



**Competition Law, State Aid Law and Free-Movement Law:
The Case of the Environmental Integration Obligation**

Thesis submitted for the degree

Doctor of Philosophy in Law

Julian Nowag

St Anne's College

January 2014

Abstract

This thesis investigates competition law, State aid law and free-movement law in their interaction with Article 11 TFEU's obligation to integrate environmental protection requirements into all activities and policies of the Union. The Article is formulated in broad and sweeping terms which makes integrating environmental protection requirements complex and context-dependent. The challenge of integrating environmental considerations is further increased as such integration in competition, State aid and free-movement law is different from other areas of EU action. The three areas are the core provisions protecting the internal market by prohibiting certain actions of the Member States and undertakings. Unlike in other areas, the EU is therefore not in the position to develop or design the actions but has to scrutinise the measure according to pre-established parameters. To address this challenge, a novel functional approach to environmental integration is developed. The approach should facilitate a better understanding of environmental integration and in particular its application to competition law, State aid and free-movement law. An important element of this thesis equally the comparison between the three areas of law. It sheds light on conceptual issues that are not only relevant to the integration of environmental protection. The comparison advances the understanding in relation to questions such as how restrictions are defined and how the respective balancing tests are applied. The contribution of this research is therefore twofold. On the one hand, it compares how the different tests in competition, State aid and free-movement law operate, thereby offering opportunities for cross-fertilisation. On the other hand, this comparison and the improvements suggested as a result help to conceptualise environmental integration thereby paving the way for a more transparent and consistent integration of environmental protection in competition, State aid and free-movement law.

Table of Abbreviations	VII
Table of Cases	VIII
Table of Statues.....	XXV
Table of Other Primary Material	XXIX

Acknowledgements	XXXIII
-------------------------------	---------------

Introduction.....	1
--------------------------	----------

Part A The Environmental Integration Obligation of Article 11TFEU 9

Introduction Part A	10
A. Development of Article 11TFEU	10
B. Extent and Addressees of the Article 11TFEU.....	17
C. Content and Meaning of the Article 11TFEU Obligation.....	22
1. Definition of ‘Environmental Protection Requirements’	22
2. Definition of ‘Integration’	26
D. Consequences of Non-compliance with Article 11TFEU	38
E. Applying Article 11TFEU to the Internal Market and in Particular to the Competition Provisions.....	40
1. Wording	44
2. Legal Certainty	44
3. Justiciability.....	48
4. Uniform Application.....	58
5. Integration and Competition Law from a Normative Perspective	59
Conclusion Part A.....	63

Part B The First Form of Environmental Integration..... 66

Introduction Part B	67
Section I: Supportive Integration	68
A. Preliminary Issues: The Definition of Undertaking, the State Action Defence and General Conditions for Applying Articles 101TFEU and 102TFEU.....	70
1. Introduction	70
2. The Definition of an Undertaking	71
a) Offering Services or Goods to the Market	73
b) Bearing the Financial Risk.....	75
c) Having the Potential to Make a Profit.....	76
3. State Action Defence	81
4. General Conditions for Applying Articles 101(1)TFEU and 102TFEU	84
5. Conclusion on the Preliminary Issues	89
B. Competition Law.....	90
1. Article 101TFEU	90
a) Introduction.....	90
b) Object and Effect on Competition.....	90
c) The Effect Analysis and Environmental Integration	92

i. Loose Commitments.....	95
ii. No Effect on Product and Production Diversity	98
iii. Creation of New Markets.....	99
iv. Mixed Cases.....	101
d) Conclusion on Article 101TFEU	106
2. Article 102TFEU	108
a) Introduction.....	108
b) The Concept of Abuse under Article 102TFEU	108
c) Conclusion on Article 102TFEU	114
C. Article 106TFEU.....	115
D. State Aid Law	118
1. Introduction	118
2. Conditions for Applying Article 107(1)TFEU	118
a) Economic Advantage	119
i. Altmark Criteria	121
ii. Market Investor Principle.....	124
b) Selectivity	128
c) Member State’s Resources, Distortion of Competition and Effect on Trade	132
d) An Alternative Interpretation of Selectivity and Distortion of Competition	137
i. Material Selectivity.....	140
ii. Geographical Selectivity.....	144
iii. Distortion of Competition	146
3. The Exclusion via Article 107(2)TFEU	148
a) Article 107(2)(a)TFEU	149
b) Article 107(2)(b)TFEU	150
c) Article 107(2)(c)TFEU	151
4. Conclusion on State Aid Law	152
E. Free-Movement Law	154
1. Introduction	154
2. General Conditions for Applying Free-Movement Law	154
3. Restrictions in Free-Movement Law	157
a) Discrimination.....	158
b) Beyond Discrimination.....	162
i. Keck.....	163
ii. Market Access	166
4. An Alternative Interpretation of Restrictions	171
5. Conclusion on Free-Movement Law.....	180
F. Conclusion Section I.....	181
Section II: Preventative Integration	183
A. Competition Law	184
B. Article 106TFEU.....	189
C. State Aid Law.....	192
D. Free-Movement Law.....	196
E. Conclusion Section II.....	199
Conclusion Part B.....	200

Part C The Second Form of Environmental Integration 201

Introduction Part C	202
Section I: Supportive Integration	203
A. Free-Movement Law	204
1. Introduction	204
2. Mandatory Requirements and Environmental Protection	204
3. Environmental Protection and Distinctly Applicable Measures	208
a) Broad Interpretation of Written Justifications.....	210
b) Mandatory Requirements as Justification for Distinctly Applicable Measures	213
c) Environmental Protection as a Special Mandatory Requirement	218
d) Mandatory Requirement and Indirect versus Direct Discrimination	219
e) Distinctly Applicable Measures and Environmental Integration.....	220
4. Environmental Protection beyond Harmonisation.....	221
5. Proportionality Test and Environmental Integration	227
6. Lessons from Environmental Protection as a Mandatory Requirement.....	232
7. Lessons from State Aid.....	233
8. Conclusion on Free-Movement Law.....	237
B. State Aid Law.....	238
1. Introduction	238
2. A Rule of Reason in Article 107(1)TFEU	238
3. Article 107(3)TFEU	240
a) Article 107(3)(a)TFEU	245
b) Article 107(3)(b)TFEU	245
c) Article 107(3)(c)TFEU	251
d) Article 107(3)(d)TFEU	257
4. The Second Form of Environmental Integration in the Context of Article 107(3)TFEU: A Model for Other Areas.....	259
5. Lessons from Free-Movement Law.....	265
6. Conclusion on State Aid.....	266
C. The Article 106TFEU Exception	267
1. Introduction	267
2. Article 106TFEU	267
3. Article 106(2)TFEU	269
a) Services of General Economic Interest.....	270
b) Revenue-Producing Monopolies.....	276
c) Entrusted.....	277
d) Proportionality or Obstructing the Performance of the Particular Task	280
4. Conclusion on Article 106TFEU	284
D. Competition Law	285
1. Article 101TFEU	285
a) Article 101(1)TFEU.....	286
b) Article 101(3)TFEU	297
i. Article 101(3)TFEU and Block Exemptions.....	297
ii. Environmental Integration before Regulation 1/2003	298
iii. Environmental Integration after the Consolidation Phase Initiated by Regulation 1/2003.....	306
iv. The Extent of Environmental Integration under Article 101(3)TFEU	308
c) Conclusion on Article 101TFEU	317
2. Article 102TFEU	318

a) Objective Justification	318
b) Hilti and Tetra-Pak as a Contradiction to the Second Form of Integration.....	322
c) Efficiency Defence	327
d) Conclusion on Article 102TFEU	330
3. Conceptualising the Second Form of Integration in Competition Law	332
a) Options for the Second Form of Environmental Integration under Articles 101TFEU, 102TFEU and 106(2)TFEU	332
b) Lessons from Free-Movement and State Aid Law	338
4. Conclusion on Competition Law	345
E. Conclusion Section I.....	347
Section II: Preventative Integration	348
A. Competition Law	349
B. Article 106TFEU.....	353
C. State Aid Law	355
D. Free-Movement Law	359
E. Conclusion Section II.....	361
Conclusion Part C.....	362
Conclusion.....	364

TABLE OF ABBREVIATIONS

AG	Advocate General
CJ	Court of Justice
CO ₂	Carbon dioxide
DG	Directorate-General
COREPER	Comité des Représentants Permanents (Committee of Permanent Representatives)
EC	European Community
ECSC	European Coal and Steel Community
EU	European Union
EURATOM	European Atomic Energy Community
GC	General Court
HCFCs	Hydrochlorofluorocarbons
IGC	Intergovernmental Conference
IP	Intellectual Property
MEQ	Measures Equivalent to Quantitative Restrictions
NO _x	Mono-Nitrogen Oxide
OFT	Office of Fair Trading
R&D	Research and Development
SGEI	Service of General Economic Interest
SME	Small and Medium Enterprises
SSNIP	Small but significant and non-transitory increase in price
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TWh	Tetra Watt Hour
UK	United Kingdom
US	United States

TABLE OF CASES

EU

CJ

Case 30/59 <i>De gezamenlijke Steenkolenmijnen</i> [1961] ECR 1	120
Case 26/62 <i>Van Gend en Loos</i> [1963] ECR 1.....	18
Joined Cases 56 and 58/64 <i>Consten and Grundig</i> [1966] ECR 299	87, 90, 91, 92, 294, 313, 351
Case 56/65 <i>Société Technique Minière</i> [1966] ECR 235	88, 90, 91, 92, 335
Case 23/67 <i>Brasserie De Haecht v Wilkin Janssen</i> [1967] ECR 407	92
Case 24/67 <i>Parke, Davis & Co v Probel</i> [1968] ECR 55.....	109, 318, 321
Case 5/69 <i>Voelk v Vervaecke</i> [1969] ECR 295.....	88
Case 41/69 <i>Chemiefarma v Commission</i> [1970] ECR 661	86
Case 40/70 <i>Sirena v Eda</i> [1971] ECR 69	109, 318
Case 78/70 <i>Deutsche Grammophon</i> [1971] ECR 487.....	109, 318
Case 1/71 <i>Cadillon</i> [1971] ECR 351	91
Case 10/71 <i>Muller</i> [1971] ECR 723.....	269, 271
Case 22/71 <i>Béguelin Import</i> [1971] ECR 949	88
Case 51-54/71 <i>International Fruit Company</i> [1971] ECR 1107	158
Case 6/72 <i>Continental Can</i> [1973] ECR 215	85
Case 29/72 <i>Marimex</i> [1972] ECR 1309.....	205, 209
Case 5/73 <i>Balkan-Import-Export GmbH</i> [1973] ECR 1091	29, 30, 357
Case 127/73 <i>BRT v SABAM</i> [1974] ECR 313	109, 268, 318, 321
Case 155/73 <i>Sacchi</i> [1974] ECR 409.....	115, 116, 268, 271, 282
Case 173/73 <i>Italy v Commission</i> [1974] ECR 709	120, 136
Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 <i>Suiker Unie</i> [1975] ECR 1663.....	83
Case 2/74 <i>Reyners</i> [1974] ECR 631.....	158
Case 8/74 <i>Dassonville</i> [1974] ECR 837	162, 205, 333
Case 33/74 <i>Van Binsbergen</i> [1974] ECR 1299.....	205
Case C-36/74 <i>Walrave and Koch</i> [1974] ECR 1405.....	155
Case 26/75 <i>General Motors v Commission</i> [1975] ECR 1367	110
Case 26/76 <i>Metro v Commission (Metro I)</i> [1977] ECR 1875	106, 293, 301
Case 27/76 <i>United Brands</i> [1978] ECR 207.....	85, 86, 110
Case 78/76 <i>Steinike & Weinlig</i> [1977] ECR 595.....	71, 119, 120, 134
Case 85/76 <i>Hoffmann-La Roche v Commission</i> [1979] ECR 461.....	85, 86, 108, 111
Case 13/77 <i>INNO v ATAB</i> [1977] ECR 2115.....	70, 83
Case 29/77 <i>SA Roquette Frères</i> [1977] ECR 1835.....	29, 30, 357
Case 77/77 <i>BP</i> [1978] ECR 1513	85, 109, 111, 318, 321
Case 120/78 <i>Rewe v Bundesmonopolverwaltung für Branntwein</i> [1979] ECR 649	2, 205, 221, 333, 359
Case 148/78 <i>Ratti</i> [1979] ECR 1629	222
Case 175/78 <i>Saunders</i> [1979] ECR 1129	156
Joined Cases 209-215 and 218/78 <i>Van Landenyeck</i> [1980] ECR 3125.....	82, 86, 301, 313
Case 258/78 <i>Nungesser</i> [1982] ECR 2015.....	315
Case 5/79 <i>Hans Buys</i> [1979] ECR 3203	74

Case 15/79 <i>Groenveld v Produktschap</i> [1979] ECR 3409	158
Case 61/79 <i>Denkavit</i> [1980] ECR 1205.....	120
Case 139/79 <i>Maižena v Council</i> [1980] ECR 3393.....	29, 30, 31, 40, 357
Case 149/79 <i>Commission v Belgium</i> [1980] ECR 3881.....	156
Case 730/79 <i>Phillip Morris v Commission</i> [1980] ECR 2671	135, 245
Case 31/80 <i>L'Oréal v PVBA</i> [1980] ECR 3775.....	106, 293
Case 113/80 <i>Commission v Ireland</i> [1981] ECR 1625	205, 209, 219, 359
Case 172/80 <i>Züchner</i> [1981] ECR 2021.....	88
Case 6/81 <i>Beele</i> [1982] ECR 707	208
Case 53/81 <i>Levin</i> [1982] ECR 1035	156
Case 249/81 <i>Commission v Ireland</i> [1982] ECR 4005	27
Case 262/81 <i>Coditel</i> [1982] ECR 3381	212, 293
Case 322/81 <i>Michelin v Commission (Michelin I)</i> [1983] ECR 3461	85, 86, 87, 111
Joined Cases 115/81 and 116/81 <i>Adoui and Cornuaille v Belgium</i> [1982] ECR 1665.....	229
Case 7/82 <i>GVL v Commission</i> [1983] ECR 483.....	76
Case 94/82 <i>Kikvorsch</i> [1983] ECR 947	208
Joined Cases 96-102, 104, 105, 108 & 110/82 <i>NV LAZ</i> [1983] ECR 3369.....	91, 95
Case 107/82 <i>AEG v Commission</i> [1983] ECR 3151	106, 293
Case 177&178/82 <i>Van de Haar</i> [1984] ECR 1797.....	169
Joined Cases 240-242, 261, 262, 268 and 269/82 <i>Stichting Sigarettenindustrie</i> [1985] ECR 3831	82, 83, 88
Case 260/82 <i>NSO v Commission</i> [1985] ECR 3801	82
Case 319/82 <i>Kerpen & Kerpen</i> [1983] ECR 4173.....	88
Case 14/83 <i>von Colson and Kamann</i> [1984] ECR 1891.....	46
Case 16/83 <i>Prantlx</i> [1984] ECR 1299	169
Case 107/83 <i>Klopp</i> [1984] ECR 2971	158, 205
Case 180/83 <i>Moser</i> [1984] ECR 2539.....	170
Case 207/83 <i>Commission v Ireland</i> [1985] ECR 1201	158
Case 240/83 <i>ADBHU</i> [1985] ECR 531	121, 206, 228
Case 288/83 <i>Commission v Ireland</i> [1985] ECR 1761	205, 281, 359
Case 290/83 <i>Commission v France</i> [1985] ECR 439.....	120
Joined Cases 25-26/84 <i>Fordwerke</i> [1985] ECR 2725	313
Case 42/84 <i>Remia</i> [1985] ECR 2545	49, 293, 301
Case 75/84 <i>Metro v Commission (Metro II)</i> [1986] ECR 3021.....	49
Case 107/84 <i>Commission v Germany</i> [1985] ECR 2655.....	77
Case 161/84 <i>Pronuptia</i> [1986] ECR 353	294
Case 182/84 <i>Miro</i> [1985] ECR 3731	208
Case C-234/84 <i>Belgium v Commission</i> [1986] ECR 2263	124, 358
Case 248/84 <i>Germany v Commission</i> [1987] ECR 4013.....	245
Case 270/84 <i>Licata v WSA</i> [1986] ECR 2305.....	226
Case 311/84 <i>CBEM v CLT and IPB</i> [1985] ECR 3261	109, 318
Case 45/85 <i>Verband der Sachversicherer</i> [1987] ECR 405	90
Case 66/85 <i>Lawrie-Blum</i> [1986] ECR 2121	156
Case 118/85 <i>Commission v Italy</i> [1987] ECR 2599.....	72, 74
Case 121/85 <i>Conegate v HM Customs&Excise</i> [1986] ECR 1007	229

Case 154/85 <i>Commission v Italy</i> [1987] ECR 2717.....	158
Case 310/85 <i>Deufil v Commission</i> [1987] ECR 901	120, 240
Joined Cases 67/85, 68/85 & 70/85 <i>Van der Kooy</i> [1988] ECR 219	133, 134
Case 62/86 <i>AKZO</i> [1991] ECR I-3359	86, 111
Case 66/86 <i>Ahmed Saeed Flugreisen</i> [1989] ECR 803.....	269, 271, 272, 274
Case 80/86 <i>Kolpinghuis</i> [1987] ECR 3969	186
Case 126/86 <i>Giménez Zaera v INSSTGSS</i> [1987] ECR 3697	27
Case 267/86 <i>Van Eycke</i> [1988] ECR 4769.....	83
Case 302/86 <i>Commission v Denmark</i> [1988] ECR 4607.....	206, 228
Case 20/87 <i>Gauchard</i> [1987] ECR 4879.....	156
Case 27/87 <i>Erauw Jacquery Erauw-Jacquery</i> [1988] ECR 1919.....	293
Case 30/87 <i>Bodson</i> [1988] ECR 247.....	74
Case 53/87 <i>CICRA v Renault</i> [1988] ECR 6039.....	321
Case 81/87 <i>Daily Mail</i> [1988] ECR 5483.....	158
Case 142/87 <i>Belgium v Commission</i> [1990] ECR I-959.....	124, 240
Case 277/87 <i>Sandoz Prodotti Farmaceutici</i> [1990] ECR I-45 summ.pub	86
Case 382/87 <i>Buet</i> [1989] ECR 1235	222
Case 395/87 <i>Tournier</i> [1989] ECR 2521.....	109, 318, 321
Case 62 & 72/87 <i>Exécutif régional wallon</i> [1988] ECR 1573.....	135, 248
Case 5/88 <i>Wachauf v Germany</i> [1989] ECR 2609.....	21
Case 18/88 <i>RTT v GB-Inno-BM</i> [1991] ECR I-5941.....	115, 280
Case C-21/88 <i>Du Pont de Nemours Italiana</i> [1990] ECR I-889.....	357
Case 25/88 <i>Wurmser</i> [1989] ECR 1105.....	205, 359
Case 62/88 <i>Greece v Council</i> [1990] ECR 1527.....	20, 41, 61
Case C-67/88 <i>Commission v Italy</i> [1990] ECR I-4285.....	208
Case C-69/88 <i>Krantz</i> [1990] ECR I-583.....	169
Case 145/88 <i>Torfaen</i> [1989] ECR 3851	207
Case 202/88 <i>France v Commission</i> [1991] ECR I-1223.....	115, 268
Case 303/88 <i>Italy v Commission</i> [1991] ECR I-1433.....	124, 126, 133, 134
Case C-169/89 <i>Van den Burg</i> [1990] ECR I-2143.....	222
Case C-234/89 <i>Delimitis</i> [1991] ECR I-93.....	60, 90, 92, 298
Case C-241/89 <i>SARPP</i> [1990] ECR I-4695	222
Case C-260/89 <i>ERT v DEP</i> [1991] ECR I-2925.....	21, 115, 268, 269, 272
Case C-305/89 <i>Italy v Commission</i> [1991] ECR I-1603.....	133, 134
Joined Cases C-1/90 and C-176/90 <i>Aragonesa de Publicidad</i> [1991] ECR I-4151	205, 208, 359
Case C-2/90 <i>Commission v Belgium</i> [1993] ECR I-4431 155, 159, 171, 208, 210, 213, 216, 218, 229, 309	
Case C-10/90 <i>Masgio v Bundesknappschaft</i> [1991] ECR I-1119.....	167
Case C-41/90 <i>Höfner and Elser</i> [1991] ECR I-1979.....	71, 72, 76, 77, 81, 280
Case C-76/90 <i>Säger</i> [1991] ECR I-4221.....	162, 166, 205
Case C-179/90 <i>Merci v Gabrielli</i> [1991] ECR I-5889.....	115, 280
Case C-204/90 <i>Bachmann</i> [1992] ECR I-249.....	214
Case C-300/90 <i>Commission v Belgium</i> [1992] ECR I-305	214
Joined Cases C-72/91 & C-73/91 <i>Sloman Neptun</i> [1993] ECR I-887.....	133, 143
Case C-126/91 <i>Schutzverband v Yves Rocher</i> [1993] ECR I-2361	169

Joined Cases C-159/91 and C-160/91 <i>Poucet and Pistre</i> [1993] ECR I-637.....	75, 76
Case C-168/91 <i>Konstantinidis</i> [1993] ECR I-1191	169
Case C-169/91 <i>Stoke-on-Trent</i> [1992] ECR I-66	207
Case C-185/91 Bundesanstalt für den Güterfernverkehr v Reiff [1993] ECR I-5801	70
Case C-189/91 <i>Kirsammer-Hack v Sidal</i> [1993] ECR I-6185	133
Case C-225/91 <i>Matra v Commission</i> [1993] ECR I-3203.....	240
Joined Cases C-241/91P and C-242/91 <i>RTE and ITP</i> [1995] ECR I-743	87, 111
Case C-267/91 and C-268/91 <i>Keck and Mithouard</i> [1993] ECR I-6097.....	154, 163, 174, 197
Case C-320/91 <i>Corbeau</i> [1993] ECR I-2533.....	115, 116, 268, 269, 272, 280
Case C-19/92 <i>Kraus</i> [1993] ECR I-1663.....	167
Case C-37/92 <i>Vanacker and Lesage</i> [1993] ECR I-4947	226
Case C-53/92P <i>Hilt</i> [1994] ECR I-667.....	111, 295, 322, 323
Case C-93/92 CMC Motorradcenter v Baskiciogullari [1993] ECR I-5009.....	169
Case 250/92 <i>Gottrup-Klim</i> [1994] ECR I-5641	87, 109, 294, 318, 321
Case C-275/92 <i>Schindler</i> [1994] ECR I-1039.....	166, 178
Case C-278/92, C-279/92 & C-280/92 Spain v Commission [1994] ECR I-4103	136
Case C-315/92 <i>Clinique</i> [1994] ECR I-317	222
Case C-334/92 <i>Wagner Miret</i> [1993] ECR I-6911	34
Case C-360/92P Publishers Association v Commission [1995] ECR I-23.....	292
Case C-364/92 <i>SAT Fluggesellschaft v Eurocontrol</i> [1994] ECR I-43.....	73, 77, 80
Case C-379/92 <i>Peralta</i> [1994] ECR I-3453.....	169, 171
Case C-387/92 <i>Banco Exterior de España</i> [1994] ECR I-877	120
Case C-391/92 <i>Commission v Greece</i> [1995] ECR I-1621.....	164
Case C-393/92 <i>Gemeente Almelo</i> [1994] ECR I-1477	268, 269, 271, 272, 278
Case C-235/92P <i>Montecatini v Commission</i> [1999] ECR I-4539	286
Case C-41/93 <i>France v Commission</i> [1994] ECR I-1829	224
Case C-42/93 <i>Spain v Commission</i> [1994] ECR I-4175.....	124
Case C-43/93 <i>Vander Elst</i> [1994] ECR I-3803	166
Case C-56/93 <i>Belgium v Commission</i> [1996] ECR I-723.....	120
Case C-280/93 <i>Germany v Council</i> [1994] I-4973	29, 30, 357
Case C-324/93 <i>Evans Medical</i> [1995] ECR I-563.....	155
Case C-384/93 <i>Alpine Investments</i> [1995] ECR I-1141.....	156, 163
Case C-406/93 <i>Reichling</i> [1994] ECR I-4061	33
Case C-415/93 <i>Bosman</i> [1995] ECR 4921.....	54, 101, 155, 162, 163, 167, 205
Case C-484/93 <i>Peter Svensson and Lena Gustavsson</i> [1995] ECR I-3955	205, 214, 359
Case C-399/93 <i>Oude Luttikhuis</i> [1995] ECR I-4515.....	92
Case C-39/94 <i>SFEI</i> [1996] ECR I-3547	119, 120, 240
Case C-44/94 <i>Fishermen's Organisations</i> [1995] ECR I-3115.....	29, 30, 357
Case C-55/94 <i>Gebhard</i> [1995] ECR I-4165.....	162, 167, 205, 208, 359
Case C-96/94 <i>Centro Servizi Spediporto</i> [1995] ECR I-2883	70, 169
Case C-134/94 <i>Esso Española</i> [1995] ECR I-4223.....	169
Joined Cases C-140/94, C-141/94 and C-142/94 <i>DIP</i> [1995] ECR I-3257	169
Case C-157/94 <i>Commission v Netherlands</i> [1997] ECR I-5699	268, 283
Case C-158/94 <i>Commission v Italy</i> [1997] ECR I-5789.....	283
Case C-159/94 <i>Commission v France</i> [1997] ECR I-5815	279, 282, 283

Case C-237/94 <i>O'Flynn</i> [1996] ECR I-2617.....	219
Case C-241/94 <i>France v Commission</i> [1996] ECR I-4551	120
Case C-244/94 <i>Fédération Française des Sociétés d'Assurances</i> [1995] ECR I-4013.....	71
Case C-251/94 <i>Lafuente Nieto</i> [1996] ECR I-4187.....	33
Case C-325/94P <i>An Taisce and WWF UK</i> [1996] ECR I-3727.....	40
Case C-333/94P <i>Tetra Pak v Commission (Tetra Pak II)</i> [1996] ECR I-5951	110, 111, 295, 322
Case C-7/95P <i>John Deere</i> [1998] ECR I-3111.....	92
Case C-34/95, C-35/95 and C-36/95 <i>De Agostini</i> [1997] ECR I-3843	165
Case C-70/95 <i>Sodemare</i> [1997] ECR I-3395	76
Case C-168/95 <i>Arcaro</i> [1996] ECR I-4705.....	186
Case C-189/95 <i>Franzén</i> [1997] ECR I-5909.....	164
Case C-219/95P <i>Ferriere Nord v Commission</i> [1997] ECR I-4411.....	83
Case C-265/95 <i>Commission v French Republic</i> [1997] ECR I-6959.....	205, 359
Case C-321/95P <i>Greenpeace</i> [1998] ECR II-1651.....	40
Case C-341/95 <i>Gianni Bettati v Safety Hi-Tech Srl</i> [1998] ECR I-4355.....	22, 24, 38
Case C-343/95 <i>Diego Cali & Figli</i> [1997] ECR I-1547.....	72, 74, 77, 275, 319
Case C-398/95 <i>SETTG</i> [1997] ECR I-3091.....	205, 359
Joined Cases C-359/95P and C-379/95P <i>Commission and France v Ladbrooke Racing</i> [1997] ECR I-6265	82
Case C-1/96 <i>Compassion in World Farming</i> [1998] ECR I-1251	222
Case C-35/96 <i>Commission v Italy</i> [1998] ECR I-3851.....	71, 74
Case C-67/96 <i>Albany</i> [1999] ECR I-5751	34, 76, 219, 268, 271, 281, 287, 290
Case C-85/96 <i>Martínez Sala</i> [1998] ECR I-2691.....	166
Case C-157/96 <i>National Farmers' Union</i> [1998] ECR I-2211	231
Case C-158/96 <i>Kobll</i> [1998] ECR I 1931.....	207
Case C-180/96 <i>UK v Commission</i> [1998] ECR I-2265.....	231
Case C-203/96 <i>Chemische Afvalstoffen Dusseldorp</i> [1998] ECR I-4075.....	160, 172, 213, 223, 273, 280, 281, 282
Case C-213/96 <i>Outokumpu</i> [1998] ECR I-1777	161, 215
Joined Cases C-215/96 and 216/96 <i>Bagnasco</i> [1999] ECR I-135.....	88
Case C-266/96 <i>Corsica Ferries France</i> [1998] ECR I-3949.....	169, 268, 271, 274
Case C-301/96 <i>Germany v Commission</i> [2003] ECR I 9919.....	151
Case C-342/96 <i>Spain v Commission</i> [1999] ECR I-2459.....	119, 125
Case C-350/96 <i>Clean Car Autoservice</i> [1998] ECR I-2521	54, 101
Joined Cases C-369/96 and C-376/96 <i>Arblade</i> [1999] ECR I-8453	162, 166
Case C-389/96 <i>Aber-Waggon</i> [1998] ECR I-4473	206, 211, 214, 215, 222
Case C-395/96P and C-396/96P <i>Compagnie Maritime Belge</i> [2000] ECR I-1365.....	85, 111
Case C-55/96 <i>Job Centre</i> [1997] ECR I-7119.....	71
Case C-6/97 <i>Italy v Commission</i> [1999] ECR I-2981.....	120
Case C-7/97 <i>Oscar Bronner</i> [1998] ECR I-7791	111
Joined Cases C-52/97 to C-54/97 <i>Viscido v Ente Poste Italiane</i> [1998] ECR I-2629.....	133
Case C-67/97 <i>Criminal proceedings against Ditlev Bluhme</i> [1998] ECR I-8033.....	161, 211, 215, 229
Case C-75/97 <i>Belgium v Commission</i> [1999] ECR I-3671	120, 128
Case C-77/97 <i>Unilever v Smithkline Beecham</i> [1999] ECR I-431	222
Joined Cases C-115/97 to C-117/97 <i>Brentjens</i> [1999] ECR I-6025.....	281, 290

Case C-200/97 <i>Ecotrade v Altiformi e Ferriere di Servola</i> [1998] ECR I-7907	133
Case C-204/97 <i>Portugal v Commission</i> [2001] ECR I-3175.....	357
Case C-212/97 <i>Centros</i> [1999] ECR I-1459	205
Case C-219/97 <i>Drijvende Bokken</i> [1999] ECR I-6121.....	281
Case C-292/97 <i>Karlsson</i> [2000] ECR I-2737.....	21
Case C-295/97 <i>Piaggio</i> [1999] ECR I-3735.....	133
Case C-302/97 <i>Konle</i> [1999] ECR I 3099	206
Case C-412/97 <i>ED</i> [1999] ECR I-3845	169
Case C-22/98 <i>Becu</i> [1999] ECR I-5665.....	75
Case C-35/98 <i>Verkooijen</i> [2000] ECR I-4071.....	205, 359
Case C-44/98 <i>BASF</i> [1998] ECR I-6269.....	169
Joined Cases C-49/98, C-50/98, C-52-54/98 and C-68/98 to C-71/98 <i>Finalarte</i> [2001] ECR I-7831.....	166
Case C-67/98 <i>Zenatti</i> [1999] ECR I 7289	229
Case C-156/98 <i>Germany v Commission</i> [2000] ECR I-6857	129, 151, 246, 357
Case C-165/98 <i>Maz�oleni and ISA</i> [2001] ECR I-2189	166
Case C-190/98 <i>Graf</i> [2000] ECR I-493	167, 169, 170, 205
Case C-209/98 <i>Sydhavnens Sten & Grus</i> [2000] ECR I-3743.....	116, 160, 172, 206, 207, 214, 268, 273, 280, 281, 283
Case C-220/98 <i>Est�e Lauder</i> [2000] ECR I-117	222
Case C-254/98 <i>TK-Heimdienst</i> [2000] ECR I-151	163, 165
Joined Cases C-300/98 and C-392/98 <i>Dior</i> [2000] ECR I-11307	33
Case C-344/98 <i>Masterfoods and HB</i> [2000] ECR I-11369.....	60
Case C-367/98 <i>Commission v Portugal</i> [2002] ECR I 4731	167, 205, 359
Case C-379/98 <i>PreussenElektra</i> [2001] ECR I-2099.....	133, 135, 216, 218, 229
Case C-464/98 <i>Stefan</i> [2001] ECR I-173	158
Case C-473/98 <i>Toolex</i> [2000] ECR I-5681	163, 168, 211, 232
Joined Cases C-180/98 to C-184/98 <i>Pavlov</i> [2000] ECR I-6451.....	71, 74, 75, 290
Case C-6/99 <i>Greenpeace France</i> [2000] ECR I 1651	231
Case C-143/99 <i>Adria-Wien</i> [2001] ECR I-8365.....	120, 128, 130, 193
Case C-157/99 <i>Smits and Peerbooms</i> [2001] ECR I-5473.....	207
Case C-263/99 <i>Commission v Italy</i> [2001] ECR I-4195.....	208
Case C-268/99 <i>Jany</i> [2001] ECR I-8615.....	156
Case C-309/99 <i>Wouters</i> [2002] ECR I-1577.....	54, 74, 75, 87, 92, 279, 287, 288, 335, 336, 338
Case C-324/99 <i>DaimlerChrysler</i> [2001] ECR I-9897	159, 226
Case C-385/99 <i>M�ller-Faur� and van Riet</i> [2003] ECR I-4509	207
Case C-475/99 <i>Ambulan� Gl�ckner</i> [2001] ECR I-8089.....	74, 76, 116, 268, 269, 271, 272
Case C-482/99 <i>France v Commission</i> [2002] ECR I-4397	125, 133, 134
Case C-483/99 <i>Commission v France</i> [2002] ECR I-4781	205
Case C-503/99 <i>Commission v Belgium</i> [2002] ECR I-4809	205
Case C-510/99 <i>Tridon</i> [2001] ECR I-7777	223
Case C-512/99 <i>Germany v Commission</i> [2003] ECR I-845.....	226
Case C-513/99 <i>Concordia Bus</i> [2002] ECR I-7213	22, 33, 63
Case C-3/00 <i>Denmark v Commission</i> [2003] ECR I-2643.....	226
Case C-17/00 <i>De Coster</i> [2001] ECR I-9445.....	166

Case C-53/00 <i>Ferring</i> [2001] ECR I-9067.....	121
Joined Cases C-57/00P and C-61/00P <i>Freistaat Sachsen</i> [2003] ECR I-9975.....	151, 246
Case C-60/00 <i>Carpenter</i> [2002] ECR I-6279.....	166
Joined Cases C-74/00P & C-75/00P <i>Falck and Acciaierie di Bolzano</i> [2002] ECR I 7869.....	358
Case C-113/00 <i>Spain v Commission</i> [2002] ECR I-7601.....	357
Case C-121/00 <i>Hahn</i> [2002] ECR I-9193.....	231
Case C-136/00 <i>Danner</i> [2002] ECR I-8147.....	214
Case C-162/00 <i>Pokerzęptowicz-Meyer</i> [2002] ECR I-1049.....	226
Joined Cases C-204/00P, C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P <i>Aalborg Portland</i> [2004] ECR I-123.....	87
Case C-218/00 <i>Cisal v INAIL</i> [2002] ECR I-691.....	74, 75, 76
Case C-278/00 <i>Greece v Commission</i> [2004] ECR I-3997.....	151
Case C-280/00 <i>Altmark Trans</i> [2003] ECR I-7747.....	117, 121, 122, 358
Case C-409/00 <i>Spain v Commission</i> [2003] ECR I-1487.....	128, 131, 143
Case C-416/00 <i>Morellato</i> [2003] ECR I-9343.....	164
Case C-463/00 <i>Commission v Spain</i> [2003] ECR I-4581.....	163, 268
Case C-501/00 <i>Spain v Commission</i> [2004] ECR I 6717.....	120
Joined Cases C-34/01 to C-38/01 <i>Enirisorse</i> [2003] ECR I-14243.....	122
Case C-95/01 <i>Greenham and Abel</i> [2004] ECR I-1333.....	232
Case C-126/01 <i>GEMO</i> [2003] ECR I-13769.....	120
Case C-159/01 <i>Netherlands v Commission</i> [2004] ECR I-4461.....	120
Case C-168/01 <i>Bosal</i> [2003] ECR I-9409.....	33
Case C-192/01 <i>Commission v Denmark</i> [2003] ECR I-9693.....	232
Case C-198/01 <i>CIF</i> [2003] ECR I-8055.....	70, 82, 83
Case C-207/01 <i>Altair Chimica</i> [2003] ECR I-8875.....	81, 82
Case C-224/01 <i>Köbler</i> [2003] ECR I-10239.....	158
Case C-236/01 <i>Monsanto Agricoltura Italia</i> [2003] ECR I-8105.....	231, 232
Case C-243/01 <i>Gambelli</i> [2003] ECR I 13031.....	205, 208, 229, 359
Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 <i>AOK-Bundesverband</i> [2004] ECR I- 2493.....	75, 76
Case C-322/01 <i>Deutscher Apothekerverband</i> [2003] ECR I-14887.....	165, 226
Case C-388/01 <i>Commission v Italy</i> [2003] ECR I-721.....	205, 208, 359
Case C-463/01 <i>Commission v Germany</i> [2004] ECR I-11705.....	206, 226
Case C-66/02 <i>Italy v Commission</i> [2005] ECR I-10901.....	120
Case C-71/02 <i>Karner</i> [2004] ECR I-3025.....	165
Case C-88/02 <i>Portugal v Commission</i> [2006] ECR I-7115.....	129
Case C-138/02 <i>Collins</i> [2004] ECR I-2703.....	33
Case C-200/02 <i>Zhu and Chen</i> [2004] ECR I- 9925.....	166
Case C-245/02 <i>Anbeuser-Busch</i> [2004] ECR I-10989.....	33
Case C-276/02 <i>Spain v Commission</i> [2004] ECR I 8091.....	358
Case C-299/02 <i>Commission v Netherlands</i> [2004] ECR I 9761.....	167
Case C-309/02 <i>Radlberger Getränkegesellschaft and S.Spitz</i> [2004] ECR I-11763.....	169, 206
Case C-442/02 <i>CaixaBank</i> [2004] ECR I-8961.....	166, 167
Case 464/02 <i>Commission v Denmark</i> [2005] ECR I-7929.....	163, 167
Case 6/03 <i>Deponiezweckverband Eiterköpfe</i> [2005] ECR I-2753.....	223

Case C-20/03 <i>Burmanjer</i> [2005] ECR I-4133.....	164, 165
Joined Cases C-128/03 and C-129/03 <i>AEM</i> [2005] ECR I-2861	130
Case C-134/03 <i>Viacom Outdoor</i> [2005] ECR I-1167.....	169
Case C-140/03 <i>Commission v Greece</i> [2005] ECR I 3177.....	167
Case C-172/03 <i>Heiser</i> [2005] ECR I-1627.....	120, 136
Case C-205/03 <i>Fenin</i> [2006] ECR I-6295.....	74
Case C-231/03 <i>Coname</i> [2005] ECR I-7287	169
Case C-270/03 <i>Commission v Italy</i> [2005] ECR I-5233.....	33
Case C-320/03 <i>Commission v Austria</i> [2004] ECR I-3593	27, 206, 217, 218
Joined Cases C-442/03P and C-471/03P <i>P&O v Commission</i> [2006] ECR I-4845.....	149
Case C-451/03 <i>Servizi Ausiliari Dottori Commercialisti</i> [2006] ECR I-2941	122, 208
Case C-514/03 <i>Commission v Spain</i> [2006] ECR I-963.....	226
Joined Cases C-544&545/03 <i>Mobistar and Belgacom Mobile</i> [2005] ECR I-7723.....	166, 169
Joined Cases C-94/04 and 202/04 <i>Cipolla v Fazari</i> [2006] ECR I-2049	82
Case C-95/04P <i>British Airways</i> [2007] ECR I-2331.....	111, 328
Case C-148/04 <i>Unicredito Italiano</i> [2005] ECR I-11137.....	87
Case C-150/04 <i>Commission v Denmark</i> [2007] ECR I-1163.....	228
Joined Cases C-151/04 and C-152/04 <i>Nadin and Nadin-Lux</i> [2005] ECR I-11203.....	167
Case C-158/04 and C-159/04 <i>Alfa Vita</i> [2006] ECR I-8135.....	164
Case C-167/04P <i>JCB Service v Commission</i> [2006] ECR I-8935.....	313
Case C-174/04 <i>Commission v Italy</i> [2005] ECR I-4933.....	167
Case C-196/04 <i>Cadbury Schweppes</i> [2006] ECR I-7995.....	156
Case C-222/04 <i>Cassa di Risparmio di Firenze</i> [2006] ECR I-289	71, 76, 87, 119, 120
Case C-237/04 <i>Enirisorse</i> [2006] ECR I-2843	71, 119, 120
Case C-311/04 <i>Algemene Scheeps Agentuur Dordrecht</i> [2006] ECR I-609.....	33
Joined Cases C-338/04, C-359/04 and C-360/04 <i>Placanica</i> [2007] ECR I 1891	208, 229
Case C-366/04 <i>Schwarz</i> [2005] ECR I-10139.....	164
Case C-372/04 <i>Watts</i> [2006] ECR I-4325	207
Case C-393/04 and C-41/05 <i>Air Liquide Industries Belgium</i> [2006] ECR I-5293.....	120
Case C-452/04 <i>Fidium Finanz</i> [2006] ECR I-9521	156
Case C-513/04 <i>Kerckbaert and Morres</i> [2006] ECR I-10967	167
Case C-519/04P <i>Meca-Medina and Majcen v Commission</i> [2006] ECR I-6991	54, 287, 289, 336
Case C-526/04 <i>Laboratoires Boiron</i> [2006] ECR I-7529	122
Case C-110/05 <i>Commission v Italy</i> [2009] ECR I-519 163, 168, 174, 178, 179, 221, 232, 283, 342	
Case C-142/05 <i>Mickelson and Roos</i> [2009] ECR I-4273 163, 168, 174, 179, 206, 218, 221, 230	
Case C-238/05 <i>ASNEF-EQUIFAX</i> [2006] ECR I-11125	312, 313
Case C-257/05 <i>Commission v Germany</i> [2006] ECR I-134.....	226
Case C-341/05 <i>Laval un Partneri</i> [2007] ECR I-11767	29, 155
Case C-370/05 <i>Festersen</i> [2007] ECR I-1129.....	219
Case C-380/05 <i>Centro Europa 7</i> [2008] ECR I-349.....	115
Case C-402/05 and 415/05P <i>Kadi and Al Barakaat International Foundation</i> [2008] ECR I-6351.....	229
Case C-404/05 <i>Commission v Germany</i> [2007] ECR I-10239	226

