterised ADMES as a joint purchasing agreement for waste collection

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105 Amendment nr. 29 (proposed by De Jong and Van der Ploeg), TK 1995-1996, 24 707 nr. 29.
107 These companies are active in markets such as retail (supermarkets, shoes, clothing), shopping centres and wholesale trade.
and treatment services. In accordance with the well-established practice of the Commission the NMa first investigated whether competition problems could be expected on the markets on which the members are active as sellers. This was considered unlikely because of the only minimal overlap between the members' markets, the minor importance of ADMES' activities compared to the members' main activities. Secondly, the NMa checked for restrictions on the market on which ADMES itself (i.e. the market for the purchase of waste collection and treatment services) is active. Because ADMES' market share was only minute (0.3%) and its members were free to buy their waste management services from other parties than ADMES, competition problems were considered improbable on this market as well.

Another case concerned the requirements imposed upon packaging by the Association of Flower Auctions in the Netherlands (Vereniging van Bloemenveiligen in Nederland, VBN). Most of these requirements were considered not to restrict competition in the first place and therefore fell outside Section 6 of the Act, as they were inherent in the logistics of the auctioning process. However, the requirement that the packaging be compatible with the waste policy of the VBN was clearly not inherent in the logistics and therefore did restrict competition within the meaning of Section 6. However, the NMa granted an exemption pursuant to Section 17. More precisely, the NMa considered that the requirement

"improved technical progress because it encouraged the reuse of packaging material and reduces the environmental impact."

Furthermore, the authority concluded that on the longer term cost reductions could be achieved. With regard to the second requirement for an exemption, the NMa considered that consumers would receive a fair share because of two reasons. On the one hand because a more sustainable economic development is promoted; on the other hand because consumers will profit from the long-term cost-reductions. The Authority considered the necessity requirement fulfilled because several suppliers would otherwise need to take into account differing requirements in this respect imposed by the individual auctions to which they deliver their goods. Finally, the NMa held that competition was not eliminated

109 Decision of 9 July 1999 in Case 492, VBN.
110 Ibid., para. 71.
111 Ibid., para. 72.
112 Ibid., para. 73. This application of the necessity test addresses only the question of the necessity of the action at the VBN level, not the necessity, in view of the environmental objectives, of the action (imposing environmental requirements upon the packaging) itself.
because 'packaging suppliers can take the requirements into account in choosing the materials'..

Apart from the minor criticisms made above, the outcome of the VBN case is to be applauded because it shows that an exemption on primarily environmental grounds is possible. The wording used by the NMa – 'Certainly on the longer term cost reductions are also possible because of [the increased reuse]' – clearly indicates that this exemption was first and foremost the result of the environmental benefits of the co-operation. In its decision upon administrative appeal in the VBN case, the NMa appeared to be backtracking from this initial pro-environmental stance. Possibly as an obiter dictum, the NMa considered that VBN had demonstrated that the backgrounds of the requirements with regard to the waste policy were of a primarily economic nature. In another case, the NMa explicitly stated that

'Environmental improvements do not in any case constitute of themselves advantages within the meaning of Section 17 that can warrant an exemption'.

It must be pointed out that the environmental benefits that were brought to the fore in this case can hardly be called convincing. Nevertheless, the firmness of the wording used by the NMa together with the fact that this consideration has been repeated in other cases appears to indicate that environmental improvements can only justify an exemption together with economic advantages.

A further case that deserves mention in this paragraph is FKS. This case involved the notification of an agreement between the six major manufacturers

113 Ibid., para. 73. This rather cryptic consideration appears to ignore the fact that the requirements will have a pervasive influence on the market for packaging for flowers destined for auctioning in the Netherlands because over 80% of the production enters the market through VBN-members. Moreover, the VBN has in practice implemented this requirement with regard to one way packaging so that only one type of material can be used, see Decision of 18 September 2000 upon administrative appeal in Case 492, VBN, paras. 22, 32.

114 Translated from 'Zeker op de langere termijn kunnen daardoor [de bevordering van hergebruik] ook kostenbesparingen worden gerealiseerd [emphasis added]'.

115 See, however, Van der Meulen 2000, at p. 198, who considers that the wording of the decision does not allow for this conclusion.

116 Decision of 18 September 2000 upon administrative appeal in Case 492, para. 54.

117 Translated from: 'Milieuvoordeelen zijn in elk geval als zodanig geen voordeelen in de zin van artikel 17 Mw, die een ontheffing kunnen legitimeren', Decision of 23 February 2000 upon administrative appeal in Case 228, VEBIDAK, para. 47.

118 Ibid., footnote 3. However, the NMa, contrary to what footnote 3 in the decision suggests, did not consider this in Stibat (infra, paragraph 10.5.2).

119 Decision of 23 July 1999 in Case 12, FKS.
of plastic pipes in the Netherlands laying down a voluntary\textsuperscript{120} product responsibility for plastic pipes. Such pipes are primarily made of PVC and thus constitute a serious environmental hazard when incinerated. Waste of such pipes is generated during the construction or demolition of buildings. Particularly in the latter case it is nearly impossible to discern the producer.\textsuperscript{121} To increase the collection and recycling quota, it was decided to make the system as user friendly as possible. This resulted in two collection routes. Firstly, the demolition firms or contractors may bring the waste to any of the FKS-collection points. These collection points – the branch offices of the FKS-members – are under an obligation to take back all plastic pipe waste free of charge. Secondly, the demolition firms and contractors may rent – at their own expense – a dedicated container to put on the building or demolition site. In this case, they receive an encouragement premium of \(€0.0454\) per kilogram as an incentive to encourage collection. The collected waste, though taken back irrespective of the brand, is divided among the FKS members in accordance with their market shares in 1989.\textsuperscript{122} The plastic pipe waste thus collected and divided must then be reprocessed by the FKS members. The waste is first regranulated (ground) and then made into new plastic pipes using so-called three-layer co-extrusion technique of the regranulated waste.

The Competition authority thus identified three restrictions of competition. Firstly, the FKS members have divided among themselves the collected plastic pipe waste. Secondly, the FKS members effectively fixed the price that they charge for the use of their system.\textsuperscript{123} Thirdly, the FKS members have limited the reprocessing methods of the waste pipes to the three-layer co-extrusion method to make new pipes.