Case C-438/05 <i>ITF & FSU v Viking Lines</i> [2007] ECR I-10779	29, 155
Joined Cases C-439/05P and C-454/05P <i>Land Oberösterreich v Commission</i> [2007] ECR I-7141.....	224
Joined Cases C 75/05P and C 80/05P <i>Germany v Kronofrance</i> [2008] ECR I 6619.....	240
Joined Cases C-14/06 and C-295/06 <i>Parliament and Denmark v Commission</i> [2008] ECR I-1649.....	231
Case C-206/06 <i>Essent Netwerke Noord</i> [2008] ECR I-5497.....	122, 134
Case C-212/06 Government of the French Community and Walloon Government [2008] ECR I 1683.....	228
Case C-244/06 <i>Dynamic Medien</i> [2008] ECR I-505.....	164
Case C-265/06 <i>Commission v Portugal</i> [2008] ECR I-2245.....	163, 168, 178, 221, 229
Joined Cases C-341/06P and C-342/06P <i>Chronopost and La Poste v UFEX</i> [2008] ECR I-4777.....	122
Case C-346/06 <i>Riiffert</i> [2008] ECR I-1989	33
Case C-352/06 <i>Bosmann</i> [2008] ECR I-3827.....	33
Case C-353/06 <i>Grunkin and Paul</i> [2008] ECR I-7639.....	169
Case C-390/06 <i>Nuova Agricast</i> [2008] ECR I-2577	357, 358
Case C-413/06P <i>Bertelsmann and Sony v Impala</i> [2008] ECR I-4951.....	85
Joined Cases C-428/06 to C-434/06 Unión General de Trabajadores de La Rioja [2008] ECR I- 6747.....	129
Case C-487/06P <i>British Aggregates</i> [2008] ECR I-10515.....	21, 27, 61, 130, 131, 132, 140, 142, 143, 193, 236
Case C-500/06 <i>Corporación Dermoestética</i> [2008] ECR I 5785.....	229
Joined Cases C-501/06P, C-513/06P, C-515/06P and C-519/06P <i>GlaxoSmithKline Services</i> [2009] ECR I-9291.....	91
Case C-518/06 <i>Commission v Italy</i> [2009] ECR I-3491.....	163, 166, 167, 176
Case C-527/06 <i>Renneberg</i> [2008] ECR I 7735.....	156, 158
Case C-280/06 <i>ETI</i> [2007] ECR I-10893	72
Case C-42/07 Liga Portuguesa de Futebol Profissional [2009] ECR I-7633.....	208
Case C-52/07 <i>Kanal 5 and TV 4</i> [2008] ECR I-9275.....	108
Case C-113/07P <i>Selex Sistemi Integrati</i> [2009] ECR I-2207	73, 75, 275
Case C-161/07 <i>Commission v Austria</i> [2008] ECR I 10671.....	232, 283, 342
Case C-169/07 <i>Hartlauer</i> [2009] ECR I 1721.....	167, 229, 230
Joined Cases C-171/07 and C-172/07 <i>Apothekerkammer</i> [2009] ECR I-4171.....	167
Case C-202/07P <i>France Télécom</i> [2009] ECR I-2369.....	111
Case C-205/07 <i>Gysbrechts</i> [2008] ECR I-9947.....	163, 168, 207
Case C-209/07 <i>Beef Industry Development</i> [2008] ECR I-8637.....	91
Case C-333/07 <i>Regie Networks</i> [2008] ECR I-10807	240
Case C-385/07P <i>DSD</i> [2009] ECR I-6155	110, 320
Case C-428/07 <i>Horvath</i> [2009] ECR I-6355.....	16
Case C-441/07P <i>Commission v Alrosa</i> [2010] ECR I-5949	111
Case C-524/07 <i>Commission v Austria</i> [2008] ECR I-187.....	206, 218
Case C-531/07 <i>LIBRO</i> [2009] ECR I-3717.....	168
Case C-350/07 <i>Kattner Stahlbau</i> [2009] ECR I-1513	72, 75, 76
Case C-49/07 <i>MOTOE</i> [2008] ECR I-4863	74, 76, 77

Case C-46/08 <i>Carmen Media Group</i> [2010] ECR I-8149.....	229
Case 100/08 <i>Commission v Belgium</i> [2009] I-140*, Summ.pub	224
Case C-128/08 <i>Damseaux</i> [2009] ECR I-6823	167
Case C-132/08 <i>Lidl Magyarország</i> [2009] ECR I-3841.....	226
Case C-153/08 <i>Commission v Spain</i> [2009] ECR I 9735.....	205, 208, 281, 359
Case C-169/08 <i>Presidente del Consiglio dei Ministri</i> [2009] ECR I-10821.....	172, 175, 206, 213, 218, 228, 230, 234
Case C-171/08 <i>Commission v Portugal</i> [2010] ECR I-6817.....	205, 359
Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 <i>Salahadin Abdulla</i> [2010] ECR I-1493.....	33
Case C-198/08 <i>Commission v Austria</i> [2010] ECR I-1645	61
Case C-211/08 <i>Commission v Spain</i> [2010] ECR I-5267.....	169
Case C-212/08 <i>Zeturf</i> [2011] ECR I-5633	205, 281, 359
Case C-221/08 <i>Commission v Ireland</i> [2010] ECR I-1669.....	61
Case C-254/08 <i>Futura Immobiliare</i> [2009] ECR I-6995.....	231
Case C-265/08 <i>Federutility</i> [2010] ECR I-3377)	33, 268, 269
Case C-279/08P <i>Commission v Netherlands</i> [2011] ECR I-7671	130, 131, 132, 133, 140, 142, 143, 243
Case C-280/08 <i>Deutsche Telekom</i> [2010] ECR I-9555	83, 111, 112
Case C-310/08 <i>Brahim</i> [2010] ECR I-1065	33
Case C-373/08 <i>Hoesch Metals and Alloys</i> [2010] ECR I-951.....	33
Case C-384/08 <i>Attanasio Group</i> [2010] ECR I 2055.....	206
Case C-400/08 <i>Commission v Spain</i> [2011] ECR I-1915.....	167, 206, 232, 283, 342
Joined Cases C-403/08 and C-429/08 <i>Football Association Premier League</i> [2011] ECR I-9083.....	91
Case C-425/08 <i>Enviro Tech (Europe)</i> [2009] ECR I-10035.....	231
Case C-446/08 <i>Solgar Vitamin's France</i> [2010] ECR I-3973.....	231
Case C-480/08 <i>Teixeira</i> [2010] ECR I-1107.....	33
Case C-578/08 <i>Chakroun</i> [2010] ECR I-1839.....	33
Case C-8/08 <i>T-Mobile Netherlands</i> [2009] ECR I-4529.....	90, 91, 335
Case C-28/09 <i>Commission v Austria</i> (CJ 21 December 2011)	34, 206, 217
Case C-31/09 <i>Bolbol</i> [2010] ECR I-5539	33
Case C-34/09 <i>Ruiz Zambrano</i> [2011] ECR I-1177	156, 166
Case C-52/09 <i>TeliaSonera Sverige</i> [2011] ECR I-527	112, 328
Joined Cases C-71/09P, C-73/09P and C-76/09P <i>Comitato</i>	120
Joined Cases C-106/09P and C-107/09P <i>Commission and Spain v Government of Gibraltar and United Kingdom</i> [2011] ECR I-11113	120
Case C-108/09 <i>Ker-Optika</i> [2010] ECR I-122213.....	168
Case C-115/09 <i>BUND Deutschland</i> [2011] ECR I-3673	33
Case C-161/09 <i>Kakavetsos-Fragkopoulos</i> [2011] ECR I-915	207
Case C-208/09 <i>Sayn-Wittgenstein</i> [2010] ECR I-13693.....	169
Case C-291/09 <i>Francesco Guarnieri & Cie</i> [2011] ECR I-2685	169
Case C-391/09 <i>Runevič-Vardyn and Wardyn</i> [2011] ECR I-3787	169
Case C-434/09 <i>McCarthy</i> [2011] ECR I-3375	156, 166
Case C-437/09 <i>AG2R Prévoyance</i> [2011] ECR I-973.....	281

Case C-439/09 <i>Pierre Fabre Dermo-Cosmétique</i> [2011] ECR I-9419.....	91, 294
Case C-15/10 <i>Etimine</i> [2011] ECR I-6681	231
Case C-43/10 <i>Nomarchiaki Aftodioikisi Aitoloakarnanias</i> (CJ 11 September 2012).....	25
Joined Cases C-58/10 to C-68/10 <i>Monsanto</i> [2011] ECR I-7763.....	231
Case C-209/10 <i>Post Danmark</i> (CJ 27 March 2012).....	112, 328, 329
Case C-385/10 <i>Elenca</i> (CJ 18 October 2012).....	168
Case C-386/10P <i>Chalkor v Commission</i> (CJ 8 December 2011)	58
Case C-389/10P <i>KME Germany</i> (CJ 8 December 2011)	91
Case C-443/10 <i>Bonnarde</i> [2011] ECR I-9327	168
Case C-456/10 <i>ANETT</i> (CJ 26 April 2012).....	168
Case C-484/10 <i>Ascafor</i> (CJ 1 March 2012)	168
Case C-549/10P <i>Tomra v Commission</i> (CJ 19 April 2012).....	112
Case C-32/11 <i>Allianz Hungária</i> (CJ 14 March 2013).....	91, 335
Case C-150/11 <i>Commission v Belgium</i> (CJ 6 September 2012).....	226
Case C-171/11 <i>Fra.bo</i> (CJ July 2012)	168
Case C-226/11 <i>Expedia</i> (CJ 3 December 2012)	88, 91, 335
Case C-256/11 <i>Dereci</i> [2011] ECR I-11315	166
Case C-1/12 <i>OTOOC</i> (CJ 28 February 2013).....	82, 116, 287, 290, 292, 336
Case C-68/12 <i>Slovenská sporiteľňa</i> (CJ 7 February 2013)	91, 324, 326, 341
Case C-136/12 <i>CNG</i> (CJ 18 July 2013).....	333
Case C-234/12 <i>Sky Italia</i> (CJ 18 July 2013).....	222

GC

Cases 788/79 <i>Gilli and Andres</i> [1980] ECR 2071	213
Case T-6/89 <i>Enichem Anic SpA</i> [1991] ECR II-1632.....	76
Case T-7/89 <i>Hercules Chemicals</i> [1991] ECR II-1711	91
Case T-30/89 <i>Hilt</i> [1991] ECR II-1439.....	90, 114, 116, 323, 325, 326, 329, 335, 337, 338, 353
Case T-65/89 <i>BPB Industries and British Gypsum</i> [1993] ECR II-389	116
Joined Cases T-68/89, T-77/89 and T-78/89 <i>SIV</i> [1992] ECR II-1403	76, 90
Case T-142/89 <i>Boël</i> [1995] ECR II-867	95
Case T-148/89 <i>Tréfilunion</i> [1995] ECR II-1063	96, 97
Case T-152/89 <i>ILRO</i> [1995] ECR II-1197	95
Case T-19/91 <i>Vichy</i> [1992] ECR II-415	111, 298
Case T-83/91 <i>Tetra Pak v Commission (Tetra Pak II)</i> [1994] ECR II-755 114, 116, 189, 323, 325, 326, 335, 336, 339, 353	
Case T-29/92 <i>SPO</i> [1995] ECR II-289.....	303
Case T-88/92 <i>Leclerc</i> [1996] ECR II-1961	111, 298
Case T-7/93 <i>Langnese-Iglo</i> [1995] ECR II-1533.....	318
Case T-17/93 <i>Matra Hachette</i> [1994] ECR II-595.....	53, 306, 363
Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 <i>Compagnie Maritime Belge</i> [1996] ECR II-120	92
Case T-49/93 <i>Case SIDE</i> [1995] ECR II-2501	262
Joined Cases T-244/93 and T-486/93 <i>TWD</i> [1995] ECR II-2265	245
Joined Cases T-447/93, T-448/93 & T-449/93 <i>AITEC</i> [1995] ECR II-1971.....	141

Case T-461/93 <i>An Taisce and WWF</i> [1994] ECR II-733	44
Case T-471/93 <i>Tiervé Ladbroke</i> [1995] ECR II-2537	125
Case T-513/93 <i>CNSD</i> [2000] ECR II-1807	87
Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 <i>Métropole Télévision</i> [1996] ECR II-649	53, 306
Case T-548/93 <i>Ladbroke Racing</i> [1995] ECR II-2565.....	88
Case T-585/93 <i>Greenpeace</i> [1995] ECR II-2205.....	44
Case T-260/94 <i>Air Inter</i> [1997] ECR II-997	287
Joined Cases T-305-307/94, T-313-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T- 335/94 <i>LVM</i> [1999] ECR II-931	92
Joined Cases T-374/94, T-375/94, T-384/94 & T-388/94 <i>European Night Services</i> [1998] ECR II-3141	90, 93, 95, 291
Case T-380/94 <i>AIUFFASS and AKT</i> [1996] ECR II-2169	245
Case T-387/94 <i>Asia Motor France</i> [1996] ECR II-961.....	88
Case T-395/94 <i>Atlantic Container Line</i> [2002] ECR II-875	90
Joined Cases T-32/95 <i>Cimenteries CBR</i> [2000] ECR II-491	93
Case T-106/95 <i>FFSA</i> [1997] ECR II-229	126, 277
Case T-149/95 <i>Ducros</i> [1997] ECR II-2031	245
Joined Cases T-213/95 and T-18/96 <i>SCK and FNK</i> [1997] ECR II-1739.....	346, 348
Case T-14/96 <i>BAI</i> [1999] ECR II-139.....	125, 130
Cases T-41/96 <i>Bayer AG</i> [2000] ECR II-3383	91
Case T-65/96 <i>Kish Glass</i> [2000] ECR II-1885.....	140
Case T-111/96 <i>ITT Promedia</i> [2000] ECR II-2937	87
Joined Cases T-132/96 and T-143/96 <i>Freistaat Sachsen</i> [1999] ECR II-3663.....	251
Case T-199/96 <i>Bergaderm and Goupil</i> [1998] ECR II-2805.....	236
Case T-46/97 <i>SIC</i> [2000] ECR II-2125.....	126
Joined Cases T-204/97 and T-270/97 <i>EPAC</i> [2000] ECR II-2267	124, 125
Case T-228/97 <i>Irish Sugar</i> [1999] ECR II-2969	92, 116, 340
Case T-288/97 Regione autonoma Friuli-Venezia Giulia [2001] ECR II-1169	141
Case T-613/97 <i>UFEX</i> [2000] ECR II-4055.....	125
Case T-62/98 <i>Volkswagen</i> [2000] ECR II-2707	93
Case T-65/98 <i>Van den Bergh Foods</i> [2003] ECR II-4653.....	113, 116, 291, 318
Case T-128/98 <i>Aéroports de Paris</i> [2000] ECR II-3929.....	81, 113
Case T-139/98 <i>AAMS</i> [2001] ECR II-3413	115
Case T-155/98 <i>SIDE</i> [2002] ECR II-1179	140, 262
Joined Cases T-191/98 and T-212/98 to T-214/98 <i>Atlantic Container Line</i> [2003] ECR II-3275	87, 90, 115, 321, 340
Joined Cases T-202/98, T-204/98 and T-207/98 <i>Tate & Lyle</i> [2001] ECR II-2035.....	95
Case T-65/99 <i>Strintzis Lines Shipping</i> [2003] ECR II-5433	87, 88
Case T-66/99 <i>Minoan Lines</i> [2003] II-5515	88
Case T-70/99 <i>Alpharma v Council</i> [2002] ECR II-3495.....	236
Case T-112/99 <i>M6 v Commission (Metropole II)</i> [2001] ECR II-2459.....	97, 291
Case T-158/99 <i>Thermenhotel Stoiser Franz</i> [2004] ECR II-1	369
Case T-219/99 <i>British Airways</i> [2003] ECR II-5917.....	90, 116
Cases T-228/99 and T-233/99 <i>Westdeutsche Landesbank Girozentrale</i> [2003] II-435	129

Case T-319/99 <i>Fenin</i> [2003] ECR II-357.....	79
Case T-213/00 <i>CMA CGM</i> [2003] ECR II-913	317
Case T-57/01 <i>Solvay</i> [2009] ECR II-4621.....	113
Case T-66/01 Imperial Chemical Industries (GC 25 June 2010)	113
Case T-67/01 <i>JCB Service</i> [2004] ECR II-49.....	95
Joined Cases T-116/01 and T-118/01 <i>P&O v Commission</i> [2003] ECR II-2957	154
Case T-151/01 <i>DSD</i> [2007] ECR II-1607	115, 325
Case T-157/01 <i>Danske Busvognmaend</i> [2004] ECR II-917	127
Case T-168/01 <i>GlaxoSmithKline Services</i> [2006] ECR II-2969.....	87, 95, 97, 313, 317, 318
Case T-203/01 <i>Michelin v Commission (Michelin II)</i> [2003] ECR II-4071	116
Case T-213/01 <i>Österreichische Postsparkasse</i> [2006] ECR II-1601	313
Case T-274/01 <i>Valmont</i> [2004] ECR II-3145	127, 130
Case T-289/01 <i>DSD</i> [2007] ECR II-1691	306, 309
Case T-17/02 <i>Olsen v Commission</i> [2005] ECR II-2031	277, 279, 283
Case T-27/02 <i>Kronofrance</i> [2004] ECR II-4177	140
Case T-34/02 <i>Le Levant</i> [2006] ECR II-267	141
Case T-193/02 <i>Laurent Piau</i> [2005] ECR II-209.....	341, 346, 348, 349, 352
Case T-210/02 <i>British Aggregates</i> [2006] ECR II-2789.....	26, 65, 135, 198
Case T-210/02RENV <i>British Aggregates</i> (GC 7 March 2012)	135, 146, 198
Case T-313/02 <i>Meca-Medina and Majcen v Commission</i> [2004] ECR II-3291	79, 294, 350
Case T-351/02 <i>Deutsche Bahn</i> [2006] ECR II-1047	138
Case T-392/02 <i>Solvay Pharmaceuticals v Council</i> [2003] ECR II-4555.....	236, 354
Case T-20/03 <i>Kahla/Thüringen Porzellan</i> [2008] II-2305.....	129
Case T-271/03 <i>Deutsche Telekom</i> [2008] ECR II-477.....	87, 88, 116
Case T-289/03 <i>BUPA</i> [2008] ECR II-81	127, 195, 273, 275, 276, 277, 279, 280, 283, 348, 366
Case T-340/03 <i>France Télécom</i> [2007] ECR II-107	116, 340
Case T-349/03 <i>Corsica Ferries France</i> [2005] ECR II-2197	127
Case T-442/03 <i>SIC</i> [2008] ECR II-1161.....	139
Case T-328/03 <i>O2 (Germany)</i> [2006] ECR II-1231	97, 291
Case T-155/04 <i>Selex Sistemi Integrati</i> [2006] ECR II-4797	76, 78
Case T-201/04 <i>Microsoft</i> [2007] ECR II-3601	116, 333
Joined Cases T-211/04 and T-215/04 <i>Government of Gibraltar v Commission</i> [2008] ECR II-3745	134
Case T-301/04 <i>Clearstream</i> [2009] ECR II-3155	113, 116
Joined Cases T-304/04 & T-316/04 <i>Italy and Wam v Commission</i> [2006] ECR II-64.....	141
Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 <i>TV2/Danmark</i> [2008] ECR II-2935	276, 280
Case T-359/04 <i>British Aggregates</i> [2010] ECR II-4227.....	369
Case T-87/05 <i>EDP</i> [2005] ECR II-3745.....	87
Case T-163/05 <i>Bundesverband deutscher Banken</i> [2010] ECR II-387	129, 132
Case T-321/05 <i>AstraZeneca</i> [2010] ECR II-2805.....	333
Case T-354/05 <i>TF1</i> [2009] ECR II-471	122, 127
Case T-268/06 <i>Olympiaki Aeroporia Ypiresies</i> [2008] ECR I-1091	156
Case T-155/06 <i>Tomra Systems</i> (GC 9 September 2010)	113

Case T-336/07 <i>Telefónica and Telefónica de España</i> (GC 29 March 2012).....	88
--	----

AG Opinions

Opinion AG Römer Case 56 & 58/64 <i>Consten and Grundig</i> [1966] ECR 299.....	92
Opinion AG Mayras Case 152/72 <i>Sotgiu v Deutsche Bundespost</i> [1974] ECR 153.....	157
Opinion AG Rozès Case 172/82 <i>Inter Huiles</i> [1983] ECR 555.....	272
Opinion AG Mancini Case 307/84 <i>Commission v France</i> [1986] ECR 1725.....	157
Opinion AG Tesouro Joined Cases C-159/91 and C-160/91 <i>Poucet and Pistre</i> [1993] ECR I-63777	
Opinion AG Jacobs Case C-278/92, C-279/92 & C-280/92 <i>Spain v Commission</i> [1994] ECR I-4103.....	126
Opinion AG Lenz Case C-391/92 <i>Commission v Greece</i> [1995] ECR I-1621.....	168
Opinion AG Darmon Case C-393/92 <i>Gemeente Almelo</i> [1994] ECR I-1477.....	280
Opinion AG Jacobs Case C-384/93 <i>Alpine Investments</i> [1995] ECR I-1141.....	169
Opinion AG Jacobs Case C-412/93 <i>Leclerc-Siplec v TF1</i> [1995] ECR 179.....	168
Opinion AG Leger Case C-80/94 <i>Wielockx</i> [1995] ECR I-2493.....	213
Opinion AG Tesouro Case C-244/94 <i>Fédération Française des Sociétés d'Assurances</i> [1995] ECR I-4013.....	75
Opinion AG Fennelly Case C-70/95 <i>Sodemare</i> [1997] ECR I-3395.....	76, 77
Opinion AG Tesouro Case C-120/95 <i>Decker</i> [1998] ECR I-1831.....	213, 219
Opinion AG Cosmas Case C-321/95P <i>Greenpeace International</i> [1998] ECR I-1651.....	38, 46
Opinion AG Cosmas Case C-343/95 <i>Diego Cali & Figli</i> [1997] ECR I-1547.....	80
Opinion AG Cosmas Joined Cases C-51/96 and C-191/97 <i>Delière</i> [2000] ECR I-2549.....	292
Opinion AG Jacobs Case C-203/96 <i>Chemische Afvalstoffen Dusseldorp</i> [1998] ECR I-4075.....	162, 269, 279
Opinion AG Fennelly Case C-67/97 <i>Criminal proceedings against Ditlev Bluhme</i> [1998] ECR I-8033.....	161, 169
Opinion AG La Pergola Case C-44/98 <i>BASF</i> [1998] ECR I-6269.....	169
Opinion AG Fennelly Case C-190/98 <i>Graf</i> [2000] ECR I-493.....	169
Opinion AG Jacobs Case C-379/98 <i>PreussenElektra</i> [2001] ECR I-2099.....	38, 159, 173, 213, 214, 215, 216
Opinion AG Léger Case C-309/99 <i>Wouters</i> [2002] ECR I-1577.....	279, 288
Opinion AG Jacobs Case C-136/00 <i>Danner</i> [2002] ECR I-8147.....	213
Opinion AG Jacobs Case C-218/00 <i>Cisal v INAIL</i> [2002] ECR I-691.....	76
Opinion AG Jacobs Case C-126/01 <i>GEMO</i> [2003] ECR I-13769.....	138, 139
Opinion AG Jacobs Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 <i>AOK-Bundesverband</i> [2004] ECR I-2493.....	71, 76
Opinion AG Léger Case C-438/02 <i>Hanner</i> [2005] ECR I-04551.....	283
Opinion AG Geelhoed Case C-320/03 <i>Commission v Austria</i> [2004] ECR I-3593.....	161, 217
Opinion AG Maduro Case C-158/04 and C-159/04 <i>Alfa Vita</i> [2006] ECR I-8135.....	167
Opinion AG Geelhoed Case C-161/04 <i>Austria v Parliament and Council</i> [2006] ECR I-7183 29, 31, 40	
Opinion AG Bot Case C-110/05 <i>Commission v Italy</i> [2009] ECR I-519.....	167
Opinion AG Mengozzi Case C-487/06P <i>British Aggregates</i> [2008] ECR	

I-10515.....	38, 61, 132, 142
Opinion of AG Bot Case C-42/07 <i>Liga Portuguesa de Futebol Profissional</i> [2009] ECR I-7633.....	283
Opinion AG Trstenjak Case C-205/07 <i>Gysbrechts</i> [2008] ECR I-9947	167
Opinion AG Trstenjak Case C-428/07 <i>Horvath</i> [2009] ECR I-6355	41
Opinion AG Kokott Case C-169/08 <i>Presidente del Consiglio dei Ministri</i> [2009] ECR I-10821.....	231
Joined Opinion AG Kokott Cases C-197/08, C-198/08 and C-221/08 <i>Commission v France, Austria and Ireland</i> [2010] ECR I-1599	62
Opinion AG Sharpston Case C-400/08 <i>Commission v Spain</i> [2011] ECR I-1915.....	170
Opinion AG Trstenjak Case C-28/09 <i>Commission v Austria</i> (CJ 21 December 2011).....	213, 217
Opinion AG Mazák Case C-439/09 <i>Pierre Fabre Dermo-Cosmétique</i> [2011] ECR I-9419	295
Opinion Case C-43/10 <i>Nomarchiaki Aftodioikisi Aitolokarnanias</i> (CJ 11 September 2012).....	25

Commission Decisions

<i>ACEC/Berliet</i> (Case IV/26045) Commission Decision 68/319/EEC [1968] OJ L201/7	298
Aid measures implemented by the Netherlands for AVR for dealing with hazardous waste Commission Decision 2006/237/EC [2006] OJ L84/37	123, 276
<i>Aid schemes for the motor vehicle industry</i> Commission Decision 90/381/EEC [1990] OJ L188/55.....	120
<i>Aluminium Imports from Eastern Europe</i> (IV/26.870) Commission Decision 85/206/EEC [1985] OJ L92/1.....	72
<i>Ansac</i> (IV/33.016) Commission Decision 91/301/EEC [1991] OJ L152/54.....	316
<i>ARA, ARGEV, ARO</i> (Cases COMP D3/35470 and COMP D3/35473) Commission Decision 2004/208/EC [2004] OJ L75/59.....	304
<i>Assurpol</i> (IV/33.100) Commission Decision 92/96/EEC [1992] OJ L37/16.....	300, 301
<i>BBC Digital Curriculum</i> Commission Decision (Case No N37/2003) C(2003)3371fin	123
<i>BBC/Brown Boveri</i> (IV/32.368) Commission Decision 88/541/EWG [1988] OJ L301/68	300
<i>Belgian Economic Expansion Act</i> Commission Decision 2000/472/EC [2000] OJ L191/30.....	129
<i>Brussels Airport</i> Commission Decision 95/364/EC [1995] OJ L216/8.....	71
<i>Carbon Gas Technologie</i> (IV/29.955) Commission Decision 83/669/EEC [1983] OJ L376/17 ...	300
<i>Cartonboard</i> (Case IV/C/33.833) Commission Decision 94/601/EC [1994] OJ L243/1	71
CCS Demonstration Competition, FEED (Aid N 74/09) [2009] OJ C203/2.....	251
<i>CCS Project in Rotterdam Harbour Area</i> (N381/2010) Decision of 27 October 2010.....	251
<i>CECED</i> (IV.F.1/36.718) Commission Decision 2000/475/EC [2000] OJ L187/47 ...	58, 59, 104, 302, 303, 305, 306, 307, 309, 314, 319, 334, 336
<i>CECED Dishwashers</i> (COMP.F.1/37.894) Notice published pursuant to Article 19(3) of Council Regulation No 17 [2001] OJ C250/2	306
<i>CECED Water-Heaters</i> (COMP.F.1/37.893) Notice published pursuant to Article 19(3) of Council Regulation No 17 [2001] OJ C250/4.....	306
CO2 Catch-up Pilot Project at Nuon Buggenum Plant (Case N190/2009) [2010] OJ C238/1	251

<i>Consumer Detergents</i> Commission Decision (Case COMP/39579) C(2011)2528final.....	339
<i>Corporation Tax Reform Gibraltar</i> Commission Decision 2005/261/EC [2005] OJ L85/1	129
<i>Customs House Docks Area</i> Commission Decision 2000/620/EC [2000] OJ L260/37.....	129
<i>Danish CO2 quotas</i> (N653/99) Decision of 12 April 2000.....	133
<i>De Post-La Poste</i> (Case COMP/37.85) Commission Decision 2002/180/EC [2002] OJ L61/32.....	270
<i>Deutsche Post</i> (Case COMP/C-1/36.915) Commission decision 2001/892/EC [2001] OJ L331/40	110, 268
<i>Deutsche Telekom AG</i> (Case COMP/C-1/37.451, 37.578, 37.579) Commission Decision 2003/707/EC [2003] OJ L263/9.....	83
<i>DSD</i> (Case COMP D3/34493) Commission Decision 1/463/EC [2001] OJ L166/1.....	99, 110, 319, 320
<i>DSD</i> (COMP/34493) Commission Decision 2001/837/EC [2001] OJ L319/1	99, 301, 304
<i>Eco-Emballages</i> (COMP/34.950) Commission decision 2004/208/EC [2001] OJ L233/37.....	304
<i>EEIG EFCC</i> (European Fuel Cycle Consortium) Notice pursuant to Article 19 (3) of Council Regulation No 17 concerning Case IV/34.781 [1993] OJ C351/6	301
<i>EUCAR</i> Notice pursuant to Article 19 (3) of Council Regulation No 17 concerning case No IV/35.742 - F/2 [1997] OJ C185/12	95, 96, 304
<i>Exxon/Shell</i> (IV/33.640) Commission Decision 94/322/EC [1994] OJ L144/20	301
<i>Football World Cup</i> (Case IV/36.888) Commission Decision 2000/12/EC [2000] OJ L5/55.....	321
<i>Ford/Volkswagen</i> (IV/33.814) Commission Decision 93/49/EEC [1993] OJ L20/14.....	301
<i>GEMA</i> (IV/26 760) Commission Decision 71/224/CEE [1971] OJ L134/15.....	184, 278
<i>GEMA II</i> (Case IV/29.971) Commission Decision 82/204/EEC [1982] OJ L94/12.....	184
<i>Intel</i> (Case COMP/C-3 /37.990) Commission Decision [2009] OJ C227/07	111
<i>KSB/Goulds/Lowara/ITT</i> (IV/32.363) Commission Decision 91/38/EEC [1991] OJ L19/25.....	298, 300
<i>Meca Medina et Majcen</i> Commission Decision (COMP/38158) Decision of 12 August 2002	289
<i>Microsoft</i> (Case COMP/C-3/37.792) Commission Decision [2007] OJ L32/23	86
<i>Ökostromgesetz - Renewables Feed-In Tariff</i> (NN162/A/2003 and N317/A/2006) Decision of 4 July 2006	134
<i>ONP</i> Commission Decision (Case COMP/39.510) C(2010)8952final.....	334
<i>Philips/Osram</i> (IV/34.252) Commission Decision 94/986/EC [1994] OJ L378/37	301
Régime temporaire de prêts bonifiés pour les entreprises fabriquant des produits verts (Aid N 11/09) [2009] OJ C106/22	247
<i>Spanish Courier Services</i> Commission Decision 90/456/EEC [1990] OJ L233/19	72
Temporary Aid for the Production of Green Products (Aid N 72/09) [2009] OJ C145/7	247
<i>Tetra Pak I</i> (Case IV/31.043) Commission Decision 88/501/EEC [1988] OJ L272/27	86
<i>UK Emissions Trading Scheme</i> (N416/2001) Decision of 28 November 2001.....	133, 250
<i>Uniform Eurocheques</i> (IV/30.717) Commission Decision 85/77/EEC [1985] OJ L35/43	278
<i>United Kingdom Aggregates Levy</i> (Case N863/01) Decision of 24 April 2002.....	130
<i>Wanadoo Espana v Telefonica</i> (Case COMP/38.784) Commission Decision [2008] OJ C83/05	83,

<i>Yves Saint Laurent Parfums</i> (IV/33.242) Commission Decision 92/33/EEC [1992] OJ L12/24.....	309
--	-----

<i>ZVEI/Arge Bat</i> Notice pursuant to Article 19 (3) of Council Regulation No 17 concerning Case IV/F1/36.172 [1998] OJ C172/13.....	101, 103
--	----------

Other Jurisdictions

France

French Conseil Constitutionnel in <i>Décision n° 94-352</i>	30
---	----

Germany

Bundesverfassungsgericht, BVerfGE 41, 29	30
Bundesverfassungsgericht, BVerfGE 77, 240	30
Bundesverfassungsgericht, BVerfGE 81, 298	30

Luxembourg

Conseil de la Concurrence <i>SA Tanklux</i> <i>Décision N° 2009-FO-02</i> of 3 August 2009 available at < http://www.concurrence.public.lu/decisions/autorites_de_concurrence/2009_FO_02.pdf >	320, 326
--	----------

United States

<i>Standard Oil Co of New Jersey v United States</i> 221 US 1 (1911)	286
<i>Continental Television v GTE Sylvania</i> 433 US. 36 (1977).....	286
<i>National Collegiate Athletic Association (NCAA) v Board of Regents of University of Oklahoma</i> , 468 US 85 (1984)	286
<i>State Oil v Khan</i> 522 US 3 (1997)	286
<i>California Dental Association v Federal Trade Commission</i> 526 US 756 (1999).....	286
<i>Leegin Creative Leather Products, Inc v PSKS, Inc</i> 127 SCt 2705 (2007).....	286

TABLE OF STATUES

EC Treaty

Article 2	27, 28
Article 3	19, 20
3(1)(g)	34
3(1)(j)	34
Article 130r(2).....	11, 206, 302

EU Charter of Fundamental Rights

Article 36	267, 284
Article 37	14, 15, 368
Article 51(1)	21

EURATOM

Article 196.....	71
------------------	----

TEU

Preamble.....	207
Article 2	26
Article 3	
Article 3(1)	26
Article 3(2)	27
Article 3(3)	27, 208, 218, 262, 301
Article 4	
Article 4(3)	18, 70, 83
Article 5	187

TFEU

Article 7	15, 314
Article 8	15
Article 9	15
Article 10.....	15
Article 11	
...1, 4, 6, 9, 10, 14, 15, 16, 17, 18, 19, 21, 22, 23, 25, 27, 29, 30, 33, 36, 38, 39, 40, 41, 42, 44, 45, 46, 49, 53, 57, 58, 59, 60, 63, 93, 96, 123, 132, 135, 137, 142, 150, 155, 171, 207, 208, 216, 218,	

220, 230, 231, 235, 240, 241, 246, 247, 248, 256, 259, 260, 275, 298, 302, 342, 350, 358, 359, 364	
Article 12.....	14, 15
Article 13.....	15
Article 14.....	267, 284
Article 18.....	173
Article 34.....	149, 165, 168, 174, 216, 224
Article 36.....	204, 208, 214, 359
Article 42.....	48, 52
Article 43.....	226, 234
Article 45(3).....	204, 208, 214, 359
Article 52(1).....	204, 208, 214, 359
Article 56.....	72, 166
Article 63.....	212
Article 65.....	204, 209, 214, 359
Article 101	
101(1).....	
.....	34, 50, 58, 70, 84, 86, 87, 89, 90, 92, 94, 96, 99, 100, 102, 105, 106, 107, 113, 114, 118, 137, 147, 152, 177, 185, 187, 238, 239, 285, 286, 288, 289, 290, 292, 293, 295, 296, 297, 304, 317, 331, 332, 334, 336, 337, 345, 349, 350, 352
101(1)(b).....	288
101(3).....	
.....	41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 56, 57, 59, 60, 104, 185, 239, 268, 285, 286, 287, 291, 293, 294, 296, 297, 298, 299, 301, 302, 305, 306, 307, 308, 310, 311, 312, 314, 315, 317, 328, 329, 330, 331, 332, 334, 335, 337, 342, 345, 346, 349, 350, 352
Article 102.....	50, 52, 58, 61, 108, 110, 132, 133, 142, 163, 184, 325, 332, 338, 340
102(a).....	108, 110, 184
Article 106	
106(1).....	115, 116, 117, 189, 267, 278
106(2).....	48, 50, 52, 58, 115, 116, 117, 119, 121, 122, 124, 153, 189, 190, 191, 194, 240, 267, 268, 269, 270, 272, 276, 277, 278, 280, 281, 282, 284, 285, 288, 319, 331, 332, 335, 336, 346, 353, 354, 358
106(4).....	117
Article 107.....	
.....	3, 5, 36, 117, 118, 120, 121, 122, 124, 128, 131, 132, 133, 134, 135, 136, 137, 140, 142, 144, 145, 146, 148, 149, 150, 151, 152, 182, 189, 192, 194, 233, 236, 238, 240, 241, 244, 245, 246, 248, 250, 251, 257, 259, 260, 261, 262, 266, 345, 348, 353, 355, 357, 362, 366
107(1).....	5, 36, 118, 119, 122, 131, 135, 136, 138, 140, 142, 145, 147, 148, 152, 192, 193, 238, 355, 358
107(2).....	5, 118, 119, 146, 148, 149, 150, 151, 152, 153, 192, 239
107(2)(a).....	149, 150
107(2)(b).....	151, 152
107(2)(c).....	152
107(3)	
107(3)(a).....	245, 258, 266

107(3)(b)	192, 194, 238, 241, 246, 247, 248, 250, 266, 355
107(3)(c).....	241, 245, 250, 252, 257, 259, 266, 355
107(3)(d).....	241, 257, 266
Article 114.....	218, 224, 226, 227, 233, 235
114(3).....	218
114(4).....	218, 224, 226, 227, 233, 283
114(5).....	224
Article 147(2).....	15
Article 167(4).....	15, 60
Article 168(1).....	15
Article 173(3).....	15
Article 175.....	15
Article 191.....	22, 23, 24, 25, 30, 38, 39, 174, 218, 223, 231, 256, 306, 358
191(1).....	22
191(2).....	23, 159
191(3).....	23, 256
Article 192.....	223
Article 193.....	188, 223, 227, 233, 235, 283
Article 258.....	58
Article 282(1).....	18

Protocol to the EEA

Protocol 22.....	71
------------------	----

Protocol to the TEU/TFEU

Protocol No 26.....	267, 270, 284
---------------------	---------------

Regulations and Directives

Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid [2006] OJ L302/29	241
Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid [2006] L379/5.....	137
Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) [2008] L 214/3.....	241, 242
Commission Regulation (EEC) No 418/85 of 19 December 1984 on the application of Article 85 (3) of the Treaty to categories of research and development agreements [1985] OJ L53/5	298

Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] L 102/1	293
Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/141, 44, 45, 47, 50, 53, 57, 58, 59, 187, 239, 297, 298, 306, 334, 351	
Article 11(6).....	58
Article 2.....	334
Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [1998] OJ L142/1	241
Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco [1995] OJ L291/40	61

TABLE OF OTHER PRIMARY MATERIAL

EU

Commission Communication on the Precautionary Principle COM(2000)1final	231
Commission Notice on a Simplified Procedure for the Treatment of Certain Types of State Aid [2009] OJ C136/3	242
Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law [1997] OJ C372/5.....	85, 92
Communication from the Commission concerning Article 95 (paragraphs 4, 5 and 6) of the Treaty Establishing the European Community COM (2002) 760final	224
Community Framework for State Aid for Research and Development and Innovation [2006] OJ C323/1.....	193, 194
<i>Community Framework for State Aid in the Form of Public Service Compensation</i> [2005] OJ C297/04	122
Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007 to 2013 [2006] OJ C319/1.....	151, 257
Community Guidelines on State Aid for Environmental Protection (1994) [1994] OJ C72/3	3, 138, 149, 242
Community Guidelines on State Aid for Environmental Protection (2001) [2001] OJ C37/3	138, 242
Community Guidelines on State Aid for Environmental Protection (2008) [2008] OJ C82/1	138, 144, 145, 146, 194, 233, 237, 242, 243, 248, 249, 250, 251, 252, 254, 255, 259, 261, 262, 281, 339, 344, 356
COREPER Strategy for the Integration of Environmental Protection and Sustainable Development into Internal Market Policy Report to the European Council No. 8970/01	37
Council Recommendation Regarding Cost Allocation and Action by Public Authorities on Environmental Matters [1975] OJ L194/1.....	138, 241
Council Resolution on Fixed Book Prices in Homogeneous Crossborder Linguistic Areas [1999] OJ C42/02.....	60
Draft Commission Notice - Guidelines on the Application of Article 81(3) of the Treaty [2003] OJ C243/10.....	307
European Commission <i>10th Report on Competition Policy 1980</i> (Office for Official Publications of the European Communities, Luxembourg 1981)	242
European Commission <i>16th Report on Competition Policy 1986</i> (Office for Official Publications of the European Communities, Luxembourg 1987)	138, 242
European Commission <i>4th Report on Competition Policy</i> (Office for Official Publications of the European Communities, Luxembourg 1975).....	138, 242
European Commission <i>Buying green! A handbook on green public procurement</i> (2nd edn Publications Office of the European Union, Luxembourg 2011)	123
European Commission <i>Free Movements of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods</i> (Publication Office of the European Union, Luxembourg 2010)	157

European Commission <i>XXIIIrd Report on Competition Policy 1993</i> (Office for Official Publications of the European Communities, Luxembourg 1994)	121, 150, 299, 315
European Commission <i>XXIIInd Report on Competition Policy 1992</i> (Office for Official Publications of the European Communities, Luxembourg 1993) ...	104, 138, 242, 271, 299, 343
European Commission <i>XXIVth Report on Competition Policy 1994</i> (Office for Official Publications of the European Communities, Luxembourg 1995)	101, 121
European Commission <i>XXIXth Report on Competition Policy 1999</i> (Office for Official Publications of the European Communities, Luxembourg 2000)	95, 98
European Commission <i>XXVth Report on Competition Policy 1995</i> (Office for Official Publications of the European Communities, Luxembourg 1996)	95, 96, 98, 299, 304
European Commission <i>XXXIth Report on Competition Policy 2001</i> (Office for Official Publications of the European Communities, Luxembourg 2002)	134
European Commission <i>XXXth Report on Competition Policy 2000</i> (Office for Official Publications of the European Communities, Luxembourg 2001)	300, 302
European Commission, Commission Press Release IP/00/1351	319
European Commission, Commission Press Release IP/00/508.....	95, 96, 98, 134, 304
European Commission, Commission Press Release IP/01/1659	306
European Commission, Commission Press Release IP/02/62.....	98
European Commission, Commission Press Release IP/11/473.....	339
European Commission, Commission Press Release IP/97/626.....	16
European Commission, Commission Press Release IP/97/636.....	41
European Commission, Commission Press Release IP/98/865.....	95, 98, 304
European Commission, Communication from the Commission, Services of General Interest in Europe [2001] OJ C17/04.....	270, 276
European Commission, Integration of Environmental Considerations into other Policy Areas-a Stocktaking of the Cardiff Process COM (2004) 394 final.....	16, 32
European Commission, Single Market and Environment Communication from the Commission to the European Parliament and the Council COM (1999) 263 final ..	37, 157, 219
European Environment Agency <i>Monitoring Progress Towards Integration: A contribution to the Global Assessment of the fifth Environmental Integration Programme of the EU, 1992-1999</i> (Executive Summary) (Copenhagen 1999)	36
European Environment Agency <i>Europe's Environment: The Second Assessment</i> , (Luxemburg 1998)	36
<i>European Union Framework for State Aid in the Form of Public Service Compensation</i> [2012] OJ C8/15	122
Guidelines on National Regional Aid for 2007-2013 [2006] OJ C54/13.....	245, 251
Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements [2001] OJ C3/2.....	93, 307, 316
Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97.....	293, 307, 309, 311, 312, 316
Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81.....	87, 88

Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2.....	83
Guidelines on Vertical Restraints [2010] OJ C130/1.....	106, 293
Internal Market Council, Report of the Internal Market Council to the Helsinki European Council on the Integration of Environmental Protection and Sustainable Development into Internal Market Policy No. 13622/99.....	37
Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis (2009) [2009] OJ C83/1.....	247
Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis (2011) [2011] OJ C6/5.....	246, 247
White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1.....	306

Submissions to the IGC

Austrian Submission to the IGC (20 September 1996) CONF 3917/96.....	209
Austrian Submission to the IGC (23 May 1996) CONF 3852/96.....	209
Commission Submission to the IGC (10 April 1991) Conf-UP 1761/91.....	12
Finnish Submission to the IGC (30 October 1996) CONF 3969/96.....	209
German Submission to the IGC (25 October 1996) CONF 3966/96.....	209
Introductory Note by the Irish Presidency to the IGC (17 September 1996) CONF 3907/96.....	13, 210
Swedish Submission to the IGC (24 September 1996) CONF 3922/96.....	209

Other Primary Material

Germany

Der Wissenschaftliche Beirat beim Bundesministerium für Wirtschaft <i>Gutachten zur Reform der europäischen Kartellpolitik</i> (Berlin 2000) < http://www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/Dokumentationen/gutachten-vom-1-juli_202000-thema-reform-der-europaeischen-kartellpolitik,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf > accessed 29 September 2009.....	41
---	----

Netherlands

ACM (Netherlands Authority for Consumer & Markets) <i>ACM Position Paper Competition & Sustainability</i> (The Hague (2013)) < https://www.acm.nl/en/download/publication/?id=11733 > accessed 20 October 2013.....	311, 316
--	----------

Nordic Competition Authorities

Nordic Competition Authorities: Report from the Nordic Competition Authorities <i>Competition Policy and Green Growth: Interactions and Challenges</i> (A Joint Report by the Nordic Competition Authorities) (2010).....	36, 345
---	---------

OECD

- OECD *Recommendations of the Council: Recommendations of the Council on guiding principles concerning international economic aspects of environmental policies* C(72)128 (Paris, 1972)
<<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=4&Lang=en&Book=False>>
accessed 12 January 2014..... 139, 254, 255
- OECD *Competition on the Merits* (Paris, 2005) <<http://www.oecd.org/competition/abuse/35911017.pdf>>
accessed 12 January 2014..... 110
- OECD Horizontal Agreements in the Environmental Context DAF/COMP(2010)39 (Paris, 2010) <<http://www.oecd.org/competition/cartels/49139867.pdf>>
accessed 12 January 2014..... 55, 63

United Kingdom

- OFT Article 101(3) - A Discussion of Narrow Versus Broad Definition of Benefits
Discussion Note for OFT Breakfast Roundtable (2010 London) 48, 60, 310, 311
- OFT The Competition Impact of Environmental Product Standards A report prepared by
Frontier Economics for the OFT (2008 London) 36, 309, 313
- OFT The Economics of Self-regulation in Solving Consumer Quality Issues (2009 London)
..... 309

ACKNOWLEDGEMENTS

I would like to thank the FAZit Foundation and my parents, Bernhard Nowag and Susanne Bock. Without their financial and mental support this endeavour would not have been possible. Moreover, I would like to thank two people, Nadine Zipperle and Günter Zipperle, without whom I would have never applied or taken up Oxford's offer to come for the MSt and subsequently the DPhil. During the process of developing and writing this thesis a number of people have been invaluable: My two supervisors Ariel Ezrachi and Katja Ziegler who always were supportive and challenged me continuously. The combination of these two great and lovely individuals has provided me with the opportunity to be challenged with regard to the important details and the bigger picture alike. My colleagues Pablo Marques, Maria Ioannidou and Vasilki Brisimi who picked me up in difficult times. Pablo who brought me to Bucaramanga, Vasilki who always was of the opposite option¹ and Maria who held the middle ground. I would also like to thank a special person Yasmine El Masri who nolens volens became an expert in the field by reading my chapters not only once. Finally, I have to thank all those wonderful people whom I met during my journey - be it at the faculty, the college or rowing - and who have made my Oxford experience a truly magical and transformative one.

¹ Although we realised in the end that we were talking past each other for years and actually had quite similar options.

INTRODUCTION

It is easier to write ten volumes of philosophy than to put a single precept into practice.
~Leo Tolstoy²

This quotation provides a useful illustration of the challenge posed by putting the obligation to integrate environmental protection requirements into practice. The environmental integration obligation is imposed by Article 11 TFEU, which specifies that:

Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.

One main aim of this thesis is to help place this obligation into practice in the areas of competition law, State aid law and the market-freedoms. This task poses challenges because the Article is formulated in broad and sweeping terms, making its application complex and context-dependent. In particular, it requires asking the following questions: What is ‘environmental integration?’ What is the constitutional status of environmental protection? How should such integration work in competition law, State aid law and the market-freedoms? When examining how to integrate environmental considerations in these areas, it becomes clear that this exercise does not merely provide guidance on environmental integration. A comparison between the three different areas of law also sheds light on conceptual issues relating to how restrictions are defined and how the respective balancing tests are applied. Therefore, the contribution and aim of this thesis is twofold³ On the one

² Leo Tolstoy 1917:2

³ On the meaning of the environmental integration in other areas see Baldock 1992; Lenschow 2002; Dhondt 2003; Martina Herodes January 2007; and on work on environmental protection matters in competition law see Portwood 2000; Vedder 2003; Lorenz 2004; Kingston 2012; see also Townley 2009.

hand, the thesis conceptualises⁴ how environmental integration can function in these areas. It thereby aims to both explaining the legal and theoretical background of the integration obligation while providing guidance on how integration can work in practice. On the other hand, the thesis compares the operation of the different tests in competition law, State aid law and the market-freedoms and offers opportunities for cross-fertilisation on questions such as, how the existence of a restriction should be determined and what principles should govern the application of justifications.

The thesis shows that competition law has developed an elaborate framework to clearly demarcate the boundaries between prohibited and non-prohibited environmental protection measures, while the market-freedoms have established sophisticated principles for the balancing exercise. This development seems to be the result of the different approaches that have dominated the two areas of law. The competition law mentality has been that competition law and environmental protection (as a public policy consideration) are two issues which need to be separated and that such considerations should not play a role in competition law.⁵ For the market-freedoms, however, the CJ extended their scope early via the *Cassis* judgment.⁶ Consequently, the scope of the exceptions available was also extended by introducing mandatory requirements, such as environmental protection.⁷ This development led to a broad range of case law establishing a sophisticated framework for the

⁴ In this sense it is not an exercise to determine whether the obligation is complied with. This would require examining each individual decision rendered. Such an examination would be particularly difficult because cases where environmental protection requirements have not been integrated may typically not even mention the environmental side of the case.

⁵ See the debate in Part A text to (n141-253).

⁶ Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein*.

⁷ See Part C, Section I, Chapter A.

balancing exercise. The thesis explains that the market-freedoms first accepted a balancing of environmental protection within its realm of application. Competition law today offers less space for such balancing. In particular, there still exists some of the traditional resistance against such balancing. The third area of law, State aid, has historically been the middle ground. It was influenced by both competition law and the market-freedoms because it is aimed at protecting competition against certain distortive State measures. Hence, State aid law has matured under the influence of competition law and the market-freedoms. Thus, it provides on the one hand a gateway for transposing concepts into both, competition law and the market-freedoms. On the other hand, State aid law has addressed environmental protection since the mid-1990s⁸ and offers some interesting lessons for competition law as well as the market-freedoms.

The thesis focuses on competition, State aid and free-movement law, as these are the main prohibitions in the Treaties that protect the internal market. They have not been substantially changed since their enactment. Structurally, the provisions apply a two-step test: First, it has to be determined whether a measure is within the scope of the relevant prohibition. Second, it has to be considered whether the measure might be justified by means of a balancing exercise. However, this distinction is not observed strictly. Balancing

⁸ See Community Guidelines on State Aid for Environmental Protection (1994) and the discussion in Part C, Section I, Chapter B.

might also occur when examining whether a prohibition applies to the measure.⁹ Equally, some exceptions like Article 107(2)TFEU¹⁰ apply without the need for balancing.

Part A of the thesis, The Environmental Integration Obligation of Article 11TFEU, shows that this distinction between scope and justification can only provide a starting point for developing a framework for integration in competition, State aid and free-movement law. It advances a framework which is then applied in the following Parts B and C. Part A shows that in competition law, State aid law and the four freedoms integration of environmental considerations can occur in two forms.¹¹ The first form of integration can be observed where the scope of the relevant provisions and its exceptions are clearly demarcated so that conflicts requiring a balancing of environmental protection and other interests are prevented. In other words: How can the relevant provisions be applied to avoid conflicts between environmental protection and competition, State aid or free-movement law? The second form of environmental integration occurs in cases of conflict and requires a balancing between environmental protection and the other relevant interests. To rephrase: How does the balancing work in cases where environmental protection and competition, State aid or free-movement law come into conflict?

Besides developing this framework, Part A also analyses the obligation to integrate environmental protection requirements in more detail. One aspect of this analysis is the historical development and the discussions at the different intergovernmental conferences

⁹ For example mandatory requirements (see Part C, Section I, Chapter A) and the European Rule of Reason under competition law (see Part C, Section I, Chapter D).

¹⁰ See Part B, Section I, Chapter D, text to (n150-161).

¹¹ See Part A, text to (n104ff).

leading to the Treaty changes. It assists in further elaborating on the extent of the obligation, by helping to identify the reach that had been intended for this obligation by the Member States, the Masters of the Treaties. Additionally, it addresses the contentious issue of whether or not the obligation applies in competition law.

Part B examines the first form of environmental integration: how competition, State aid and free-movement law demarcate the boundaries between prohibited and non-prohibited measures without engaging in a balancing exercise. Part B, therefore, echoes the unique approach taken in this thesis which adopts a functional perspective that is somewhat different from the classical scope/justification distinction: While the first form of environmental integration, the clear demarcation to avoid conflicts, can often overlap with the issue of scope or the questions of what constitutes a restriction, this is not always the case. From a functional perspective, an environmental protection measure is not prohibited if it is outside the scope of the relevant prohibition. Similarly, the measure is not prohibited if the relevant exception applies. Such exceptions do not necessarily involve balancing, as Article 107(2)TFEU exemplifies. Hence, the first form of environmental integration can occur at the stage of the scope and/or at the stage of justification. For example, environmental protection measures can be seen as not restricting competition and, therefore, not be prohibited by competition law. Similarly, environmental protection measures may escape Article 107(1)TFEU via Article 107(2)TFEU without the need for balancing between environmental protection and competition, even though such measures are in principle within the scope of Article 107(1)TFEU.

Part B investigates which provisions and concepts within competition law, State aid law and the market-freedoms can be interpreted in order to provide the first form of environmental integration. Part B consist of two sections. Section I is dedicated to supportive integration. Supportive integration relates to whether measures that support environmental protection are prohibited by the relevant provisions of competition, State aid and free-movement law or whether the provisions can be interpreted in a way so as to allow such measures. It therefore covers cases where the integration of environmental protection into the different areas of law supports the environmental protection aim. Section II examines preventative integration. Preventative integration relates to whether the competition, State aid and free-movement law can be interpreted so as to prevent measures which have negative environmental effects.

Part C analyses the second form of integration: how competition, State aid and free-movement law allow for a balancing of the environment against restrictions in cases of conflict. The functional approach adopted in this thesis means that Part C examines cases where environmental protection is balanced against the relevant restriction. The second form of environmental integration typically occurs within the justification stage. Yet, it might also occur in the context of determining whether measures are within the scope of the relevant prohibition, eg in the form of balancing within the concept of mandatory requirement. Part C therefore examines which concepts in the areas of competition law, State aid law and the market-freedoms can provide such balancing exercises and highlights the principles that govern this balancing. The Part C consistent, as Part B, of two sections

investigating cases of supportive integration separately from those of preventative integration.

Before the thesis delves into the details of environmental integration in the different areas of competition, State aid and free-movement law, it examines the obligation of Article 11TFEU and its legal significance in the Part A, The Environmental Integration Obligation of Article 11TFEU.

PART A
THE ENVIRONMENTAL INTEGRATION OBLIGATION OF ARTICLE
11TFEU

INTRODUCTION PART A

Part A of this thesis explores the legal effects of the so-called environmental integration obligation enshrined in Article 11TFEU. It thereby develops the framework for analysis of the rules governing the internal market, the market-freedoms, the State aid and the competition provisions discussed in Part B and Part C.

Part A first explains the historical development of the obligation in order to establish the scope that the Member States had envisaged for it. Then it highlights to whom -Union or Member States- the obligation imposed by Article 11TFEU is addressed. Additionally, it examines whether the integration obligation only applies at a general policy-making stage or also in concrete cases (such as the adoption of regulations, directives and decisions). Part A also addresses the question of what exactly is meant by ‘integration of environmental protection requirements’. Next, it highlights the consequences of non-compliance with this obligation, and finally, it asks whether competition law is special in the sense that the integration obligation does not apply to this field of internal market law.

A. Development of Article 11TFEU

The environmental integration clause of Article 11TFEU was the first, and for a long time, the only integration clause.¹ It supports the idea of a holistic interpretation of the Treaty, stating that

¹ Cf Jahns-Böhm/Breier 1992:50.

Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.

The history of the integration obligation reveals a steady strengthening. In a move to address environmental issues the Single European Act introduced a title on the environment in 1987.² This title included in the second sentence of Article 130r(2)EC the statement that ‘environmental protection requirements shall be a component of the Union’s other policies’. It could be said ‘that the Single European Act thereby gave birth to the integration’³ obligation in EU law. Although it was mentioned in the text of the Single European Act, not much discussion concerning environmental integration seems to have taken place at the Intergovernmental Conference. Later, changes in the Maastricht and Amsterdam Treaties were debated extensively.⁴ The Maastricht Treaty strengthened the provision by altering the wording ‘shall be a component of’ to ‘must be integrated’, thereby imposing an justiciable version⁵ of the integration obligation.⁶ At the Intergovernmental Conference for the Maastricht Treaty the Commission had argued, that the call for integration, should be made ‘tighter and more forceful in order that genuine account be taken of the environment in the definition and implementation of other policies’.⁷ Thus, the Commission suggested amending the wording to ‘must be integrated’. The original version - which read ‘shall be a

² Before being introduced into primary law the idea could be traced back to the 3rd Environmental Action Programme; see McIntyre 2013:125–126.

³ Jans 2010:1537.

⁴ See on the development, the debates at the IGC and the scope intended by the Member States, Nowag forthcoming.

⁵ Cf Hession/Macropy 1994:155; Portwood 2000:79; Wasmeier 2001:160; Jans/Vedder 2008:20–21; Weidemann 2009:74.

⁶ On the possible tension between the principle of conferral and integration clauses in general see Stein 1995.

⁷ *Ibid.*

component of P - was imprecise, since ‘the practical implications’ were unclear and the text seemed to ‘record a fact rather than imposing an obligation’.⁸ While it seemed to be sufficient that environmental considerations were one aspect of consideration before the change,⁹ the amendment meant that ‘mere consideration without action will no longer be sufficient’.¹⁰ Another aim of the Commission’s proposal was to make the extent of the obligation more precise¹¹ by adding ‘into the definition and implementation of other Community policies’. This change to the Maastricht Treaty widened the obligation’s scope since ‘into the definition and implementation’ has a broader meaning than ‘into other policies’.¹²

The Amsterdam Treaty further strengthened the obligation and broadened the scope by making it applicable in all areas of EU law. The Intergovernmental Conference for the Amsterdam Treaty placed the integration obligation among the ‘Principles’ at the front of the Treaty. During the conference a broader discussion of the environmental integration obligation occurred¹³ while a particular focus was on environmental integration in agriculture, transport and trans-European networks. Eventually, a compromise was reached to include a generally applicable clause. So that DG Environment reported that the Commission and the Member States aimed at an environmental integration obligation that

⁸ *Ibid*:5.

⁹ *Ibid*:79.

¹⁰ *Ibid*.

¹¹ Commission Submission to the IGC (10 April 1991):5.

¹² Arguing in this way, also Jans 2010:1537.

¹³ See Nowag forthcoming.

applies to ‘all sectors (in particular agriculture and regional policies)’.¹⁴ Similarly in 1995 when summarising the outcome of the discussions over the years, the Irish Presidency observed an overwhelming support ‘for a horizontal integration clause that would include all other sectoral policies’.¹⁵ This broad area of application was not a happenstance occurrence caused by imprecise wording but the result of years of discussions. The Member States envisaged that the integration obligation should be applicable to *all* areas of EC actions.¹⁶ Furthermore, the Amsterdam Treaty included the interlink between environmental protection and sustainable development by highlighting that environmental integration should take place ‘in particular with a view to promoting sustainable development.’ It thereby strengthened the link between environmental protection and economic activities because sustainable development relies on the premise that environmental protection, economic growth and social development are mutually compatible, rather than conflicting, objectives.¹⁷

Unlike the Amsterdam Treaty that substantially altered the environmental integration obligation and placed it at the front of the Treaty under the heading ‘Principles’, the Lisbon

¹⁴ European Commission Directorate General XI Report on the Meeting on Environmental Aspects of the Intergovernmental Conference (4 August 1995).

¹⁵ ‘A cet égard, une disposition horizontale renforcée dans le traité pourrait prévoir l’intégration de considérations environnementales dans toutes les politiques sectorielles’. Introductory Note by the Irish Presidency to the IGC (17 September 1996):3 (underlining in the original).

¹⁶ In this line also Görlach/Hinterberger/Schepelmann 1999:4; McGillivray/Holder 2001:153; Weidemann 2009:72.

¹⁷ Lenschow 2002:6. For a brief summary of facts on the idea that environmental and economic objectives are not contradictory and can be achieved concurrently see European Commission *Facts and Figures*.

Treaty¹⁸ did not substantially change the obligation. Other policy-linking clauses¹⁹ were grouped together with the environmental integration obligation and placed under the heading ‘Provisions Having General Application’. Moreover, the Lisbon Treaty made the Charter of Fundamental Rights binding. Article 37 of the Charter contains a similar provision to Article 11 TFEU, specifying that ‘a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’. Equally, the preamble of the TEU contains a reference to environmental protection and sustainability. The preamble calls for the promotion of ‘economic and social progression...taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection’.

The new grouping of all policy-linking clauses under the heading ‘Provisions Having General Application’ has been described as a dilution with regard to environmental protection.²⁰ However, this change does not seem to substantially affect the obligation as such. The amendment has more of an organising nature, since it brings together the policy-linking clauses. More importantly, however, a comparison with the other integration

¹⁸ In an early draft of the Treaty Establishing a Constitution for Europe the integration obligation was taken from the first articles and only found its place under ‘clauses of general application’ in the final version. On this see Jans/Scott 2003.

¹⁹ Articles 7-12 TFEU.

²⁰ Kingston 2009:27; McIntyre 2013:138, in this line also Jans 2010:1543–1544, who, however, acknowledges that this would not change the legal situation but rather the policy perspective.

clauses²¹ (still) shows that only environmental requirements ‘*must be*’ integrated while the others ‘*shall be*’ integrated.²² Likewise, the Lisbon Treaty made Article 37 of the Charter of Fundamental Rights binding, thereby further supporting the importance of environmental integration.²³

In conclusion, the history²⁴ of the environmental integration obligation suggests that environmental protection is a task that can only be fulfilled when it is observed across the board: ie in all areas where environmental problems arise.²⁵ Hence, the *ratio legis* of Article 11TFEU demands that the sectoral policy in non-environmental areas not only take account

²¹ Article 8TFEU with regard to equality between men and women; Article 10TFEU with regard to discrimination; Article 12TFEU with regard to consumer protection; Article 13TFEU with regard to animal welfare; Article 147(2)TFEU and Article 9TFEU with regard to employment, social protection and exclusion; Article 167(4)TFEU with regard to culture; Article 168(1)TFEU with regard to public health; Article 173(3)TFEU with regard to industrial policy; Article 175TFEU with regard to regional policy; Article 208(1) 2 sentence of the 2 subpara TFEU with regard to development cooperation and a general principle of consistency in Article 7TFEU. In this regard it seems interesting that the Treaty, only in the case of industrial policy, expressly prohibits ‘any measure which could lead to a distortion of competition’, Article 173(3)TFEU.

²² See also Frenz 2011:105–107 regarding animal welfare and Krämer 2013:84 explaining that the other integration clauses would only require to ‘deploy best efforts’ or ‘to consider’ a certain matter. With regard to the situation under the old Treaty see also Stuyck 2005:5.

²³ For a contrary view arguing that this would weaken Article 11TFEU, see Jans 2010:1538–1539. He fears that the interaction of the integration obligation with the ‘weaker’ integration obligation in Article 37 of the Charter of Fundamental Rights might have a negative influence. Article 37 is weaker as it seems to only apply to the policy stage and not to individual measures and seems to be a principle within the Charter rather than a right, see Marin-Duran/Morgera 2013:14–15. The argument advanced by Jans, however, does not seem convincing from a legal point of view. Article 37 of the Charter cannot limit the scope of Article 11TFEU. The Articles might be applied in parallel but do not affect each other’s scope. Moreover, the scope of Article 37 might even be broader than that of Article 11TFEU, as it refers to ‘a high level of environmental protection and the improvement of the quality of the environment’ rather than ‘environmental protection requirements’. Thus, his argument could also be made *vice versa*: that the broader scope of Article 37 impacts on Article 11TFEU and leads to an extension of Article 11TFEU, cf also *Ibid*.

²⁴ But certainly also reasons based on the nature of environmental protection.

²⁵ Breuer 2003¶36; in Germany environmental protection has been prudently described as ‘problembezogene Querschnittsaufgabe’, which might be translated as a transversal, problem-orientated approach/task.

of its particular concerns. Instead, it must also take its environmental impact into account.²⁶ Consequently, a measure might have to be changed or even omitted.²⁷ Hence, the integration obligation has to be taken into consideration whenever Union law is applied/interpreted.²⁸ Consequently, a rule can be formulated: Union 'law should basically be interpreted in a way that renders it consistent with environmental protection requirements'.²⁹ The rule ensures the *ex ante* identification and solution of possible conflicts between different policies,³⁰ rather than addressing restriction and damage after they have occurred. This leads to increased synergies and quicker action: ie increased efficiency.³¹

After examining the historical development, some questions still need to be answered: Who is bound by Article 11 TFEU only the Union or also the Member States? At what stage is the integration obligation binding - only at a stage of general policy-making or also when a specific action is adopted? What is meant by 'environmental protection

²⁶ Krämer 2003¶10; McGillivray/Holder 2001:152. The Commission equally emphasised that 'environmental policy alone cannot achieve the environmental improvements needed as part of sustainable development'. European Commission, Integration of Environmental Considerations into other Policy Areas-a Stocktaking of the Cardiff Process:2.

²⁷ Calliess 2007¶6; Lenschow 2002:7.

²⁸ Zils argued that the older 'shall be a component of' was already so broad that the obligation would apply to all areas of the Union:Zils 1994:27.

²⁹ Wasmeier 2001:161–162. It might even argue that environmental protection becomes one objective of the Union's other policy. In this line the CJ has found in the area of agricultural policy that the integration obligation would lead to the result that the essential objectives of the [Union] ... must be regarded as an objective which also forms part of the common agricultural policy'. Case C-428/07 *Hornath*¶29.

³⁰ The Commission has called on all of its DGs to take into account environmental protection requirements, see Commission Press Release IP/97/626. On the internal measures of the Commission to ensure integration see eg Wilkinson 1998 and more recently Krämer 2013:88–100 who explains that they now have nearly all been abandoned.

³¹ Cf Weidemann 2009:72.

requirements' and 'integrated' in Article 11TFEU? What are the consequences of violating Article 11TFEU? These questions will be addressed in the following sections.

B. Extent and Addressees of the Article 11TFEU

This section argues that Article 11TFEU binds the Union organs and the Member States. All Union organs are bound by Article 11TFEU both at a policy-making stage but also when individual measures like regulations, directives or decisions (ie competition decisions) are adopted. Member States are also directly bound by Article 11TFEU when they are acting in their capacity as Union organs, namely when applying Union law.

In contrast to this, it has been argued that only the Union and not the Member States are bound by Article 11TFEU.³² Moreover, with regard to the extent (ie at what stage of decision making), it has been claimed that Article 11TFEU only applies at the general stage of Union policy-making and not when individual measures such as regulations, directives or decisions are adopted.³³ This means that only the EU institutions are bound at a general stage of policy-making and that the Member States are bound when implementing Union law. According to this interpretation, it is questionable whether the obligation would apply to the GC and the CJ.³⁴

³² Krämer 2003¶13-19; Dhondt 2003:30–38.

³³ Krämer 2003¶18-19. Krämer seems to have at least partly changed his position as he now claims that the obligation would also apply to decisions. Yet, he adds that not every individual measure but rather overall the policy would need to comply with the obligation, see Krämer 2013:89.

³⁴ Under this interpretation they could only be bound if one considers them to adopt a policy.

In this vein, Dhondt and Krämer suggest that Member States are not directly bound by the integration obligation; instead, only the duty of loyal cooperation (now Article 4(3)TEU and Article 282(1)TFEU) would apply.³⁵ The argument advanced for this interpretation is based on the wording of Article 11TFEU. If Member States had been intended to be bound by this Article, the wording of Article 11TFEU would have included ‘and Member States’.³⁶ Such an argument faces problems since it should be borne in mind that Union law has sometimes evolved beyond what was or might have been intended when the Treaties were negotiated.³⁷ A classical example may be the concept of direct effect established in *Van Gend en Loos*,³⁸ which can hardly be described as foreseen or intended by (all) the founding Member States.³⁹ Hence, the intent of the contracting EU Member States, when not clearly expressed,⁴⁰ is difficult to prove, in particular if only the wording of the provision is examined. However, the historical debates in the different IGCs seem to suggest a very broad scope.⁴¹ This would also make sense from a teleological point of view because EU law is typically implemented by the Member States. Thus, it might rather be

³⁵ Krämer 2003:13; Dhondt 2003:30–38. Weidemann 2009:30–32 also seems to suggest such an interpretation. However, her position is not that clear, as she also postulates that it would apply to Member States in cases where they implement Union policy.

³⁶ Dhondt 2003:48–49.

³⁷ The *travaux préparatoires* are also not often available and even if available are not taken into account and regarding Article 11TFEU material available and examined above (see text to n 1-31) does not directly address the issue.

³⁸ Case 26/62 *Van Gend en Loos*

³⁹ Craig/de Búrca 2011:181.

⁴⁰ If the wording of Article 11TFEU included ‘and *not* the Member States’ or ‘only the Union,’ this would be a striking argument that Member States are not directly bound by the integration obligation.

⁴¹ As observed above in the section on the historical development text to (n1-31).

argued that the integration obligation applies to Member States when implementing Union law, as long as they are not explicitly excluded.⁴²

Krämer argues that Member States are not bound by Article 11 TFEU. He comes to this conclusion by advancing three arguments: First, ‘implementation’ would not have to be understood as execution or enforcement but as implementation of policies, strategies and action programmes within the meaning of the old Article 3 EC. Such ‘implementation’ could only be performed by the Union institutions.⁴³ Second, environmental concerns only have to be integrated at general policy level and not when adopting ‘particular...directives, regulations and decisions’.⁴⁴ This interpretation stems from the wording of Article 11 TFEU, which refers to ‘activities’ and ‘policies’ but not to ‘measures’ which would encompass directives, regulations and decisions.⁴⁵ Third, an interpretation that would require integration even at the stage of adopting directives, regulations and decisions would be too broad. Such a broad understanding would effectively mean that every one of the myriad of regulations and directives, every accession to an international agreement and every individual decision would be subject to Article 11 TFEU. Such a broad interpretation could not have been intended nor would it fit with the current practice.⁴⁶

Yet, these arguments need to be rejected. The argument that Article 11 TFEU applies only at a general policy level and not when a particular measure (regulation, directive or

⁴² For a similar conclusion Hession/Macroray 1998:106; Gasse 2000:18–19.

⁴³ Krämer 2003¶16.

⁴⁴ *Ibid*¶18.

⁴⁵ He expressly refers to the ‘more precise’ English and French version which would not use ‘measure’ or ‘mesure’ but ‘activities’ and ‘activités’ *Ibid*:fn 20.

⁴⁶ Krämer 2003¶18; Krämer 2002:163.

decision) is adopted, could have been made under the old version of the obligation which referred to ‘policies’. Under the later and current versions the obligation has also been extended to ‘activities’.⁴⁷ As such, the wording does not support Krämer’s argument. The wording of Article 11 TFEU mandates that environmental requirements must be integrated when *implementing* general policies, strategies, action programmes, etc. Such implementation is typically achieved by means of directives, regulations and decisions.⁴⁸ Additionally, it seems unclear why the term ‘policies and activities’ should not encompass measures (ie regulations, directives and decisions).⁴⁹ In particular, the positioning of Article 11 TFEU under the ‘provisions having general application’ suggests⁵⁰ that environmental requirements have to be integrated when adopting measures such as directives, regulations or decisions.⁵¹ Furthermore, it is difficult to draw the line between the general policy stage and the stage of an individual measure. The general policy always affects the individual act and should serve as guidance in such individual cases. Finally, the following three points need to be kept in mind: First, contrary to Krämer’s claim, the CJ applies Article 11 TFEU not only to activities and policies but also to ‘measures’.⁵² Second, under the Lisbon Treaty the reference to Article 3 EC ceases to exist, so an argument that bases its restrictive interpretation on this

⁴⁷ Hession/Macropy 1998:105.

⁴⁸ Regarding the adoption of secondary law for regulating the internal market, see Epiney 1995.

⁴⁹ Calliess 1998:566.

⁵⁰ Cf Herzog 2008:82.03.

⁵¹ Jahns-Böhm 2000¶11; Grimeaud 2000:216; Gasse 2000:13–14; Epiney 2006:31; Townley 2007-2008:352ff; Kingston 2012:106–119, see also Schumacher 2001:33 arguing the obligation applies to all actions of the Union.

⁵² Case 62/88 *Greece v Council*¶20; the Court used in the English version the term ‘measure’ and ‘mesure’ in the French version, so that the claim that ‘policies and activities’ do not encompass measures, which would follow clearly from these language versions, cannot be maintained.

reference can no longer be upheld.⁵³ Third, Article 11TFEU refers to ‘implementation’. Restricting the application of Article 11TFEU to the Union only would render Article 11TFEU nearly meaningless because most parts of EU law are implemented by the Member States. *Effet utile* therefore mandates that Article 11TFEU also binds on the Member States at least when they are implementing Union law.⁵⁴ Thus, Article 11TFEU’s scope is similar to that of EU fundamental rights, which are also applicable where Member States implement EU law.⁵⁵ Fundamental rights seem to apply whenever EU law is applicable: ie whenever a national measure is within the scope of EU law.⁵⁶ Hence, the argument might even be made that Article 11TFEU should similarly apply whenever a national measure is within the scope of EU law.⁵⁷

This conclusion is also supported by two judgments of the GC and the CJ. The GC held in *British Aggregates* that Article 11TFEU applies also in individual cases, such as decisions by the Commission.⁵⁸ Second, the CJ in *Concordia Bus* applied Article 11TFEU in a

⁵³ In a similar direction but based on the older changes Hession/Macrorry 1998:105. Hession had suggested that under the early versions of Article 11TFEU an argument could have been made that only policies which are named as policies were covered, as only a reference to ‘policies’ existed. But, this argument would no longer apply since ‘activities’ are also named in Article 11TFEU.

⁵⁴ Mehling 2005 [9th *Ergänzungslieferung*]¶24; Jahns-Böhm 2000¶15; Calliess 2007¶12; Nettesheim 2009 [40th *Ergänzungslieferung*]¶12; Calliess 1998:566; Wasmeier 2001:164–166.

⁵⁵ See Case C-292/97 *Karlsson*; Case 5/88 *Wachauf v Germany* and the Article 51(1) of EU Charter of Fundamental Rights.

⁵⁶ See Case C-260/89 *ERT v DEP*.

⁵⁷ However, such an argument is more difficult to make these days. This is so, since after the Lisbon Treaty and the discussions about the reach of the EU charter there is some uncertainty whether the CJ will confirm its case law applying EU fundamental rights whenever national measures are ‘only’ within the scope of EU law.

⁵⁸ Case T-210/02 *British Aggregates*¶117. In this regard the Case was upheld by the CJ Case C-487/06P *British Aggregates*.

case where a Member State implemented EU law.⁵⁹ Hence, the application of Article 11TFEU is extensive and applies to the definition and implementation of all activities and policies of the Union, be it by Union institutions or by Member States. In conclusion, the obligation mandates the integration of environmental considerations whether the Union or the Member States implement/apply Union law.

C. Content and Meaning of the Article 11TFEU Obligation

As explained the Union institutions and Member States are bound by Article 11TFEU when implementing Union law. However, it remains to be explained ‘what’ has to be integrated and what does ‘integration’ mean.

1. Definition of ‘Environmental Protection Requirements’

The integration obligation requires ‘environmental protection requirements’ to be integrated into the activities and policies of the Union. These requirements are comprised of the objectives, principles and criteria of Article 191TFEU⁶⁰ as well as the goal of ‘sustainable development’.⁶¹ The objectives are listed in Article 191(1)TFEU and include amongst others ‘preserving, protecting and improving the quality of the environment’ and ‘human health’.

⁵⁹ Case C-513/99 *Concordia Bus* ¶57.

⁶⁰ Jahns-Böhm 2000¶9; Zils 1994:28–29; Jans 1995:25; Bernuth 1996:57–60; Nollkaemper 2002:27; Dhondt 2003:72–79; Jans 2010:1542. See also Case C-341/95 *Gianni Bettati v Safety Hi-Tech Srl* and Bleckman/Koch 1995:117.

⁶¹ In a nutshell the Brundtland Commission in the World Commission on Environment and Development 1987 defined ‘sustainable development’ as a ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. For more details on the meaning of ‘sustainable development’ within the scope of Article 11TFEU see: Dhondt 2003:53–62 Furthermore see Calliess 1998:562–564 on the development of sustainable development especially with regard to the relationship between international law and Union law and Gehring 2006 with regard to the relationship sustainability and competition law.

Article 191(2)TFEU includes principles such as the ‘polluter-pays’ principle, while Article 191(3)TFEU lists criteria which should be considered; eg ‘potential benefits and costs of action or lack of action’. All of these different objectives, principles and criteria make up the ‘environmental protection requirements’ within Article 11TFEU. However, in contrast to this definition of ‘environmental protection requirements’, both narrower and more inclusive meanings have been put forward.

Some argue that the ‘environmental protection requirements’ should be limited to Article 191(1)TFEU and Article 191(2)TFEU’s second sentence, because Article 191(3)TFEU is not supposed to be integrated but simply taken ‘account of’.⁶² However, a position which excludes the criteria of Article 191(3)TFEU seems difficult to uphold. It can be expected that any restrictions would have been included in the wording since Article 11TFEU was formerly paragraph 2, second sentence, of what is now Article 191TFEU. This is because Article 11TFEU refers to ‘environmental protection requirements’, which is a broader term than the environmental objectives and principles named in Article 191(1) and (2)TFEU.⁶³ Moreover, the holistic character of environmental protection supports the interpretation that ‘environmental protection requirements’ also refer to Article 191(3)TFEU. The Union has always to take ‘account of’ the requirements of Article 191(3)TFEU, if it acts in the field of environmental protection. Correspondingly, the CJ in the *Safety Hi-Tech* case examined the contested regulation in the light of not only Articles

⁶² Krämer 2003¶6-9. This position seems now slightly amended, see Krämer 2013:85.

⁶³ Gasse 2000:9.

191(1) and (2) but also of (3) TFEU.⁶⁴ It is thus difficult to comprehend why Article 191(3) TFEU should not apply if environmental protection comes into play due to the integration obligation.⁶⁵

While the position put forward in the earlier paragraphs extends ‘environmental protection requirements’ to the list of criteria in Article 191(3) TFEU - such as the ‘potential benefits and costs of action or lack of action’ - this interpretation has limits. An argument for an even broader range of requirements⁶⁶ is problematic because it is unclear whence the normative force of a broad range of requirements should be derived. Moreover, the limitation to Article 191 TFEU means that *national* environmental protection aims can only be considered if they can find their basis in Union law.⁶⁷ This limitation helps with a clear delineation of competences and ensures that national interests are not used to circumvent EU regulation.⁶⁸

Integration has to take place ‘in particular with a view to promoting sustainable development’. This part of the Article does not restrict the previous part of the obligation but rather emphasises the attainment of sustainable development via the integration. The idea of sustainable development⁶⁹ is problematic within a legal provision because the

⁶⁴ Case C-341/95 *Gianni Bettati v Safety Hi-Tech Srl* [30-53]. At that time the integration principle was enshrined in Article 130r. For more details see text to (n127-132).

⁶⁵ Gasse 2000:10.

⁶⁶ See eg Hession/Macrory 1998:108–109.

⁶⁷ Gasse 2000:5–7; Vedder 2003:75; Casey 2009:373.

⁶⁸ See below text to (n224-228).

⁶⁹ First, proclaimed by World Commission on Environment and Development 1987.

concept seems to lack the clarity⁷⁰ needed in a legal context. Thus, sustainable development adds little if anything to the legal obligation of Article 11 TFEU. However, it can be considered as further support for the idea that environmental protection and economic aims are not in fundamental opposition to each other. Instead of fundamental opposition, synergies between environmental protection and economic aims should be achieved. Where a real conflict occurs, a balanced approach is to be adopted.⁷¹ AG Kokott recently suggested that the principle of sustainability also affects the balancing exercise:

The principle of sustainability must be taken into account in connection with the justification, that is to say in assessing the reasons of public interest, the damage and alternatives. If the project cannot achieve its objectives sustainably, or can do only partially, the weight of those objectives in the balancing of interests is reduced. Thus, merely temporary damage has less weight than sustained damage.⁷²

The extent to which this part of her opinion can give new impetus to the principle of sustainable development is unclear: Even under traditional balancing sustained advantages or disadvantages should have a different weight than temporary ones. Moreover, the Court did not directly use her suggestion in its ruling.⁷³

To conclude, it can be said that ‘environmental protection requirements’ are the objectives, principles and criteria of Article 191 TFEU which need to be integrated into other

⁷⁰ For an overview see Kingston 2009:19, critical of the concept of sustainable development also Krämer 2011¶1102; 1-11 since it would embody a political compromise to which everyone can agree and which is given its ‘political content according to the political actor who uses it’. *Ibid.*

⁷¹ Explored in more detail in the next section.

⁷² Opinion Case C-43/10 *Nomarchiaki Aftodioikisi Aitolokarnanias*¶238.

⁷³ Case C-43/10 *Nomarchiaki Aftodioikisi Aitolokarnanias*¶134-139.

areas of Union law. This link between environmental and economic aims is further strengthened by sustainable development.

2. Definition of ‘Integration’

Having identified the requirements that must be integrated, this section turns to the meaning of *integration*. Kingston⁷⁴ and Dhondt⁷⁵ have identified three possible interpretations of the term ‘integration’. First, there is a weak interpretation, where the environmental implications need only be taken into account without adjusting the policies; second, a stronger version would necessitate that the environmental protection requirements be taken into account in a way which places them on equal footing with the sectoral goals and which requires a process of balancing; and a third, a strong interpretation wherein environmental requirements take precedence in cases of conflict. The first and third interpretations can only be sustained if environmental protection has lower or higher constitutional status, respectively, than other values in the Treaties, which is not the case.

The preamble of the Lisbon Treaty explains that the Member States would be determined ‘to promote...economic and social progress for their peoples, taking into account the principle of sustainable development...the accomplishment of the internal market...and environmental protection’. Article 3(1)TEU states that the ‘Union’s aim is to promote peace, its values and the well-being of its peoples’. In Article 2TEU, the broad founding values of the Union are listed. However, despite this clearly formulated aim of the

⁷⁴ Kingston 2010:788; Kingston 2012:113–1119.

⁷⁵ Dhondt 2003:88–110.

Union, Article 3(2)-(6)TEU specifies ‘tasks’⁷⁶ of the Union, such as establishing ‘an internal market...work[ing] for the sustainable development of Europe based on balanced economic growth...and a high level of protection and improvement of the quality of the environment’. If the CJ’s case law on the former EC aims⁷⁷ is applied by analogy, the aim of the Union is expressed in Article 3(1)TEU, but it should be achieved by means of the tasks of Article 3(2)-(6)TEU. It seems inherent with the great variety of Union goals that they may come into conflict. Under the former EC Treaty it had been argued that the internal market, with a system of undistorted competition and free-movement (economic aims), was supreme over the other goals.⁷⁸ The proponents of this interpretation argued that it would follow from a comparison between the tasks of the EC (Article 2EC), their elaboration through the means of Articles 3 and 4EC and the autonomy of the different EC policy areas. Another argument was that the internal market would be named first in the context of Article 2EC.⁷⁹ At the other end of the spectrum, the argument has been raised that the environmental integration obligation may ‘act as a “trump” ’ thereby establishing normative supremacy of the environment.⁸⁰

However, both of these positions need to be rejected in the context of the Lisbon Treaty. First, the mere existence of Article 11TFEU does not show that a preference must

⁷⁶ To use the terminology of the old Article 2EC, which elaborated on the tasks of the EC.

⁷⁷ Cf Case 126/86 *Giménez Zaera v INSTGS*¶10; Case 249/81 *Commission v Ireland*¶28 C-Case C-487/06P *British Aggregate*¶91; Case C-320/03 *Commission v Austria*¶64, 72.

⁷⁸ Basedow 1995:68; Dreher 1998:656; Immenga/Mestmäcker 2007¶91.

⁷⁹ Gasse 2000:138–139.

⁸⁰ Schumacher 2001:37ff; Monti 2002:1078. In the same line Portwood 2000:97 arguing that environmental protection has the higher status, as competition *policy* which would not be a constitutional value.

exist; it merely shows that the environmental impact has to be considered. Second, the integration of environmental considerations is not the only clause that demands integration.⁸¹ Regarding the issue of whether economic aims - namely the internal market/competition - have a higher constitutional status than the environment, the changes to the Treaties need to be taken into account. While, such superiority might have been true regarding previous versions of the EC Treaty, it seems to no longer hold true. Starting with the changes of the Single European Act and the subsequent Treaties of Amsterdam and Maastricht, the balance has shifted.⁸² In particular, the Maastricht Treaty enlarged the tasks of the EC⁸³ listed in Article 2EC.⁸⁴ These changes have tilted the balance. The purported supremacy did not even exist when the Lisbon Treaty was adopted.⁸⁵ The new formulation of the aim of the Union under the Lisbon Treaty makes it now nearly impossible to argue for such superiority.⁸⁶

⁸¹ Cf Gasse 2000:17.