Since the FKS system falls within the scope of Section 6 of the Competition Act, the NMa went on to consider whether an exemption could be granted on the basis of Section 17. According to the NMa the first requirement was met because using the regranulated waste to make pipes means that less virgin material is used. Additionally, the NMa continued, the environmental effects of the incineration of plastic pipe waste are reduced because less pipes are incinerated while at the same time there are cost savings because there is less dangerous waste that would otherwise result from the incineration.\textsuperscript{124} Furthermore, the Authority considered that the common collection system and ensuing division brought

\begin{itemize}
  \item[120] In this case, the manufacturers sought to avoid legislative action. \textit{cf. ibid.}, para. 15.
  \item[121] Such pipes may have been encased in the building for over 20 years or so and will not be removed unscathed.
  \item[122] These market shares have been established in a confidential manner.
  \item[123] In the form of a zero-price (in case of delivery of the waste to the FKS collection points) or a negative price (the premium per kilogram of collected waste in case a container is used).
  \item[124] Decision of 23 July 1999 in Case 12, FKS, para. 50.
\end{itemize}
with it efficiency gains because the alternative (first identifying the producer who should then take back his own waste) would be much more cumbersome if not impossible. In paragraph 52 the NMa considers that the take back free of charge and the encouragement premium in connection with the container promotes the separate collection of waste. In paragraph 53 the Authority appears to partially repeat itself when it states that the FKS system contributes to the reuse of waste through the development of new technologies such as the three-layer co-extrusion method. This, in turn, the NMa notes, has lead to the creation of a new product. Finally, the NMa considers that limiting the reprocessing methods also contributes to improving production or distribution or to promoting technical or economic progress because it achieves high-grade reuse. This, according to the NMa, is in line with the Netherlands' government’s policy with regard to waste.

With regard to the second requirement for an exemption (fair share for consumers), the NMa sees no problems because the FKS system allows the contractors and demolition firms to dispose themselves of their waste on a more advantageous (voordeligere) and environmentally friendly manner. It is assumed that the advantageousness relates to the lower costs of handing in waste through the FKS system compared to alternative methods of disposal (incineration). Furthermore, the NMa considers the ‘contractors and demolition firms have, because of the FKS system, the possibility to reduce the amount of incinerated waste and thus improve the quality of the environment.’

Neither does the third (proportionality) requirement prove to be an insurmountable hurdle. The NMa starts out by stating that, firstly, the reuse of plastic pipe waste is, at the moment, unprofitable and, secondly, the efficiency gains that flow from the FKS system can only be attained through co-operation. Therefore, the NMa concludes, sharing the collected waste according to the market shares is necessary to ensure the continuity of the system and a fair division of the costs associated with the system. Moreover, sharing the amount of collected waste in accordance with the market shares also fits in best with the principle of product responsibility. Furthermore, the NMa considers that the fixing of the take back prices is inherent in this system. If these prices were not fixed, the FKS members could use these prices as an instrument to reduce the amount of waste that is taken back by raising them and thereby reducing the incentive for

125 Ibid., para. 51. This consideration appears to overlap partly with the test involved in the proportionality requirement.
126 Ibid., para. 56. Translated from: ‘De aanbieder van kunststofleidingsystemen wordt door middel van het in zamelsysteem op vrijwillige basis in staat gesteld een bijdrage te leveren aan de verkleining van de hoeveelheid te verbranden afval van kunststofleidingsystemen en daarmee aan verbetering van de kwaliteit van het milieu’
127 Ibid., para. 57.
contractors and demolition firms to collect and hand over the waste. In view of the fact that the reuse is at the moment loss making and the free-rider problem, this reasoning appears to make sense. As regards the necessity of the limitation of the number of reprocessing methods, the NMa considers that abolishing this limitation would mean that no experience is gained with the high-tech co-extrusion technology. Moreover, this limitation prevents the regranulate from being used in low-tech applications that the NMa considers to be 'less desirable from an environmental perspective'.

Finally, the NMa addresses the requirement that competition may not be eliminated. In this respect it considers with regard to the external residual competition that third parties may set up similar recycling systems and that incineration is still possible. As far the internal residual competition is concerned, the NMa considers that the FKS members can still compete with regard to the costs of the regranulation and the costs of the reuse of the regranulate.

The end result for the FKS is a five-year exemption for their take back and recycling system. In general, the FKS decision brings with it quite a bit more interesting consequences. Firstly, the NMa reconfirms its stance according to which environmental considerations can, together with economic or efficiency considerations warrant an exemption. The fact that environmental considerations need to be accompanied by economic gains is, as we have seen above, unproblematic from the perspective of an integration of environmental and competition concerns. This for the simple reason that such advantages, as the NMa demonstrates in FKS, are simply inherent in the co-operation. What is slightly disappointing, however, is the fact that the NMa appears to be a bit uncertain of its case and thus tries to 'economise' the environmental benefits. When, for example, it states that there are savings with regard to virgin materials, it appears to have identified an economic benefit. However, in reality this is a primarily ecological benefit because the use of secondary (i.e. regranulated waste) raw materials is still more expensive than the use of virgin material thus effectively ruling out any short-term economic benefits. On the upside of things, the consideration that there is a fair share for consumers because the contractors and demolition firms can reduce the amount of incinerated waste and thus improve environmental quality appears to come rather close to the reasoning according to which environmental benefits by their very nature involve a fair share for consumers. The considerations with regard

128 Ibid., para. 60.
129 Ibid., para. 62.
130 Ibid., para. 50, first sentence.
131 Ibid., para. 25.
132 Ibid., para. 56.
133 Supra, paragraph 3.7.3
to the necessity-requirement are equally interesting because they show how two hard-core restrictions (market-sharing and price fixing) can be exempted within the context of a producer responsibility scheme. Indeed, not allocating market shares would greatly reduce the efficiency of the system and similarly, not fixing prices could lead to their being used as part of a free-riding strategy. The acceptance of these restrictions in FKS may however be contrasted with the consistent refusal to accept certain aspects of agreements involving a removal fee.\(^{134}\) Finally, the considerations with regard to the internal residual competition are a bit puzzling. Apparently, the NMa considers it possible that there is still competition possible concerning the costs of the reprocessing technology. The reader, however, could be lead to believe that the reprocessing method was limited to three layer co-extrusion following regranulation. Even, if is still possible to compete with regard to the costs of the regranulation, it would then have to be shown that these costs represent a significant part of the total costs of reprocessing.\(^{135}\) A more fundamental observation with regard to the limitation of the number of reprocessing methods is the fact that such a restriction effectively stifles innovation. While it prevents the reuse of the regranulate in low-tech applications, it similarly reduces the incentive to search for new reprocessing methods that are even more high-tech and possibly more profitable than the three-layer co-extrusion technology. As we have seen above, innovation is of the utmost importance with regard to the integration of environmental concerns and competition. Moreover, the environmental less-desirability of the use of the regranulate in low-tech applications is, at least to this layman author, not entirely clear. Even in a low-tech application, using secondary raw materials constitutes recycling and is therefore to be preferred over the use of virgin material.

Finally, there is the decision in VVAV that we will address here only with regard to the application of Section 11 of the Competition Act.\(^{136}\) This case concerned a crisis-cartel set up by operators of landfill installations for the restructuring of the landfill industry in the Netherlands. Among others, the parties to the agreement had fixed minimum tariffs that they would charge for certain types of waste. These minimum tariffs were characterised as restrictions of price competition and as such were considered to violate Section 6 of the Competition Act. Interestingly, the VVAV relied, inter alia, on Section 11. The NMa interpreted Section 11 in a way that is arguably more restrictive than the ECJ’s application of Article 86(2) EC.\(^{137}\) For one, the NMa appeared rather sceptical with regard to the question whether or not waste management could

\(^{134}\) *Infra*, paragraph 10.5.2.

\(^{135}\) These costs and their relative importance are, for a layman at least, not specified in the decision.


\(^{137}\) See further Vedder 2002, p. 108 *et seq.*
constitute a service of general economic interest. As we have seen above, the judgment in the Sydhavnens Sten & Grus case (rendered before the NMa decided in VVAV) shows that the Court has no problems in this respect.

Concluding, the decisions in ADMES, VBN, VVAV and FKS show that the NMa certainly does award a – varying – role to environmental improvements in granting an exemption. This praiseworthy fact is, however, slightly tarnished by the methodological uncertainties that at times surface in the form of considerations that show that the NMa is still not at ease with these ‘non-economic’ considerations.

After this overview of the case law concerning environmental agreements that do not involve a removal fee, we will now turn our attention to the more controversial cases that involve environmental considerations. These concern the product responsibility organisations that are funded through a removal fee.

16.5.3 The removal fee, producer responsibility and the polluter pays principle

As something of an intermezzo, we will now have a look at some of the backgrounds of the removal fee before we turn our attention to the NMa’s practice with regard to the removal fee. The removal fee is of particular interest for the purpose of this research because it very adequately highlights the tensions and discrepancies between the concept of producer or product responsibility, the polluter pays principle and the free rider problem. Moreover, the removal fee is of great interest from a competition point of view because of the way in which it is often regulated by the parties. Firstly, it is fixed by the parties (manufacturers and importers) to the agreement (i.e. horizontally) per product category. Secondly, the removal fee must be passed on to the consumers in its entirety. Thirdly, the removal fee is to be mentioned separately on the invoice. This ‘externalisation’ of the removal fee (i.e. passing it on through the distribution chain and not integrating it into the price of the products) brings the whole system dangerously close to a horizontal price fixing scheme that, of course, ensures the undivided attention of the competition authorities.

With regard to the backgrounds of the cases involving removal fee-funded take back and recycling schemes, the following remarks can be made in general. The removal fee or waste management fee has its origins in the Environmental Management Act. Basically, it was introduced to reduce free rider problems in collective product responsibility organisations. To further reduce free riding

138 Ibid., paras. 61 and 71.
139 Supra, paragraph 7.6.
140 New legislation has resulted in the name Environmental management fee (milieubeheersbijdrage). For the purpose of this book we shall refer to the term ‘removal fee’.
by ascertaining that all members of an industry contribute to the funding of the implementation of the product responsibility an environmental agreement containing a waste management fee can be declared generally binding upon the industry. The Environmental Management Act requires that an ‘important majority’ of the industry has acceded to the agreement. In cases where the fee is actually declared generally binding, the underlying agreement is replaced with the Ministerial decision. In that respect, the agreement falls outside the scope of Section 6 of the Competition Act. However, because competition as well as macro-economic implications can be envisaged, the Environmental Management Act requires consultation of the Minister of Economic Affairs before the agreement can be declared generally binding. This consultation of the Minister of Economic Affairs has now effectively been replaced with a consultation of the NMa. Moreover, in cases of collective notifications of schemes funded by means of a removal fee, the Environment Minister will make the approval subject to authorisation by the Competition authority. In principle, the Environment Minister is not obliged to do this as the Environmental Management Act only requires him to consult the Minister of Economic Affairs and thus neither requires him to consult the NMa nor does it require prior authorisation by the NMa. Section 16 confirms this on a more general level by sideling the Competition Act in cases where an agreement was already subject to review or approval on the basis of another act. The removal fee is therefore stuck between environmental and competition law. However, even from an environmental perspective, the status of the removal fee is not beyond debate. We will therefore start out examination of the removal fee with an overview of the environmental backgrounds of the removal fee.

What, then, is the relation between producer responsibility, the removal fee and the polluter pays principle? Firstly, we may ask, how this passing on of the removal fee to consumers fit in with the polluter pays principle? Intuitively, one could be tempted to say that that the removal fee must be paid and borne by the producers according to the polluter pays principle. Indeed, the principle of

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143 Section 15.36 Environmental Management Act.
144 In the Explanatory memorandum, 75% of the turnover in the industry is given as an indication of what constitutes an important majority, TK 1992-1993, 23 256, nr. 3, p. 2.
145 Section 15.36(1) Environmental Management Act.
146 Published in the State Gazette, Protocol VROM-NMa, Stcrt. 2000, 274, p. 95.
147 The NMa has used Section 16 in connection with an environmental agreement only twice to this date in its Decision of 30 September 1998 in Case 139, SPRN and in its Decision of 5 April 2000 in Case 115, ARN. Both cases concerned agreements involving a removal fee that had been declared generally binding.
148 See, for example, the discussion between Van Ophe m and Dresden in Milieu en Recht, 1995 April issue p. 77-80 and May issue p. 103-104.
producer responsibility and the polluter pays principle are often casually associated with each other.\footnote{See, e.g., the explanatory memorandum to the proposal for the WEEE Directive, COM (2000) 347 provisional (13-6-2000), at p. 11.} This, however, would be injudicious as will be shown below.