⁸² Higgins/Demetriou 2003:195.

⁸³ Ruffert 2007¶10.

⁸⁴ The Maastricht Treaty in essence included 'sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States' in Article 2EC.

⁸⁵ See von Bogdandy 2009 [40th Ergänzungslieferung]¶63. However, sometimes a hierarchy favouring an 'economic orientation' in policies but not in aims/objectives of the EC might still be identified based on the elaboration of the different policies, see Baquero Cruz 2002:79.

⁸⁶ In fact, it has been argued that Lisbon has tilted the balance against the economic aims, in particular competition. For such a position see Riley 2007, possibly also Townley 2010:321 but see Townley 2013:text to fn 53-95. On this debate and the reasons why a weakening should not be feared see Nowag 2012.

Moreover, the elaboration of the different tasks⁸⁷ seemed merely to reflect the fact that in some areas the Community had exclusive competence while in other areas the competence was shared with or retained by the Member States. Therefore, the EC Treaty and even more so the Lisbon Treaty has to be described as a Treaty aimed at a multifaceted goal. If a conflict among the diverse and potentially conflicting aspects of this multifaceted goal occurs, the

institutions must secure the permanent harmonization made necessary by any conflicts between those objectives taken individually and, where necessary, give any one of them temporary priority in order to satisfy the demands...in view of which their decisions are made.⁸⁸

This can be rephrased to mean that no aspects of the multifaceted goal of the Union should ‘take absolute precedence over the other and neither...should [one] be emptied of its entire content’.⁸⁹ Such an approach rejects any general normative supremacy and seems to have some similarities with the concept of ‘practical concordance’⁹⁰ used by the German

⁸⁷ Which has been advanced as an argument in support of the normative supremacy of economic aims, as explained above.

⁸⁸ Case C-44/94 *Fishermen’s Organisations* ¶37; Case C-280/93 *Germany v Council* ¶47; Case 139/79 *Maizena v Council* ¶23; Case 29/77 *SA Roquette Frères* ¶30; Case 5/73 *Balkan-Import-Export GmbH* ¶24. More recently, the question of balancing the different aims of the EC was addressed in *Laval* and *Viking* where the Court emphasised that the Union has not only an economic purpose but that the Union’s activities and tasks would also encompass other activities and tasks besides the internal market and, hence, that these tasks must be balanced against each other. Case C-341/05 *Laval un Partner* ¶104-105; Case C-438/05 *ITF & FSU v Viking Lines* ¶78-79. It is noteworthy that the CJ explicitly held that the ‘[Union] has thus not only an economic but also a social purpose’.

⁸⁹ Joined Opinion AG Jacobs Case C-67/96 Joined Cases C-115/97 to C-117/97 and Case C-219/97 *Albany, Brentjens, Maatschappij* ¶179, with regard to Article 11 see also Opinion AG Geelhoed Case C-161/04 *Austria v Parliament and Council* ¶59-60, arguing that environmental protection cannot always take precedence but that Article 11 TFEU requires ‘to take due account of ecological interests in policy areas outside that of environmental protection *stricto sensu*’.

⁹⁰ In German, ‘Praktische Konkordanz’.

Bundesverfassungsgericht and other constitutional courts.⁹¹ In essence, the concept of ‘practical concordance’ applies a proportionality test to achieve a balance between different values.

Hence, Articles 2 and 3 TEU mandate that all goals of the EU are on an equal footing and need to be balanced in case of conflict.⁹² Thus, only the second interpretation of Kingston and Dhondt, mandating that different goals of the Union need to be observed and brought into balance with each other, is consistent with the Treaty. This interpretation seems to form the widely agreed upon position amongst the scholars.⁹³ To place this finding in the context of the requirements that have to be integrated, it could be said that ‘integration’ within the meaning of Article 11 TFEU takes into account the environmental requirements of Article 19 TFEU in a way which places them on equal footing with the sectoral goals and requires a process of balancing in the case of conflict. However, this obligation to balance faces some restrictions. First, in cases of conflict between the environment and other EU objectives, the relevant institution has a wide margin of

⁹¹ BVerfGE 41, 29 [51]; 77, 240 [255]; 81, 298 [308]. See also the French Conseil Constitutionnel in *Décision n° 94-352* even though not expressly referring to this concept but applying it.

⁹² Case C-280/93 *Germany v Council* ¶47; Case C-44/94 *Fishermen’s Organisations* ¶37; Case 139/79 *Maižena v Council* ¶23; Case 5/73 *Balkan-Import-Export GmbH* ¶24; Case 29/77 *SA Roquette Frères* ¶30.

⁹³ Cf Krämer 2003 ¶20-24; Calliess 2007 ¶12; Mehling 2005 [9th *Ergänzungslieferung*] ¶33-34; Beyer 1990:966; Zils 1994:27, 31-32; Bernuth 1996:73–86; Bär/Kraemer 1998:319; Steinbeck 1998:560; Calliess 1998:565; Grimeaud 2000:216; Gasse 2000:14–15; Wasmeier 2001:160, 164; Maduro 2002:150ff; Jans/von Heide 2003:19–20; Townley 2007-2008:352ff; Makowski 2007:83-85; 89; Jans/Vedder 2008:17–18; Weigt 2009:116–117; Weidemann 2009:73, 82, 227; Casey 2009:367; Kingston 2010:789; Jans 2010:1542–1543; Frenz 2011:104; Lianos 2012:269–270; Sjaåfell 2012:260.

discretion.⁹⁴ The second restriction is inherent in the way the rules governing the internal market are designed. These are different from other areas where integration has taken place.

Member States had focused on areas such as fisheries, agriculture, transport and energy when negotiating the Amsterdam Treaty.⁹⁵ EU action in these areas might have a high direct impact on the environment as the Union takes direct positive action. From the point of view of political theory, three forms of environmental integration in cases of direct positive action can be identified: (1) top-down integration, which is characterised by action plans or timetables to reach quantified targets; (2) bottom-up integration, which is characterised by influence and guidance in a ‘process of continuous negotiation’ between the DG Environment and other DGs; and (3) intermediate steps, which are characterised by forms of environmental assessment of the impact of the sectoral policy.⁹⁶ The extent of influence and guidance by the DG Environment on other DGs can hardly be measured. Action plans, timetables to reach quantified targets and environmental assessment of the impact of the sectoral policy seem, however, to be measurable in the areas of fisheries, agriculture, transport and energy.⁹⁷ The Commission has, thus, declared that in order to integrate environmental considerations it will use an extended impact assessment when

⁹⁴ Opinion AG Geelhoed Case C-161/04 *Austria v Parliament and Council* ¶59-60; Zils 1994:31–32; Grimeaud 2000:216. Cf Case 139/79 *Maizena v Council* ¶23.

⁹⁵ See above text to (n12-17).

⁹⁶ Wilkinson 1998:115–116.

⁹⁷ For a very good overview of the literature in the field see Martina Herodes January 2007. On the Union’s environmental action programs with regard to integration see Görlach/Hinterberger/Schepelmann 1999; Lenschow 2002; McIntyre 2013, an overview also in Grimeaud 2000.

proposing individual policy measures or initiatives.⁹⁸ The degree of integration can, therefore, be assessed by the extent to which these sectors have ‘taken on board and implemented environmental objectives...to form an environmentally prudent decision’.⁹⁹ In this sense, the integration obligation has a procedural aspect¹⁰⁰ that should ultimately lead to an environmentally sound outcome.

However, these methods are specifically designed for areas where the Union takes positive action. In these areas a clear aim is pursued by the Union, and the question becomes how to achieve this aim in the best possible way. In such a situation, the impact assessment helps to paint the whole picture of the consequences of the measure by highlighting the environmental effects. Yet this form of integration is not readily transferable to the areas of the freedoms, State aid and competition law. In these areas, the Union¹⁰¹ does not take positive action to achieve an aim. Instead, the Union supervises the compliance with certain prohibitions. The Union, thus, has less flexibility here than in the other areas because it usually can either prohibit or allow the action (though it has no liberty in designing the action).¹⁰² Hence, the integration obligation can only have an indirect effect on the outcome,

⁹⁸ European Commission, Integration of Environmental Considerations into other Policy Areas-a Stocktaking of the Cardiff Process:1.

⁹⁹ Lafferty/Tuud/Larsen 2006:230.

¹⁰⁰ Cf Hession/Macrory 1998:107.

¹⁰¹ And possibly other national enforcement mechanisms, such as national courts and national agencies.

¹⁰² An exception to this general rule might be commitment decisions in the area of competition law. The Commission could suggest certain remedies. However, these remedies are designed to solve the competition issue(s) at hand and not the environmental ones.

as it can only affect the way in which the Union¹⁰³ invigilates the prohibition, but not the initial actions by the Member States or undertakings.

So, what does integration of environmental considerations in the internal market rules mean, if environmental integration has been defined as taking into account the environmental requirements in a way which places them on equal footing with the sectoral goals and requires a process of balancing in the case of conflict?

Environmental integration in this area means that the competition, State aid rules and the fundamental freedoms need to be interpreted in the light of Article 11 TFEU. Such an interpretation¹⁰⁴ seems to a certain extent akin to the indirect effect, or principle of consistent/harmonious interpretation. Yet, it differs from indirect effect. The norm in the light of which another norm is interpreted is not a national one,¹⁰⁵ nor is secondary Union law being interpreted in the light of primary Union law,¹⁰⁶ the Charter of Fundamental Rights¹⁰⁷ or an international agreement.¹⁰⁸ Instead, one provision of the Treaty is interpreted in the light of another provision of the Treaty. An example where the Court construed one provision in the light of Article 11 TFEU is *Commission v Austria*. In this case, the CJ based its

¹⁰³ Or national courts and agencies. These are also bound by Article 11 TFEU when implementing Union law, see text to (n32-57).

¹⁰⁴ See also Sjøfjell 2012:273.

¹⁰⁵ With regard to indirect effects eg Chalmers/Davies/Monti 2010:294–300.

¹⁰⁶ Eg Case C-138/02 *Collins*¶60; Case C-270/03 *Commission v Italy*¶19; Case C-513/99 *Concordia Bus*¶57; Case C-168/01 *Bosa*¶43; Case C-251/94 *Lafuente Nieto*¶33, 38; Case C-352/06 *Bosmani*¶29; Case C-265/08 *Federutility*¶26; Case C-406/93 *Reichling*¶21; Case C-346/06 *Rüffer*¶43.

¹⁰⁷ Eg Case C-31/09 *Bolbol*¶38; Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salabadin Abdulla*¶53-54; Case C-578/08 *Chakeroun*¶44.

¹⁰⁸ Eg Case C-245/02 *Anbeuser-Busch*¶55; Case C-115/09 *BUND Deutschland*¶41; Case C-311/04 *Algemene Scheeps Agentuur Dordrecht*¶34; Joined Cases C-300/98 and C-392/98 *Dior*¶47; Case C-480/08 *Teixeira*¶39; Case C-373/08 *Hoesch Metals and Alloys*¶40; Case C-310/08 *Brabim*¶31.

reasoning that environmental protection is a mandatory requirement within the meaning of the market-freedoms on a sound Treaty-based provision, namely Article 11 TFEU.¹⁰⁹ Another example of such interpretation is *Albany*, where the Court read ‘the provisions of the Treaty as a whole’.¹¹⁰ In this case the CJ used Article 3(1)(g) and (j) EC and the Articles related to collective bargaining. It found that Article 101(1) TFEU would not cover the agreement in question.¹¹¹ This effect of interpretation taking place within primary EU law might be termed ‘*internal indirect effect*’, as it occurs internally, ie within EU primary law. It is important to point out that ‘interpretation in the light of’ implies that the wording and the current case law¹¹² define the framework for the interpretation. Thus, the wording including the current case law also sets the framework as well as the boundaries for integration.¹¹³ As such, integration in the areas of market freedoms, State aid and competition law is only possible in so far as the current legal framework allows it.¹¹⁴ This boundary runs parallel to the CJ’s finding that indirect effect does not require a *contra legem* interpretation.¹¹⁵

Taking all of this together, two forms of integration can be identified: The first form of integration is characterised by the possibility of bringing environmental aims in line with

¹⁰⁹ Case C-28/09 *Commission v Austria* ¶121.

¹¹⁰ Case C-67/96 *Albany* ¶60.

¹¹¹ *Ibid* ¶54-60.

¹¹² The case law might also include unwritten parts, as the mandatory/imperative requirements or the European Rule of Reason in Article 101(1) TFEU show. See in this regard Part C, Section I, Chapter A and Chapter D.

¹¹³ Cf also Kingston 2012:115–116 who also describes the wording as limit to integration.

¹¹⁴ This also seems to be the position of the Commission. Any further form of integration can only take place via legislation or by amending the treaties, European Commission *Environment and Internal Market* 19 April 2010. Anything beyond, would also clash with the principle of conferral cf Kingston 2010:790.

¹¹⁵ Case C-334/92 *Wagner Miret*.

the sectoral policy objective. In these cases, both the environmental aim and the sectoral objective can be pursued simultaneously and conflict is prevented. This form of integration typically also supports subsidiarity, as it ensures that fewer measures are subjected to EU law. The second form of integration has been described as ‘balancing’ of the environmental and the sectoral objectives, based on the idea that both are of the same constitutional value. However, this balancing is not a ‘wild balancing’ but instead it can only take place within the boundaries given by the rules in place: ie competition, State aid law and the market-freedoms.¹¹⁶

These two forms of environmental integration set the structure for this thesis, with Part B investigating the first form of integration by asking the question: How can the relevant provisions be applied to avoid conflicts between environmental protection and competition, State aid or free-movement law? Part C investigates the second form by posing the question: How does the balancing work in cases where environmental protection and competition, State aid or free-movement law come into conflict?

When examining the relevant provisions of competition law, State aid law and the freedoms, it becomes clear that these two forms of integration typically, but not always, coincide with the scope on the one hand and justification on the other. While the scope is one major component of examining the first form of integration, other areas which do not require balancing but typically would be classified as justification can also bear significance.

¹¹⁶ The structure of these provisions particularly in terms of justification might suggest a certain hierarchy, as environmental protection is only seen as justifying an exception to the general rule. However, this follows merely from the structure of the provision and cannot change the general constitutional balance between the different aims of the EU.

For example, Article 107(2)TFEU allows for environmental measures to escape Article 107(1)TFEU if the environmental project can be considered a project of common European interest.¹¹⁷ The second form of integration, which requires a balancing based on the premise of equal value, is typically but not always found in the area of justification. For example, the balancing of environmental protection as mandatory requirement¹¹⁸ determines whether freedoms are applied and would thus seem to determine the scope.

In order to better evaluate environmental integration, the European Environmental Agency has outlined different indicators.¹¹⁹ Two of these¹²⁰ can be used to assess the environmental integration within the rules governing the internal market:

- (1) Are synergies between economic and environmental objectives maximised?¹²¹
- (2) Are trade-offs, between environmental and economic objectives minimised and transparent?

It can be inferred from these indicators that the first form of integration should be given priority over the second one. This ranking is also supported by Article 11TFEU, in

¹¹⁷ See Part C, Section I, Chapter B.

¹¹⁸ See Part C, Section I, Chapter A.

¹¹⁹ European Environment Agency *Monitoring Progress Towards Integration* Dec 1999 and European Environment Agency *Europe's Environment* 1998: 284, see also Schepelmann 2000:13 and for a critical position describing them as 'wishful thinking' Krämer 2011¶1103.

¹²⁰ The others are tailored to positive action and thus are not useful for this analysis.

¹²¹ See with regard to competition law, Report from the Nordic Competition Authorities 2010:5 explaining that competition 'supports the achievement of environmental goals in a cost-efficient way' and that environmental protection and competition law go hand in hand as they both have a common aim which a harmonised and concordant application can ensure, namely the achievement of the maximum social welfare. *Ibid*:15. See also with regard to open environmental standards (defining only the performance aim) OFT, *The Competition Impact of Environmental Product Standards* 2008¶1.30, pointing out that these increase the incentives for innovation in environmental terms.

particular the concept of sustainable development which aims at the maximisation of synergies between economic and environmental objectives.¹²² The Commission equally seems to favour the first form, expressing that the Union has to

seek a coherent approach to the pursuit of the objectives of the Treaty in relation to both the Single Market and the environment. [The aim should be to make both policies] mutually supportive and reinforcing, whilst developing positive synergies between them.¹²³

It follows that, where possible, the Commission or the relevant institution has to use the means available to ensure the prevalence of the first form of integration. In the context of competition law, an example might be commitment decisions. In cases where the measure is aimed at an environmental improvement but contains unnecessary provisions which restrict competition, a balancing/trade-off could be avoided if these unnecessary provisions are abandoned. Moreover, the indicators can offer a benchmark for comparing the integration in the different areas of the internal market: the freedoms, State aid and competition law.

Finally, it should be recalled that the effect of environmental integration on the rules governing the internal market is indirect: The Union is confronted with an action which seems to conflict with its rules on competition, State aid or the market-freedoms. This behaviour can either be environmentally beneficial or lead to environmental degradation. The question then becomes whether and to what extent the legal framework can be applied

¹²² Although it should be noted that sustainable development goes further, it includes environmental, economic and social factors, see World Commission on Environment and Development 1987.

¹²³ European Commission, Single Market and Environment:¶1 See also with regard to the Union Council COREPER, Strategy for the Integration of Environmental Protection and Sustainable Development into Internal Market Policy No. 8970/01; Report of the Internal Market Council to the Helsinki European Council on the Integration of Environmental Protection and Sustainable Development into Internal Market Policy No. 13622/99:4, 10.

in a way to allow environmentally beneficial behaviour¹²⁴ or whether and to what extent the legal framework can be used indirectly to prevent environmental degradation. This distinction between cases where a measure is aimed at benefiting the environment as compared to cases where the measure has negative environmental effects is also reflected in the structure of the thesis. The majority of cases concern the application of the internal market rules to environmentally beneficial measures and can be called *supportive integration*. Cases where the rules are applied in such a way as to prevent environmental degradation can be called *preventative integration*. In both cases the above described principles of the first and second form of integration are applicable. Hence, the thesis subdivides Part B and C into sections on supportive and preventative integration.

D. Consequences of Non-compliance with Article 11 TFEU

After establishing the extent and content of the obligation of Article 11 TFEU, the practical consequences of non-compliance must be considered. ‘Article [11] is not merely programmatic; it imposes legal obligations’.¹²⁵ This was not only the intention of the various changes this obligation has seen,¹²⁶ but it is also exemplified by the *Safety Hi-Tech* case. In *Safety Hi-Tech*, the Court considered an infringement of the obligation to integrate the environmental protection requirements,¹²⁷ namely the objectives,¹²⁸ principles¹²⁹ and

¹²⁴ Cf also Gasse 2000:14–15.

¹²⁵ Opinion AG Jacobs Case C-379/98 *PreussenElektra* ¶231; see also Opinion AG Mengozzi Case C-487/06P *British Aggregates* ¶102; Bär/Kraemer 1998:318; Schumacher 2001:32; Sjäfjell 2012:266ff and Opinion AG Cosmas Case C-321/95P *Greenpeace International* ¶62 who even suggested direct effect.

¹²⁶ See above text to (n1-31).

¹²⁷ Case C-341/95 *Gianni Bettati v Safety Hi-Tech Srl* ¶30-53. At that time the integration principle was enshrined in Article 130rEC.

¹²⁸ Which are listed in Article 191(1) TFEU.

criteria¹³⁰ of Article 191 TFEU when adopting a regulation. An EU regulation aimed at protecting the ozone layer prohibited the use of hydrochlorofluorocarbons (HCFCs), found in fire-fighting and other products. In proceedings between private parties the validity of the EU regulation was contested, and the question was referred to the CJ. The CJ examined the validity of the regulation and whether the Council had infringed on its obligation to integrate environmental protection requirements when adopting the regulation.¹³¹ The CJ did not find such an infringement because the Council had not exceeded the bounds of its discretion by simply taking the ozone depletion potential into account. It was not obliged to also consider the global warming potential and atmospheric lifetime of HCFCs as compared to other substances.¹³²

Although the case law on the environmental integration obligation and in particular on the infringement of the Article 11 TFEU obligation is sparse,¹³³ the *Safety Hi-Tech* case shows that any measure that does not comply with the integration obligation is liable to annulment.¹³⁴ An action for annulment can certainly be brought by privileged applicants: the Council, Commission, the Parliament and the Member States. However, two caveats must

¹²⁹ Listed in Article 191(2) TFEU.

¹³⁰ Listed in Article 191(3) TFEU.

¹³¹ *Ibid.*

¹³² *Ibid.* ¶53.

¹³³ It might be argued that the obligation of Article 11 TFEU will only be taken seriously if the Court actually strikes down a measure, see Krämer 2011 ¶1107.

¹³⁴ In this line also Mehling 2005 [9th Ergänzungslieferung] ¶36; Beyer 1990:966; Zils 1994:32–33; Wasmeier 2001:164; Kingston 2010:786; Krämer 2011 ¶1–26. In opposition Gasse 2000:64–65; Grimeaud 2000:217; Sjøfjell 2012:269–270. Unclear Weidemann 2009:85 who claims that the obligation would be more than programmatic but at the same time does not see grounds for annulment.

be made.¹³⁵ First, the availability of annulment for measures not complying with Article 11 TFEU does not mean that individuals gain standing where Article 11 TFEU is infringed.¹³⁶ Individuals still have to satisfy the strict conditions of individual concern.¹³⁷ In the area of competition law this is typically not problematic, since this condition is satisfied where a decision is addressed to an individual.¹³⁸ The second caveat stems from the wide discretion that the institutions have in balancing environmental requirements with other objectives of the Union,¹³⁹ although they cannot completely neglect environmental requirements since, they must have (at least) ‘co-shaped’ the measure.¹⁴⁰

E. Applying Article 11 TFEU to the Internal Market and in Particular to the Competition Provisions

After having established the basic features of Article 11 TFEU’s environmental integration obligation, this part examines whether the obligation also applies to the rules governing the internal market. As explained earlier, the debate of the IGC on the strengthening of the integration obligation in the Maastricht Treaty supports such an application to the internal market rules. The obligation applies to *all* areas of Union policy.¹⁴¹ Giving a broad scope of

¹³⁵ One might hope that the obligation would not have the same fate as the subsidiarity until the strengthening in Lisbon. So that every measure pays attention to obligation formally but the practical relevance is doubtful. With regard to subsidiarity see eg de Estella Noriega 2005; Craig 2012.

¹³⁶ Case T-461/93 *An Taisce and WWF* upheld by Case C-325/94P *An Taisce and WWF UK*, Case T-585/93 *Greenpeace* upheld by Case C-321/95P *Greenpeace*. Although the *Safety Hi-Tech* case shows that they can raise Article 11 TFEU in proceedings before the Courts.

¹³⁷ Cf also Zils 1994:33–34.

¹³⁸ Eg to an undertaking in the case of competition or to the State for orders of recovery of State aid.

¹³⁹ Opinion AG Geelhoed Case C-161/04 *Austria v Parliament and Council* ¶59-60. Cf Case 139/79 *Maizena v Council* ¶23.

¹⁴⁰ Calliess 2007 ¶7; Frenz 2011:104.

¹⁴¹ See text to (n1-32).

application to Article 11 TFEU is also supported by the majority of scholars in this area,¹⁴² the Commission,¹⁴³ AG Trstenjak¹⁴⁴ and the CJ. The CJ has held that the environmental integration obligation would reflect ‘the principle whereby all Community measures must satisfy the requirements of environmental protection’.¹⁴⁵

This conclusion has been disputed by some parts of the competition community, in particular regarding Article 101(3) TFEU after decentralising its application with Regulation 1/2003. This debate must be seen in context with earlier discussions concerning the legality of decentralisation.¹⁴⁶ In the discussions on decentralisation, the same arguments were advanced as in the current debate on the integration of environmental considerations in competition law. Moreover, it seems clear that anyone who argued against the

¹⁴² Seidel 1989:446; Scheuing 1989:176–177; Beyer 1990:966; Jahns-Böhm/Breier 1992:50–51; Zils 1994:27; Cremer 1995:156; Hession/Macrory 1998:105; Grabitz/Zacker 1998:300; Görlach/Hinterberger/Schepelmann 1999:4; Gasse 2000:13; Grimeaud 2000:216; Schumacher 2001:33; Weidemann 2009:72; Lianos 2012:269–270; Krämer 2013:83.

¹⁴³ See Commission Press Release IP/97/636, which called on all its DGs to integrate environmental protection requirements. On the internal measures of the Commission to ensure integration see eg Wilkinson 1998.

¹⁴⁴ Opinion AG Trstenjak Case C-428/07 *Horvath* fn 16.

¹⁴⁵ Case 62/88 *Greece v Council* ¶20.

¹⁴⁶ Interestingly, it seems mainly German literature which doubted the legality of the decentralisation, see Möschel 1999; Mestmäcker 1999:525–527; Monopolkommission 2000 ¶14–21; Möschel 2000:61–62; Paulweber 2000:30–32; Deringer 2000:6–7; Mestmäcker 2000:413–419; Der Wissenschaftliche Beirat beim Bundesministerium für Wirtschaft 01 July 2000 ¶7; Fikentscher 2001:447–455; Mestmäcker/Schweitzer 2004:§ 13 I; but see also Mok 1999:318–319 and most recently Pace 2007:314–317 and Weidemann 2009:206–211 who still argue against the decentralisation. Weidemann’s argument is interesting, as he argues that the decentralisation would be *contra legem* as it would deprive the integration clauses (such as Article 11 TFEU) of its effect on Article 101(3) TFEU. The decentralisation is therefore a change of the Treaty and would have needed Treaty amendment. However, this argument is based on the interpretation that Article 11 TFEU does not bind the Member States when applying Union Law, which does not hold true as shown above, see text to (n32-60).

decentralisation based on the wording¹⁴⁷ or the lack of justiciability of Article 101(3)TFEU¹⁴⁸ would advocate a restrictive application of Article 101(3)TFEU in a decentralised system.

Before arguments advanced against the application of the environmental integration obligation in competition law are considered, attention should be drawn to how the question is formulated. From a pure policy and non-legal perspective it could be asked if integration of environmental considerations should take place in competition law? From a legal point of view the question must be posed differently: What reasons can justify non-compliance with the obligation in the area of competition law?¹⁴⁹ This follows from Article 11TFEU's position under the Treaty heading 'Provisions Having General Application'. The integration obligation applies, as shown earlier, generally to *all* areas of Union law, whether enforced by the Union or the Member States. Thus it applies generally also in the area of competition law. This finding is crucial because it shifts the burden of proof. Those opposed to such integration need to justify why the integration obligation does *not* apply in competition law.

The arguments advanced against the integration of environmental considerations in competition law are typically inspired by two schools of thought: (1) the 'Anglo-American

¹⁴⁷ Wesseling 1999:425; Mestmäcker 1999:525–526; Paulweber 2000:30; Wißmann 2000:139; Möschel 2000:62; Deringer 2000:6; Mestmäcker 2001:228–229; Mestmäcker/Schweitzer 2004:§ 13¶11; Pace 2007:314–317.

¹⁴⁸ Article 101(3)TFEU would not be justiciable as it would involve a complex assessment of economic facts and would entail wide discretionary power for weighing up different interests Mestmäcker 1999:526; Paulweber 2000:32; Wißmann 2000:140; Mestmäcker 2000:231; Pace 2007:311–322. Moreover, national courts would not be in a position to carry out this essentially political task Bovis 2001:100–101; Möschel 2001:148; Mestmäcker/Schweitzer 2004:§ 13¶15-16 and Martínez Lage/Brokelmann 2001:600, 608-612 who argue for the extreme position of excluding national judges from the application of competition law in the absence of a precedent. See also:Odudu 2002 and Gustafsson 2000:174–178, who is likewise critical with regard to the national civil courts' competence.

¹⁴⁹ In a similar line see also Townley 2011b:443, arguing, however, that a deviation from case law of the European Courts would need to be justified.

School’ which sees the main and often proclaimed sole purpose of competition policy as achieving economic efficiency typically defined along the lines of the Chicago School¹⁵⁰ and (2) a school of thought that may be called the ‘German school’. This school typically fears the ‘*instrumentalisation*’ of competition law. This position is usually associated with Ordoliberalism¹⁵¹ and claims that competition policy should only protect the competitive progress and should not be ‘abused’ for other purposes.

Five interconnected lines of arguments have been advanced in an attempt to justify non-compliance with the integration obligation. The first claim is that the wording of Article 101(3)TFEU, in particular, would not allow such integration. The second concerns legal certainty. The third relates to the ability of national judges to make such ‘value judgements’, ie the justiciability. The fourth line of argument focuses on the question of consistent interpretation, ie uniform application. The final argument is based on democratic accountability and division of powers. These arguments are similar to the arguments that have been raised unsuccessfully against the decentralisation of the application of Article 101(3)TFEU in general.

¹⁵⁰ The Chicago School goes back to the ideas of Aaron Director, Bork, Bowman, Easterbrook, Posner, McGee, Stigler and Tesler but one might also include Demsetz from the University of California at Los Angeles. The most influential writings include Bowman 1957; McGee 1958; Director/Levi 1959; Telser 1960; Stigler 1964; McGee 1974; Demsetz 1974; Posner 1976; Posner 1979; Easterbrook 1986, see Wright 2007:28.

¹⁵¹ Ordoliberalism goes back to Walter Eucken, Franz Böhm and Hans Großmann-Doerth. See Großmann-Doerth 1933; Böhm/Eucken/Großmann-Doerth 1937a; Eucken 1950, see in particular the Ordoliberal Manifesto by Eucken, Böhm and Großmann-Doerth Böhm/Eucken/Großmann-Doerth 1937b. This fear of ‘instrumentalization’ can however also be found in current UK scholarship, most recently Odudu 2010:11, who speaks of ‘hijacking’ competition law.

1. Wording

Some have argued that the wording of Article 101(3)TFEU does not accommodate ‘non-economic aims’; therefore, environmental considerations could not be considered under Article 101(3)TFEU.¹⁵² As explained above, the wording and the current case law set the boundaries within which integration of environmental considerations can take place.¹⁵³ As such, the wording of Article 101(3)TFEU would be a legitimate reason why the integration obligation of Article 11TFEU would not apply. However, Article 101(3)TFEU refers to the ‘improvement of production’ and ‘consumer benefit’. These terms are sufficiently broad to allow an interpretation that encompasses environmental benefits.¹⁵⁴ Moreover, the analysis of the Commission’s application of Article 101(3)TFEU and the Courts’ case law shows that environmental benefits have been subsumed under the conditions of Article 101(3)TFEU.¹⁵⁵ Hence, the claim that the environmental integration obligation would not apply within Article 101(3)TFEU cannot be justified by the wording of the Article.

2. Legal Certainty

Another argument raised is that fully isolating competition law from environmental benefits and refocusing on efficiency are needed to ensure legal certainty in the sense of predictability and transparency.¹⁵⁶ This refocus would be needed after the decentralisation introduced by Regulation 1/2003, since only a narrow application of Article 101(3)TFEU could ensure

¹⁵² Venit 2002:579; Komninos 2005:8.

¹⁵³ See text to (n105-115).

¹⁵⁴ See Townley 2009:141ff; Kingston 2012:261ff.

¹⁵⁵ See Part C, Section I, Chapter D, text to (n73ff).

¹⁵⁶ Basaran 2006:484.

legal certainty.¹⁵⁷ Taking into account environmental benefits would decrease legal certainty, justiciability, transparency, clarity and predictability and would, therefore, even threaten the direct effect of Article 101(3)TFEU.¹⁵⁸ Finally, including ‘non-competition concerns’ in the assessment would be based on a teleological approach that renders provisions that are not capable of having direct effect¹⁵⁹ (like Article 11TFEU), directly effective.

However, the arguments that address the direct effect of Article 101(3)TFEU have been *unsuccessfully* put forward against the direct effect of this provision in general. Although it is true that taking into account external, non-competition considerations decreases legal certainty, integrating environmental considerations as demanded by Article 11TFEU does not, as long as doing so complies with the conditions of Article 101(3)TFEU. Therefore, legal certainty does not decrease as long as environmental benefits are taken into account in such a way. Moreover, in the case of the *ex ante* assessment by undertakings it should be noted that it is possible to enquire informally with the national competition authority whether or not the action would be legal. Likewise, for questions which have not been subject to a Court or Commission decision it is possible to informally ask the Commission.¹⁶⁰ So it might be said that no serious legal certainty issues arise if the environmental integration obligation of Article 11TFEU were also to apply in the area of competition law.

¹⁵⁷ Odudu 2006:168–172; Whish/Bailey 2012:159–160.

¹⁵⁸ Basaran 2006:481.

¹⁵⁹ Odudu 2006:166–167; see also Quellmalz 2004:466, who argues that this would in consequence bestow direct effect on the old Articles 2 and 3EC.

¹⁶⁰ See in this regard Recital 38 of Regulation 1/2003 and Commission Notice on Informal Guidance Relating to Novel Questions (guidance letters).

The argument that taking environmental benefits into account would bestow direct effect on a provision of the Treaty that is not capable of having direct effect faces two objections: First, an ‘exemption’ in cases of environmental benefits is not based on Article 11 TFEU but on Article 101(3) TFEU, so that Article 11 TFEU would not be directly effective. Instead, Article 101(3) TFEU is interpreted in the light of Article 11 TFEU¹⁶¹ which does not bestow direct effect on Article 11 TFEU but is a form of *internal indirect effect* as explained earlier.¹⁶² This conclusion is also supported by the idea that the direct effect of a provision establishes an individual right.¹⁶³ If the competition provisions, however, are interpreted in the light of Article 11 TFEU it is not this Article but the competition provisions establishing the individual right. Finally, it should be borne in mind that in cases of indirect effect, the provision is not required to fulfil the conditions for direct effect¹⁶⁴ as established in *von Colson*.¹⁶⁵ Hence, Article 11 TFEU, which is used in interpreting Article 101(3) TFEU, is not required to fulfil the conditions of direct effect.

But even if the effect of Article 11 TFEU would have to be described as direct effect, as explained, Article 11 TFEU imposes a clear, precise and unconditional obligation.¹⁶⁶ Thus, AG Cosmas has suggested that the provision should be directly effective.¹⁶⁷ Therefore, the

¹⁶¹ Cf also Weidemann 2009:196, who highlights that the decision is always based on the competition law provision *Ibid*:227. In the same line, with regard to the argument that this would lead to direct effect of the old Articles 2 and 3 EC Koch 2005:633–634.

¹⁶² See text to (n105-115).

¹⁶³ Chalmers/Davies/Monti 2010:269.

¹⁶⁴ Craig/de Búrca 2011:200–201.

¹⁶⁵ Case 14/83 *von Colson and Kamann*.

¹⁶⁶ See in this regard to (n60-140).

¹⁶⁷ Opinion AG Cosmas Case C-321/95P *Greenpeace International* ¶62.

arguments based on legal certainty are not likely to justify non-compliance with the integration obligation of Article 11 TFEU in the decentralised system.

It might, however, be conceded that legal certainty in terms of environmental benefits has suffered, because the Guidelines on Article 81(3) and the old Horizontal Guidelines seemed sometimes difficult to reconcile, and the new Horizontal Guidelines also seem far from unambiguous.¹⁶⁸ Yet, the decisional practice of the Commission appears straightforward. It subsumes environmental benefits under the conditions of Article 101(3) TFEU.¹⁶⁹ Furthermore, the difficulty of the subject matter in general should not be forgotten. Even if all the so-called non-competition concerns were removed, legal uncertainty would remain due to the complex nature of economic analysis and evidence.¹⁷⁰ Finally, it needs to be highlighted that the analysis of Article 101(3) TFEU must be the same whether the provision is applied by the Commission or at national level, especially in terms of legal certainty. Hence, an interpretation of Article 101(3) TFEU requiring a narrow reading when applied at national level, but a traditional (broad) reading when applied by the Commission, cannot be maintained. Moreover, there are no indications that the competences of the Commission when applying Article 101(3) TFEU should have been restricted by Regulation 1/2003. Such a restriction would also not have been viable since a change of primary law by means of secondary law - ie Regulation 1/2003 - is not possible.¹⁷¹ A change like this would, moreover, lead to the absurd situation wherein certain

¹⁶⁸ This issue is considered in more detail in Part C, Section I, Chapter D, text to (n111ff).

¹⁶⁹ See *Ibid*, text to (n73ff).

¹⁷⁰ Amato 1997:123–124; Möschel 2000:62 see also: Castañeda 1998:50.

¹⁷¹ See also in this direction Townley 2009:97; Weidemann 2009:202–203; Townley 2011b:443; Townley 2013:text to fn 165.

Commission decisions¹⁷² would be illegal though they have been found legal in the past.¹⁷³

This situation can hardly be said to contribute to legal certainty.

3. Justiciability

The third line of arguments against the integration of environmental considerations in competition law is related to the national application of Article 101(3)TFEU and its justiciability. The application of Article 101(3)TFEU would involve value judgements, as competition and non-competition concerns would need to be balanced against each other. National courts or competition authorities would not be in a position to make such value judgements.¹⁷⁴ Hence, the integration of environmental considerations would threaten the direct effect of Article 101(3)TFEU.¹⁷⁵ Moreover, it would not be the role of a judge or a competition authority to bring the values of a society into balance, since such decisions would be reserved for the constitutionally determined regulators and might create a problem with regard to democratic accountability and division of powers.¹⁷⁶ Other ‘non-competition’ aims should be pursued by means other than Article 101(3)TFEU.¹⁷⁷ The Treaty would provide for the exclusion of certain activities from the scope of competition law: eg Article 106(2), 239(1)(b) and 42TFEU. However, if a balancing between competition and other

¹⁷² Which are based on the traditional broad reading of Article 101(3)TFEU.

¹⁷³ See in this regard also: Koch 2005:645–646.

¹⁷⁴ See OFT, Article 101(3) - A Discussion of Narrow Versus Broad Definition of Benefits 2010¶3.57-360; Odudu 2010:13–14.

¹⁷⁵ Whish/Sufrin 2000:145; Immenga 2001:354; Quellmalz 2004:466ff; Odudu 2006:172–173; Whish/Bailey 2012:160. See also Koch 2005:634–636 criticising this ‘political decision’. Koch acknowledges, however, that environmental benefits can be taken into account in the analysis, as they fit with the criteria of Article 101(3)TFEU, *Ibid*:643–644.

¹⁷⁶ Baquero Cruz 2002:160f; Basaran 2006:483; Odudu 2010:10–11. With regard to this problem see also Townley 2009:87ff.

¹⁷⁷ Odudu 2010:10–11.

values were to be allowed in Article 101(3)TFEU, these provisions would become superfluous.¹⁷⁸ The idea that national courts would not be in a position to make such judgments would furthermore be supported by the fact that the European Courts have restricted their review of exemption decisions of the Commission, since such decisions involve complex assessment of facts, and the Commission might take considerations of the public interest into account.¹⁷⁹ This restriction would equally apply to national courts, as they are neither in a position to conduct such complex assessments of facts and to balance public interests, nor would they have the competence or information to do so.¹⁸⁰

The claim that Article 101(3)TFEU would involve a complicated assessment of facts and value judgements¹⁸¹ and that judges would, consequently, not be in a position to make such decisions is problematic for several reasons: First, as explained previously, the first form of integration wherein environmental and economic aims are brought in line should be preferred over the second form of integration. The second form of integration is a balancing in the case of conflict, where both aims should not be restricted more than necessary. Thus, such arguments can only justify the non-application of Article 11TFEU in competition law to the extent that the second form of integration, ie balancing, is concerned.

¹⁷⁸ Odudu 2006:168–172.

¹⁷⁹ Case 75/84 *Metro v Commission (Metro II)*¶65; Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision*¶118; Case 42/84 *Remia*¶34; Case T-17/93 *Matra Hachette*¶104.

¹⁸⁰ Mestmäcker 1999:526; Wesseling 1999:424–425; Möschel 2000:62; Kingston 2001:248; Odudu 2002:23; Mestmäcker/Schweitzer 2004:§ 13¶15-16.

¹⁸¹ It seems that judges with a common law background, in particular, are concerned about making ‘value judgments’ in the application of Article 101(3)TFEU see in this regard:McCracken 2001; Ferris 2001.

Second, from a jurisprudential point of view, most judgments involve value judgements. Dworkin distinguishes between empirical and theoretical disagreements about the law.¹⁸² Empirical disagreements are disagreements on issues such as whether the actual speed limit is x or y. These disagreements can be solved by examining whether the statute book says x or y. The typical issue for judges or anyone making legal decisions is, however, one of theoretical disagreement. Theoretical disagreements concern decisions regarding what counts as being the law or the ‘ground of law,’ as Dworkin explains it.¹⁸³ Any legal decision which is not only an empirical restatement but also an interpretation of the law is guided by moral convictions and thus value judgements.¹⁸⁴ Such value judgement also occurs in competition law. Taking Dworkin’s standpoint, it might be argued that nearly every competition decision involves such judgements. But even clearer examples of these value judgements can be found in competition law. Even before the decentralisation introduced by Regulation 1/2003, national courts, for example, had to analyse Articles 101(1), 102¹⁸⁵ and 106(2)TFEU. These provisions all involve the complex assessment of facts and previous decision practice which is said to be inherent in Article 101(3)TFEU.¹⁸⁶ Regarding Article 106(2)TFEU, it should be pointed out that the application involves the delicate weighing of different interests and that the effect of Article 106(2)TFEU goes even further than that of

¹⁸² Dworkin 1991:4–5.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*:87, see also Dworkin 1978; Dworkin 2006.

¹⁸⁵ Nehl 2000:15; Cooke 2000:61, 64; Burrichter 2001:539. The application of Article 102TFEU, in particular, seems even more difficult than Article 101(3)TFEU Temple Lang 2000:24.

¹⁸⁶ Wesseling 2001:371; Schaub 2001:45; Gyselen 2002:183 ff. Cases in competition law generally involve complex assessments, as the definition of the relevant market, the effect of the agreements and its appreciability show. With regard to legal certainty in the context of self assessment see: Ritter/Braun 2005:227–228.

Article 101(3)TFEU.¹⁸⁷ Moreover, the need to balance different interests does not generally threaten the direct effect, as the case law on the market-freedoms shows.¹⁸⁸ Lastly, it might be further argued that the decentralisation has eliminated the biggest threat to legal certainty, namely the division in the application of Article 101TFEU between the courts that enforce Article 101(1)TFEU and the Commission with the monopoly on Article 101(3)TFEU. Now ‘the court can hear the whole Article [101TFEU] case’.¹⁸⁹

Third, even if the analysis of Article 101(3)TFEU were to be restricted and all so-called non-competition concerns excluded, a judge would still be in the position to make a value judgement, in particular when increased costs must be balanced against improved quality¹⁹⁰ or when increased costs must be weighed against future improvements.¹⁹¹

Fourth, environmental benefits have become part of the competition analysis under Article 101(3)TFEU¹⁹² so that a ‘wild’ balancing between non-competition concerns and the restriction of competition in the sense of value judgement does not take place. Hence, the

¹⁸⁷ Ehlermann 2000:557–558 see also: Forwood 2004:33.