Let us start by establishing exactly what the removal fee encompasses. Basically, it covers the costs of the environmentally friendly collection and treatment of waste products. It does not cover the costs of transport of the waste products from the consumers to the collection point.\footnote{Consumers can leave their old appliance with the retailer when they buy a replacement or they can require him to take back the old appliance when delivering the new product. Similarly, they can take it to the municipal waste collection centre. In all these cases, either the consumer or the retailer bears the costs of the transport.} Furthermore, as we have seen above, the removal fee includes some costs associated with the organisation of the product responsibility scheme. In short, it covers the environmental costs arising from the waste stage of production and consumption.

Now, let us consider the question of who is the polluter. Again, intuitively the producer would appear to be the polluter. However, we must consider that in a competition driven free market economy, theory at least, prescribes that consumers dictate what is produced in what quantity and, more importantly in this respect, what quality. Certainly, putting the blame solely on producers for having manufactured hard to recycle products that use large amounts of virgin and environmentally dangerous materials fails to recognise the fact that consumers were quite happy to buy these products. The term polluter must in many cases implementing the polluter pays principle not be thought of as concerning any one identifiable person but rather as a method of allocating responsibility. With regard to the environmental impact of production and consumption after the end of life of the product, producers and consumers must probably share the responsibility.

Why then, a further question asks, does producer responsibility put responsibility solely with the producers and, furthermore, why do the producers decide to defer the costs flowing from the product responsibility and pass it on to the consumers? As regards the first sub-question, assigning the environmental responsibility to the producers, rather than sharing it with consumers or putting it completely with the consumers is simply more efficient and effective. For one, the costs flowing from this responsibility are much higher for producers than they are for the individual consumer so that they constitute a much more effective incentive to actually change the design and production of their products. Furthermore, allocating the environmental responsibility for the waste stage with the consumers is likely to involve greater enforcement costs, presuming identical propensities for evasion of the law, for the simple reason that there are
far more consumers than producers. Producer responsibility can therefore be characterised as a partial implementation of the polluter pays principle guided by efficiency and effectiveness considerations.

This leaves us with the question why the producers have chosen to pass the costs arising from this responsibility on to the consumers. In the three instances mentioned above, the need to opt for financing through a uniform removal fee that has to be passed on to consumers, was explained by the parties by reference to the fact that initially they would be dealing with so-called 'historical waste' only. Producer responsibility for durable consumption goods effectively means that at the moment of entry into force of the responsibility, the producers are actually collecting and recycling goods that they have already, designed, produced and marketed some time ago. For example, the average age of the cars that are treated by the ARN system is currently 14.3 years and still increasing. If the idea behind producer responsibility is to protect the environment by integrating environmental considerations in the design and production stages, then a producer responsibility for historical waste makes little sense since there is nothing that can be done about the environmental impact of these products. Moreover, a portion of the historical waste can be further classified as 'orphanned waste' because the producer or importer can no longer be identified. The fact that the producers would initially only be taking back and recycling historical waste, together with fact that a product rather than producer responsibility has been imposed, has lead to a collective solution in which all competition with regard to the removal fee was considered impossible and objectionable. To explain this we need to look at the backgrounds to and the legal framework concerning the product responsibility as well as the structure of the industry. Firstly, retailers and ultimately the manufacturers and importers are under an obligation to take back the old products irrespective of the brand (this is referred to as the 'old for new' rule). Secondly, the retailers must take back the products at least free of charge. Thirdly, the industries concerned can be characterised as quite competitive and dynamic. Fourthly, taking back and recycling waste products costs money. Finally, the practice of the removal fee needs to be set out in a bit more detail. The fee is first fixed per product category on the basis of the average costs involved in taking back ad recycling the products. The fee thus includes, inter alia, transport costs, recycling costs and costs flowing from the administration of the system. The manufacturers and importers are under an obligation to pay the fee into a fund for every product that they market. Moreover, they are obligated to pass the fee on in its entirety to the next link in the distribution chain so that ultimately the consumer pays the same fee that was paid by the producer. The result is that no one in the production and distribution chain bears the costs of the removal fee.


Supra, paragraph 9.6.
Making the removal fee subject to competition could have a number of effects. However, it is most likely that competitive pressure from the demand side will cause a link in the distribution chain to no longer pass the fee on completely. Such competitive pressure is most likely at the retail level where large retail chains may very well be able to exercise considerable buyer power while they have at the same time the possibility to achieve significant savings. The producer/distributor that is thus confronted with buyer power will have to bear the costs of the removal fee himself. This will deteriorate his competitive position vis-à-vis other producers/distributors thus increasing the incentive to seek for alternative, cheaper methods of meeting the product responsibility.

A manufacturer with a small market share who sells his products through a relatively exclusive selective distribution system will thus be encouraged to set up his own take back and recycling system. Once this process has been set in motion, the 'good risks' will all soon disappear, leaving the collective system to the 'bad risks', i.e. those manufacturers with a large amount of historical waste and a large current market share. In other words, the product responsibility for historical waste presupposes a large degree of solidarity among the members of the system. Such solidarity in turn requires that the price of the take back and recycling system is not subjected to competition. This is exactly what has been accepted in FKS but what the NMa has, as we will see below, consistently refused in the removal fee cases.

16.5.4 The removal fee and competition law

As was mentioned above, the agreements surrounding the removal fee come dangerously close to horizontal price fixing. Indeed, the NMa has qualified this approach to the removal fee as such in a number of cases concerning Dutch product responsibility schemes. These are Stibat (spent batteries), ARN (car wrecks) and Wit-en Bruingoed (WEEE). Because these three cases are quite similar and the decisions by the Netherlands Competition authority are also comparable, we will examine these three cases together.

A number of interesting observations can be made concerning the competitive appraisal of the removal fee. Firstly, with regard to Section 6 of the Competition Act, it was argued in all three cases that the removal fee did not constitute an appreciable restriction of competition. The primary arguments used in

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154 The amount of the removal fee (€ 17,- for a fridge, for example) will probably not be sufficiently interesting for the majority of the consumers to bargain about.