¹⁸⁸ Ehlermann 2000:558; Roth 2006:431. With regard to the balancing, a comparison to the market-freedoms is suggested see: Whish/Sufrin 2000:145; Tesouro 2000:10; Ehlermann 2000:558. Holmes 2000:67 fn 14 points out that in the UK the ‘Restrictive Practice Court had to consider in applying the public interest test...[under the old UK competition regime] similar matters to those in Article [101(3)TFEU]’.

¹⁸⁹ Hawk/Denaaijer Stanton 2000:53.

¹⁹⁰ The Guidelines on 101(3)TFEU expressly recognise this fact:Guidelines on the Application of Article 81(3):¶103; Sufrin 2006:950. See also:Nicolaides 2005:138.

¹⁹¹ See also Townley 2011a.

¹⁹² See Part C, Section I, Chapter D, text to (n73ff).

claim that taking into account environmental benefits would introduce a value judgement that the judges are not equipped to make seems dubious and cannot be substantiated.¹⁹³

Now, the argument that the relationship between the environment and competition is a constitutional choice that should not be left to the judge in the context of Article 101(3)TFEU but to the legislature will be considered. This argument also holds that taking such decisions in the context of Article 101(3)TFEU risks making provisions like Articles 106(2), 239(1)(b) and 42TFEU superfluous. The part of argument holds that Articles 106(2), 239(1)(b) and 42TFEU may become superfluous seems to ignore the difference between an exclusion and a justification. In the case of exclusion, an activity is outside the ambit and a balancing does not take place, while in the case of a justification, there is a presumption that the activity is not allowed. Only in the exceptional case of the other interests outweighing the restriction is the activity allowed.¹⁹⁴ Moreover, exclusion is generally hostile to a case-by-case approach,¹⁹⁵ as a balancing does not take place. Inclusion with a subsequent justification, in contrast, allows for a case-by-case approach so that none of the competing interests is restricted more than necessary.

The constitutional choice argument, has equally to be rejected. This argument holds that the value judgement between competition and non-competition concerns has to be made at the constitutional level, ie by the (Union) legislator, and that national courts and competition authorities lack the competence to do so. In this regard it should be pointed out

¹⁹³ In the same line also Schaub 2001:46 arguing that Article 101(3)TFEU is a legal provision ‘not a political instrument’.

¹⁹⁴ See also: Townley 2009:101–102.

¹⁹⁵ One might, therefore, call it a coarse instrument.

that the Member States, as Masters of the Treaties, have chosen to make Article 11 TFEU applicable to all areas of Union law. Subsequently, the Union legislator has made the constitutional choice that judges and national competition authorities should apply Article 101(3) TFEU¹⁹⁶ while complying with the rest of the Union law. Hence, the argument that environmental benefits cannot be taken into account in Article 101(3) TFEU and should be excluded from the analysis as a non-competition concern is in itself a constitutional choice. A constitutional choice which the legitimate Union legislator and the Masters of the Treaties have decided *not* to adopt. Therefore, the argument of constitutional choice seems to be misplaced, and those who put forward this argument are actually proposing a change to the status quo;¹⁹⁷ ie, the abolition of Regulation 1/2003¹⁹⁸ or even a Treaty amendment.¹⁹⁹ Furthermore, it could be argued that it is a typical situation of legal norms or legal obligations in a conflict which has to be reconciled by the same body that must apply the law, as long as the matter is not regulated by the legislature in a specific way.²⁰⁰

Regarding the democratic accountability and separation of powers argument,²⁰¹ which holds that the problem is that private actors lack the legitimacy to restrict competition

¹⁹⁶ Forwood 2004:33.

¹⁹⁷ An honest proponent of the political decisions argument would thus not have to call for excluding such considerations but would call upon the legislator to adopt regulation in this matter.

¹⁹⁸ It seems that this argument goes to the heart of Regulation 1/2003 and questions the legality of the transfer of the competence to apply Article 101(3) TFEU from the Commission to the national level and therefore is essentially the same as the arguments that have been voiced against Regulation 1/2003 in general.

¹⁹⁹ See also Townley 2011b:443, 447.

²⁰⁰ This in turn means that only where the legislator has decided to regulate in a specific way, eg that something should not be the subject of competition law, the body in question does not have to reconcile the conflicting norms/obligations.

²⁰¹ See Bernuth 1996:142f; Ehle 1997:110f; Baquero Cruz 2002:160f; Basaran 2006:483; Odudu 2010:10–11.

in the public interest²⁰² and that national competition authorities and courts are also not in the position to strike the balance between the public interests of environmental protection and competition, the following must be taken into account:

The CJ does not seem to perceive private parties who pursue a public interest or the lack of democratic accountability to pursue such aims as problematic. In *Wouters*,²⁰³ *Meca-Medina*,²⁰⁴ and *Bosman*²⁰⁵ the CJ held that private actors might equally pursue public interests. The Court found that ‘[t]here is nothing to preclude individuals from relying on justifications on grounds of public policy. ... Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature’.²⁰⁶ Additionally, raising the public/private divide in such cases seems contrary to the Courts’ approach, which does not distinguish between public or private restrictions of competition.²⁰⁷ If democratic accountability would make a difference, State actions (whether or not in the form of an undertaking) should *not* be measured against the same standard as private actions under competition law. This is because the State has democratic legitimacy and accountability which the private actors lack.²⁰⁸

²⁰² See also Kieran 2013:205, who argues that action by undertakings should only be banned where ‘the State or States at issue have put measures or agencies in place to the same end’.

²⁰³ Case C-309/99 *Wouters*.

²⁰⁴ Case C-519/04P *Meca-Medina and Majcen v Commission*.

²⁰⁵ Case C-415/93 *Bosman*.

²⁰⁶ *Ibid* ¶86, see also Cases C-176/96 *Lehtonen* ¶51; Case C-350/96 *Clean Car Autoservice* 24

²⁰⁷ Makowski 2007:183. In this regard see Part B, Section I, Chapter A.

²⁰⁸ Townley 2009:89.

Although the fact that the State defines public policy aims could *prima facie* suggest that public policy claims should be reserved for the State, this is not the case. Allowing private parties to pursue public policy aims does not strip the State of the power to define them, as long as the State has the final say about what does and does not constitute a public policy aim. Hence, as long as the State can take action against the private parties claiming to pursue public policy aims (eg *qua* competition law) the democratic accountability of these private actions is present.²⁰⁹ It should be noted that democratic accountability is not only achieved by the direct involvement of parliament. It can be equally achieved if the acts are subjected to parliamentary law.²¹⁰ Therefore, democratic accountability is given in cases where private parties pursue a public policy aim and are still monitored by being subject to, for example, competition law.²¹¹

A final argument in terms of justicability needs to be examined. This argument holds that national competition authorities and courts lack democratic accountability to ‘balance’ environmental benefits and the reduction of competition. In Australia, where the competition authority has to make such balancing decisions, the system seems to work without particular problems.²¹² Fears that the competition authority could not take such decisions as it lacks the democratic accountability or will lose independence do not seem to have materialised in Australia.²¹³ So these arguments against such balancing may rather be

²⁰⁹ Makowski 2007:30-32, 183 See also Britz/Schmidt 1999:467, 479ff; Langenbacher 2002:275ff.

²¹⁰ Augsberg 2003; Mähner 2005:128ff; Bovens 2007:455–457 eg distinguishes political, legal, administrative, professional and social accountability.

²¹¹ Makowski 2007:30–32.

²¹² For an overview see Nagarajan 2013 who explains how the ‘public benefit’ exception has developed and adjusted to the changing priorities.

²¹³ See the submission by the Australian competition authority in OECD 2010.

resistance against a feature which is perceived as ‘new’. However, this feature is not new.²¹⁴ Additionally, it should be pointed out that environmental integration as described above does not necessarily lead to such ‘balancing’.²¹⁵ Such ‘balancing’ can only appear in the second form of integration and would need to follow strictly the lines of the competition law analysis, thus also Article 101(3)TFEU. Moreover, the idea that this ‘balancing’ is something beyond the normal task of implementing legal norms is misguided.²¹⁶ National competition authorities and courts do not simply implement legal norms without making policy decisions.²¹⁷ First, drawing a boundary between policy-making and policy implementation is difficult because these fields interact.²¹⁸ Second, the analysis of competition issues in a complex legal and economic context (eg in cases of research and development where different market participants have conflicting interests) often entails socio-economic policy decisions.²¹⁹ This prioritisation is inherent in the discretion entrusted to the national competition authorities and courts. So it ‘is more useful to accept this as a fact of life’²²⁰ and examine how these powers should be exercised than to lament the fact that this policy-making exists.

In terms of the degree of democratic legitimacy it should also be recalled that national competition authorities and courts have a higher democratic legitimacy than the

²¹⁴ See for example Part C, Section I, Chapter D, text to (n73ff).

²¹⁵ See text to (n74-125).

²¹⁶ See text to (n181-185).

²¹⁷ See text to (n182-185).

²¹⁸ Highlighted also in the field of political science see Lindblom/Woodhouse 1993; Brinkerhoff 1996.

²¹⁹ In this regard see also Hancher/Lavrijssen 2009:49.

²²⁰ Lavrijssen 2010:654.

Commission.²²¹ In this regard, it might be surprising that concerns of democratic legitimacy are raised, when democratic legitimacy is increased by taking such decisions back to the national level.

A final remark concerns the way in which an argument for democratic accountability and protection of parliamentary choice is made. Where such an argument for the exclusion of all ‘non-competition concerns’ is based on the idea that the sole aim of competition law should be a form of economic efficiency, the argument is self-defeating: If the debate about how competition should be applied is only focused on economic efficiency, ‘non-competition concerns’ like the principle of democratic accountability cannot be taken into account.

After having examined the those angles of the justiciability argument, one final justiciability argument remains: National courts cannot make such value judgements since they should be limited in the same way as the European Courts. These have limited their judicial review. Such an argument seems to be misguided, as national courts have been forced in this position by Regulation 1/2003, so the argument seems to attack the validity of Regulation 1/2003 in general and cannot justify a non-compliance with the obligation of Article 11TFEU. Moreover, national courts, unlike the European Courts, do not perform judicial review. National courts are obliged to make the assessment required under Article 101(3)TFEU itself.²²² Furthermore, the claim of the exceptional position of Article

²²¹ The democratic legitimacy of the Commission has long been an issue; see Marquand 1979; Mény 2003; Kohler-Koch 2007; Chalmers/Davies/Monti 2010:125ff.

²²² It should also be noted that the review by the European Courts is a full review as the CJ recently confirmed when finding that ‘[t]he review provided for by the Treaties thus involves review by the

101(3)TFEU due to the limited judicial review by the European Courts cannot be maintained since the Courts' review of Article 101(3)TFEU does not differ from the Courts' review of Commission decisions on Articles 101(1), 102 and 106(2)TFEU.²²³

4. Uniform Application

A final line of arguments that aims at justifying the non-compliance with the Article 11TFEU obligation in competition law, is based on the idea of circumventing the competition rules. Decisions like *CECED*²²⁴ might be used by Member States to induce their national public policy concerns and to circumvent competition rules.²²⁵ This argument does not withstand close scrutiny. First, a certain degree of variation seems inherent in a decentralised system. Second, Article 11TFEU does *not* mandate taking national environmental considerations into account, so there is no real danger of what could be called 'national level versus Union level'.²²⁶ Third, the Commission may take over the case if such a danger arises under Article 11(6) of Regulation 1/2003. The argument that this might lead to an 'overload' of the Commission so that the very aim of Regulation 1/2003 is jeopardised²²⁷ has to be rebutted. Member States would face infringement procedures under Article 258TFEU if they used national public policy concerns to circumvent the EU

Courts of the European Union of both the law and the facts...'. Case C-386/10P *Chalkor v Commission* ¶67.

²²³ Wils 2001:329–330; Atanasiu/Ehlermann 2002:74–75; Gyselen 2002:183 ff.

²²⁴ *CECED*.

²²⁵ Basaran 2006:482.

²²⁶ As explained Article 11TFEU, mandates to integrate Union based considerations only, see text to (n74-84).

²²⁷ *Ibid.*

competition rules. Moreover, the fact that no claim of putting national interests over Union interests has been made thus far shows that this danger is exaggerated.

In conclusion, the arguments put forward against the integration of environmental considerations in competition law cannot justify the restriction of Article 11 TFEU's integration obligation. In the area of competition law, the obligation also applies in the context of the decentralised application of Article 101(3) TFEU.²²⁸ Although, such integration might make the assessment more difficult, this cannot justify the general non-application of Article 11 TFEU; such non-application would be disproportionate.²²⁹

5. Integration and Competition Law from a Normative Perspective

Despite the legal requirement of Article 11 TFEU which demands environmental integration, further normative arguments might be advanced to substantiate this legal obligation. The integration of environmental consideration in competition law is also necessary in terms of legal certainty. Indeed, it would not help legal certainty if national courts and competition authorities used a different approach in cases like *CECED*.²³⁰ In legal terms, this position is also backed by Regulation 1/2003. National competition authorities or courts are not allowed to act in a way that would contradict previous Commission decisions, per Article 16 of Regulation 1/2003.²³¹ National courts or competition authorities would not, therefore, be

²²⁸ See also Bleckman/Koch 1995:118; Bernuth 1996:64–65; Gasse 2000:13; Portwood 2000:97; van de Gronden 2005:92; Weidemann 2009:193, also Pernice 1992:141 who sees the main effect on Article 101(3) TFEU.

²²⁹ Cf Kingston 2010:804 who points out that a non-application may only occur in special cases.

²³⁰ *CECED*, for an analysis of these and other cases see Part C, Section I, Chapter D, text to (n73ff).

²³¹ This seems to codify Case C-344/98 *Masterfoods and HB* and Case C-234/89 *Delimitis* see: Hamer 2004:20.

allowed to exclude environmental benefits in their analyses of Article 101(3)TFEU and prohibit the CECED agreement. Such integration also satisfies the need to take into account the fact that competition law is not regulated as a separate area but is part of the EU Treaties,²³² and allows greater alignment of EU objectives²³³ and greater convergence between the market-freedoms and competition law.²³⁴ Moreover, arguments based on a governance perspective,²³⁵ economics²³⁶ and public support for competition policy²³⁷ also support the view that environmental considerations should be integrated into competition law.²³⁸

These reasons might also have supported the European Courts' position to apply the integration obligation in the area of competition law. Early on, the Court held that Article 11TFEU would reflect 'the principle whereby all Community measures must satisfy the requirements of environmental protection'.²³⁹ This broad statement was later repeated specifically with regard to competition. The GC found in *British Aggregates* that Article

²³² Townley 2010:319–320; Kingston 2010:783ff.

²³³ OFT, Article 101(3) - A Discussion of Narrow Versus Broad Definition of Benefits 2010¶1.8

²³⁴ Which is particularly needed as more and more state functions are privatised see Kingston 2010:791–794.

²³⁵ Kingston 2009:126–162; Baldock 1992:2–4; Kingston 2010:794–798.

²³⁶ Kingston 2009:163–193; Hammer 1999-2000. The integration in Article 101 (3)TFEU, for example, brings the assessment in line with the standard cost benefit analysis and it reduces the likelihood that agreements that have a positive net effect on consumers are prohibited, see OFT, Article 101(3) - A Discussion of Narrow Versus Broad Definition of Benefits 2010:1.8 3.23.

²³⁷ *Ibid*¶3.32.

²³⁸ In terms of culture, the Council is of the opinion that the integration clause for culture (Article 167(4)TFEU) which demands that '[t]he Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures' would apply to the area of competition law; see Council Resolution on Fixed Book Prices in Homogeneous Crossborder Linguistic Areas. For a discussion Townley 2009:155–159.

²³⁹ Case 62/88 *Greece v Council*¶20.

11TFEU provides that environmental protection requirements must be ‘integrated into the definition and implementation of, inter alia, arrangements which ensure that competition is not distorted within the internal market’.²⁴⁰ On appeal, the CJ was even more explicit, holding that Article 11TFEU ‘provides that environmental protection requirements must be integrated into the Community policies...which include competition policy’.²⁴¹ Although *British Aggregates* was a case concerning State aid, there seems to be no reason and no indication in the judgment that this ruling should not also apply to Articles 101-106TFEU. The Courts, instead of using the term ‘State aid’, used ‘competition’ that also includes Articles 101-106TFEU.²⁴²

However, the opposite view with regard to all clauses calling for integration is taken by Odudu.²⁴³ For his claim he relies on a series of cases concerning the taxation of tobacco under Directive 95/59/EC.²⁴⁴ In these cases the Court disallowed the setting of minimum prices for cigarettes (based on reasons of public health, contrary to Article 9 of the Directive). Odudu claims these judgments show that the integration clauses would not be directly effective.²⁴⁵ Moreover, he claims, based on the Opinion of AG Kokott,²⁴⁶ that the

²⁴⁰ Case T-210/02 *British Aggregates* ¶117.

²⁴¹ Case C-487/06P *British Aggregates* ¶73. The AG was also of the opinion that the obligation applies in this area see Opinion AG Mengozzi Case C-487/06P *British Aggregates* ¶102.

²⁴² A narrower statement would have been possible because just before these sentences the courts spoke about State aid and not about competition. This suggests that ‘competition’ within the meaning of The Title VII, Chapter 1 ‘Rules on Competition’ of the Treaty is referred to.

²⁴³ Odudu 2010.

²⁴⁴ Cases C-197/08 *Commission v France*; Case C-198/08 *Commission v Austria*; Case C-221/08 *Commission v Ireland*.

²⁴⁵ Odudu 2010:8–9.

²⁴⁶ Citing Joined Opinion AG Kokott Cases C-197/08, C-198/08 and C-221/08 *Commission v France, Austria and Ireland* ¶36.

obligation only applies when the Union legislates and not if Union legislation is applied. Furthermore, he argues that public policy justification can only come into play if ‘there is legal obligation on the party infringing Union law to achieve the particular policy objective’.²⁴⁷ However, this passage of the AG’s opinion can hardly be interpreted in such a manner. The passage rather summarises the argument of the Austrian government that the Directive should have taken public health considerations into account. According to the Austrian government, it would follow that Member States should not be precluded from imposing minimum prices on tobacco for public health reasons where the Directive has not directly taken account of public health considerations. The AG pointed out that this argument ‘cannot be summarily rejected’.²⁴⁸ Yet, the wording of the Directive precluded it from being interpreted in a way that would allow public health to be taken into account.²⁴⁹ This fits perfectly with the *internal indirect effect* of the integration obligation as described above, which is limited by the wording and does not require direct effect.²⁵⁰ Regarding the Odudu’s conclusion that these cases show that obligation would only apply when the Union legislates and not where Union legislation is applied, two points should be mentioned. First, in these cases there is no scope for *internal indirect effect*, as the wording of the Directive does

²⁴⁷ Odudu 2010:9.

²⁴⁸ Joined Opinion AG Kokott Cases C-197/08, C-198/08 and C-221/08 *Commission v France, Austria and Ireland*¶37.

²⁴⁹ *Ibid*¶39.

²⁵⁰ See text to (n105-115). Moreover, one might question whether these cases can actually contain a meaningful statement about direct effect. In direct effect cases an individual usually relies on a provision against the Member State. In these cases the Commission is bringing infringement actions against Member States.

not lend itself to an interpretation in favour of public health considerations. Second, *Concordia Bus*²⁵¹ shows that the obligation also applies when Union law is implemented.²⁵²

Thus, it can be concluded that the arguments advanced against the application of the integration obligation cannot justify non-compliance with the obligation in the area of competition law. The Union and Member States have to comply with the integration obligation, not only at general policy level, but also when adopting an individual competition decision.²⁵³ Otherwise, such measures would be liable to annulment.

CONCLUSION PART A

Part A has investigated the development of the integration obligation and has shown that Article 11 TFEU's environmental integration obligation applies not only to the Union but also to the Member States when they apply Union law. Moreover, Article 11 TFEU is applicable to individual measures, such as decisions, directives and regulations not only at a general policy stage. Part A has defined integration of environmental considerations as 'maximising synergies between economic and environmental objectives by preventing conflict' (the first form of integration). Where this is not possible, a balancing exercise based on the premise of the same constitutional value must take place (the second form of integration). The limit of environmental integration in the areas of market freedoms, State aid and competition law is set by the extent that the current legal framework allows

²⁵¹ Case C-513/99 *Concordia Bus* ¶57.

²⁵² See text to (n60-68).

²⁵³ This also seems to be the position of DG competition as expressed recently in the OECD context, see OECD 2010:121. It is also interesting to note that in practice conflicts rarely occur, see the submission of the German Bundeskartellamt *Ibid*:52.

interpretation in such a manner. Finally, Part A has also investigated the arguments advanced against applying the integration obligation to the area of competition law based on the wording of the Treaty, legal certainty, justiciability and uniform application. These do not seem to be sufficient to justify non-compliance with the integration obligation, even after the decentralisation.

Part A has set the scene for the parts that follow. It explained the first and second forms of integration which sets the structure of the forthcoming analysis in Part B and Part C. Both parts are subdivided into two sections based on ‘supportive’ and ‘preventative integration’, concepts which were developed in Part A. Supportive integration was defined as ‘applying the rules in order to allow environmental protection measures’, while preventative integration was defined as ‘applying the rules in order to prevent environmental degradation’.

PART B
THE FIRST FORM OF ENVIRONMENTAL INTEGRATION

INTRODUCTION PART B

Part B examines the first form of environmental integration. As explained in Part A,¹ this involves investigating how competition, State aid and free-movement law can demarcate the boundaries between prohibited and un-prohibited measures to avoid conflicts with environmental protection. Part B is subdivided into two sections: Section I investigates supportive integration in the areas of competition, State aid and free-movement law, while Section II examines preventative integration in these areas.

¹ See Part A text to (n104ff).

SECTION I: SUPPORTIVE INTEGRATION

As explained in Part A,¹ supportive integration is concerned with the extent to which the legal framework can be interpreted to allow environmentally beneficial measures.² This section shows that the area of competition law has developed the most elaborate framework in its effect on competition analysis, allowing for the first form of environmental integration, ie preventing conflicts between environmental protection measures and competition. The development of this framework seems on the one hand to be inspired by the aim to exclude environmental protection considerations from competition law.³ On the other hand this development is linked to the adoption of the more economic approach⁴ wherein economic theories are employed to determine restrictions of competition. While in competition law there was a move to exclude environmental protection from its scope under the contention that balancing between competition and public policies such as environmental protection should be prevented, free-movement and State aid law took a different direction. These areas more readily accepted that environmental protection might be balanced against restrictions of the freedoms or in cases of State aid. Accepting that environmental protection can be balanced has led to a certain ‘laziness’ in terms of developing tests that prevent conflicts in the first place.⁵ This section highlights the different approaches in the

¹ See text to Part A, text to (n115ff).

² Cf also Gasse 2000:14–15.

³ See Part A, text to (n141ff).

⁴ This approach is rooted in the 1990s with the EU merger regulation, the changed approach to the vertical restraints and cooperation agreements (late 1990s to early 2000s) and recently with the discussion about a more effects-based economic approach to Article 102TFEU.

⁵ Although, a certain pressure has always been present, as the debate about the reach of EU law and the competences shows. Yet, where the policy has the internal motive to exclude something results will be different.

three areas. Competition law provides a starting point to suggest improvements on how the current tests in State aid and free-movement law could be improved to provide for the first form of integration.

A. Preliminary Issues: The Definition of Undertaking, the State Action Defence and General Conditions for Applying Articles 101TFEU and 102TFEU

1. Introduction

This chapter examines the first form of environmental integration in exploring what might be called jurisdictional questions: ie whether competition law applies in the first place. First, the definition of an ‘undertaking’ is considered, as competition law only applies to undertakings. Second, the area called the State action defence¹ is examined. These areas seem to be obvious candidates where the aim is to exclude environmental considerations from the outset of the competition law analysis² because competition law would not apply in the first place. However, this chapter shows that neither concept currently allows for the first form of environmental integration; that is, preventing conflicts between environmental protection and competition law. Finally, it is shown that the general conditions of Articles 101(1) and 102TFEU cannot serve to integrate environmental protection requirements. These conditions include the market definition, the issue of dominance, questions of agreements/decisions/concerted practice, appreciability and the issue of whether trade between Member States is affected. This means that the normal principles are used to determine whether competition law applies to environmental protection measures.

¹ The State action defence must be differentiated from cases where certain actions by the State are or are not subject to competition law. This issue is typically decided with reference to the definition of ‘undertaking’ or under the doctrine which prohibits the State to act contrary to its obligation under Articles 4(3)TEU read in conjunction with Articles 101 and 102TFEU. See in this regard for example Case C-96/94 *Centro Servizi Spediporto*; Case C-198/01 *CIF*; Case 13/77 *INNO v ATAB*; Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Reiff*. For a critical comment Gerad 05 January 2010.

² See Part A, text to (n141ff).

Supportive integration, the prevention of conflict can then occur in a later state of the substantive analysis.³

2. The Definition of an Undertaking

Competition law only applies to undertakings. The definition of an undertaking is the same within Articles 101 and 102 TFEU⁴ and equally applies in State aid law.⁵ The European Courts and the Commission have adopted a functional approach towards the definition of undertaking.⁶ Whether an entity is an undertaking is determined by the effect of the activity on competition, ie functional, not institutional or organisational criteria.⁷ Thus ‘substance

³ See Part B, Section I, Chapter B.

⁴ Cf Joined Cases T-68/89, T-77/89 and T-78/89 *SIV* ¶358. But this definition might also be relevant to Article 106 TFEU and the European Merger Regulation.

⁵ Cf Case C-222/04 *Cassa di Risparmio di Firenze* ¶107ff; Case C-237/04 *Enirisorse* ¶28ff; Case 78/76 *Steinke & Weing* 16–18.

⁶ Cf Case C-41/90 *Höfner and Elser* ¶21 which might be described as the first and clearest example of the adoption of a functional approach by the Court; See also Case C-35/96 *Commission v Italy* ¶36; Joined Cases C-180/98 to C-184/98 *Parlon* ¶74; Case C-244/94 *Fédération Française des Sociétés d'Assurances* ¶14; Case C-55/96 *Job Centre* ¶21; or the General Court in eg Case T-155/04 *Selex Sistemi Integrati* ¶50; Case T-6/89 *Enichem Anic SpA* ¶240 or the Commission eg Community Guidelines on Financing of Airports and Start-up Aid to Airlines Departing from Regional Airports ¶30; *Cartonboards* ¶140; *Brussels Airport* ¶2. In terms of the functional approach it is also interesting to note that the ECSC Treaty and the EURATOM Treaty both seem essentially to look at the activity performed by the undertaking and not the undertaking itself. Cf Article 80 of the ECSC Treaty: '[f]or the purposes of this Treaty, “undertaking” means any undertaking engaged in production in the coal and steel industry within the territories...and also,...any undertaking or agency regularly engaged in distribution other than sale to domestic consumers or small craft industries.’ Article 196 EURATOM Treaty: ‘For the purposes of this Treaty, ... “undertaking” means any undertaking or institution which pursues all or any of its activities in the territories of Member States within the field specified in the relevant Chapter of this Treaty, whatever its public or private legal status’. However, the definition in Article 1 in Protocol 22 of the EEA Treaty which defines that ‘an “undertaking” shall be any entity carrying out activities of a commercial or economic nature’ was adopted after the Court first established its functional approach and seems, thus, not to have influenced the Courts’ approach.

⁷ Schröter 2003 ¶22; Gippini Fournier 2005 ¶39; Opinion AG Jacobs Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband* ¶26; Aicher/Schuhmacher/Stockenhuber/Schroeder 2009 [40th Ergänzungslieferung] ¶51; Vedder 2003:108; Mestmäcker/Schweitzer 2004: § 8 Die Adressaten von Art. 81 EG ¶5; Korah 2007:46; Goyder/Goyder/Albors-Llorens 2009:74; Ezrachi 2012:1; Whish/Bailey 2012:84–85.

prevails over form”⁸ and it might even be said that the question is not so much whether the entity is an undertaking but whether the activity performed by the entity makes the entity an undertaking, ie subjects it to competition law.⁹ This means that the following analysis considers whether environmental protection activities exclude entities from the definition of an undertaking for the purpose competition law.

The CJ explained that ‘the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed’.¹⁰ As this definition is based on the taxonomy of the economic or non-economic nature of the activity, the case law on Articles 56TFEU *et seq* also seems relevant.¹¹ Because of the functional approach, competition law can even be applied to entities that are part of the general administration of the State.¹² However, the functional approach may also lead to the finding that entities are not undertakings within the meaning of competition law, although they are considered to be undertakings under company and tax-law.¹³ In terms of environmental integration and the definition of undertaking, it must be examined, whether an environmental protection measure is an economic activity and *not* who carries out the activity.

⁸ Louri 2002:146.

⁹ Odudu 2004-2005:212.

¹⁰ Case C-41/90 *Höfner and Elser* ¶21 more recently Case C-350/07 *Kattner Stahlbau* ¶34; Case C-280/06 *ETI* ¶38.

¹¹ Hatzopoulos 2002:706.

¹² Eg *Aluminium Imports from Eastern Europe; Spanish Courier Services*; Case 118/85 *Commission v Italy*.

¹³ Louri 2002:148. This might be illustrated by reference to Case C-343/95 *Diego Cali & Figli* where the Court held that EU competition law was not applicable in a case where anti-pollution surveillance was delegated to a private company. On the question of when private undertakings may act in a way that is not subject to the EU Competition regime see: Schepel 2002.

But what is an economic activity? Three constituting elements of an economic activity can be identified in the case law. An activity is considered to be economic when the body in question

(1) offers services or goods to the market,

(2) bears an economic/financial risk and

(3) has, in turn, the opportunity to make a profit from the relevant activity.¹⁴

A final point when examining the definition of an undertaking through the lens of economic activity is that every activity must be analysed separately.¹⁵ However, this statement must be taken with a pinch of salt after the CJ's *SELEX* judgment.¹⁶ In *SELEX* activities of Eurocontrol were at stake. It was already clear from the earlier *Eurocontrol* judgment¹⁷ that Eurocontrol exercised public authority in terms of its air traffic control activity. In *SELEX* the CJ found that activities which were directly linked to the main aim of Eurocontrol, ensuring the safety of the air traffic, could not be considered a separate economic activity.¹⁸

a) Offering Services or Goods to the Market

The criterion of economic activity, requires that an undertaking carries out 'economic activities of an industrial or commercial nature by offering goods and services on the

¹⁴ Odudu 2004-2005:214; Odudu 2006:26; Whish/Bailey 2012:86.

¹⁵ Most notably the GC in Case T-155/04 *Selex Sistemi Integrati*⁵⁴ expressed that: 'various activities of an entity must be considered individually'. This approach seemed to be generally accepted: eg in Vaughan/Vaughan-Lee-Kennelly-Riches 2006:34; Odudu 2006:25; Jones/Sufrin 2008:129; Monti 2008:486; Whish/Bailey 2012:85

¹⁶ Case C-113/07P *Selex Sistemi Integrati*.

¹⁷ Case C-364/92 *SAT Fluggesellschaft v Eurocontrol*.

¹⁸ Case C-113/07P *Selex Sistemi Integrati*. For more details see Nowag 2010.

market”¹⁹, as the Court held in *Commission v Italy*. The case concerned a directive on transparency of financial relations between Member States and public undertakings. Italy did not comply with the directive in respect to AAMS which was engaged in the production and sale of tobacco. According to Italian law, AAMS was not a public undertaking but part of the State in the sense of official authority. Yet the Court qualified AAMS as an undertaking because it offered goods and services to the market.²⁰

Goods and services are not offered to the market where the State regulates the market.²¹ The same idea applies to consumption, defined as end-usage of a product, because the goods or services are not offered to the market afterwards.²² Moreover, in *FENIN*²³ the Court clarified that purchase activities are only economic activities when the goods or services are purchased for an economic activity.²⁴ Finally, workers ‘are...incorporated into undertakings...[and] do not therefore in themselves constitute “undertakings.”’²⁵

¹⁹ Case 118/85 *Commission v Italy*¶7. Constantly reiterated eg Case C-218/00 *Cisal v INAIL*¶23; Case T-319/99 *Fenin*¶36; Case C-49/07 *MOTOE*¶22; Case C-475/99 *Ambulanx Glöckner*¶19; Case C-343/95 *Diego Cali e Figli*¶16; Case C-35/96 *Commission v Italy*¶36; Joined Cases C-180/98 to C-184/98 *Pavlov*¶75.

²⁰ Regarding how goods and services are defined, reference can be made to the case law on goods and services cf Case T-313/02 *Meca-Medina and Majcen v Commission*¶42. Whether something is considered a service is also a difficult issue in free-movement law as the discussion about the healthcare cases law might exemplify. On this matter see for example: Davies 2002; Spaventa/Dougan 2005. For the notion of undertaking in relation to health services see especially Pieters/van den Bogaert 1997.

²¹ See Case 30/87 *Bodson*; Case 5/79 *Hans Buy*¶30. At first glance Case C-309/99 *Wouters* might contradict this approach since a regulatory body was found to pursue an economic activity. However in *Wouters* the Court based its judgment on the fact that the bar was an association of undertakings (the lawyers) so that an economic activity by the bar itself was not needed *Ibid*:paras 49-64. See in this regard also Odudu 2006:31.

²² Cf Joined Opinion AG Jacobs Case C-67/96 Joined Cases C-115/97 to C-117/97 and Case C-219/97 *Albany, Brentjens, Maatschappij*¶216 For more details see:Lasok K.P.E 2004.

²³ Case T-319/99 *Fenin* upheld by Case C-205/03 *Fenin*.

²⁴ So that the purchase of goods which are subsequently used for an activity of ‘purely social nature’ escapes the ambit of competition law Case T-319/99 *Fenin*¶37. This case law can be generally applied

Thus, for the integration of environmental protection the only relevant consideration is whether goods or services are provided to the market. Whether a certain measure has an environmental aim or provides environmental benefits will not influence the assessment of whether the product is a good or service offered to the market.²⁶ Goods or services might be environmental ones, but as long as they are offered to the market, the condition is fulfilled.

b) Bearing the Financial Risk

Secondly, the entity must bear the financial risk of its activity to be considered an undertaking.²⁷ In *Pavlov* the Court stated that ‘the medical specialists...as self-employed economic operators...assume the financial risks attached to the pursuit of their activity’²⁸ and are thus undertakings.²⁹ Hence, an activity is not subject to competition law if the financial risk is borne by a system of solidarity.³⁰ This concept cannot serve to integrate

and not only in the social area see Case C-113/07P *Selex Sistemi Integrati*¶103. However, if the subsequent activity is economic problems might arise. Eg to the degree of necessity of the goods/services for the subsequent economic activity, or how cases should be treated where the subsequent economic activity is a service of general economic interest provided free of charge. Cf *Odudu* 2004-2005:216–217.

²⁵ Case C-22/98 *Beck*¶26, Even though ‘one could argue that it is an economic activity similar to the sale of goods or the provision of services’ Joined Opinion AG Jacobs Case C-67/96 Joined Cases C-115/97 to C-117/97 and Case C-219/97 *Albany, Brentjens, Maatschappij*¶212. However, the Court’s approach causes problems in distinguishing employees and self-employed, in this regard see: *Nihoul* 2000; *Townley* 2007.

²⁶ With regard to whether a market exists see, text to (n32ff).

²⁷ *Odudu* 2004-2005:212; *Odudu* 2006:34–35; *Whish/Bailey* 2012:86.

²⁸ Joined Cases C-180/98 to C-184/98 *Pavlov*¶76.

²⁹ Likewise Case C-309/99 *Wouters*¶48 see also *Ibid*¶37.

³⁰ See Case C-218/00 *Cisal v INAIL*¶38; Opinion AG Tesouro Case C-244/94 *Fédération Française des Sociétés d’Assurances*¶18; Joined Cases C-159/91 and C-160/91 *Poucet and Pistre*¶12; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband*¶53 or recently Case C-350/07 *Kattner Stahlbau*¶38-41 and 43-48; Case C-350/07 *Kattner Stahlbau*¶54-59. Critical of this approach *Townley* 2009:59–62.

environmental protection requirements to prevent conflicts between competition and environmental protection. It solely examines by whom the financial risk of the activity is borne. Thus, the concept cannot take environmental protection requirements on board when determining whether the entity is an undertaking.³¹

c) Having the Potential to Make a Profit

Although some argue that the final condition for an economic activity, the potential to make a profit, can integrate environmental protection,³² the following analysis shows that this is not the case. For this condition to be fulfilled an actual profit-making motive is not necessary.³³ The activity is classified as economic if the activity ‘could, at least in principle, be carried on by a private undertaking in order to make profits’.³⁴ Thus it can be asked: Does competition from the private sector exist,³⁵ or would a private company *in principle* be able to offer such a service?³⁶ So far, the courts have found this condition not to be fulfilled in only a number of cases. One example is redistribution.³⁷ Another is in the area of the exercise of

³¹ For the view that the principle of solidarity could be used to integrate environmental considerations see Kingston 2012:199–200 as environmental protection could be seen as a form of solidarity. However, as the principle of solidarity means the ‘involuntary subsidization of one social group by another’ (Opinion AG Fennelly Case C-70/95 *Sodemare* ¶29, see also Case C-70/95 *Sodemare* ¶29) it is difficult to see how environmental protection measure might come under this definition.

³² See Vedder 2003:115ff; Lorenz 2004:148; Odudu 2006:44; Kingston 2012:203–204.

³³ Case 7/82 *GVL v Commission*. See also Opinion AG Jacobs Case C-218/00 *Cisal v INAIL* ¶38; Case T-128/98 *Aéroports de Paris* ¶124; Case C-222/04 *Cassa di Risparmio di Firenze* ¶122-123; Joined Cases C-159/91 and C-160/91 *Poucet and Pistré* ¶9; Case C-49/07 *MOTOE* ¶27.

³⁴ Opinion AG Jacobs Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband* ¶28, this test seems to stem from Case C-41/90 *Höfner and Elser* ¶22 where the Court found that the activity ‘has not always been, and is not necessarily, carried out by public entities’.

³⁵ Case C-475/99 *Ambulanz Glöckner* ¶20; Case C-67/96 *Albany* ¶84.

³⁶ Joined Opinion AG Jacobs Case C-67/96 Joined Cases C-115/97 to C-117/97 and Case C-219/97 *Albany, Brentjens, Maatschappij 311* ¶338.

³⁷ See Case C-350/07 *Kattner Stahlbau*; Case C-218/00 *Cisal v INAIL*; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband*; Joined Cases C-264/01, C-306/01, C-354/01

public powers, those powers are necessarily carried out by the State.³⁸ In the environmental context *Diego Cali*³⁹ comes to mind.

Diego Cali concerned an Article 102 TFEU dispute over fees for surveillance services provided to Diego Cali by Servizi ecologici porto di Genova SpA (SEPG) in the port of Genova. The State had delegated to the private company SEPG the task of surveilling safety procedures which were designed to prevent pollution caused by accidental discharges of oil into the sea and the removal and/or neutralising of possible spillage. The Court found that SEPG was not engaged in economic activity as it exercised public power and thus was not an undertaking.

An explanation advanced by Vedder is that ‘environmental benefits are, by their very nature, diffuse benefits’.⁴⁰ He opines that *Diego Cali* is based on this idea of the diffuse nature of environmental benefits. Yet, the case also ‘indicate[s] the limits to the activities

and C-355/01 *AOK-Bundesverband*; Redistribution is an ‘inherently uncommercial act of involuntary subsidization of one social group by another’ (Opinion AG Fennelly Case C-70/95 *Sodemare* ¶10). It seems as if the court used in these cases, which essentially concerned social security systems, a market economy test. It asked whether a private company would be able/would act in such a way Vedder 2003:110, 113-115; see also on redistribution under EU competition law Hancher/Buendia Sierra 1998.

³⁸ Case C-49/07 *MOTOE* ¶24; Joined Opinion AG Jacobs Case C-67/96 Joined Cases C-115/97 to C-117/97 and Case C-219/97 *Albany, Brentjens, Maatschappij* ¶314; Opinion AG Tesouro Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* ¶12; Case C-343/95 *Diego Cali & Figli* ¶22-23; Case 107/84 *Commission v Germany* ¶14-15; Case C-41/90 *Höfner and Elser* ¶22; Case C-364/92 *SAT Fluggesellschaft v Eurocontro* ¶27-30. This reasoning is often used to explain why certain tasks are outside the ambit of competition law. See Odudu 2006:42–45; Jones/Sufrin 2008:131; Goyder/Goyder/Albors-Llorens 2009:75; Whish/Bailey 2012:89; Kingston 2012:203. It has been suggested that this test is essentially a short cut for cases where it seems clear to the Courts that the activity is non-economic see Vedder 2003:110–113.

³⁹ Case C-343/95 *Diego Cali & Figli*.

⁴⁰ Though he admits that environmental benefits ‘may occasionally also involve a specific benefit for an individual’. Vedder 2003:115; this distinction seems to build on Buendia Sierra 1999 ¶1.158-1.159.

that can be considered to yield sufficiently diffuse benefits'.⁴¹ Vedder explains that the room for 'non-economic activities doctrine' is shrinking while the ambit of competition law is broadening. This results from increased internalisation of environmental cost and the adoption of market mechanisms.

Such an approach which examines whether an activity 'yield[s] sufficiently diffuse benefits'⁴² does not seem to be particularly helpful in terms of legal certainty, consistency and clarity. Vedder himself admits that 'determining *exactly how diffuse* a benefit should be' (emphasis added)⁴³ in order to fall outside the scope of economic activity is far from clear.

Odudu aims to explain the case as an 'essential function of the state' by suggesting that such activities provide public goods,⁴⁴ i.e. goods that are non-rivalrous⁴⁵ and non-excludable.⁴⁶ Odudu describes *Diego Cali* as a case where the Court found that the 'maintaining of a clean environment...[is] a public good'⁴⁷ and would, therefore, not be an economic activity.

⁴¹ Vedder 2003:115.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Odudu 2004-2005:224; Odudu 2006:42-45. This seems to expand the idea that in cases where an activity creates non-excludable benefits the activity 'is unlikely to be taken on by an entity subject to the laws of the market economy' Vedder 2003:109 see also Buendia Sierra 1999¶1.158-1.159.

⁴⁵ So an infinite number of consumers can use the good without diminishing others' enjoyment.

⁴⁶ So other consumers cannot be prevented from using the good once produced. With regard to public goods see Cornes/Sandler 1999; Stiglitz 2000:128ff; Stiglitz/Walsh 2006:126ff.

⁴⁷ Odudu 2006:44.