155 No altogether inconceivable in the automobile or electronics market.

this respect related to the relative insignificance of the removal fee compared with the price of the product.\textsuperscript{155} With regard to these arguments basically two approaches can be discerned in the decisions of the NMa. Firstly, there is the hard-core approach according to which appreciability forms part of the effects-test to which it is unnecessary to look once it has been established that there is a hard-core restriction (restriction by object).\textsuperscript{156} The second approach involves the quantitative concept of appreciability according to which the market shares of the parties are the only relevant factor in determining appreciability.\textsuperscript{157} The NMa appears to have relinquished its initial hard-core approach, a step that is to be applauded.\textsuperscript{158} Nevertheless, agreements concerning a removal fee are considered to appreciably restrict competition and therefore prohibited.\textsuperscript{159} This could be otherwise if the NMa were to apply a qualitative concept of appreciability. In that case the Authority would have to investigate the relative importance of the removal fee in the context of all other factors with regard to which competition is possible. Particularly in connection with the removal fee for cars, there is lot to be said for the conclusion that a decision to fix, pass through and separately mention a fee is inappreciable. For one, the fee constitutes an insignificant part of the consumer price. Secondly, the price, as the Court has already stated in the Metro I case, constitutes only one, albeit important, of many forms of competition.\textsuperscript{160} With regard to automobiles, price is certainly not the only and maybe even not the most important form of competition as brand image, mechanics, colours and after sales service play a major role in consumer decisions.

Indeed in the ARN II case, concerning the renewed ARN system, the NMa has come to the conclusion that the agreement, even though it is funded by a uniform removal fee, did not appreciably restrict competition.\textsuperscript{161} It must be pointed out that this case concerned a uniform fixed removal fee without the obligation to pass the fee on to the consumers or the obligation to mention it separately on the invoice.\textsuperscript{162} ARN had in its notification of the agreement explicitly addressed the – in its view – inappreciability of the fee, partly on the

\textsuperscript{155} For example, the removal fee for a car (€ 45,-) constituted less than 0.5% of the average retail price of a car. Typical removal fees for electrical and electronic equipment are € 17,- for a fridge, € 8,- for a television and € 5,- for a washing machine, source: www.nvmp.nl.

\textsuperscript{156} The NMa used this approach in Stibat, Decision of 18 December 1998 in Case 51, para. 52.

\textsuperscript{157} This approach can be seen in the Decision upon administrative appeal in Stibat, Decision of 31 May 1999 in Case 51, para. 47.

\textsuperscript{158} Cf. De Pree 1999, p. 310.

\textsuperscript{159} Decision of 5 April 2000 in Case 115, ARN, para. 43 and Decision of 18 April 2001 in Case 1153, Wit- en Bruinood, para. 73.

\textsuperscript{160} Case 26/76, Metro I, [1977] ECR 1875, para. 21.

\textsuperscript{161} Decision of 22 October 2001 in Case 2026, ARN II.

\textsuperscript{162} Ibid., para. 9.
basis of the ruling in *Pavlov*. The NMa first reiterated that the competitive appraisal in this case related solely to the fixing of a uniform removal fee. Then the Authority referred to the Chapter Seven of the Horizontal Guidelines in which it is stated that co-operation that leads to the creation of a genuinely new market will in general not restrict competition. After that, the NMa states that the uniform removal fee is used to subsidise the recycling of parts and materials that could in the absence of such subsidisation not take place profitably. Such parts and materials, so continues the NMa, were in the past shredded along with other materials, which it states to be environmentally undesirable. From the fact that the recycling of these parts and materials is unprofitable, the NMa concludes that it is unlikely that these recycling activities would not be undertaken individually. According to the Authority, the collective collection and recycling means that economies of scale can be achieved which means a more efficient solution at lower costs and thus a higher coverage.

In the next paragraph, the NMa appears to be addressing the arguments brought forward by the parties with regard to the inappreciability of the removal fee. According to the NMa there would only be a competition concern if the uniform removal fee would lead to a substantial standardisation of costs. According to the Authority no such substantial harmonisation takes place since the removal fee of € 45, – compared to the total costs of a car is so small that the risk of a co-ordination of prices and market behaviour by producers and importers is nil. The NMa explicitly mentions the fact that the producers and importers remain free with regard to all other commercial decisions including whether or not and to what extent they want to pass the removal fee on to the consumers.

The decision in *ARN II* closely follows the judgment in *Pavlov*. On the basis of a combined rule of reason- (the agreement was necessary for the creation of a new market) and appreciability reasoning (only an insignificant harmonisation of costs), the NMa reaches the conclusion that Section 6 of the Competition Act does not apply. This is certainly a welcome development as it, on the one hand, acknowledges that the removal fee is a useful instrument to make a producer responsibility scheme work while it recognises that, on the other hand, the impact of the removal fee on competition is unimportant. Furthermore, *ARN II* is of interest because of the seeming role that the NMa awards to environmental protection considerations within the scope of the rule of reason. After having mentioned them in paragraph 26, the Authority is applying the Horizontal Guidelines to the facts of the case in paragraph 27. Whilst

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163 *Joined Cases C-180/98 to C-184/98, Pavlov* [2000] *ECR* I-6451, supra paragraph 3.4.2.3 and 3.4.2.4.


165 *Ibid.*, para. 27.


it could have simply stopped when it stated that the removal fee has led to the 
creation of a new market for the recycling of car parts that could otherwise 
not be profitably recycled, the NMa goes further. The NMa considers that the 
creation of this particular market is environmentally beneficial. What are we 
to think of this consideration? For one, the weight attached to this considera-
tion is unclear. Certainly, it has nothing to do with the appreciability of either 
the co-ordination of environmental aspects of production or the removal fee 
itself. Rather, it is simply a statement that the subsidisation created not just any 
market but a market that is environmentally friendly. Secondly, this contempla-
tion is superfluous from the perspective of the Horizontal Guidelines as no such 
test is provided in those Guidelines. Again, given the uncertainty surrounding 
the status of this consideration, it cannot be said whether the NMa has indeed 
departed from the Horizontal Guidelines. Thirdly, it is gratuitous as there will 
hopefully not be many producer responsibility organisations that are involved in 
environmentally unfriendly activities. However, should a producer responsibility 
an organisation, for example, fail to use state of the art recycling techniques, then 
this consideration could possibly allow the NMa to come to a different conclu-
sion with regard to the appreciability. Concluding, these environmental consid-
erations have played only a very small role – if at all – in the competitive analysis 
in ARN II. Any substantial role for environmental protection requirements, 
such as to, for example, influence the appreciability, is not to be welcomed as it 
will in fact introduce elements into this competitive appraisal that do not belong 
there.\footnote{Supra, paragraph 3.4.2.4.} Indeed, the NMa could have certainly also come to the conclusion that 
the uniform removal fee did not constitute an appreciable restriction of competi-
tion without this consideration.

The Decision in ARN II leads to a number of interesting questions with 
regard to other schemes involving a removal fee. In this respect, we need to take 
into account that ARN II is the most recent decision of the NMa concerning the 
legality of a removal fee. In all other preceding decisions, the NMa has come 
to the conclusion that the decision to fix a uniform removal fee represents an 
appreciable restriction of competition. Does ARN II in fact mean that the NMa 
has radically changed its approach to the removal fee? In order to answer this 
question, we have to take into account that all the preceding cases involved a 
uniform removal fee that had to be fully passed on to consumers and separately 
mentioned on the invoice. The latter two requirements were absent in the ARN 
II case. Could it, for example, be said that if the uniform removal fee itself is not 
an appreciable restriction of competition, the decision to pass it on and sepa-
rately invoice is also inappreciable? The answer must most probably be in the 
negative. As the parties have argued and the NMa has decided in ARN II, fixing 
the removal fee can be characterised as cost fixing. The decision to fully pass
these costs on to consumers and the accompanying obligation to mention the fee as a separate item on the invoice actually turns this cost fixing into price fixing. Nevertheless, the underlying logic – the removal fee is negligible compared to the total costs of a car – employed by the Authority can certainly be applied analogously to the price fixing situation. In fact it could probably be applied a fortiori as the relative importance of the removal fee is even smaller in view of the consumer price (rather than the producer’s costs) of a car. However, as we have seen above, the NMa is quite resolute in its refusal to accept such reasoning with regard to price fixing. Environmental agreements that contain a removal fee that has to be passed on and separately mentioned on the invoice will thus restrict competition within the meaning of Section 6 of the Competition Act. This means that such producer responsibility organisations are basically only left with the possibility of an exemption pursuant to Section 17 as a means to legalise such an agreement.

With regard to the possibility of such an exemption, the NMa maintains the distinction between the collective agreement fixing the removal fee per product category on the one hand and the agreement to pass the removal fee on its entirety and separately mention it on the invoice on the other.

For example, in its decision in Wit-en Bruingoed, the NMa stated that ‘it is plausible that the collective co-operation (sic!) yields economic advantages’. Furthermore, it states that the prevention of environmental damage is cheaper than cleaning it up once it has occurred. Finally, the NMa considers that environmental improvements, in combination with the economic advantages mentioned above, constitute an element that contributes to improving production or distribution and to promoting technical or economic progress. These advantages arise, so holds the NMa, from the co-operation and the collective fixing of a uniform fee. With regard to the passing through and separate billing of the removal fee, the NMa states that it has not been shown that this contributes in any way to attaining these advantages. The same pattern – accepting the collective fixing of the removal fee and rejecting the passing through and separate billing – recurs throughout the decision and other decisions. With regard to, for example, the requirement of a fair share for consumers, the Authority holds that passing though the removal fee cannot possibly constitute a benefit for the consumer. In similar vein the NMa refuses to accept the indispensability or necessity of the agreement to pass the fee on to consumers.

170 Ibid., para. 89.
171 Ibid., para. 91.
173 E.g. Decision of 18 December in Case 51, Stibat, para. 66.
Finally, the \textit{NMa} contends itself with a mere statement that the conclusion that there is sufficient residual competition does not apply to the mandatory passing through of the removal fee without giving any reasoning.\footnote{Ibid., para. 99.}

As was shown above, there is certainly a case to be made for a removal fee that is fixed per product category and must be passed on and mentioned separately. This case is primarily built on the fact that producer responsibility schemes will be dealing with historical (and orphaned) waste initially. This issue is also addressed by the \textit{NMa} in the \textit{Wit- en Bruingoed} case. According to the \textit{NMa} the historical waste problem does not actually exist because there have been more new appliances sold than old appliances have been collected.\footnote{Ibid., para. 96 where the historical waste is referred to as `Altlast'.} Apart from the fact that the observation that more new appliances are sold than old ones have been collected says nothing about the amount of historical waste,\footnote{It is, for example, perfectly possible that the Mum and Dad's old television set has not broken down and is in fact only replaced for a better one while the old one is transferred to the children's bedroom. In this case the amount of historical waste remains unchanged while new appliances are indeed bought.} this reasoning ignores the very essence of the competition problems associated with historical waste.

In its decision upon administrative appeal in \textit{Wit- en Bruingoed}, the \textit{NMa} has granted an exemption for the obligation to pass the collectively decided removal fee on to consumers.\footnote{Decision upon administrative appeal of 19 June 2003 in Case 2495, \textit{Wit- en Bruingoed}.} Basically, this change of heart is the result of the WEEE-Directive, which explicitly allows for a passing through of the removal fee for the period in which the historical waste is collected.\footnote{Ibid., paras. 97-101 where the \textit{NMa} refers to Article 8 of the WEEE Directive.} More specifically, the \textit{NMa} qualifies the environmentally friendly removal of appliances that were marketed before 13 August 2005\footnote{This is the cut-off date provided by the Directive. All the appliances marketed after this date are considered not to constitute historical waste.} as an economic benefit. This conclusion is nowhere substantiated. Furthermore, the fact that the producers in the Netherlands have already been taking back and recycling waste appliances for several years does not result in a different cut-off date even though the volume of historical waste in the Netherlands can well be said to be smaller compared to other member states.\footnote{Decision upon administrative appeal of 19 June 2003 in Case 2495, \textit{Wit- en Bruingoed}, para. 104.} According to the \textit{NMa} there is a fair share for consumers in the economic benefit thus identified in that they can hand in all waste appliances regardless of the brand or age whereas the consumer will also know for certain that these appliances will be treated in an environmentally friendly manner.\footnote{Ibid., para. 106.} Apparently, the economic benefit identified as part of the first requirement for
an exemption does have some ecological aspects to it. The NMa then goes on to address the issue of the removal fee and its seemingly difficult relation with the requirement of a fair share for consumers. We have submitted above that this should not be problematic at all and indeed the NMa appears to also consider this. According to the NMa, the passing through of the removal fee will facilitate the visibility and usefulness of the system for consumers. As a result, the collection rates are likely to increase to that the increased environmental efficiency can lead to a reduction in the removal fee. Moreover, the NMa recognises that the WEEE Directive provides for this share of the burden between industry and consumers.\(^{183}\) However, a further consideration reveals that de NMa does not accept the fundamental reasoning with regard to a removal fee according to which the collective fixing is to qualified as necessary only during the transitional phase whereas the pass through obligation will help bring about the internalisation even after the transitory phase.\(^{184}\) In considering the necessity of the restrictions the reasoning of the NMa can be characterised as rather unclear and implicit.\(^{185}\) The NMa appears to rely primarily on the arguments that have resulted in the adoption of the special provision for the historical waste (Article 8) in the WEEE Directive. As a result, the NMa can be said to have accepted the solidarity reasoning that was suggested in paragraph 16.5.3 above. Logically, the NMa reiterates that the removal fee may only cover the costs involved in taking care of the historical waste.\(^{186}\) As regards the last condition for an exemption, the NMa considers that the agreement concerning the removal fee does not entail any consequences for all the other aspects of production and products with regard to which the parties still compete.\(^{187}\) Moreover, the NMa does not consider there to be any legal barriers that stand in the way of multiple collection systems alongside each other.\(^{188}\) It submitted that this fails to recognise that legal barriers and the exit regulations of producer responsibility organisations are not what keeps multiple systems from existing alongside each other. On the contrary, the economies of scale involved make it more than likely that the system set up by the Stichting Witgoed and the Stichting Bruingoed will remain the only system.\(^{189}\)