Yet, the idea of public goods as the decisive element seems of limited use in cases of environmental protection.⁴⁸ Environmental protection nearly always amounts to a public good⁴⁹ and the total exclusion from the ambit of competition law of any activity that protects the environment could hardly be intended.

A third explanation of *Diego Cali* is offered by Kingston. She claims that the case allows entities to escape competition law where the State provides particular environmental goods or services that could not be provided for profit. She, however, acknowledges that the extent of this exclusion is ‘rather unclear’⁵⁰ and that only a case-by-case approach that asks whether the provision of this service could be provided for profit would help.⁵¹ Such an approach would be needed as since the ‘*Diego Cali* exception for environmental services carried out in the public interest’ should be narrowly construed.⁵²

However, such an interpretation of *Diego Cali* would, in essence, not permit the first form of integration and, moreover, would not add much to the analysis. This is true for the following reasons: First, environmental factors would not be relevant if one examines whether the service could be provided for profit or not.⁵³ Second, the analysis would not help prevent conflicts between competition law and environmental protection. No

⁴⁸ Kingston 2009:149.

⁴⁹ Kingston 2012:203–204.

⁵⁰ *Ibid*:202.

⁵¹ *Ibid*:204.

⁵² *Ibid*; see also Lorenz 2004:148 claiming a narrow scope of the judgment. However, it would show that environmental protection could be considered as an essential function of the state.

⁵³ Activities might be thought of which are in the interest of the environment but from which it would not be possible to make a profit, like classical NGO work eg campaigning for environmental protection, informing about pollution, etc.

competition problem would exist in the first place if it were not possible to make a profit from the activity. Competition law claims are only likely to occur if someone argues that there is at least the potential for competition, ie a business sees the opportunity to make a profit from the activity. However, if such an opportunity to make a profit exists, the definition suggested by Kingston is no longer relevant. The answer to whether or not it is possible to make a profit is already answered in the affirmative. Moreover, it seems that the environment as such was not the reason for the *Diego Calì* judgment. The Opinion of AG Cosmas analysed the case in great detail and provides valuable insight. He explained after examining the relevant primary and secondary Union law that the anti-pollution service provided was fundamental to ensure safety.⁵⁴ Moreover, he highlighted that ‘supervision and control intended to gauge compliance with legislation that is designed to prevent accidents of that nature constitute public authority activities’.⁵⁵ The service had ‘to be exercised regardless whether the fees owed...ha[d] been paid’.⁵⁶ This draws a parallel to the *Eurocontrol*⁵⁷ judgment. Both *Eurocontrol* and *Diego Calì* concern actions involving supervision of rules which were designed to ensure safety.⁵⁸ To label the service provided in *Diego Calì* as ‘environmental control’⁵⁹ seems more appropriate. The activity at issue in *Diego Calì* was supervision of compliance with the law. Only the consequence of this compliance, ie that no oil is spilled, would then in turn be in the interest of the environment. This idea that control

⁵⁴ Opinion AG Cosmas Case C-343/95 *Diego Calì* *et* *Figli*¶47.

⁵⁵ *Ibid*¶62.

⁵⁶ *Ibid*¶49.

⁵⁷ Case C-364/92 *SAT Fluggesellschaft v Eurocontrol*¶25.

⁵⁸ Safety of air traffic and safety of the environment.

⁵⁹ The term is used by Korah 2007:48 and partly by Opinion AG Cosmas Case C-343/95 *Diego Calì et Figli*¶60, 62.

or supervision of compliance with the law is a typical matter of State power meant that the activity was non-economic. Moreover, this task is not only performed in the interest of protecting a certain good, like the environment or airspace. Law enforcement, in general, serves the interest of upholding the rule of law which is a public task.⁶⁰ The decisive point in *Diego Cali* was thus not environmental protection but the fact that the service concerned law enforcement.⁶¹ To rephrase: Environmental protection as such 'has not always been, and is not necessarily, carried out by public entities'.⁶² Hence, although it is possible to imagine cases where it is *impossible* to make a profit from an environmental protection task the current case law does not permit the first form of environmental protection, ie preventing conflicts between environmental protection and competition. The current definition of an undertaking and in particular the condition of having the potential to make a profit do not support the view that environmental protection can become relevant.

3. State Action Defence

After having explained that the definition of an 'undertaking' currently does not permit environmental integration, the focus now turns to a second jurisdictional issue which might remove conduct from the ambit of competition, the State action defence.⁶³ The State action

⁶⁰ This is in particular supported by the idea that an infringement of the law is 'punished' even if no actual harm to the protected good has occurred.

⁶¹ This approach is moreover supported by *Altair*. In that case the State imposed a surcharge on the price of electricity to encourage energy saving, to offset the extra costs of closing nuclear power stations and to support the production of energy from renewable sources. This surcharge was collected by the private company ENEL and the passed on to a fund. The CJ found that the ENEL with regard to this activity had not engaged in economic activity but that it was performing a task similar to the collection of tax on behalf of the State Case C-207/01 *Altair Chimica* ¶35.

⁶² Case C-41/90 *Höfner and Elser* ¶22.

⁶³ For a comparison between the US and the EU see Fox 2004; in general Wainwright/Bouquet 2004, very critical regarding this defence Castillo de la Torre 2005. On the broader area Duisberg 1997.

defence equally does not permit the first form of environmental integration, ie preventing conflicts between environmental protection and competition.

Competition law is concerned with the anticompetitive actions by undertakings.⁶⁴ Thus, where a national law or regulative measure requires a certain anticompetitive behaviour from an undertaking and the undertaking has no room for autonomous conduct, the infringement does not result from the undertaking but from national law as the *Ladbroke*⁶⁵ judgment emphasised. The rationale of this exclusion from competition law is a catch-22 situation. The undertaking must either act contrary to the law or regulative measure to meet the competition law requirements or comply with competition law and act contrary to the law or regulative measure. In terms of environmental protection, such cases can exist, where a Member State defines certain environmental standards with which the undertakings have to comply.

The *Ladbroke* judgment which refined the earlier case law⁶⁶ highlighted that it only had to be determined whether the legislation left enough space for autonomous conduct on part of the undertaking.⁶⁷ It was immaterial whether the Member State's regulation was

⁶⁴ The case law on the obligation not to frustrate competition law needs to be borne in mind, see for example Joined Cases C-94/04 and 202/04 *Cipolla v Fazari*.

⁶⁵ Joined Cases C-359/95P and C-379/95P *Commission and France v Ladbroke Racing*, and later often confirmed Case T-271/03 *Deutsche Telekom* ¶86-90; Case T-168/01 *GlaxoSmithKline Services* ¶66-71; Case T-65/99 *Strintzis Lines Shipping* ¶119-120; Case T-87/05 *EDP* ¶119; Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line* ¶1130; Case C-207/01 *Altair Chimica* ¶30, 35-36; Case C-198/01 *CIF* ¶52-55; Case T-513/93 *CNSD* 58–59; Case T-111/96 *ITT Promedia* ¶96.

⁶⁶ Joined Cases 240-242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie*; Case 260/82 *NSO v Commission*; Joined Cases 209-215 and 218/78 *Van Landenyeck*.

⁶⁷ Joined Cases C-359/95P and C-379/95P *Commission and France v Ladbroke Racing* ¶31-34, recently also in Case C-1/12 *OTOC* ¶50ff. With regard to the different approaches of the GC and the CJ see Martínez Lage/Brokelmann 1999.

contrary to Union law.⁶⁸ Hence, in cases where, for example, a maximum price cap is set by the State, Articles 101 and 102 TFEU apply.⁶⁹ The *Ladbroke* findings seem to apply not only to legislative or regulative action but also if the Member State applies ‘irresistible pressure’.⁷⁰ Yet, such a defence has only seldom succeeded.⁷¹ Another explanation may be that it is unlikely that competition proceedings will be initiated if it is clear that the undertaking is compelled to act in such a way by national law. Instead, the Member State might be subjected to proceedings for violating its obligation under Article 4(3) TEU in conjunction with Articles 101 or 102 TFEU.⁷²

Nonetheless, in environmental cases the space for a State action defence is limited as in other cases. Only where a certain environmentally friendly conduct is prescribed and no room for autonomous conduct is left can an undertaking successfully shield itself against the application of competition law.⁷³ Yet in terms of environmental integration, the focus in State action defence cases is solely on whether there is room for autonomous behaviour. Whether the law has an environmental aim or whether the undertaking pursues such an aim with its actions is irrelevant. Undertakings cannot design their measures in a certain way

⁶⁸ As the GC had found. Case T-548/93 *Ladbroke Racing* ¶47-50.

⁶⁹ See *Deutsche Telekom AG* confirmed by Case C-280/08 *Deutsche Telekom*; Case T-271/03 *Deutsche Telekom* or *Wanadoo Espana v Telefonica* confirmed Case T-336/07 *Telefónica and Telefónica de España*.

⁷⁰ Case T-387/94 *Asia Motor France* however, the exact meaning of irresistible pressure does not seem too clear. In this regards see Blomme 2007:246f.

⁷¹ One of the very few cases Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 *Suiker Unie*.

⁷² This idea was developed in Case 13/77 *INNO v ATAB* ¶31-33.

⁷³ However, a reduction of the fine is possible in cases where a certain behaviour was prescribed but room for autonomous conduct was available see Case T-65/99 *Strintzis Lines Shipping* ¶171; Case C-198/01 *CIF* ¶57; Guidelines on the Method of Setting Fines: ¶29; Case T-66/99 *Minoan Lines* ¶347; Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 *Suiker Unie* ¶612-620; Case 267/86 *Van Eycke* 57; Case C-219/95P *Ferriere Nord v Commission* ¶38; Joined Cases 240-242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* ¶96, see also Rizza 2004.

which would allow the concept of the State action defence to be applied in order to prevent conflicts between environmental protection and competition. Thus, this concept does not permit environmental integration.⁷⁴

4. General Conditions for Applying Articles 101(1)TFEU and 102TFEU

For actions to be prohibited by Article 101(1)TFEU, two or more undertakings⁷⁵ must have agreed or been involved in a concerted practice which restricts competition⁷⁶ on a certain market. Moreover, the restriction must have affected trade between Member States to an appreciable extent. Similarly, for Article 102TFEU to apply, an undertaking must be dominant and its abuse must affect trade between Member States. These conditions do not permit environmental integration as they apply parameters that cannot be influenced by the environmental protection nature of the measure in question.

Before beginning the actual analyses of Articles 101 and 102TFEU the relevant market needs to be established. Environmental protection factors may occasionally influence how the market is defined.⁷⁷ Yet, the market definition as such does not allow environmental integration. The Commission might use the SSNIP test⁷⁸ for defining the

⁷⁴ See in this regard also Vedder 2003:115; Kingston 2009:228–231, however, seems to adopt a different approach.

⁷⁵ For the issue of whether the definition of undertaking allows environmental integration see Part B, Section I, Chapter A.

⁷⁶ Either by object or effect, as examined below.

⁷⁷ See de Vries 2006:223 and Kingston 2012:207–219 who explain how consumer preferences for environmentally friendly products or environmental regulation might influence the market analysis.

⁷⁸ The **small but significant non-transitory increase in price** test is used to determine the relevant product market. It examines how consumers would react if the price of a product would increase by around 5-10%. Another product would be part of the relevant market if the increase in price would

market. This test helps to determine whether certain products or services are substitutable and are thus within the same market.⁷⁹ Certain environmentally friendly products may (or may not) be seen by consumers as substitutable with non-environmentally friendly ones. However, the substitutability is not influenced by environmental protection as such; rather, what is relevant is the consumers' perception of substitutability. Hence, this criterion cannot be used in a way to prevent conflicts between environmental protection and competition.⁸⁰ The same is true with regard to the geographical market. The geographical market is determined by examining whether the conditions of another area are sufficiently homogenous.⁸¹ For example, environmental protection regulation might lead to a narrower market definition because a product cannot be sold in certain regions. Again, environmental protection requirements cannot be integrated into this concept.⁸² Environmental protection as such is not relevant; the only relevancy is whether the conditions for competition are sufficiently homogenous.

not be profitable, ie enough consumers would switch to the other product so that the loss of business would not be compensated by the higher price. On the theoretical background, O'Brien/Wickelgren 2003; Katz/Shapiro 2003. See also Moresi/Salop/Woodbury (26 January 2008); Øystein/Sørgard/Thomassen 2008.

⁷⁹ Commission Notice on the Definition of Relevant Market:[¶]17. and also Case T-30/89 *Hilt*[¶]66-81; Case T-219/99 *British Airways*[¶]91-116; Case T-395/94 *Atlantic Container Line*[¶]267-283; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)*[¶]60-78, 91-99; Case 85/76 *Hoffmann-La Roche v Commission*[¶]23-29; Case 27/76 *United Brands* 10–57; Case 322/81 *Michelin v Commission (Michelin I)*[¶]23-28, 35-52; Case 6/72 *Continental Can*[¶]32-37 and eg O'Donoghue/Padilla 2013:chapter 3.

⁸⁰ On the issues of dominant position/collective dominance see Case C-395/96P and C-396/96P *Compagnie Maritime Belge*; Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line*; Joined Cases T-68/89, T-77/89 and T-78/89 *SIV*; Case C-413/06P *Bertelsmann and Sony v Impala*; Gordon/Richardson 2001; Monti 2001; Moresi (January 26, 2008).

⁸¹ Commission Notice on the Definition of Relevant[¶]8. For the relevant time period see eg Joined Cases T-374/94, T-375/94, T-384/94 & T-388/94 *European Night Services*; Case 322/81 *Michelin v Commission (Michelin I)*; Case 77/77 *BP*.

⁸² Kingston 2012:207.

Similarly in Article 102 TFEU, determining whether an undertaking holds a dominant position within the defined market cannot be used to provide the first form of integration. This is because dominance is established by determining whether an undertaking ‘enjoys a position of economic strength...which enables it...to behave to an appreciable extent independently of its competitors, customers and ultimately consumers’.⁸³ The analysis of whether such autonomy exists cannot be influenced by environmental considerations.⁸⁴ This is even more the case where dominance is presumed when an undertaking has a certain market share,⁸⁵ since the percentage of market share is a calculation based on the evidence collected from the market.

An agreement within the meaning of Article 101(1) TFEU is an expression of a common intention that gives rise to an obligation, although it is not necessary that the agreement is legally binding.⁸⁶ A concerted practice, in contrast, does not even require a legal or moral obligation; the common intention is sufficient.⁸⁷ In terms of environmental integration, it can be observed that the issue of whether a common intention exists is

⁸³ Case 27/76 *United Brands* ¶65. In general with regard to the establishment of dominance see Walker/de Azevedo 2002; de Azevedo/Walker 2003; O'Donoghue/Padilla 2013:chapter 4.

⁸⁴ Relevant are, for example, the competitors' position *vis-à-vis* the dominant undertaking (See Case 322/81 *Michelin v Commission (Michelin I)* ¶23-28, 35-52; Case 322/81 *Michelin v Commission (Michelin I)* ¶55-58; Case 85/76 *Hoffmann-La Roche v Commission* ¶48; Case 27/76 *United Brands* 10–57) and barriers to entry (see *Microsoft* ¶515-525; *Tetra Pak I* ¶44.3 and 22-24; Case 27/76 *United Brands* ¶122.

⁸⁵ See Case 62/86 *AKZO* ¶60-61; Case 322/81 *Michelin v Commission (Michelin I)* ¶32-52; Case 27/76 *United Brands* 97–108; Case 85/76 *Hoffmann-La Roche v Commission* ¶41-47.

⁸⁶ Case 277/87 *Sandoz Prodotti Farmaceutici* ¶3; Cases T-41/96 *Bayer AG* ¶68, eg a gentlemen's agreement see Case 41/69 *Chemiefarma v Commission*.

⁸⁷ Case T-7/89 *Hercules Chemicals v Commission* ¶256; Joined Cases 209-215 and 218/78 *Van Landuyck* ¶86; Cases T-41/96 *Bayer AG* ¶67.

assessed in a way which cannot be influenced by environmental considerations.⁸⁸ As soon as a common intention is established, Article 101(1)TFEU applies, either because the behaviour is classified as a concerted practice or because it creates obligations as an agreement.⁸⁹ Similarly, environmental consideration cannot be integrated into the definition of ‘decision by an association of undertakings’ because it applies whenever undertakings are part of the association, and instead of agreeing directly amongst each other, the association renders a decision.⁹⁰

Both in Articles 101(1)TFEU and 102TFEU⁹¹ the restriction of trade between Member States acts as a criterion to determine the jurisdiction.⁹² The cross-border element makes EU law applicable. The notion of effect on trade between Member States is a wide one. It captures not only cases where an actual effect can be shown but it also encompasses cases which potentially affect trade between Member States.⁹³ The Commission explains in its Guidelines on the Effect on Trade that the condition is met where the agreement has an impact on cross-border economic activity.⁹⁴ An actual impact is not necessary. It is sufficient to ‘foresee with a sufficient degree of probability on the basis of a set of objective factors of

⁸⁸ With regard to the issue whether compulsion changes the outcome see above Part B, Section 1, Chapter A, text to (n63-74).

⁸⁹ Joined Cases T-305-307/94, T-313-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM* ¶697; Joined Cases C-204/00P, C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland* ¶81-86.

⁹⁰ See Case 250/92 *Gottrup-Klim*; Case C-309/99 *Wouters*.

⁹¹ The standard is the same, see Guidelines on the Effect on Trade Concept; Joined Cases C-241/91P and C-242/91 *RTE and ITP* ¶70; Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge* ¶201; Case T-228/97 *Irish Sugar* ¶170; Case 322/81 *Michelin v Commission (Michelin I)* ¶104.

⁹² Joined Cases 56 and 58/64 *Consten and Grundig* 341.

⁹³ Case C-222/04 *Cassa di Risparmio di Firenze* ¶140; Case C-148/04 *Unicredito Italiano* ¶54; Joined Cases 56 and 58/64 *Consten and Grundig* 341.

⁹⁴ Guidelines on the Effect on Trade Concept: ¶19.

law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential on the pattern of trade between EU countries'.⁹⁵ The effect that such an agreement has must be appreciable.⁹⁶ The Commission explains that agreements in principle are not required to have an appreciable effect, where

(1) the aggregate market share of the parties on any relevant market within the EU affected by the agreement does not exceed 5% and

(2) in the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned in the products covered by the agreement does not exceed 40 million euro. In the case of agreements concerning the joint buying of products the relevant turnover shall be the parties' combined purchases of the products covered by the agreement.⁹⁷

Additionally, agreements which already come under the *de minimis* notice are typically not able to affect trade between Member States.⁹⁸ In terms of environmental integration, it needs to be pointed out that the analysis of the appreciability and *de minimis* cannot integrate environmental considerations.⁹⁹ Whether the market share and turnover threshold are met is solely dependent on the actual turnover and market share;¹⁰⁰ the criteria cannot be

⁹⁵ *Ibid*¶23 the Commission points to Joined Cases 240-242, 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie*¶48; Joined Cases T-32/95 *Cimenteries CBR*¶3930; Case 172/80 *Züchner*; Case 319/82 *Kerpen & Kerpen* and to vertical cases where the issue of the attainment of the internal market is important, Case 56/65 *Société Technique Minière* 337; Joined Cases C-215/96 and 216/96 *Bagnasco*¶47; Case T-62/98 *Volkswagen*¶179.

⁹⁶ Joined Cases T-374/94, T-375/94, T-384/94 & T-388/94 *European Night Services*¶102; Case 5/69 *Voelk v Vervaecke*¶5/7; Case 22/71 *Béguelin Import*¶16.

⁹⁷ Guidelines on the Effect on Trade Concept:¶52, footnote omitted.

⁹⁸ *Ibid*¶50. However, as the CJ recently in Case C-226/11 *Expedia* pointed out, the *de minimis* notice does not hinder national competition authorities to find that there is an appreciable effect on competition at least in object cases; for a comment see Bushell/Healy 2013.

⁹⁹ See also Kingston 2012:223–224.

¹⁰⁰ This depends on the market definition.

interpreted differently to allow environmentally beneficial measures or prohibit environmentally damaging ones.

5. Conclusion on the Preliminary Issues

This chapter examined the boundaries of competition law. It scrutinised the definition of undertaking and the State action defence as well as the general conditions for applying Articles 101(1) and 102 TFEU. It highlighted that neither the definition of undertaking, the State action defence nor the general conditions of Articles 101(1) and 102 TFEU currently permit the integration of environmental protection requirements. However, environmental integration can take place at a later stage of the competition law analysis, either by ensuring that conflicts between environmental protection and competition are prevented (the first form of integration)¹⁰¹ or by balancing.¹⁰² The general application of competition law principles should increase efficiency, quality and innovation of the environmental protection measure.¹⁰³

¹⁰¹ See in particular Part B, Section I, Chapter A.

¹⁰² See in particular Part C, Section I, Chapter D.

¹⁰³ Kingston 2012:204, see also Townley 2013:text to fn 254ff.

B. Competition Law

The following chapter investigates the first form of environmental integration, ie the prevention of conflicts in competition law, particularly in the context of Articles 101 and 102TFEU.

1. Article 101TFEU

a) Introduction

This part shows that the first form of environmental integration, ie where conflicts with the aim of environmental protection are prevented, can be observed in Article 101(1)TFEU's effect on competition criterion. It first explains the difference between object and effect restrictions and then explores in more detail how the first form of integration takes place in the effect analysis.

b) Object and Effect on Competition

Article 101(1)TFEU prohibits agreements restricting competition either by their object or effect. Object and effect are not cumulative conditions.¹ Thus, first it must be established whether an agreement's object is to restrict competition, as 'there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the

¹ Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle* ¶72; Joined Cases T-374/94, T-375/94, T-384/94 & T-388/94 *European Night Services* ¶136; Case T-142/89 *Boët* ¶89; Case T-67/01 *JCB Service* ¶117; Case T-152/89 *ILRO* ¶32; Case C-8/08 *T-Mobile Netherlands* ¶28, 30; Joined Cases 56 and 58/64 *Consten and Grundig* ¶342; Case 56/65 *Société Technique Minière* ¶249; Case 45/85 *Verband der Sachversicherer* ¶39; Case T-168/01 *GlaxoSmithKline Services* ¶55; Case C-234/89 *Delimitis* ¶13.

prevention, restriction or distortion of competition'.² To determine whether an object restriction exists the purpose of the agreement must be considered.³ Whether an agreement is in fact an object restriction must be examined in the legal and economic context.⁴ Hence the specific legal or factual context is used to verify whether an alleged object restriction has actually the potential to restrict competition.⁵ In terms of enforcement, object restrictions have the advantage that there is no need to provide evidence of actual effects on competition.⁶ Only where object restriction cannot be established, the agreement's effect on competition needs to be assessed by an in-depth analysis.⁷

² Case C-68/12 *Slovenská sporiteľňa* citing Case C-389/10P *KME Germany* ¶75; Joined Cases C-238/99P, C-244/99P, C-245/99P, C-247/99P, C-250/99P, C-251/99P, C-252/99P and C-254/99P *Limburgse Vinyl Maatschappij* ¶508; Joined Cases 56 and 58/64 *Consten and Grundig* 299.

³ See in this regard Case 56/65 *Société Technique Minière*. For classical restrictions by object containing price-fixing, market-sharing or the control of outlets see Case T-148/89 *Tréfilunion v Commission* ¶109 but also restrictions that are designed to restrict parallel trade, CJ forcefully in Joined Cases C-501/06P, C-513/06P, C-515/06P and C-519/06P *GlaxoSmithKline Services* ¶59. The intention of the parties is not an essential factor but can be taken into account, see Case C-8/08 *T-Mobile Netherlands* ¶27 IAZ International Belgium v Commission, paragraphs 23 to 25). With regard to the restriction of competition by object see Odudu 2001b; Odudu 2001a.

⁴ Joined Cases C-403/08 and C-429/08 *Football Association Premier League* ¶136; Joined Cases C-501/06P, C-513/06P, C-515/06P and C-519/06P *GlaxoSmithKline Services* ¶58; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* ¶35; Case C-8/08 *T-Mobile Netherlands* ¶27; Case 1/71 *Cadillon* ¶8; Case 56/65 *Société Technique Minière*; Case C-32/11 *Allianz Hungária* ¶36; Case C-32/11 *Allianz Hungária* ¶33; Case C-226/11 *Expedia* ¶21.

⁵ See Joined Cases C-403/08 and C-429/08 *Football Association Premier League* ¶135; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* ¶34; Case C-8/08 *T-Mobile Netherlands* ¶28, 30; Joined Cases C-501/06P, C-513/06P, C-515/06P and C-519/06P *GlaxoSmithKline Services* ¶55.

⁶ See Case C-32/11 *Allianz Hungária* ¶34; Joined Cases C-501/06P, C-513/06P, C-515/06P and C-519/06P *GlaxoSmithKline Services* ¶55; Case C-439/09 *Pierre Fabre Dermo-Cosmétique* ¶34; Case C-8/08 *T-Mobile Netherlands* ¶27; Joined Cases 96-102, 104, 105, 108 & 110/82 *NV IAZ* ¶25; Case C-209/07 *Beef Industry Development* ¶16, 21.

⁷ The recent Case C-32/11 *Allianz Hungária* seems to blur the lines between object and effect restrictions by transferring much of the effect analysis into the object assessment. However, whether this judgment was an anomaly or illustrates a new principle remains to be seen.

This effect assessment takes into account the legal and economic context in order to establish the agreements effect on the market.⁸ A threefold test must be conducted: First, the product market and the geographical market must be determined.⁹ Second, the effect on actual and potential competition must be assessed by comparing the competitive situation with and without the agreement.¹⁰ In this context, one must take into account the foreclosure effect¹¹ and effects on the other parameters of competition, eg quantity, price, quality and the like.¹² Finally, one must investigate the relationship between the restriction of competition and the agreement,¹³ keeping in mind that not all restrictions on the freedom of action of contract parties are restrictions of competition.¹⁴

c) The Effect Analysis and Environmental Integration

The examination of the effects of the agreement offers room for the integration of environmental protection requirements.¹⁵ In cases where the object of an agreement is not

⁸ See Joined Cases 56 and 58/64 *Consten and Grundig*; Case C-399/93 *Oude Luttikhuis* ¶20; Case 56/65 *Société Technique Minière* 249–250; Case 23/67 *Brasserie De Haecht v Wilkin Janssen*; Case C-234/89 *Delimitis* ¶13 ff.

⁹ Case T-168/01 *GlaxoSmithKline Services* ¶162; Case C-234/89 *Delimitis* ¶16. See also in this regard the Commission Notice on the Definition of Relevant Market.

¹⁰ Case C-7/95P *John Deere* ¶76; Case T-328/03 *O2 (Germany)* ¶66ff; Case T-168/01 *GlaxoSmithKline Services* ¶162; Case 56/65 *Société Technique Minière* 249–250, but see also Opinion AG Römer Case 56 & 58/64 *Consten and Grundig* 342.

¹¹ See Case C-234/89 *Delimitis* ¶13 ff.

¹² In this regard Case T-168/01 *GlaxoSmithKline Services* ¶167; Case T-148/89 *Tréfilunion v Commission* ¶109. For an approach on how to measure the effect on competition see Odudu 2006:103ff.

¹³ Case C-234/89 *Delimitis* ¶25.

¹⁴ See eg Case T-168/01 *GlaxoSmithKline Services* ¶171; Case T-112/99 *M6 v Commission (Metropole II)* 76; Case C-309/99 *Wouters* ¶97.

¹⁵ Very critical with regard to the possibility of environmental integration, Gasse 2000:91–92. However, Gasse seems to have in mind primarily a reduced scope for Article 101(1)TFEU in environmental cases. He claims that the aim of Article 101(1)TFEU of protecting the freedom of action of all market participants would be an autonomous aim. This aim would be essential for the aims of the Union and

the restriction of competition but that of environmental protection, the effect analysis can help to prevent conflicts between environmental protection and competition. Thus, the environmental protection object acts as a precondition to the examination of the effects. The following section explains how the effect analysis can prevent conflicts between environmental protection and competition and therefore exemplifies the first form of environmental integration.

The Commission categorised environmental agreements in the 2001 Horizontal Guidelines¹⁶ by distinguishing between agreements that are ‘not likely to’, ‘may’ or ‘almost always’ restrict competition. Although these distinctions cannot be found in the new version of the Horizontal Guidelines,¹⁷ the classification is likely to apply in the future, as it offers a good first reference point, in particular as the broader examination of environmental agreements has been abandoned in the new Guidelines.

According to the old 2001 Horizontal Guidelines, an environmental agreement would be unlikely to restrict competition if there are no precise individual obligations for the parties or if they commit only ‘loosely’ to a sector-wide target.¹⁸ Moreover, agreements which stipulate the environmental performance of products but do not affect the diversity of production or the product itself or that have only a marginal affect on purchasing

thus a restriction of the application of Article 101(1)TFEU due to clauses demanding integration would not be possible. In this regard it is interesting that he also claims that a restriction of Article 101(1)TFEU based on the Article 11TFEU seems generally possible, *Ibid*:74. See in this regard also Weidemann 2009:194 who explains that there could be no effect because Article 101(1)TFEU would be ‘unequivocal’.

¹⁶ See Guidelines on the Applicability of Article 81 to Horizontal Co-operation Agreements:¶184.

¹⁷ Guidelines on the Applicability of Article 101 to Horizontal Co-operation Agreements¶18 Fn 1.

¹⁸ Guidelines on the Applicability of Article 81 to Horizontal Co-operation Agreements:¶185.

decisions are also unlikely to affect competition.¹⁹ Finally, agreements that would create a new market which could not be created without the agreement are also not likely to be contrary to Article 101(1)TFEU.²⁰

The Commission determined agreements ‘may restrict²¹ competition’ that either affect the parties’ choice regarding the characteristics of their product or production, in a way which gives the parties influence over the others’ production or sales or those agreements that affect the output of third parties.²² However, all these cases depend on a large market share.²³ This market share analysis, which operates similarly to the *de minimis* rule,²⁴ is solely concerned with whether the market share is above or below a certain threshold. This dualistic approach leaves no room for environmental integration. Hence, as soon as a large market share is established and it is determined that the agreement affects the parties’ output in a way which allows them to influence each other or the agreement affects the output of third parties, Article 101(1)TFEU applies. The same holds true for the third category of agreements, those which ‘almost always restrict competition’. The Commission mentions agreements that do not really have an environmental objective but are a ‘disguised

¹⁹ *Ibid*¶186.

²⁰ If no current competitor would exist. See *Ibid*¶187.

²¹ It seems the Commission is in fact describing situations which usually restrict competition, and a special factor must be found in the cases to exclude them from the scope of 101(1)TFEU.

²² *Ibid*¶189. The Commission gives two examples. First, where the agreement leads to a significant effect on the parties’ important product or production, or where individual pollution quotas are allocated (para 190). Second, where the parties agree on an exclusive provider of a service (the Commission points to recycling or collection of waste) in a case where actual or ‘realistic potential’ competitors exist.

²³ As the Commission points out in the old Guidelines ‘a major share’ (*Ibid*), ‘hold a significant proportion of the market’ (para 190) and ‘parties holding significant market shares’ (para 101). However, the Commission does not give any indication when a market share is held to be sufficiently ‘significant’.

²⁴ See above text to (n98ff).

cartel²⁵ or in fact aim at ‘excluding...competitors’ and not at protecting the environment.²⁶ It is therefore questionable whether the expression ‘environmental agreements’ is suitable. These agreements do precisely not have environmental aim.

In terms of the integration obligation, agreements which are ‘not likely to restrict competition’ deserve consideration. The following four types of cases will be examined in more detail: (1) ‘loose commitments’, (2) environmental performance agreements with no effect on product and production diversity, (3) agreements that create new markets and (4) mixed cases which do not fall within one of the Commission’s categories.

i. Loose Commitments

The *loose commitments* category in the Guidelines stems from cases like *EUCAR*,²⁷ *ACEA*,²⁸ *JAMA and KAMA*²⁹ and parts of the *CEMEP*³⁰ clearance. In *EUCAR* a comfort letter was sent, as the agreement did not restrict competition. The agreement was intended to establish greater environmental sustainability by creating an association of major European car producers concerned with R&D.³¹ The agreement stipulated that the accession of other car producers would require consensus among all members and that all IP necessary for the

²⁵ The Commission explains that such cartels consist of ‘otherwise prohibited price fixing, output limitation or market allocation, or if the cooperation is used as a means amongst other parts of a broader restrictive agreement which aims at excluding actual or potential competitors’. *Ibid.*¶188.

²⁶ A case that might be mentioned in this context is *LAZ*, Joined Cases 96-102, 104, 105, 108 & 110/82 *NV LAZ*. The ‘environmental’ conformity label was only available to Belgian producers and sole importers.

²⁷ *EUCAR*; XXVth Report on Competition Policy:150–151.

²⁸ Commission Press Release IP/98/865; XXVth Report on Competition Policy:151.

²⁹ XXIXth Report on Competition Policy :160.

³⁰ Commission Press Release IP/00/508. For more details see Martínez-López 2000:13.

³¹ It concerned basic research, and the results could not be directly used in the subsequent manufacturing of cars.

research would be shared among its members. If the R&D resulted in new IP, all participants could use it free of charge. In *ACEA* and similar cases - *JAMA and KAMA* - the agreement among the major car producers aimed at reducing the average CO₂ emissions of passenger cars to 140g CO₂/km, a 25% reduction compared to 1995. The important element was that the agreement did not impose a precise obligation on producers regarding the method to achieve this aim, giving them freedom to choose how to meet the target. Hence, ‘new CO₂ efficient technologies [would be developed] independently and in competition’.³² The Commission sent a comfort letter explaining that the agreement did not restrict competition.

The CEMEP agreement aimed to introduce a labelling system for electric motors with regard to energy efficiency and to reduce the overall level of sales of the least energy-efficient engines by at least 50%. This agreement was found not to restrict competition as it helped users take energy efficiency into account as a criterion in their purchase decisions. Moreover, the target was a loose target, and the information made available was old and aggregated data.³³

In terms of the integration obligation of Article 11 TFEU, the *EUCAR* case seems to be a basic R&D agreement aimed at increasing environmental performance. The important point which seems to have determined that the agreement was not within the ambit of Article 101(1) TFEU was that the agreement concerned basic research with no direct commercial usability. This finding is in line with the Commission’s standard approach

³² XXVth Report on Competition Policy:151.

³³ Commission Press Release IP/00/508 and Martínez-López 2000:13.

to R&D agreements. The new Horizontal Guidelines explain that ‘[m]ost R&D agreements do not fall under Article 101(1). ...[T]his can be said for many agreements relating to co-operation in R&D at a rather early stage, far removed from the exploitation of possible results’.³⁴ Hence, in this agreement the environmental element was not relevant in terms of the scope of Article 101(1)TFEU.

However, in *ACEA*, *JAMA* and *CEMEP* the first form of environmental integration can be observed. The first form of environmental integration in competition law ensures that conflicts between environmental protection and competition are prevented by clearly demarcating the boundaries between those areas. In the cases of *ACEA*, *JAMA* and *CEMEP* an environmental aim was accepted as being pursued by the agreement. The conflict with competition law was prevented by ensuring that competition was not distorted. This was done by the agreement’s leaving open how to best achieve the environmental aim.³⁵ This approach provides an example of how the first form of environmental integration can look and how such integration can lead to the desirable result of mutual reinforcement: The environment is preserved while competition is protected, ie competition is used as a means to achieve environmental protection most efficiently. Such an approach cannot only improve the efficiency of environmental protection, but it can also increase competition particularly in terms of innovation.

³⁴ Guidelines on the Applicability of Article 101 to Horizontal Co-operation Agreements¶129.

³⁵ Moreover, it was ensured that the agreement is not used for anticompetitive information sharing. It might be pointed out that sharing would not have any beneficial environmental effect so that this fact of the case is not of great relevance in the context of this research.

ii. No Effect on Product and Production Diversity

The second category, which concerns the ‘no effect on product and production diversity’ cases, contains not only *ACEA*,³⁶ *CEMEP*,³⁷ and *JAMA and KAMA*³⁸ but also *E.ON and Verbund*.³⁹ The agreement at stake in *E.ON and Verbund* was designed to establish a joint venture for hydro-power. The Commission cleared the joint venture because it would not engage in the market but rather would sell the produced power to its parent companies. This case might not easily serve as an example of environmental integration, as an environmental protection aim seems rather remote. The aim of the agreement was energy production using hydro-power. Nevertheless, the general idea that the absence of an effect on the diversity of a product or the production of agreements aimed at environmental protection does perfectly fit with the first form of environmental integration, ie allowing environmental protection measures ensuring that competition is not affected. It leads to the previously described mutual reinforcement between competition and environmental protection since diversity and competition regarding how to achieve the environmental aim is ensured.⁴⁰

³⁶ Commission Press Release IP/98/865; XXVth Report on Competition Policy:151.

³⁷ Commission Press Release IP/00/508. For more details see Martínez-López 2000:13.

³⁸ XXIXth Report on Competition Policy :160.

³⁹ Commission Press Release IP/02/62. Cf Kingston 2012:243–244.

⁴⁰ To a certain extent the *ACEA*, *CEMEP* and *JAMA and KAMA* agreements examined above (text to (n27-35)) might also serve as examples here as these agreements did not affect product diversity or production. Yet, the main point in *ACEA*, *CEMEP* and *JAMA and KAMA* was that they contained only loose commitments.

iii. Creation of New Markets

The third line of cases concerns the creation of new markets. According to the Commission recycling can be such a case. The best example in this respect might be *DSD*.⁴¹ One part of the agreements under scrutiny in *DSD* concerned the collection of plastic waste which had never before been recycled. For environmental protection reasons the German Packaging Ordinance imposed an obligation upon undertakings to collect and recycle such plastic waste. To comply with this and other obligations under the Packaging Ordinance, the German packaging industry created DSD. The DSD then organised the collection and recycling of the waste often via contractors. The agreement with its contractors obliged them to supply all plastic waste to an exclusive, designated recycling company free of charge. This clause, the so-called zero interface clause, was not considered to infringe Article 101(1)TFEU despite setting the price and establishing exclusivity.⁴² The rationale for this finding was that the German Packaging Ordinance aimed to create a new market for environmental reasons.⁴³ This market, however, was not yet functioning. The price for plastic waste⁴⁴ was often negative, which led to its not being recycled but disposed of by cheaper means. Hence, the Commission considered that as long as a sound market had not

⁴¹ *DSD (COMP/34493)*. It is important to point out that this decision solely concerned Article 101TFEU, the Article 102TFEU decision, *DSD (Case COMP D3/34493)*. On Article 102TFEU see also Part C, Section I, Chapter D, (n170ff).

⁴² *DSD (COMP/34493)*¶114.

⁴³ *Ibid*¶112.

⁴⁴ However, there was already a functioning market for glass, paper and cardboard, tinsplate and aluminium. Hence, this reasoning was applied only with regard to plastic waste.

been established for plastic waste this zero interface clause was not infringing on Article 101(1)TFEU.⁴⁵

Such an approach can accommodate the first form of environmental integration, that is the prevention of conflict, in terms of Article 101(1)TFEU. The approach can be divided into an environmental part and a part that ensures that competition is not distorted. On the one hand is the motivation to improve environmental protection by creating a new market for recycling household plastic packing. On the other hand is a competition argument: Competition can only exist where a market exists. The Commission thus held that competition law would not apply as long as the market does not work (properly). Specific to the *DSD* case is the finding that the environmental aim of creating a market for the take-back and recovery of plastic packaging can be linked back to the State. The State wanted to create a new market by introducing the obligation of ‘take-back and recovery’. This raises two questions: first, whether this approach can be considered as environmental integration; and second whether this principle can only apply if the State creates a market for environmental or other reasons;. In terms of environmental integration it should be pointed out that environmental protection can be one of many reasons to create a market. The obligation to interpret in the light of environmental protection requirements underscores exactly this: Environmental protection can be *a reason* to create a market. Regarding the issue of State involvement, there seems to be no reason to differentiate between private parties and the State.⁴⁶ The CJ has not even raised objections in the more problematic cases where the public interest comes into conflict with the competition provision. In such a case the

⁴⁵ *Ibid*¶113-114.

⁴⁶ See also for this debate Part A, text to (n201-239).

Court found that ‘[t]here is nothing to preclude individuals from relying on justifications on grounds of public policy... . Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature’.⁴⁷ Moreover, as the next section⁴⁸ and in particular *ZVEI/Arge Bat*⁴⁹ shows, the principles for creating a market for environmental reasons apply even without direct State involvement. Thus, the creation of a new market for environmental reasons can be seen as the first form of environmental integration: ie preventing conflicts between environmental protection and competition law.

iv. Mixed Cases

Finally, *Oliebranchens Fællesråd*⁵⁰ and *ZVEI/Arge Bat*⁵¹ seem to be cases with mixed features that do not clearly fall within one of the previous categories, although *ZVEI/Arge Bat* could be seen as a form of market creation.

In *Oliebranchens Fællesråd* the Commission found that an agreement among nearly 100% of the suppliers of petrol in Denmark that established a joint pool to pay for clean-ups of contaminated sites of petrol stations was not having a restrictive effect on competition. The contributions to the fund were calculated based on the quantity of petrol sold by its members. According to the agreement, contributions would not exceed 0.05

⁴⁷ Case C-415/93 *Bosman* ¶86, see also Cases C-176/96 *Lehtonen* 51; Case C-350/96 *Clean Car Autoservice* 24

⁴⁸ See text to (n50-62).

⁴⁹ *ZVEI/Arge Bat*.

⁵⁰ XXIVth Report on Competition Policy :368–369.

⁵¹ *ZVEI/Arge Bat*.

Danish Crowns per litre.⁵² The established pool would use the funds provided to pay for clean-ups of contaminated sites of petrol stations⁵³ after an application was made. The pool would only pay for a clean-up if the site owner could not pay for the clean-up and would stop operating the petrol station. The site owner would be restricted from reopening within ten years if the expenses of the fund were not refunded⁵⁴ and insurance coverage for future pollution was not shown. At the beginning the arrangements also established a penalty fee for the reopening; however, this provision was dropped after the Commission expressed the concern that this might act as an artificial entry barrier. After this change had been made, the Commission determined that the agreement would not restrict competition provided that environmental considerations were the sole determinants of whether a claim for clean-up would be granted and that the clean-up costs, including administration and other fees were not excessive.

In terms of the environmental integration obligation, the case shows that the Commission takes into account agreements that should ensure the polluter-pays principle is implemented, as the requirement for reopening was that the polluter paid the costs of the previous pollution.⁵⁵ The aim of the agreement was twofold. The oil industry provided a pool ensuring that all pollution caused by petrol stations would be paid for. This broader

⁵² The members of the pool reassured the Commission that no agreement on a price increase for petrol had been made. It seems interesting to note that the Commission in this case seemed to be satisfied with the reassurance.

⁵³ The Commission only discussed the case of registered and currently operational petrol stations. The fund moreover paid for clean-ups of former petrol stations. For these cases the Commission did not even consider it appropriate to discuss an anticompetitive effect but explained that this would not raise Article 101(1)TFEU issues.

⁵⁴ At the beginning the arrangements established also set a penalty fee for the reopening. However, this provision was dropped after intervention from the Commission.

⁵⁵ In terms of the polluter-pays principle see also Part B, Section I, Chapter D, text to (n105ff).

implementation of the polluter-pays principle, which ensured that the industry causing the pollution would pay for it, was then supplemented by the industry with the introduction of the polluter-pays principle at the individual level. Only providers who paid for the pollution they caused and who showed insurance for future pollution could reopen the location. Implementing the first form of environmental integration, ie preventing conflict between environmental protection and competition, meant that the environmental aim of ensuring clean-ups needed to be pursued in a way that would not hinder competition. Thus, it had to be ensured that the conditions for pay-outs by the fund would be based on environmental reasons and that the costs which had to be reimbursed in the case of reopening would not be excessive. These conditions guaranteed, first, that the fund would not provide a financial advantage to a particular undertaking thereby distorting competition. Second, it ensured that no artificial entry barrier would be erected in the form of an excessive reimbursement requirement. At the same time the agreement does not seem to have had an effect on the product or production diversity, as in the category explained above. Although the agreement might have led to a price increase of up to 0.05 Danish Crowns per litre, such an increase was only a possibility and was not agreed upon; additionally, it was marginal.⁵⁶

In *ZVEI/Arge Bat*⁵⁷ manufacturers created a non-profit foundation for organising the take-back and recovery of batteries in anticipation of Union legislation. The legislation came into force two years later and required all manufacturers and distributors of batteries to take back used batteries they marketed either by means of a joint collection or by establishing their own scheme. The scheme set up by companies to ensure the take-back and recovery

⁵⁶ Around 0.5 Euro cents.

⁵⁷ *ZVEI/Arge Bat*.

was open to every producer or trader. The contributions to this foundation were calculated from each company's prior year's sales. The foundation used tenders to contract third parties for the various steps in the recovery process. Moreover, producers agreed to reduce the environmental impact of batteries in three ways: first, by not producing certain battery types anymore; second, by using the most environmentally friendly design of batteries that was technically feasible; and third, by clearly marking batteries containing pollutants. Finally, the agreement stipulated that the disposal costs would form an integral part of the price, and for informational purposes they would be shown separately on each producer and importer invoice.⁵⁸ The traders would agree to take back the sold quantity of batteries in their outlets free of charge and would not be further billed for recycling. Part of the agreement was also a commitment to only sell batteries produced either by members of the foundation that separately showed the disposal costs or by other companies which ensured the take back themselves.

At first sight it seems that the agreement contained far-reaching restrictions on competition. The agreement specified the seizure of production,⁵⁹ the obligation to reduce the environmental impact as far as possible, the separate invoicing⁶⁰ and the take-back obligation imposed upon traders. A closer examination shows that the Commission's

⁵⁸ However, as the disposal costs would be variable this would not amount to a fixed charge or levy. Cf in contrast the *VOTOB* case, XXIIInd Report on Competition Policy :106, considered in more detail in Part C, Section I, Chapter D, text to (n277ff).

⁵⁹ This can be compared to the *CECED* case where the seizure of production was balanced against the benefits of the agreement under Article 101(3)TFEU; see Part C, Section I, Chapter D, text to (n93ff).

⁶⁰ Which was in *VOTOB* case considered to be an issue, in retrospect however, it seems that the separate invoicing became only an issue as it was combined with the problematic fixed charge, XXIIInd Report on Competition Policy :106.

decision combines the normal competition analysis with the first form of integration to come to the conclusion that competition is not restricted. The phase out concerned only a certain type of batteries, and the quantities sold were marginal, so Article 101(1)TFEU would not apply due to the *appreciability*⁶¹ element. Regarding the other elements of the agreement, the first form of integration can be observed. The agreement combined all of the elements that were set out above: loose commitments, no effect on product and production diversity and the creation of a new market for environmental reasons. The undertakings' objective was to reduce the environmental impact as much as possible. The methodology to achieve this was left to competition. So the agreement was only a loose commitment and would not affect the product or production diversity. The separate invoicing would give an additional competitive incentive, as batteries that are more environmentally friendly would have lower recycling costs which could be highlighted to the consumers. The agreement also created a new market for environmental reasons. The take-back obligation meant that a new market for mechanised sorting of batteries and the industrial recovery process of batteries containing low pollutants would be established. The case exemplifies how the different parts that can deliver the first form of environmental integration, ie the parts of the analysis which can be used to prevent conflict between environmental protection and competition, can come together.

Finally, after the examination of horizontal issues, a glance at vertical situations should follow. However, the current state of law does not seem to offer the first form of

⁶¹ Regarding *appreciability* see above text to (n96ff).

environmental integration in vertical cases. The Guidelines on Vertical Restraints⁶² emphasize that a selective distribution system based on objective qualitative criteria does not restrict competition if (1) the product in question necessitates a selective distribution system,⁶³ (2) the resellers are chosen based on objective criteria of quality and (3) the criteria are necessary.⁶⁴ This approach seems to be based on the CJ's *Metro I*⁶⁵ judgment. In terms of environmental integration, this means that a certain form of balancing is needed as the necessity of the criteria is examined. Hence, this represents the second form of integration and is investigated in Part C.

d) Conclusion on Article 101 TFEU

This part examined the first form of integration in the context of Article 101(1) TFEU. It showed that the concept of effect on competition can be used to achieve the first form of integration, preventing conflict between environmental protection and competition. However, at the current state of law the first form of integration is only possible in cases of horizontal agreements. In cases of vertical agreements, the analysis performed exhibits a form of a balancing test and thus displays the second form of integration.⁶⁶ The first form of environmental integration in horizontal cases leads to the finding that the environmental protection measure does not restrict competition. This is the case when the agreement is

⁶² Guidelines on Vertical Restraints.

⁶³ This means as the Commission explains, that the 'system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use'. *Ibid.* ¶175.

⁶⁴ *Ibid.*

⁶⁵ Case 26/76 *Metro v Commission (Metro I)* ¶20-21, see with regard to selective distribution also Case 107/82 *AEG v Commission* ¶35; Case T-19/91 *Vichy* ¶65; Case T-88/92 *Leclerc* ¶11; Case 31/80 *L'Oréal v PVBA* ¶15-16.

⁶⁶ See in this regard Part C, Section I, Chapter D, text to (n50ff).

only a loose commitment, has no effect on product and production diversity or creates a new market for environmental reasons. In these cases the agreement specifies an environmental aim but the precise means of how to achieve the aim are left to competition. Competition in turn ensures the most efficient way to achieve the aim. Where a new market for goods or services is created that would lead to an environmental improvement -typically the incorporation of environmental externalities- competition is not affected.⁶⁷ In both cases the polluter-pays principle gains importance. The principle is given a twist of the competition law rationale: The polluter pays the minimum amount possible, remedying the situation but in the most economically efficient way. Such measures lead to protecting or even fostering competition in new areas while simultaneously protecting the environment by using the competitive mechanism to ensure the most efficient way of achieving such protection.

In the following sections, it will become clear that the first form of integration in Article 101(1)TFEU can serve as a model for State aid and free-movement law. The starting point for developing a framework for the first form of integration in those areas is the finding that loose commitments, agreements which have no effect on product and production diversity or agreements that create a new market for environmental reasons do not restrict competition.

⁶⁷ See also Bock 1994:49; Steinbeck 1998:560–561; London 2003:271; Lorenz 2004:134–135.

2. Article 102 TFEU

a) Introduction

The following part shows that the current framework for examining abusive behaviour under Article 102 TFEU does not permit the first form of environmental integration. Environmental integration may only have a role to play in the context of examining whether an allegedly abusive behaviour might be justified. But this form of environmental integration would then involve balancing, ie in the second form.⁶⁸

b) The Concept of Abuse under Article 102 TFEU

An abuse of a dominant position within the meaning of Article 102 TFEU can take the form of unilateral conduct and agreements.⁶⁹ Abuse in that context is defined by the Courts as follows:

[A]buse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.⁷⁰

⁶⁸ Examined in Part C, Section I, Chapter D.

⁶⁹ As a look at the wording of Articles 102(a), (c) and (d) TFEU exemplifies, as these sections concern typically agreements. For a contrary view see Rouseva 2010:460ff.

⁷⁰ Case T-57/01 *Solvay* ¶314; Case T-301/04 *Clearstream* para140; Case T-155/06 *Tomra Systems* ¶206; Case T-66/01 *Imperial Chemical Industries* ¶294; Case T-128/98 *Aéroports de Paris* ¶170; Case 85/76 *Hoffmann-La Roche v Commission* ¶91; Case C-52/07 *Kanal 5 and TV 4* ¶25; Case T-65/98 *Van den Bergh Foods* 157.

Establishing whether a certain behaviour is a prohibited abuse is a two-step process: First, it must be established whether a certain behaviour can qualify as abusive or not. Second, the presence of an objective justification which might alter the outcome of the first analysis needs to be examined.

To start with the second issue, the concept of objective justification seems to have been first established in *Sirena v Edda*.⁷¹ From the subsequent case law it can be inferred that the concept of objective justification demands a reaction by an undertaking to an external factor that is beyond the undertaking's control.⁷² However, every reaction to such external factors must comply with the proportionality principle.⁷³ Hence, the concept of objective justification balances the alleged abuse with the external factor and can thus only deliver the second form of integration, where environmental protection is balanced against the restriction of competition. As such, the first form of integration can only occur in the context of establishing whether certain behaviour can qualify as an abuse in the first place. Moreover, a dominant undertaking may raise a efficiencies defence. However, this defence

⁷¹ Case 40/70 *Sirena v Edda* ¶17. However, one might also identify such an approach in Case 24/67 *Parke, Davis & Co v Probel* ¶72. But see also Case 78/70 *Deutsche Grammophon*. Another classical example seems to be Case 311/84 *CBEM v CLT and IPB* ¶27 stressing the 'objective necessity'.

⁷² See: Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty ¶29; Rousseva 2006:39; Albors Llorens 2007:1746; Rousseva 2007:262f.. Among the few cases where the Court has accepted an objective justification seem to be Case 77/77 *BP* and Case 250/92 *Gottrup-Klim*.

⁷³ Rousseva 2006:37; Jones 2011:276–277; Whish/Bailey 2012:211. See also the Courts' decisions eg Case T-30/89 *Hilt*; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)*; Case 395/87 *Tournier*; Case 127/73 *BRT v SABAM*; Case 250/92 *Gottrup-Klim*. Some authors draw a general comparison between the objective justification under Article 102 TFEU and the free-movement provisions. See eg Rousseva 2006:34f; Albors Llorens 2007:1729ff; Craig/de Búrca 2011:1041.

where the negative effects and the positive effect are balanced is - as the objective justification - only able to provide the second form of integration examined in Part C.⁷⁴

Abusive behaviour can be categorised into exploitative⁷⁵ and exclusionary abuses.⁷⁶ In both, the principle of ‘competition on the merits’ is used to differentiate abusive behaviour from non-abusive (market) behaviour.⁷⁷ However, that principle does not reveal much as to what must be considered as abuse or as competition on the merits.⁷⁸

In the area of exploitative abuses it could be argued that this distinction is essentially a value judgment. This is because ‘normal’ and ‘non-normal’ market behaviour need to be distinguished.⁷⁹ Moreover, in cases of excessive pricing⁸⁰ and unfair trading conditions,⁸¹ it is evaluated whether the purchase or selling prices or the trading conditions are ‘unfair’ within the meaning of Article 102(a)TFEU. In cases of Article 102(c) and (d)TFEU ‘unequal’ treatment or whether supplementary obligations have a justifiable connection with the main transaction need to be considered. These issues are intrinsically linked to the issue of

⁷⁴ See Part C, Section II, Chapter D, text to (n219ff).

⁷⁵ Discriminatory and tying abuses under Article 102(d)TFEU should also be considered under this definition.

⁷⁶ See eg Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty ¶7.

⁷⁷ Ie if the exclusion is the result of a competition on the merits and thus not abusive. See eg *Faull/Nikpay* 2007 ¶4.154ff; *O’Donoghue/Padilla* 2013:215–217.

⁷⁸ Eg the OECD had a full report and round table on this matter, see OECD 2005.

⁷⁹ Cf *O’Donoghue/Padilla* 2013:215–217. This distinction is to a certain extent troubling because a strategy enacted by a non-dominant undertaking would be considered normal market behaviour, while the same strategy enacted by a dominant undertaking would be abusive. In this sense the dominant undertaking has a ‘special responsibility’. See *Joined Cases T-191/98 and T-212/98 to T-214/98 Atlantic Container Line* ¶1460, see also *Eilmansberger* 2005.

⁸⁰ Eg *Deutsche Post*; *Case 27/76 United Brands*; *Case 26/75 General Motors v Commission*.

⁸¹ Eg *Case C-333/94P Tetra Pak v Commission (Tetra Pak II)*; *DSD (Case COMP D3/34493)*; confirmed by *Case T-139/98 AAMS*; *Case C-385/07P DSD*; *Case T-151/01 DSD*.

objective justification. For example, it cannot be determined whether certain behaviour is unfair or unequal per Article 102 TFEU without taking the reasons for the behaviour into account and balancing them against the effects. Hence, establishing whether certain behaviour is exploitative entails a balancing and thus can only provide the second form of integration.

While exploitative abuses are closely linked to the issue of objective justification, the Commission has made a move to modernise the approach to exclusionary abuses.⁸² The Commission has summarised⁸³ the most important exclusionary abuses as exclusive dealing in the forms of exclusive purchasing⁸⁴ and conditional rebates,⁸⁵ tying and bundling,⁸⁶ price predation,⁸⁷ refusal to supply⁸⁸ and margin squeeze.⁸⁹ The area of exploitative abuses is currently moving to a more effects-based approach, but at this stage it is not clear to what extent this move will ultimately be successful.⁹⁰

⁸² Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty.

⁸³ *Ibid.*

⁸⁴ Eg Case T-65/98 *Van den Bergh Foods*; Case C-441/07P *Commission v Alrosa*; Case 85/76 *Hoffmann-La Roche v Commission*; Case T-65/89 *BPB Industries and British Gypsum*.

⁸⁵ Eg Case T-219/99 *British Airways*; Case C-95/04P *British Airways; Intel*; Case 85/76 *Hoffmann-La Roche v Commission*; Case 322/81 *Michelin v Commission (Michelin I)*; Case T-203/01 *Michelin v Commission (Michelin II)*.

⁸⁶ Eg Case C-53/92P *Hilt*; Case T-201/04 *Microsoft*; Case T-30/89 *Hilt*; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)*; Case C-333/94P *Tetra Pak v Commission (Tetra Pak II)*.

⁸⁷ Eg Case C-395/96P and C-396/96P *Compagnie Maritime Belge*; Case T-228/97 *Irish Sugar*; Case C-202/07P *France Télécom*; Case 62/86 *AKZO*; Case T-340/03 *France Télécom*.

⁸⁸ Eg Case T-201/04 *Microsoft*; Case T-301/04 *Clearstream*; Case C-7/97 *Oscar Bronner*; Case 77/77 *BP*; Joined Cases C-241/91P and C-242/91 *RTE and ITP*.

⁸⁹ Eg *Wanadoo Espana v Telefonica*; Case C-280/08 *Deutsche Telekom*; Case T-271/03 *Deutsche Telekom*.

⁹⁰ For a recent analysis see Gormsen 2013.

Exclusionary abuses are characterised by a foreclosure effect. Such an effect exists if access to the market or supply of actual or potential competitors is hindered.⁹¹ To determine whether this is the case, the Commission would currently not delve into a full analysis of the effect but would examine whether an as-efficient competitor would be hindered.⁹² The current version of the as-efficient competitor test does not permit the integration of environmental considerations. The test only examines whether an as-efficient competitor could compete regarding price,⁹³ ie whether or not the price set by the dominant undertaking would exclude an as-efficient competitor.⁹⁴ In this sense, the test infers harmful effects from the capability of behaviour to exclude an as-efficient competitor.⁹⁵ It is currently not clear to what extent the CJ and the GC will endorse this approach. In *Tomra*, which concerned retroactive rebates, the CJ did not seem to follow the Commission down this road,⁹⁶ while in *Deutsche Telekom*,⁹⁷ *TeliaSonera*⁹⁸ and *Post Danmark v. Konkurrencerådet*⁹⁹ the Court seemed to accept an as-efficient competitor test.¹⁰⁰

⁹¹ See in this regard Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty ¶18-22.

⁹² Gormsen 2013.

⁹³ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty ¶19ff.

⁹⁴ Although, it seems that the Commission has not excluded that non-price factors might be used Lianos 2009.

⁹⁵ Gormsen 2013:244.

⁹⁶ Case C-549/10P *Tomra v Commission* ¶73ff, although this case was decided by the Commission before the Guidance paper was adopted.

⁹⁷ Case C-280/08 *Deutsche Telekom* ¶255.

⁹⁸ Case C-52/09 *TeliaSonera Sverige* ¶63.

⁹⁹ Case C-209/10 *Post Danmark* 21ff.

¹⁰⁰ One distinction that could be made is that the efficient competitor test applies to exclusionary pricing practices such as margin squeeze and selectively low prices but not to cases where a rebate is

Whether the as-efficient competitor test or a more traditional form-based test is used will not affect the outcome with regard to environmental integration. Neither test allows for the incorporation of the first form of environmental integration. The as-efficient competitor test does not provide the flexibility which allows such integration, preventing conflicts between environmental protection and competition. As soon as there is the possibility that a certain action could exclude an as-efficient competitor, the action is caught by the test. Environmental considerations might only come into play when examining whether a certain action is justified.¹⁰¹ As long as the as-efficient competitor test is based on an inference of harmful effects and does not clearly examine whether any harm actually exists, the first form of environmental integration will not be possible. Only if the actual effects were examined, as under Article 101(1)TFEU, would there be the possibility of achieving the first form of integration.¹⁰² The same holds true with regard to the old, more form-based approach. As soon as behaviour is determined to take the form of exclusive purchasing, conditional rebates, tying and bundling, price predation, refusal to supply or margin squeeze, the first step of the analysis is completed and an abuse is presumed. Hence, environmental protection requirements can only become relevant at the second stage where the possible justification for the behaviour is examined.

given in return for exclusivity, Gormsen 2013:243. However, from an economic point of view it seems unclear how such a distinction should be justified.

¹⁰¹ See in this regard Part C, Section I, Chapter D, text to (170ff).

¹⁰² See in this regard Part B, Section I, Chapter B.

c) Conclusion on Article 102TFEU

The current framework of Article 102TFEU does not permit the first form of environmental integration, ie the prevention of conflicts between environmental protection and competition. The old, form-based approach would allow only the second form of integration, balancing. The more effects-based approach suggested in the Article 102TFEU Guidance paper also does not currently seem to offer room for the first form of integration. Thus, as long as the analysis does not examine the actual effect of the conduct, as under an Article 101(1)TFEU analysis, only the second form of integration may be relevant in Article 102TFEU.

C. Article 106 TFEU

Article 106 TFEU is an important provision in the context of environmental protection. However, it allows only for the second form of environmental integration, ie balancing.¹ The Article is, therefore, covered in this part in order to explain briefly why it cannot provide the first form of integration (preventing conflicts between environmental protection and other objectives).

Article 106 TFEU has three functions.² The first of the three functions is established by Article 106(1) TFEU.³ It confirms Member States' liability for granting exclusive rights. Member States need to ensure that they 'neither enact nor maintain in force any measure contrary to the rules contained in the Treaties'. This provision covers cases where an exclusive right enables an undertaking to infringe EU law, eg abuse its dominant position⁴ or restrict the fundamental freedoms.⁵ In this sense the prohibition is not a stand-alone

¹ See Part C, Section I, Chapter C.

² Some have argued that Article 106(1) and (2) TFEU are entirely superfluous as the functions would be readily fulfilled by the classical competition and free movement provisions see Davies 2009.

³ Article 106(1) TFEU is one tool and the legal reason for the de-monopolisation in the 1990s in areas such as telecommunication . See Gyselen 2010:493 and the seminal case Case 202/88 *France v Commission*.

⁴ The Court in this regard pointed out that granting these rights in itself is not contrary to the Treaty, see Case 155/73 *Sacchi* ¶14. Although, this might have been overruled to a certain extent in Case C-320/91 *Corbeau* where the CJ apparently assumed that the granting of an exclusive right was in itself contrary to Article 106(1) TFEU and then examined Article 106(2) TFEU, the CJ seemed to have retreated from this line of case law. For more details Buendia Sierra 1999:5.109-5.128; Faull/Nikpay 2007:6.76-6.83; Maillo 2007:603; Whish/Bailey 2012:233–234. Article 106 TFEU might equally apply to cases of Article 101 TFEU, as the wording of Article 106 TFEU refers to competition law as a whole.

⁵ Eg Case C-179/90 *Mercy v Gabrielli*; Case C-260/89 *ERT v DEP*; Case 18/88 *RTT v GB-Inno-BM*; Case C-380/05 *Centro Europa 7*.

prohibition but is one that is contingent on the violation of other obligations.⁶ This approach, which requires a further examination into whether, for example, the competition provisions have been infringed, is applied in cases like *Sydbavnens*,⁷ *Ambulanz Glöckner*⁸ or recently in *OTOOC*.⁹ Another approach¹⁰ which can be observed in cases like *Sacchi*¹¹ and *Corbeau*¹² suggests that the establishment of a legal monopoly as such needs to be justified by means of Article 106(2)TFEU. From the perspective of environmental integration the *Sydbavnens* approach would offer some room for the first form of integration. However, this integration would then not occur within Article 106(1)TFEU but within the relevant competition or free-movement provision. The second approach where every establishment of a legal monopoly would require a justification under Article 106(2)TFEU could only offer the second form of integration (balancing), as the balancing must be applied as soon as a legal monopoly is established. Whether this establishment of the monopoly involves environmental reasons does not play a role. Hence, Article 106(1)TFEU itself cannot provide for the first form of environmental integration.

Article 106(2)TFEU contains the second function. It offers a balancing test. This test implies that under certain conditions competition law in the broad sense (ie also

⁶ Article 106(1)TFEU is also described as a *renvoi* provisions or reference rule capturing the fact that the provision does not have an independent application, cf Whish/Bailey 2012:223.

⁷ Case C-209/98 *Sydbavnens Sten & Grus*.

⁸ Case C-475/99 *Ambulanz Glöckner*.

⁹ Case C-1/12 *OTOOC*.

¹⁰ On these two approaches see eg Hancher 2003:727–730; de Vries 2006:155–159.

¹¹ Case 155/73 *Sacchi*.

¹² Case C-320/91 *Corbeau*.

including State aid law) is not applicable. Thus, Article 106(2)TFEU can only provide for the second form of integration.

The third function is found in Article 106(3)TFEU. It serves as the basis for infringement proceedings¹³ and for legislation ensuring compliance with Article 106TFEU.¹⁴ Therefore, the Article does not contain a self-standing obligation and thus also cannot accommodate the first form of environmental integration.

Although a State might grant exclusive rights for environmental reason, the first form of environmental integration is not possible under Article 106TFEU. Articles 106(1) and 106(3)TFEU do not have an independent scope of application and Article 106(2)TFEU only offers a balancing test. Consequently, none of the sections of this Article can provide for the first form of environmental integration where conflicts between environmental protection and other objectives of the EU are prevented.

¹³ Regarding the infringement proceedings under Article 106(3)TFEU in general, see eg Faull/Nikpay 2007:6.217-6.238.

¹⁴ The directives based on this provision have been described as aimed at preventing future infringements of Article 106(1)TFEU, *Ibid*:6.240ff. Article 106(3) was an important basis of the liberalisation in the telecommunication sector and other areas of former state monopolies, see Koenig/Bartosch/Braun 2009: in particular Chapter 3. For an analysis with a focus on public services Prosser 2005:Chapter 8&9. Finally, the Article seems to have served as a model for the development of the *Altmark* criteria, Case C-280/00 *Altmark Trans*. *Altmark* is not directly related to Article 106(2)TFEU but to the question of whether a certain measure constitutes aid within the meaning of Article 107(1)TFEU but requires a service of general economic interest to exist, see Case T-354/05 *TF* ¶130, 135, 140. For the *Altmark* test see Part B, Section I, Chapter D, text to (n14ff).

D. State Aid Law

1. Introduction

This chapter shows that there is some, albeit limited, room for the first form of environmental integration (the prevention of conflict by clear demarcation) within Article 107 TFEU. Article 107 TFEU contains three paragraphs. Article 107(3) TFEU is concerned with a balancing test and thus cannot offer the first form of integration.¹ The two remaining paragraphs, Article 107(1) and 107(2) TFEU, are analysed in this chapter. They provide for the first form of integration to a certain extent. This chapter first scrutinises Article 107(1) TFEU and examines the defining elements of State aid: (1) financial advantage granted through the Member State's resources; (2) selectivity and (3) distortion of competition and effect on trade between Member States. This analysis suggests that the current framework implies that such integration is only marginally possible within Article 107(1) TFEU. A suggested alternative reading of the case law on selectivity and distortion of competition which also borrows from the analysis of Article 101(1) TFEU might broaden the framework and permit the first form of environmental integration. The chapter then turns to Article 107(2) TFEU and highlights the first form of environmental integration within this provision.

2. Conditions for Applying Article 107(1) TFEU

Article 107(1) TFEU stipulates that any form of State aid to undertakings by or through Member States' resources is incompatible with the internal market if the aid measure

¹ For the second form see, Part C, Section I, Chapter B.

actually or potentially distorts competition and affects trade between Member States.² An aid measure that satisfies the conditions of Article 107(1) TFEU can either be compatible with the internal market by virtue of Article 107(2) TFEU or can be declared compatible by the Commission based on Article 107(3) TFEU.³ Furthermore, the prohibition of Article 107(1) TFEU may not apply because of Article 106(2) TFEU if the restriction of competition is necessary for the provision of a service of general interest.⁴ The definition of an undertaking under Article 107 TFEU is the same as under competition law.⁵

a) Economic Advantage

In order to find that an undertaking has received aid, ‘an economic advantage which it would not have obtained under normal market conditions’⁶ must have been conferred. Within the current framework, this condition seems to be the only one offering at least some room for the integration of environmental considerations. Integrating environmental conditions seems possible within the narrow *Altmark* exception and to a very limited extent under the more frequently used market investor principle that will be discussed below.⁷

² With regard to WTO prohibition of subsidies and the polluter-pays principle see eg Kim 2000 and more generally Rubini 2009.

³ See in this regard Part C, Section I, Chapter B. Moreover, the Council may by way of decision grant an exemption or Regulations may be adopted to exempt certain forms of aid.

⁴ See in this regard Part C, Section I, Chapter C.

⁵ Cf Case C-222/04 *Cassa di Risparmio di Firenze* ¶107ff; Case C-237/04 *Enirisorse* ¶28ff; Case 78/76 *Steinike & Weinlig* 16–18. With regard to the definition of undertaking see Part B, Section I, Chapter A.

⁶ Joined Cases T-204/97 and T-270/97 *EPAC* ¶66; Case C-342/96 *Spain v Commission* 41; Case C-39/94 *SFEI* ¶60.

⁷ Portwood 2000:191 claims that the definition of aid would be affected by the environmental factors. Aid would exist where the costs of pollution are taken away from the undertaking. However, this

An economic advantage can either be conferred in the form of positive benefits or by easing a financial burden.⁸ In the assessment of the advantage, neither the causes nor the aims of the State measure are important. It is the effects of the measure that determine whether an advantage exists.⁹ Where an undertaking provides an appropriate *quid pro quo*, and thus the Member State obtains a fair market value, no economic advantage can be established.¹⁰ Therefore, if the monies transferred go beyond what is normally paid for such a transaction an advantage within the meaning of Article 107(1)TFEU is conferred.¹¹ This fundamental principle¹² explains cases where the Member States buy goods or services from the market just like any other market participants.¹³ Integrating environmental considerations seems impossible under this principle, as determining whether an undertaking provides an appropriate *quid pro quo* does not take into account any

does not seem specific to the environment. An advantage is always conferred where an undertaking does not have to bear the costs it would usually have to bear.

⁸ Case C-6/97 *Italy v Commission*¶15; Case C-75/97 *Belgium v Commission*¶23; Case C-143/99 *Adria-Wien*¶38; Case C-66/02 *Italy v Commission*¶77; Case C-501/00 *Spain v Commission*¶90; Case C-172/03 *Heiser*¶36; Case C-393/04 and C-41/05 *Air Liquide Industries Belgium*¶29; Case C-222/04 *Cassa di Risparmio di Firenze*¶131; Case C-237/04 *Enirisorse*¶42; Case C-39/94 *SFEM*¶48; Case C-387/92 *Banco Exterior de España*¶13; Case C-241/94 *France v Commission*¶34.

⁹ Case T-613/97 *UFEX*¶160; Joined Cases C-106/09P and C-107/09P *Commission and Spain v Government of Gibraltar and United Kingdom*¶48; Joined Cases C-71/09P, C-73/09P and C-76/09P *Comitato "Venezia vuole vivere"*¶94; *Aid schemes for the motor vehicle industry*; Case C-126/01 *GEMO*¶34; Joined Cases T-204/97 and T-270/97 *EPAC*¶76; Case C-75/97 *Belgium v Commission*¶25; Case C-172/03 *Heiser*¶46; Case 310/85 *Deufil v Commission*¶8; Case 173/73 *Italy v Commission*¶13; Case C-241/94 *France v Commission*¶20; Case C-56/93 *Belgium v Commission*¶79; Case C-159/01 *Netherlands v Commission*¶51.

¹⁰ Case 30/59 *De gezamenlijke Steenkolenmijnen* page 19, also and *argumentum e contrario* drawn from the case law in (n66). See also Heidenhain 2010:23 and Nicolaidis 2010 who explains how and when competitive procurement can prevent the finding of an advantage within the meaning of Article 107(1)TFEU.

¹¹ Case 290/83 *Commission v France*; Case T-14/96 *BAI*¶71-76; Case 61/79 *Denkavit*¶29-32; Case 78/76 *Steinike & Weinlig*¶22.

¹² Although this principle seems to be straight forward it is not always easy to apply in practice, cf Case T-471/93 *Tiercé Ladbroke*.

¹³ This principle also seems to be the origin of the market investor test detailed below, text to (n32ff).

environmental considerations. Nevertheless, payments can be made for environmental services. Examples include cases like *ADBHU*¹⁴ or the payment for cleaning up pollution which was not caused by the undertaking.¹⁵ Yet, how to clearly distinguish these cases from cases where an undertaking provides services of general economic interest,¹⁶ the *Altmark* scenario or the market investor principle remains unclear. It appears that in cases where it is complicated to determine whether an economic advantage has been conferred, the EU courts use the more nuanced tests of *Altmark* or the market investor principle. No advantage has been conferred where the *Altmark* criteria are fulfilled or where the advantage could have been equally granted by a market investor.

i. Altmark Criteria

Given the difficulties in assessing the correct market price for services of general economic interest,¹⁷ it seems reasonable that the CJ¹⁸ adopted a more nuanced approach.¹⁹ The nuanced approach allows for the first form of environmental integration. The Court in *Altmark* explained that such services need to be clearly defined, the terms for compensation must be established in advance and must be objective and transparent, and the

¹⁴ Case 240/83 *ADBHU* ¶18-19.

¹⁵ See also *Ibid.* In the same line see XXIIIrd Report on Competition Policy :262 ¶421; XXIVth Report on Competition Policy :193 ¶388 and 532f.

¹⁶ See in this regard Part C, Section I, Chapter C.

¹⁷ The value will be difficult to assess as such services are typically not provided by the market because they generally will not yield a profit.

¹⁸ Case C-280/00 *Altmark Trans.*

¹⁹ Before the Court used the so-called compensation approach which was closer to the fundamental principle that no advantage is conferred where the state buys goods and services and receives an appropriate *quid pro quo*, see Case C-53/00 *Ferring* 26–29 relying on Case 240/83 *ADBHU* ¶18. The GC, however, took a different approach subjecting such payments to the prohibition of Article 107(1)TFEU but applying Article 106(2)TFEU to justify the aid, see Case T-106/95 *FFSA* and Case T-46/97 *SIC*. For an overview of the different approaches and the *Altmark* solution see Louis/Vallery 2004.

compensation cannot be higher than the costs of the service provided plus a reasonable profit. Moreover, the compensation must be determined by comparison with a typical and well-run undertaking providing such services, if the provider is not chosen via an open tender.²⁰ The efficiency criterion has been partly relaxed in *BUPA* and *Chronopost*.²¹ Where a State measure does not satisfy these requirements, the undertaking receives an economic advantage within the meaning of Article 107(1)TFEU.²²

For *Altmark* to apply there must be a service of general economic interest within the meaning of Article 106(2)TFEU.²³ Although the *Altmark* test is closely modelled along the requirements of Article 106(2)TFEU,²⁴ it is still possible for a measure that does not meet the *Altmark* criteria to escape the application of Article 107(1)TFEU via Article 106(2)TFEU.²⁵ This could, for example, occur where the terms for compensation had not

²⁰ Case C-280/00 *Altmark Trans* ¶89-93. See also Case T-274/01 *Valmont* ¶130-131; Case T-157/01 *Danske Busvognmaend* ¶97-98; Case T-289/03 *BUPA* ¶258; Case T-349/03 *Corsica Ferries France* ¶310; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* ¶61-72; Joined Cases C-34/01 to C-38/01 *Enirisorse* ¶31-40; Case C-206/06 *Essent Netwerk Noord* 79–88; Case C-526/04 *Laboratoires Boiron* ¶50-57.

²¹ Joined Cases C-341/06P and C-342/06P *Chronopost and La Poste v UFEX*; Case T-289/03 *BUPA* see Bartosch 2008:211; Ross 2009:138; Müller 2009:39. For a further examination of the developments post *Altmark* in general see Renzulli 2008.

²² Case T-354/05 *TFI* ¶130.

²³ See in this regard in particular Part C, Section I, Chapter C.

²⁴ Gyselen 2010:497, for an argument that *Altmark* has blurred the line between 107(1)TFEU and 106(2)TFEU and was detrimental to legal certainty see Lynskey 2007.

²⁵ Case T-354/05 *TFI* ¶130, 134, 140. The Commission has provided further guidance on the relationship between *Altmark* and Article 106(2)TFEU see *Community Framework for State Aid in the Form of Public Service Compensation; The Application of Article 86(2) of the EC Treaty to State Aid in the Form of Public Service Compensation Granted to Certain Undertakings Entrusted with the Operation of Services of General Economic Interest* and its update *The Application of the European Union State Aid Rules to Compensation Granted for the Provision of Services of General Economic Interest; European Union Framework for State Aid in the Form of Public Service Compensation; The Application of Article 106(2) of the Treaty on the Functioning of the European Union to State Aid in the Form of Public Service Compensation Granted to Certain Undertakings Entrusted with the Operation of Services of General Economic Interest*. On the main changes see Pesaresi/Sinnaeve/Guigue-Koepfen/Wiemann/Radulescu 2012c; Pesaresi/Sinnaeve/Guigue-

been established in advance or were not objective.²⁶ In this sense, the *Altmark* criteria are narrower than those of Article 106(2) TFEU. Moreover, *Altmark* applies an efficiency test either in the form of a tender or in form of a comparison to a well-run undertaking, while Article 106(2) TFEU only uses a balancing test assessing the proportionality of the restriction of competition.²⁷ Thus the focus of the two tests is different, and while one allows the first form of environmental integration (prevention of conflicts) the other offers the second form (balancing in the case of conflict).

Some suggested that the environmental integration obligation of Article 11 TFEU could affect two *Altmark* criteria. First, the integration obligation would have an effect on the legality of how the tender is designed. Second, the fourth condition, ie the comparison to a typical efficient undertaking, ‘should be read as referring to a typical undertaking providing environmental services at the same level of quality’.²⁸ Although it is arguable that such an interpretation is in the interest of environmental protection, it is difficult to consider this as an effect of the integration obligation on the *Altmark* criteria. Considering environmental concerns in the design of tenders must be classified as a case where the integration obligation affects the rules relating to tenders.²⁹ The *Altmark* criteria do not prescribe the design of the tender. Interpreting the fourth condition so as to include a

Koepfen/Wiemann/Radulescu 2012a; Sauter 2012; Pesaresi/Sinnaeve/Guigue-Koepfen/Wiemann/Radulescu 2012b.

²⁶ See *BBC Digital Curriculum; Aid measures implemented by the Netherlands for AVR for dealing with hazardous waste*.

²⁷ Müller 2009:42.

²⁸ Kingston 2012:284. Moreover she suggests that when calculating the costs incurred ‘the use of “environmental” accounts where possible (ie drawn up to include environmental costs and benefits)’ should be considered. However, it remains unclear how this should work in practice.

²⁹ With regard to green procurement see European Commission, *Buying green! A handbook on green public procurement*, Arrowsmith 2009; Caranta/Trybus/Caranta-Trybus 2010; Gaus 2013.

comparison of environmental protection only where it has the same quality is also not influenced by the integration obligation. The *Altmark* test requires a comparison to a typical efficient undertaking providing this service of general interest. Thus, in the case of an environmental service the quality of environmental service needs to be the same; otherwise, a comparison is not possible. An example might be treatment of dangerous waste. An undertaking treating the waste in a way that leaves dangerous residues is not comparable to an undertaking that performs the same process without producing such residues.

The essence of the *Altmark* criteria can be summarised as follows: The compensation for a service of general economic interest cannot exceed incurred costs³⁰ and must be transparent. Hence, only the definition of a service of general economic interest leaves room for integrating environmental considerations. As elaborated in the context of Article 106(2)TFEU, this concept can be read as encompassing environmental protection services.³¹ Therefore, it can be said that the *Altmark* criteria permit the first form of environmental protection where a conflict between environmental protection and Article 107TFEU is prevented. Nonetheless, the conditions are stringent.

ii. Market Investor Principle

The market investor principle applies where no service of general interest is involved.³² This principle in its broader sense³³ encompasses not only investments³⁴ but also loans,³⁵ sales of

³⁰ Including a reasonable profit.

³¹ This question has been considered in Part C, Section I, Chapter C, text to (n14ff).

³² Which seems established in Case C-234/84 *Belgium v Commission*¶14 see also Case T-20/03 *Kabla/Thüringen Porzellan*¶237; Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale*¶245; Case T-163/05 *Bundesverband deutscher Banken*¶36; Case 142/87 *Belgium v Commission*¶29; Case 303/88

State assets³⁶ or purchases.³⁷ Although some have argued that this test would allow the integration of environmental considerations,³⁸ the latest case law seems to have limited this option remarkably.

In the context of the market investor principle, the test is whether the ‘State has adopted the conduct of a prudent investor operating in a market economy’.³⁹ This test has been interpreted as contrasting the economic rationale with non-economic considerations in a way that would inhibit integrating environmental considerations.⁴⁰ However, it cannot be deduced that a prudent investor could not integrate environmental considerations into its decisions or that such integration would make the investor ‘*imprudent*’. At first sight, this test seems to offer scope for evolution in terms of business strategies. The integration of environmental considerations should not be a problem⁴¹ if the claim of Michal Porter, who teaches at Harvard Business School, is taken seriously, ie that business leaders have changed in the last ten years⁴² and that the way forward for business is what he calls ‘creating shared

Italy v Commission ¶24; Case C-42/93 *Spain v Commission* ¶13. On the details of this test see eg Anestis/Mavrogemis 2006 and on its economic underpinnings see Kavanagh/Niels/Pilsbury 2011.

³³ Others distinguish between the market investor and market creditor test, eg Santa Maria 2007:23ff.

³⁴ Eg Case C-342/96 *Spain v Commission*.

³⁵ Eg Case T-274/01 *Valmont*.

³⁶ Eg Case T-14/96 *BAI*.

³⁷ Given this broad scope it would be possible to argue that this test is the basic test to assess whether a financial advantage is conferred to an undertaking.

³⁸ Kingston 2012:381–382 Vedder would apparently also support such an interpretation, Vedder 2003:289.

³⁹ Case C-482/99 *France v Commission* 71. For some of the problems this test raises, see Khan/Brochardt 2008.

⁴⁰ Vedder 2003:289.

⁴¹ This also seems to be what Vedder would like to achieve; see *Ibid*.

⁴² Interview with Michal Porter (London, 02 January 2011).

value'.⁴³ 'Creating shared value' can be seen as the perfect example of environmental integration as environmental protection is achieved by creating business opportunities.⁴⁴ Moreover, activities can often have both a public interest and commercial interest, which cannot easily be distinguished.⁴⁵ Finally, the idea that environmental considerations might play a role when applying the market investor principle might find further support since it is not necessary to adopt a short-term view with regard to the investment. Instead, it is possible to compare the State to investors with a long-term interest.⁴⁶

One objection that might be raised against such an interpretation is embodied in *Italy v Commission* where the CJ seems to have rejected the claim that 'not merely...short-term profitability but also...social and regional considerations'⁴⁷ could be accommodated under the market investor test.⁴⁸ However, this statement by the CJ was more limited. It asserted that 'when injections of capital by a public investor disregard any prospect of profitability, even in the long-term, such provision of capital must be regarded as aid'.⁴⁹ As such, this judgment did not seem to close the door to the interpretation that the market investor principle would allow investments with an environmental motive if they are profitable in the short or in the long run.

⁴³ On this concept Porter 2011. He sees the delivery of societal benefits as the markets for companies in the future.

⁴⁴ Cf *Ibid.*

⁴⁵ See Rousseva 2007:391, also Niels/Jenkins/Kavanagh 2011:390 who describes the example of an airport/port. The commercial interest of charging fees for the usage goes hand in hand with the public interest of providing basic infrastructure and creating jobs.

⁴⁶ Vesterdorf/Nielsen 2008¶6004.

⁴⁷ Case 303/88 *Italy v Commission*¶18.

⁴⁸ For such an argument see Kingston 2012:381 and Opinion AG Jacobs Case C-278/92, C-279/92 & C-280/92 *Spain v Commission*¶28.

⁴⁹ Case 303/88 *Italy v Commission*¶22.

A second objection concerns the GC's decision in *Bundesverband deutscher Banken*.⁵⁰ This judgment seems to make the integration of environmental considerations much harder because it makes it more difficult to interpret the market investor principle to mean an investor who takes the environmental impact into account. The GC explained that the market investor principle is not concerned with the investor and its attributes. Rather, it must be investigated whether the undertaking that allegedly received aid could have found someone to invest under similar investment conditions.⁵¹ Hence, the question is not whether the investor can be considered a 'sustainable' investor. Instead, the focus is on the terms for investment and whether investment could have been obtained from other investors under the same terms. This test investigates whether an investor could have been found on the financial market in general given the specific terms of investment.⁵² Even if investors who were concerned about the environmental impact were available on the financial market in general, the question is whether they would accept the terms of investment. The method for determining whether the terms for the investment are acceptable seems identical in environmental and non-environmental cases. As such, *Bundesverband deutscher Banken* makes using the market investor test to provide the first form of environmental integration much more difficult. However, a small option might still exist, as the question is whether the terms of the investment are viable for an investor. Whether an investment is commercially viable depends on how the investor values the service or product. This valuation might, for

⁵⁰ Case T-163/05 *Bundesverband deutscher Banken*. For a critical comment see Ahlborn/von Brevern 2010. For the difficulties that arise in certain cases with regard to the comparison between state investment and private investment see eg Niels/Jenkins/Kavanagh 2011:393–395.