\(^{183}\) Ibid., para. 107.

\(^{184}\) See further infra paragraph 16.6 and Vedder 2002, p. 126 et seq.

\(^{185}\) Decision upon administrative appeal of 19 June 2003 in Case 2495, Wit- en Bruingoed, paras. 110-112.

\(^{186}\) Ibid., paras. 113-114.

\(^{187}\) Ibid., para. 116.

\(^{188}\) Ibid., para. 117.

\(^{189}\) See further supra paragraph 9.6.
16.6 Interim conclusion with regard to the external perspective

What, then, may we conclude from the above overview? In this paragraph we will come to some interim conclusions with regard to chapter 10. These conclusions will be divided according to the environmental and the competition point of view. Firstly, we will address the role that competition plays in the member state's environmental legislation.

With regard to this role a number of general remarks may be made. For one, the theory behind producer responsibility as an ideal means to internalise the external costs associated with the waste stage of production and consumption is widely acknowledged. Nearly all the explanatory memoranda to producer responsibility legislation boast about producer responsibility being an incentive for design for recycling or eco-design. While, however, this theory is explicitly recognised and given a central role in the rationale underlying these laws, practice is in many ways flawed. As we have seen, with the exception of the UK, the imposition of producer responsibility has lead to large-scale monopolistic producer responsibility organisations. The interim conclusion in this respect was that the emergence of such monopolistic systems can for a large part be traced back to the fact that a product rather than true producer responsibility has been imposed. This conclusion was validated by the experiences in the Netherlands where product responsibility for a wide range of products (packaging, old tyres, cars, electronical and electrical equipment, batteries etc.) has resulted in such monopolistic systems. Furthermore, the emergence of a market rather than one monopolistic system cannot, in our opinion, be traced back to the size and population of the member states concerned. If size and population were the major factors for success in Britain, then why were similarly populous and large states such as France\(^{99}\) and Germany unable to create a market? Furthermore, the fact that the different schemes in the UK are not only territorially defined but also distinguished on the basis of the type of packaging covered shows that the geographical area is not the only factor with regard to which competition is possible. Even though the UK producer responsibility solution is from this perspective to be preferred over the product responsibility approach at least one remark must be made. A comparison of the German and UK recovery goals shows that Germany aims at and achieves a degree of collection and recycling that is much higher than that applying in the UK.\(^{91}\) It remains to be seen whether incorporation of higher collection and recovery standards and the ensuing higher costs would not increase sunk costs to such a level that the economies of scale will also lead to monopolistic solutions or at least a concentration on the UK market for producer responsibility solutions.

\(^{99}\) Where a product responsibility resulted in the creation of Eco-Emballage that covers approximately 75\% of all packaging.

Nevertheless, the conclusion that product responsibility is very likely to lead to monopolistic product responsibility organisations is primarily of significance for the legislature for he is responsible for drafting effective legislation. Can it, however, also be said that the effectiveness of the producer responsibility mechanism is inherently impaired when such responsibility is accepted through monopolistic systems? In Part One the mutually reinforcing relation between competition and environmental protection has already been described. Without doubt, producer responsibility as a means to internalise the external costs of the waste stage requires the presence of competition. Producer responsibility and the resulting costs of collecting and recycling the waste will remain nothing more than an incentive if there is no competitive pressure to react to this incentive. Only in the presence of the need to compete will this incentive be transformed into actual design for recycling and thus lead to less waste. How, then, does the emergence of monopolistic producer responsibility organisations affect this effectiveness? At a glance it would seem that the fact that these systems are effectively monopolists rules out competition. Indeed, this has been the primary concern of both the Commission and the Bundeskartellamt with regard to DSD. It is, however, submitted that this view centres very much on external competitive pressure i.e. the emergence of actual competitors. It thereby fails to recognise internal competitive pressure within these monopolistic systems.

DSD’s institutional structure has been analysed to find that the representation of both upstream and downstream industries provide for a good ‘balance of power’ and the presence of some competition. The users of packaging will want to minimise the costs associated with the waste stage of the packaging (i.e. the license fee in the DSD system) whereas the presence of the packaging and collection industry in DSD will ensure that this minimisation will take place through better design for recycling and not through other means.

Nevertheless, such internal checks and balances are not present in the product responsibility schemes in the Netherlands. These are operated purely by the producers made responsible. Indeed, DSD’s institutional architecture with the representation of both up- as well as downstream industries is a result of an unforeseen financial crisis. However, in the Netherlands, the intervison by upstream and downstream industries is replaced by supervision by the Minister for the Environment. As with all forms of government supervision, the effectiveness and efficiency of this solution compared to supervision through market forces can be doubted.

Another environmental mechanism with competition implications was identified in relation to the Dutch practice of financing product responsibility organisations by means of removal fees. We have seen that the uniform, fixed character of the removal fee together with the requirement that these are to be

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192 This is of course not to say that there are no other incentives to eco-design products.
193 See, for further details: Bastians 2002, p. 59, 60.
passed on to consumers in their entirety effectively rules out competition pressure within one such producer responsibility system.

However, two remarks need to be made in this respect. Firstly, it must be taken into account that the goods for which producer responsibility has been accepted are primarily durable (consumption) goods. As a result it is more than likely that the goods actually being collected and recycled right now have been designed, produced and marketed years ago, before the entry into force of the producer responsibility in the first place. The conclusion must therefore be that producer responsibility is simply impossible to function as a means to internalise environmental costs associated with the waste stage. This for the simple reason that the producer cannot alter the product that he has already designed, manufactured and marketed. The fact, therefore, that producer responsibility actually concerns 'historical waste' rules out the usefulness of competitive pressure and producer responsibility.

Secondly, and this follows directly from what has been said above, once the historical waste has been dealt with and products that have been designed and marketed after the entry into force are being collected, competition is possible and should be allowed to play its role. How, then, is competition to play its part in making producer responsibility effective? With regard to the removal fee essentially two different restrictions of competition can be identified. On the one hand the fact that a uniform removal fee has been agreed upon per product group. On the other hand the agreement to pass this removal fee on to consumers in its entirety together with the obligation to mention this removal fee separately on the invoice. We have seen how the Netherlands Competition authority is willing to exempt the fixing of a uniform removal fee but remains unwilling to legalise the agreement to pass the fee on to consumers as well as the separate invoicing.\footnote{See, however, Decision upon administrative appeal of 19 June 2003 in Case 2495, Wit- en Bruingoed.} Thus, the NMa holds that competition should play its role with regard to the passing through of the removal fee.

It is submitted that, contrary to the opinion of the NMa, the best point of attack for competition would be the uniform character of the removal fee and not the agreement that it should be fully passed on and separately invoiced to consumers. There are two interrelated reasons for this.

Firstly, the requirement that the removal fee is to be passed on to consumers completely and must be mentioned separately on the invoice improves the transparency of the market with regard to the amount the removal fee and thus the environmental impact of the product once it reaches the waste stage. The amount of the removal fee thus directly reflects the impact of the product once it becomes waste. Secondly, this, of course, works to the advantage of the producer responsibility only if the removal fees can differ between products. On other words: a fridge that is easier to recycle should have a lower removal fee than one that is more difficult to recycle. These relative amounts should, however, not
differ between the shops where the fridges can be bought. Only in this scenario would competition be able to play its beneficial role without additional distorting factors being present. If, for example, certain retailers would be able to negotiate the relinquishing of the obligation to fully pass on the removal fee for the difficult to recycle fridge, the result would be that consumers might be led to think that this fridge is actually better to recycle. As a result consumer choice cannot be steered with the help of the market mechanism in the direction of more environmentally friendly products.

This solution has in fact been adopted in Flanders.\(^{195}\) The product responsibility enacted for electronics waste there envisages a mandatory environment fee (milieubijdrage).\(^{196}\) This environment fee must be passed on to consumers and mentioned separately on the invoice in order to increase awareness among consumers.\(^{197}\) At the same time, the agreement explicitly envisages that the fee must be adjusted on the basis of the recyclability of the products.\(^{198}\)

The practicability of this approach to producer responsibility should not present us with any insurmountable hurdles. The recyclability of products can probably be determined rather easily when testing conformity of the product with (European) norms by simply dismantling it and checking how much this costs. Standardising this should not be any more difficult than standardising any other testing procedure. Furthermore, modern electronic accounting and stock administration systems should have no problems with the passing through obligation.

What may present us with some difficulties is the fact that the amount of the removal fee thus determined per product may very well not differ that much between the products. This is caused by two factors. Firstly, a significant part of the costs can be traced back to the logistics of the collection and transportation.\(^{199}\) These costs (and therefore the fee) are only marginally influenced by the recyclability of a product (rather, volume and weight would appear to be of importance). Secondly, it may be expected that the difference in costs will not be that large as to effectively influence consumer behaviour. At the moment, the uniform removal fee in the Netherlands for a car is € 45. If this amount is an average and the most difficult to recycle car is assumed to be three times as expensive to recycle as the cheapest one (€ 0), the removal fee for that car would have to be € 135. It may indeed be wondered whether a price differential of € 135

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195 See, for further details: Vedder 2002, p. 169 et seq.
196 This product responsibility has been implemented though a co-called Environmental policy agreement (Milieubeleidsovereenkomst) between the Flemish government and the industry. This agreement has been published in the Belgian Statute Book (Staatsblad) of 31 May 2001.
197 Ibid., Section 8(1) and (4).
198 Ibid., Section 8(1), second sentence.
199 According to the NVMP, logistics account for approximately 23% of the total costs. ARN devotes approximately 20% of its costs to logistics.
on the price of a new car is going to have any effect at all on consumer choice. In this respect, we refer back to our considerations with regard to the qualitative concept of appreciability within Article 81(1). It may be recalled that we have argued above that an agreement covering only a minor part of the price cannot be said to appreciably affect competition.

These – albeit important – practical considerations aside, the fact remains that the price mechanism and competitive pressure need not be completely ruled out even within large scale monopolistic systems funded by removal fees that are fully borne by consumers. Once the historical waste has been dealt with, removal fees should at least allow for a differentiation to reflect the actual costs of the recycling of a particular product. This should be accompanied by the obligation to pass this fee on to consumers in its entirety.

As far as the competition point of view is concerned, we have seen a number of different solutions. In Germany, the unsatisfactory situation in which DSD was tolerated has resulted in the insertion of a dedicated exemption clause in the Act Against Restrictions of Competition. This clause, Section 8 of the Act, has however, never been used and its use in the future is unlikely in view of its restrictive wording. In the Netherlands, the NMa has gathered quite a lot of experience in dealing with the competitive impact of environmental agreements. We have seen how it is beyond doubt that the Netherlands Competition authority allows environmental concerns to play a role in the application of the exemption clause (Section 17 of the Competition Act). This role, however, appears to be varying over time and shows signs of conceptual uncertainty from the part of the NMa. Despite these drawbacks, the practical experience accumulated by the NMa over the course of its short existence is in many respects an example for the Commission.

Despite the totally different approaches to the integration of environmental and competition concerns in the Netherlands and Germany, the fact remains that neither solution allows for a true integration of environmental concerns and competition. In both jurisdictions, competition is placed at the forefront and it is not recognised that an integration may very well require that competition takes a step back or at least shifts its focus from assuring short term consumer benefits (no removal fee) to the longer term (bringing about a competition for the environment). Indeed, the case law of the NMa and the German legislation very much reflect a traditional competition law approach to environmental concerns. An integration of competition and environmental protection would require a more innovative approach in which environmental improvements could of themselves warrant an exemption. In determining whether such an exemption should be granted, the competition authorities would have to try to achieve a competition for the environment. Particularly with regard to producer responsibility, the problem of the historical waste would have to lead to the conclusion that competition is simply not always possible to the extent that a traditional competition law approach may have dictated.