⁵¹ Case T-163/05 *Bundesverband deutscher Banken* ¶58ff.

⁵² As focus is on the financial market in general, the problem of liquidity constraints that a single investor might face are avoided, see Niels/Jenkins/Kavanagh 2011:392.

instance, be different for a sustainability-minded investor as compared to a non-sustainability-minded one. Thus, although *Bundesverband deutscher Banken* has shifted the focus from the properties of the investor to the conditions of the investment, the assessment of the conditions will also be indirectly affected by properties of the investor. Hence, a certain room for integrating environmental considerations remains. Sustainability- and non-sustainability-minded investors will place different values on environmental considerations, and these valuations will indirectly influence the assessment of the conditions of investment. An investment with environmental benefits will therefore have to offer conditions which will make the investment attractive for the financial market in general, and such an investment must be profitable in the short or long run; thereby, conflicts between environmental protection and Article 107(1)TFEU are prevented.

b) Selectivity

The current framework for the examination of selectivity does not seem to offer room for integrating environmental considerations.⁵³ In order to be classified as aid the economic advantage must be selective in nature. To satisfy this condition the advantage must be available only to some undertakings but not to others in comparable situations.⁵⁴ In this assessment, the size of the group receiving the advantage is immaterial.⁵⁵

⁵³ However, below an alternative interpretation is suggested which allows material selectivity and to a certain extent also regional selectivity to be applied in a way that allows environmental considerations to be integrated, see text to (n117-141).

⁵⁴ Case C-409/00 *Spain v Commission*¶47; Case C-143/99 *Adria-Wier*¶48; Case C-75/97 *Belgium v Commission*¶32. For an overview regarding selectivity see Quigley 2012.

⁵⁵ Case C-409/00 *Spain v Commission*¶47; Case C-143/99 *Adria-Wier*¶48; Case C-75/97 *Belgium v Commission*¶32.

The issue of selectivity can be divided into geographical and material selectivity. The current framework for assessing geographical selectivity does not seem to permit the integration of environmental considerations. In the context of geographical selectivity the Commission examines the extent to which the advantage is available only in certain regions.⁵⁶ This test is also applied by the CJ to detect selectivity in cases where the Member State restricted the advantages to a particular region.⁵⁷ Regional selectivity might not be found to exist where the advantage is available in only one region if it is granted by an autonomous regional body. In this case, where the advantage is available to all of the undertakings within the territory reference, the framework for comparison is different. Selectivity then depends on the extent to which the regional body enjoys independence.⁵⁸ The analysis of regional selectivity therefore typically consists of a comparison of two regions or considers the question of the independence of a region. Thus, the concept of geographic selectivity is not designed in a way that would currently allow the integration of environmental considerations.

In terms of material selectivity, the CJ in *Adria-Wien* found that a measure had to ‘favour certain undertakings...in comparison with other undertakings which are in a legal and factual situation which is comparable in the light of the objective pursued by the

⁵⁶ See eg *Corporation Tax Reform Gibraltar* ¶31; *Belgian Economic Expansion Act* ¶31; *Customs House Docks Area* ¶57ff.

⁵⁷ Case C-156/98 *Germany v Commission* ¶23; Bartosch 2011:176.

⁵⁸ See Joined Cases T-211/04 and T-215/04 *Government of Gibraltar v Commission*; Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de La Rioja*; Case C-88/02 *Portugal v Commission*. On material selectivity and the question of autonomy see: Bousin/Piernas 2008:643ff; Lindsay-Poulsen 2008; Urraca Caviedes 2008; da Cruz Vilaca, 2009:448ff; Greaves 2009; Bartosch 2011:176–178; Micheau 2011:204ff.

measure in question'.⁵⁹ Yet, the measure is not selective if the 'nature or general scheme of the measure of which it is part'⁶⁰ justifies the different treatment. For this assessment a three-step analysis is needed: First, the general aim of the measure needs to be outlined. Second, the undertakings in the same legal and factual situation must be determined. Third, the treatment of the different undertakings in the light of the objective must be evaluated.⁶¹

An important case in this context is *British Aggregates*. It concerned a levy which was imposed on virgin aggregates (sand, gravel etc for construction use). The scheme contained an exception for recycled aggregates or aggregates which occurred as by-products. The aim of the levy was to increase the efficient use of non-renewable resources (ie aggregates) by imposing a levy on the aggregate sector without weakening its competitiveness.⁶² The Commission⁶³ as well as the GC⁶⁴ held that the nature and logic of the system justified the different treatment. The CJ strongly rejected the GC's position that an environmental objective as such could lead to the conclusion that the measure was not selective. Rather, the effects of the measure would need to be taken into account.⁶⁵ The CJ thus continued the analysis, which the measure in *British Aggregates* did not pass.⁶⁶ The CJ held that the selectivity criterion was fulfilled. Selectivity was dependent on whether 'operators in comparable

⁵⁹ Case C-143/99 *Adria-Wier* ¶41.

⁶⁰ *Ibid* ¶42, see also Joined Cases C-128/03 and C-129/03 *AEM* ¶39-43.

⁶¹ Quigley 2012:114–119 see also Bousin 2008:640–664 who describes the test as a discrimination test. The GC recently seemed to have used a four-stage test in Case T-210/02RENV *British Aggregates* ¶53-55. The first step in this test was to establish the "normal" taxation principle'.

⁶² On ecotax and *British Aggregates* in general see also Flett/Walkerova 2008.

⁶³ *United Kingdom Aggregates Levy*.

⁶⁴ Case T-210/02 *British Aggregates*.

⁶⁵ Case C-487/06P *British Aggregates* ¶86ff.

⁶⁶ The same is true for Case C-279/08P *Commission v Netherlands*.

situations in the light of the objective being pursued might [receive] a “selective advantage”. [The selectivity issue is thus decided] on the basis of [the measure’s] effects’.⁶⁷

Some have criticised the CJ’s judgment⁶⁸ because Member States would now be required to tax ‘a huge range of activities at every level of the society [because of] its negative environmental effects’.⁶⁹ The Court has also been criticised for suggesting that environmental protection requirements are not sufficient justifications for a distinction between economic actors as long as they do not apply ‘to all economic operators causing similar environmental harm’.⁷⁰ Thus, it has been argued that environmental objectives would not play any role in the application of the material selectivity criterion and in Article 107(1)TFEU in general.⁷¹ This view is based on statements in *British Aggregates*, *Commission v Netherlands*⁷² and on the earlier *Spain v Commission* where the Court held that

[t]hose [environmental] grounds, however legitimate, and supposing them to be established, are ineffective at the stage of the assessment of a national measure with regard to Article [107(1)] of the Treaty.⁷³

The CJ in *British Aggregates* found that

the need to take account of requirements relating to environmental protection, however legitimate, cannot justify the exclusion of selective measures...from the scope of Article [107(1)TFEU] as account may in any

⁶⁷ Case C-487/06P *British Aggregates*¶87.

⁶⁸ See eg Kurcz/Vallindas 2008:177ff; Bartosch 2010; Kingston 2012:397ff.

⁶⁹ Kingston 2012:397.

⁷⁰ *Ibid*:398.

⁷¹ Quigley 2012:118.

⁷² Case C-279/08P *Commission v Netherlands*.

⁷³ Case C-409/00 *Spain v Commission*¶54.

event usefully be taken of the environmental objectives when the compatibility of the State aid measure with the common market is being assessed pursuant to Article [107(3)TFEU].⁷⁴

This seems to be in line with AG Mengozzi's suggestion that it is sufficient to integrate environmental considerations in Article 107(3)TFEU to comply with the obligation of Article 11TFEU.⁷⁵ A similar approach to selectivity can be found in *Commission v Netherlands*.⁷⁶ The case concerned an emission trading system where an overall NOx target for the Netherlands and an individual target for undertakings were adopted. Large undertakings could trade their emission certificates and would either need to buy additional certificates or reach their target to avoid a fine. The CJ overturned the GC's judgment since all Dutch undertakings were subject to a NOx target but only undertakings emitting large amounts of NOx had the possibility to monetise an economic value when reducing their emissions.⁷⁷ It thus seems possible to argue that environmental considerations are *not* integrated when examining the question of selectivity,⁷⁸ neither in the first nor in the second form of environmental integration.

c) Member State's Resources, Distortion of Competition and Effect on Trade

After explaining the limited potential to integrate environmental considerations when examining whether an advantage has been granted and whether this advantage is selective,

⁷⁴ Case C-487/06P *British Aggregates*¶92. This is nearly verbatim repeated in Case C-279/08P *Commission v Netherlands*¶75.

⁷⁵ Opinion AG Mengozzi Case C-487/06P *British Aggregates*¶102.

⁷⁶ Case C-279/08P *Commission v Netherlands*.

⁷⁷ *Ibid*¶64.

⁷⁸ Cf, de Vries 2006:123.

Member State's resources, distortion of competition and effect on trade should be analysed. These conditions within the current framework also do not seem to be open for either form of environmental integration.

In order for a measure to be covered by Article 107(1) TFEU, the selective financial advantage must be granted through resources of a Member State, either directly or indirectly,⁷⁹ and it must always be imputable to the Member State.⁸⁰ The case law on measures with environmental benefits does not seem to permit the first form integration, the prevention of conflict by clear demarcation; the environmental dimension seems to play no role in the analysis.

In *Netherlands v Commission* the Courts found that State resources were transferred. The Netherlands would forgo revenue as long as the NOx permits were not sold or auctioned off.⁸¹ The permits could be traded and were needed by undertakings exceeding their emission targets to avoid fines.⁸² Hence, the environmental purpose of the scheme did not matter. In contrast, the Commission found in *Belgian Green Electricity Certificates* that although the State provided green energy certificates free of charge, the advantage was not

⁷⁹ Case C-200/97 *Ecotrade v Altiformi e Ferriere di Servola* ¶35; Case C-295/97 *Piaggio* ¶35; Case C-379/98 *PreussenElektra* ¶58; Joined Cases C-72/91 & C-73/91 *Sloman Neptun* ¶19; Case C-189/91 *Kirsammer-Hack v Sidal* ¶16; Joined Cases C-52/97 to C-54/97 *Viscido v Ente Poste Italiane* ¶13.

⁸⁰ Case C-482/99 *France v Commission* ¶24; Case T-351/02 *Deutsche Bahn* ¶101; Case C-305/89 *Italy v Commission* ¶13; Joined Cases 67/85, 68/85 & 70/85 *Van der Kooy* ¶35; Case 303/88 *Italy v Commission* ¶11.

⁸¹ An aid measure is not attributable to the State when it merely implements EU legislation (see Case T-351/02 *Deutsche Bahn* ¶102), the implementation of the EU Emission Trading System at national level which leads to differential treatment between undertakings within and outside the scope of the system is not attributable to the State, Seinen 2007:100; Kingston 2012:389–393.

⁸² Case T- 233/04 *Netherlands v Commission* ¶17 confirmed by Case C-279/08P *Commission v Netherlands* ¶106-108. Critical of these cases: Soltész 2011; Sauter/Vedder 15 February 2012. On the free allocation of certificates see also *Danish CO2 quotas* 6; *UK Emissions Trading Scheme* 9.

provided from the Member State's resources. The certificates merely gave official proof that the energy was indeed green.⁸³ The decisive factor was again, however, not related to the environmental context. Instead, the crucial factor was that the certificates were not diminishing the Member States' resources in any way as they simply provided official proof for a certain fact.⁸⁴

Where no direct State resources are involved and the State does not forgo revenue, the advantage conferred might still be State resources if the advantage is imputable to the State.⁸⁵ Thus, Article 107(1)TFEU applies to cases where the aid is managed by a private undertaking while it essentially originates from the State,⁸⁶ as well as cases where the State has sufficient influence on the individual measure.⁸⁷ Hence, the feed-in tariffs for renewable energy in Slovenia and Austria were considered to be deriving from State resources. The payment for the green energy was provided by a clearing body which was set up by the State and over which the State had influence.⁸⁸ This approach essentially mirrors the Court's approach in *Essent Netwerk*⁸⁹ which is a non-environmental case and only examines whence the monies originate. Hence, the criterion of Member State's resources does not seem to permit the integration of environmental considerations. Even the most prominent case,

⁸³ XXXIth Report on Competition Policy, ¶363.

⁸⁴ It could have, for example, equally been certificates which provide official proof that the electricity was produced during a certain period or at a certain place.

⁸⁵ Case 303/88 *Italy v Commission* ¶11; Case C-305/89 *Italy v Commission* ¶13; Case C-482/99 *France v Commission* ¶24; Joined Cases 67/85, 68/85 & 70/85 *Van der Kooy* ¶35.

⁸⁶ Case C-482/99 *France v Commission*; Case 78/76 *Steinike & Weinlig*.

⁸⁷ Case T-442/03 *SIC*; Case C-482/99 *France v Commission*.

⁸⁸ See *Slovenian Support for Production of Electricity from Renewable Energy Sources and in Co-generation Installations*; *Ökostromgesetz - Renewables Feed-In Tariff* for a comment Renner-Loquenz 2006. See also Commission Press Release IP/00/508.

⁸⁹ Case C-206/06 *Essent Netwerk Noord* ¶65-75.

PreussenElektra, does not manifest the integration of environmental considerations.⁹⁰ In this case the Court found that a German measure to promote green energy did not constitute State aid.⁹¹ The German law stipulated a purchase obligation and a statutory minimum price for energy produced from renewable sources. The CJ found that this financial advantage for undertakings producing renewable energy was not granted through State resources but by private undertakings.⁹² The fact that the obligation to purchase with minimum prices might have repercussions on the tax received from the undertakings that were obliged to participate was not sufficient to bring the system into the ambit of Article 107(1) TFEU.⁹³ Whether the transfer of the advantage occurs from the State or from a private undertaking to the benefiting undertaking(s) is a factual question where environmental considerations cannot come into play.⁹⁴

Also, the requirements of the effect of a measure on competition and on trade between Member States under Article 107(1) TFEU do not currently permit the integration of environmental considerations. Like with Articles 101 and 102 TFEU, the market needs to be established before the effect on competition can be examined.⁹⁵ Once the relevant market

⁹⁰ For the opposite view, arguing that the environmental motive of the measure meant that it was excluded from Article 107(1) TFEU, see Nagel:107ff.

⁹¹ Critical Emmerechts/Goossens 2001:1002; Kreiner 2001; Baquero Cruz/Castillo de la Torre 2001, who in essence argue that *PreussenElektra* would allow MS to circumvent the State aid rules.

⁹² Case C-379/98 *PreussenElektra* ¶59-60. On *PreussenElektra* and state funds also see van Vliet 2008.

⁹³ The possible repercussions on economic results and consequently a diminution in tax receipts would be inherent in the system, Case C-379/98 *PreussenElektra* ¶62. The CJ furthermore rejected an extension of the State aid prohibition via the loyalty principle of Article 4(3) TFEU, *Ibid* ¶63-65.

⁹⁴ For an opposite view see Nagel 2000 who argues that due to Article 11 TFEU and the environmental objective the measure could not be aid within the meaning of Article 107 TFEU and moreover the state resources requirement would not be fulfilled.

⁹⁵ Case T-27/02 *Kronofrance* ¶42; Case T-65/96 *Kish Glas* ¶84-95; Case T-155/98 *SIDE* ¶71; Case 730/79 *Phillip Morris v Commission* ¶10-11; Case 62 & 72/87 *Exécutif régional wallon* ¶15.

and advantage for the undertaking or sector are determined this advantage is presumed to distort competition.⁹⁶ Yet, the CJ requires at least a minimal counterfactual analysis,⁹⁷ where a comparison of the situation with and without the aid is performed.⁹⁸ This presumption even when combined with such a comparison is not able to integrate environmental considerations. First, a test based on a presumption that competition is affected once selectivity is established does not offer room to integrate environmental considerations because the selectivity criterion does not currently permit the first form of integration.⁹⁹ Second, the counterfactual test does not take into account environmental factors but merely compares situations with and without aid. Third, it is questionable whether the presumption is rebuttable in reality. It seems that even minor distortions fall within the scope of Article 107(1)TFEU.¹⁰⁰

The test of whether trade between Member States is affected by the measure is modelled on the test used in Articles 101 and 102TFEU.¹⁰¹ Yet, it is important that a *de minimis* rule exists regarding the effect on trade.¹⁰² The Commission has set the *de minimis*

⁹⁶ See da Cruz Vilaca, 2009:444–445; Quigley 2009:52–53; Craig/de Búrca 2011:1092–1093. This idea seems to be expressed in Case C-278/92, C-279/92 & C-280/92 *Spain v Commission* para. 41.

⁹⁷ For an economic approach to such an analysis see Hildebrand/Schweinsberg 2007:461. Also Ahlborn/Berg 2005:47ff who contrasts the approach to Article 107 with that to Article 101.

⁹⁸ Case 173/73 *Italy v Commission* ¶17.

⁹⁹ See above text from (n54) to (n77).

¹⁰⁰ Eg Case C-172/03 *Heiser* ¶56-57; Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* ¶46. It might be questioned whether such an approach is in line with the idea of a more economic approach. However, Hildebrand/Schweinsberg 2007:458–459 has recently identified a more economic approach of the GC. The GC would require to show the effect on competition, in the cases of Joined Cases T-304/04 & T-316/04 *Italy and Wam v Commission* ¶69; Case T-34/02 *Le Levant* ¶123f; Joined Cases T-447/93, T-448/93 & T-449/93 *AITEC* ¶138-143.

¹⁰¹ It has been pointed out that the test under 107(1)TFEU might be even broader than under Articles 101 and 102TFEU see Vedder 2009:57. In general see also Heidenhain 2010:54ff.

¹⁰² For details see eg Evans 1997:99f; Hancher/Ottervanger/Slot 2006 ¶7001-7014; Quigley 2009:60–64.

thresholds for Article 107(1)TFEU most recently in Regulation 1998/2006.¹⁰³ However, as pointed out in the context of Articles 101 and 102TFEU the examination of whether trade between Member States is affected does not offer room for integrating environmental considerations.¹⁰⁴ The test merely applies a fixed market share requirement.

d) An Alternative Interpretation of Selectivity and Distortion of Competition

The previous sections examined the current framework for selectivity and distortion of competition and explained how these do not readily permit the first form of environmental integration. This section advocates an alternative reading of the selectivity case law and suggests taking the criterion of distortion of competition more seriously in order to integrate environmental considerations. An alternative interpretation of distortion of competition can, moreover, draw on lessons from Article 101(1)TFEU. This also results in a more economic approach to Article 107(1)TFEU and allows for the first form of environmental integration by clear demarcation, thereby preventing conflicts between environmental protection and competition. Thus, environmental protection is achieved without distorting competition.

A good starting point for the integration of environmental considerations in the analysis of selectivity and distortion of competition under Article 107(1)TFEU is the polluter-pays principle. The Commission tried to integrate environmental considerations via the polluter-pays principle even before the integration obligation of Article 11TFEU was included in the Treaty. The EU adopted in 1974 a first Community framework for

¹⁰³ [2006] OJ L379/5.

¹⁰⁴ See Part B, Section I, Chapter A text to (n75ff).

environmental aids with a particular focus on that principle.¹⁰⁵ In this early framework, the Commission postulated that environmental protection and competition would be mutually supportive if the polluter-pays principle would generally and uniformly be upheld.¹⁰⁶ Aid which the State grants for the rectification of environmental damage would upset this principle. When the framework was extended in 1980 and 1986 the Commission realised that it was not easy to implement the polluter-pays principle fully.¹⁰⁷ In 1994 the first Environmental Guidelines were adopted.¹⁰⁸ They were updated in 2001¹⁰⁹ and 2008.¹¹⁰ These Guidelines, however, focus mainly on the conditions under which environmental aid could be justified. They do not contain in-depth guidance on how the polluter-pays principle could be used in Article 107(1) TFEU.¹¹¹

The polluter-pays principle can be interpreted in two distinct ways. The first interpretation refers to the principle as a guideline for the legislature. This broad reading demands that legislation be adopted in a way to ensure that externalities are internalised, ie

¹⁰⁵ See 4th Report on Competition Policy:101ff, which seems to be initiated by the Council Recommendation Regarding Cost Allocation and Action by Public Authorities on Environmental Matters.

¹⁰⁶ 4th Report on Competition Policy: 101¶176.

¹⁰⁷ 10th Report on Competition Policy: 157¶226. This framework was twice extended until 1992 (see 16th Report on Competition Policy: 173¶255) and then until 1993 (see XXIIInd Report on Competition Policy :251¶448).

¹⁰⁸ Community Guidelines on State Aid for Environmental Protection (1994). On the early developments see Krämer 1993:68–70.

¹⁰⁹ Community Guidelines on State Aid for Environmental Protection (2001).

¹¹⁰ Community Guidelines on State Aid for Environmental Protection (2008). For some critical comments on the older guidelines which have been partially remedied by the new regime see, Holmes 2006; Branton 2006.

¹¹¹ See also Opinion AG Jacobs Case C-126/01 *GEMO*¶68 who merely points out that the polluter-pays principle can be used as ‘an analytical tool to allocate responsibility according to economic criteria for the costs entailed by the pollution in question. A given measure will constitute State aid where it relieves those liable under the polluter-pays principle from their primary responsibility to bear the costs.’

that the price of goods or services includes the costs of pollution caused by their production.¹¹² The second, narrower, interpretation¹¹³ requires that the polluter bear the costs which are incurred by complying with the current legal framework for environmental protection.¹¹⁴ Both readings of the polluter-pays principle can help in the analysis of selectivity.

The narrow reading can be used to determine material selectivity. Where a State measure relieves an undertaking from a financial burden which it would have to bear under the current legal framework for environmental protection the undertaking receives a selective advantage.¹¹⁵ The broader understanding can also act as a guiding principle for the Courts or Commission.¹¹⁶ Where the State adopts measures to address a certain form of pollution caused by a certain economic activity, the legislation or measure must ensure that the polluter-pays principle is upheld consistently. Only where the measure covers all of the undertakings performing the economic activity that creates the specific form of pollution can the measure escape the selectivity criterion. In the following sections the use of the polluter-pays principle and other aspects of an alternative reading of the CJ's case law which help provide for the first form of environmental integration are highlighted.

¹¹² Stevens 1994:578.

¹¹³ Also referred to as the non-subsidisation principle, see OECD 26 May 1972¶4.

¹¹⁴ *Ibid.*, see also Stevens 1994:579; Stoczkiewicz 2009:173.

¹¹⁵ See also Opinion AG Jacobs Case C-126/01 *GEMO*¶68 who points out that the polluter-pays principle can be used as 'an analytical tool to allocate responsibility according to economic criteria for the costs entailed by the pollution in question. A given measure will constitute State aid where it relieves those liable under the polluter-pays principle from their primary responsibility to bear the costs'.

¹¹⁶ See below (text to n 121-126) with regard to the polluter-pays principle in the CJ's judgment in *British Aggregates*.

i. Material Selectivity

In terms of material selectivity, an alternative reading of the CJ's cases suggests that the CJ in *British Aggregates* and *Commission v Netherlands* accepted that environmental protection could be an objective pursued by States.¹¹⁷ The CJ only rejected the GC's position that an environmental objective *as such* could remove the measure from the scope of Article 107(1)TFEU.¹¹⁸ The CJ required that further analysis be performed. However, the levy in *British Aggregates*¹¹⁹ did not pass this further analysis.

The CJ stated in *British Aggregates* that 'all similar activities which have a comparable impact on the environment' must be subject to the levy.¹²⁰ This proposition has been criticised for requiring 'a huge range of activities at every level of the society [to be subjected to the levy because of] its negative environmental effects'.¹²¹ However, a different reading is also possible. On closer examination the aforementioned statement seems to merely highlight that the GC's position, ie that the environmental aim *as such* would be sufficient to exclude the measure from the scope of Article 107(1)TFEU, cannot be upheld. It does not follow from the CJ's statement that 'a huge range of activities at every level of the society' needs to be subjected to the levy in order to fall outside the scope of Article 107(1)TFEU. Instead, the CJ rejected a formalistic approach, holding that an environmental tax regime must use an effects-based approach to determine those entities covered by the system. The system needs to address the negative externality by looking at the specific externality

¹¹⁷ Case C-279/08P *Commission v Netherlands* ¶75; Case C-487/06P *British Aggregates* ¶81ff.

¹¹⁸ Case C-487/06P *British Aggregates* ¶86ff.

¹¹⁹ Also in Case C-279/08P *Commission v Netherlands*.

¹²⁰ Case C-487/06P *British Aggregates* ¶86.

¹²¹ Kingston 2012:397.

stemming from a particular form of economic activity. The ambit cannot be determined by only examining the form, ie certain economic sectors, or the way in which the advantage is granted. The CJ's approach seems sensible. Following it, the levy in *British Aggregates* would not have been selective if all but aggregates from recycled materials were subjected to it. The levy would then have used an effects-based approach to determine those undertakings covered and would have addressed the specific negative externalities stemming from the production of aggregates. Aggregates from recycled materials do not create those externalities and can thus be excluded. The CJ's approach also supports the polluter-pays principle as a guiding policy principle. It ensures that all competing economic actors creating a specific pollution have to pay for their pollution. The judgment, thus, ensures that Member States do not favour certain undertakings over others in the same market if they cause the same environmental impact. This idea was also stressed in the recent GC judgment in *British Aggregates*. The CJ had referred the case back to the GC, who held that the levy was designed to tax aggregates¹²² and had an environmental objective.¹²³ The environmental objective was, however, turned upside down as

the extraction of untaxed materials, particularly slate and clay, is at least equally, if not more, harmful to the environment than the extraction of other, taxed, materials, which also produce spoil, waste or other by-products capable of being used as aggregates.¹²⁴

¹²² Case T-210/02RENV *British Aggregates*, ¶53-55.

¹²³ *Ibid*, ¶63-64.

¹²⁴ *Ibid*, ¶73.

The GC also stressed that the levy could have a steering effect, driving up demand for more environmentally harmful aggregates.¹²⁵ From this perspective the judgment of the CJ and the subsequent judgment of the GC have to be welcomed. Furthermore, it is worth highlighting that the CJ reaffirmed that the Commission has ‘to take account of the environmental protection requirements referred to in Article [11]TFEU’¹²⁶ in their assessment. In this regard, the CJ’s judgment unfortunately lacks clarity. It stated that the environmental integration obligation could not ‘justify the *exclusion of selective* measures...from the scope of Article [107(1)]TFEU as account *may* in any event usefully be taken’ (emphasis added)¹²⁷ in Article 107(3)TFEU. On the one hand, this statement corresponds to the finding in the first chapter, that environmental integration can only take place in so far as the wording and case law allows for it.¹²⁸ On the other hand, if this statement must be read to mean that integration can only take place in Article 107(3)TFEU, it conflicts with the idea that balancing environment with other objectives should only be the second choice.¹²⁹ It should be pointed out that the CJ’s finding is not as explicit as AG Mengozzi’s suggestion that it would be sufficient to integrate environmental considerations in Article 107(3)TFEU.¹³⁰ The CJ only found that environmental considerations would not justify *the exclusion of selective measures* from Article 107(1)TFEU. This does not mean that environmental protection cannot play a role in the assessment of selectivity. The statement seems to be worded that strongly so as to reject the GC’s approach which had suggested that a measure is not

¹²⁵ *Ibid*¶78 see also¶88-90.

¹²⁶ Case C-487/06P *British Aggregates*¶90.

¹²⁷ *Ibid*¶92. This is repeated nearly verbatim in Case C-279/08P *Commission v Netherlands*¶75.

¹²⁸ See Part A, text to (n104ff).

¹²⁹ See Part A, text to (n120ff). Also critical Kingston 2012:398.

¹³⁰ Opinion AG Mengozzi Case C-487/06P *British Aggregates*¶102.

selective simply because of its environmental motivation.¹³¹ The important point is that the CJ has repeatedly held¹³² that the objective of the system can be environmental protection.¹³³

Exceptions to the system need to be attributable to the nature and general scheme of the system; otherwise, the system becomes selective. This means that the Court does not perform a test of justification along classical lines but rather examines whether the (environmental) objective has been applied consistently.¹³⁴ From a normative point of view this consistency test is supported by the polluter-pays principle as general policy guideline. The State should generally aim to internalise externalities, ie ensure that the price of goods or services reflect the costs of pollution caused. If the State adopts measures addressing a certain form of pollution caused by a certain economic activity it needs to observe the polluter-pays principle. Thus, the legislation or measure should ensure that all undertakings performing this economic activity and creating the specific form of pollution are covered by the measure. Where this is not the case, the polluter-pays principle is not upheld and a selective advantage can be found. Hence, schemes that pursue environmental objectives are not selective as long as the different treatment of undertakings results from the consistent application of the environmental objective.¹³⁵ Thus, the test for examining selectivity as described by the CJ is whether a measure is consistent with its environmental objective and

¹³¹ Cf Bartosch 2010:750.

¹³² Case C-279/08P *Commission v Netherlands* ¶62, 76; Case C-487/06P *British Aggregates* ¶83, 87-88; Case C-409/00 *Spain v Commission* ¶52.

¹³³ See also Bartosch 2010:738; Bartosch 2011:187 who explains that environmental protection is an objective that can justify the different treatment of undertakings.

¹³⁴ For a form of consistency test also Kurcz/Vallindas 2008:176ff; Bartosch 2010:739.

¹³⁵ See also Joined Cases C-72/91 & C-73/91 *Sloman Neptun* ¶21.

can provide the first form of environmental integration by employing the polluter-pays principle.

ii. Geographical Selectivity

In terms of geographical selectivity, the current framework also seems to limit the integration of environmental considerations because it only examines whether the advantage is restricted to a particular region.¹³⁶ An alternative approach might shift the focus from this formal investigation towards an examination of the substance or effect of the measure. It could be investigated whether there are substantive differences between regions in terms of an environmental problem. If so, the regions would not be comparable thereby making undertakings from these two regions also not comparable.¹³⁷ The Commission seems to have acknowledged this in the context of Article 107(3)TFEU and aid for the relocation of undertakings. The Commission accepted that the location where an undertaking performs its polluting activity might make a difference.¹³⁸ Moreover, it might be questioned why the objective and nature of the scheme cannot justify regional selectivity as compared to material selectivity.¹³⁹ Admittedly, an advantage which is limited to a region would typically be less targeted and thus more likely to be selective than an advantage that is available to all undertakings fulfilling certain environmental protection criteria. However, rather than the form, the effect on competition should be decisive. There might be cases where an environmental problem occurs in only one region and it is possible to formulate the

¹³⁶ In cases where an autonomous region has acted, the degree of autonomy is decisive.

¹³⁷ It might be sensible to ask whether these undertakings are within the same geographic or product market. However, this question does not typically seem to be examined under the selectivity criterion.

¹³⁸ Community Guidelines on State Aid for Environmental Protection (2008):¶54, 135-136.

¹³⁹ Urraca Caviedes 2008:142ff.

selection criteria either by defining a certain area or by defining the environmental problem itself. In such cases the recipients are substantially the same whether defined by region or environmental problem. The applicability of regional or material selectivity as framework of investigation should not change the outcome. The environmental objective of the measure should mean, if applied consistently, that the measure is not selective, either from a geographic or a material point of view. However, integrating environmental considerations faces some obstacles in cases where undertakings could receive an economic advantage in a region with a specific environmental problem where this advantage would not be subject to Article 107(1)TFEU.

According to the Guidelines, the aid intensity for relocation of undertakings cannot exceed 50%.¹⁴⁰ However, finding that an advantage is not selective would mean there is no control over aid intensity in cases of relocation because Article 107(1)TFEU would not apply in the first place. This difference highlights the problem in terms of supervision of the aid. If the advantage is not found to be selective there is no need to notify the measure to the Commission. Hence the measure would escape oversight by the Commission.¹⁴¹ Arguably, the CJ was not as concerned with oversight when establishing the rule on material selectivity. Therefore, a more consistent approach is still possible treating material and geographical selectivity alike. Such an approach would allow to consider measures as not selective which address a specific environmental problem and are only applicable to one

¹⁴⁰ Plus 10%/20% for medium/small undertakings, see Community Guidelines on State Aid for Environmental Protection (2008):¶137.

¹⁴¹ Cf also with regard to a Rule of Reason under Article 107(1)TFEU, Part C, Section I, Chapter B text to (n1ff).

region or certain regions This approach thus would permit the first form of environmental integration.

iii. Distortion of Competition

Any selective measure must be seen in context with the assessment of how competition is affected. A selective measure is an action that can distort or threaten to distort competition. Yet, not all selective measures will necessarily affect competition. Selectivity and effect on competition are two cumulative conditions which need to be fulfilled in order to find that a measure constitutes aid within the meaning of Article 107(1)TFEU. While the current framework seems to work with a presumption and a quick counterfactual analysis to establish the effect on competition,¹⁴² a thorough examination of whether competition is indeed affected could form the basis for environmental integration.¹⁴³ Such an examination could lead to the first form of integration, namely a clear demarcation of the scope to prevent conflicts and balancing between environmental protection and competition. In practice this would mean abandoning the presumption and the quick counterfactual analysis and replacing them with an in-depth analysis of the competitive effects. Moreover, such an approach could reduce the caseload of the Commission as the notification and examination under Article 107(2)(3)TFEU would be avoided for cases not affecting competition. In the Environmental Guidelines, the Commission mainly details the negative effects on competition.¹⁴⁴ Yet, it also states that competition is typically not affected in cases where the

¹⁴² See Part B, Section I, Chapter A, text to (n94-100).

¹⁴³ Also critical with regard to the lack of analysis of the effect on competition eg Heidenhain 2010:53.

¹⁴⁴ Community Guidelines on State Aid for Environmental Protection (2008):¶175-187.

aid ‘has taken into account all advantages to the undertaking’.¹⁴⁵ Taking into account all advantages might arguably be difficult in practice. Nevertheless, this statement should offer a basis for the in-depth analysis. If, for example, the recipients of aid have been selected in a ‘non-discriminatory, transparent and open’,¹⁴⁶ ie competitive, manner or the aid has been granted to all undertakings on the relevant market¹⁴⁷ competition should typically not be affected. Therefore, such cases should not be subject to Article 107(1)TFEU. Moreover, State aid could possibly learn more from the analysis of effect on competition in Article 101(1)TFEU. This suggestion would also be in line with the objective of a more economic approach to State aid law. The analysis of Article 101(1)TFEU has explained that competition is not affected where an agreement contains only loose commitments, has no effect on the product and on production diversity or where new markets are created for environmental reasons.¹⁴⁸ In the case of loose commitments, an environmental aim is spelled out but the way to achieve it is left to competition. This idea seems to have some overlap with the statement that where the aid is available in a ‘non-discriminatory, transparent and open manner’ competition is not affected. Thus, competition would typically not be affected where the State formulates a certain abstract environmental target in a non-discriminatory, transparent and open manner and leaves it to the undertakings or competition to determine how to achieve this target.¹⁴⁹ Within Article 101(1)TFEU agreements which do not affect

¹⁴⁵ *Ibid*¶176.

¹⁴⁶ *Ibid*¶180e).

¹⁴⁷ *Ibid*¶180f). The Commission apparently does further require that the aid is available to all ‘companies that could address the same environmental objective’. This does not seem to make much sense from the point of competition. These undertakings are not competing with those who are in the relevant market and in this sense competition cannot be affected.

¹⁴⁸ Cf Part B, Section I, Chapter B, text to (n15-65).

¹⁴⁹ In essence such a system works as a bounty system; if you reach the target you receive the aid.

the product and the production diversity are considered not to restrict competition. In its Environmental Guidelines the Commission also seems mainly concerned with such effects.¹⁵⁰ Hence, in cases where these effects are not expected from the measure, the measure should not be subjected to Article 107(1)TFEU. Finally, in the context of Article 101(1)TFEU it has been established that where the agreement is needed to create a market for environmental reasons competition is not affected as a market does not yet exist. The same reasoning should apply in the context of Article 107(1)TFEU: Where the aid measure is needed to create a market and thereby competition in the first place, Article 107(1)TFEU should not apply.

3. The Exclusion via Article 107(2)TFEU

After having shown the complexities of the first form of environmental integration within the context of Article 107(1)TFEU, the chapter now turns to Article 107(2)TFEU. Article 107(2)TFEU does not narrow the scope of Article 107(1)TFEU. Instead, Article 107(2)TFEU lists three forms of aid that are considered to be compatible with the internal market *per se*. In this sense Article 107(2)TFEU only comes into play once an environmental protection measure is found to be within the scope of Article 107(1)TFEU. However, for the first form of environmental integration this is immaterial, because the first form of environmental integration occurs where conflicts between environmental protection and the other EU aims are prevented so that these EU aims do not need to be balanced. It is therefore irrelevant whether this occurs within the framework of Article 107(1) or Article

¹⁵⁰ See *Ibid* ¶176-182.

107(2)TFEU, as the effect is the same: The environmental measure will not be subjected to a balancing exercise.

However, as the next part of the chapter shows that Article 107(2)TFEU is currently rarely applied in environmental cases by the Commission. It suggests that there is some room for enhancing this track record, although the exceptionally narrow scope of Article 107(2)TFEU makes only minor improvements possible.

a) Article 107(2)(a)TFEU

Article 107(2)(a)TFEU applies to cases where State aid has a ‘social character’ and is ‘granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned’. In addition under Article 107(2)(a)TFEU requires that the aid directly benefits the consumer and only indirectly favours undertakings.¹⁵¹ Moreover, the aid must be irrespective of which undertaking provides the service or good as a result of the two requirements: direct benefit for the consumer and non-discrimination.¹⁵²

Article 107(2)(a)TFEU was used by the Commission in a German case where a tax exemption was given to consumers who bought cars with catalytic converters, as long as the measure complied with Article 34TFEU.¹⁵³ Typically, the main factor that hinders aid from

¹⁵¹ Vesterdorf/Nielsen 2008¶1048; Heidenhain 2010:145.

¹⁵² Joined Cases C-442/03P and C-471/03P *P&O v Commission*¶123ff; Joined Cases T-116/01 and T-118/01 *P&O v Commission*¶63.

¹⁵³ Agence Europe 31 March 1990:8 as referenced in Hancher/Ottervanger/Slot 1999¶3004. Only under certain circumstances would the Commission again find that this would constitute aid in the first place because ‘measures to encourage final consumers (firms and individuals) to purchase environmentally friendly products...do not confer a tangible financial benefit on particular firms’ Community Guidelines on State Aid for Environmental Protection (1994):¶3.5.

falling under the Article 107(2)(a)TFEU exception is the non-discrimination requirement. Discrimination is a conventional feature of aid since it is typically granted to specific undertakings within the Member State providing it.¹⁵⁴ The limitation that the Commission imposed by referring to Article 34TFEU was possibly even broader than the classical non-discrimination requirement which refers to the origin of the undertaking and not to the type of goods or services.¹⁵⁵ While this represents a narrowing of the non-discrimination requirement of Article 107(2)(a)TFEU, the Commission's decision adopted a broad reading of the 'aid having a social character'. It interpreted the term such that the legal exception could apply where the aid was available to all consumers. Although this decision resulted in aid being available for catalytic converters that were more environmentally friendly this effect was only an incidental one. The Commission had not interpreted the term 'aid having a social character' as encompassing environmental considerations. The Commission's interpretation that allowed aid to all consumers could equally be applied in a non-environmental case. Moreover, it seems difficult to argue that the term 'aid having a social character' can be interpreted so as to include environmental considerations. This is in line with the obligation of Article 11TFEU which demands integration only to the extent that wording and the current case law leave room for such integration.¹⁵⁶

b) Article 107(2)(b)TFEU

Article 107(2)(b)TFEU concerns State aid that is given in support of attempts 'to make good damages caused by natural disasters or exceptional occurrences'. While this exception is

¹⁵⁴ Craig/de Búrca 2011:1093.

¹⁵⁵ Cf XXIIIrd Report on Competition Policy¶354; Vesterdorf/Nielsen 2008¶1048.

¹⁵⁶ See Part A, text to (n104ff).

narrowly construed¹⁵⁷ meaning that the aid must help to remedy a situation that has a direct causal connection to the natural disaster or exceptional event,¹⁵⁸ the integration of environmental considerations is possible. Thus, the Commission elaborates in the Guidelines for the Agriculture and Forestry Sector that ‘exceptional occurrences’ within the meaning of Article 107(2)(b)TFEU can be ‘with certain reservations and depending on their extent, major nuclear or industrial accidents’.¹⁵⁹ Interpreting Article 107(2)(b)TFEU to cover such cases producing extensive pollution is a classical form of environmental integration and must be welcomed. The issue that can be raised is that the limitation to major accidents ‘depending on their extent’ might be problematic since no clear guidelines exist explaining when such an incident can be considered major. However, within this narrow group of cases, Article 107(2)(b) allows for the first form of environmental integration.

c) Article 107(2)(c)TFEU

Article 107(2)(c)TFEU, finally, applies to cases where disadvantages resulting from the division of Germany are rectified. This exception is very narrowly construed and only covers disadvantages directly resulting from the division. The exception does not extend to disadvantages resulting from the different economic development under the two different economic and political systems on either side of the border.¹⁶⁰ So far, environmental integration has not taken place in the context of this provision. However, there is room to

¹⁵⁷ Case C-301/96 *Germany v Commission*¶66; Case C-156/98 *Germany v Commission*¶49; Case C-278/00 *Greece v Commission*¶81; *Vesterdorf/Nielsen* 2008¶1049.

¹⁵⁸ Case C-301/96 *Germany v Commission*¶72; Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission*¶49; Case C-278/00 *Greece v Commission*¶82; Case C-156/98 *Germany v Commission*¶54.

¹⁵⁹ Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007 to 2013:¶122.

¹⁶⁰ Joined Cases C-57/00P and C-61/00P *Freistaat Sachsen*¶136.

interpret the term ‘disadvantages’ to encompass pollution. The limiting factor in Article 107(2)(c)TFEU is the CJ’s requirement that disadvantages must result directly from the division of Germany. Thus, only environmental effects of the division or the border such as soil or water contamination in the border area caused by old ammunition could establish a case where environmental integration affects the application of Article 107(2)(c)TFEU.

The legal exception of Article 107(2)TFEU therefore offers room for environmental integration in Article 107(2)(b) and (c)TFEU.¹⁶¹ The narrow area of application and limited scope that these provisions provide for the first form of environmental integration are unfortunate, in particular because Article 107(2)TFEU allows for the first form of integration without the need to resort to the second form of integration, namely balancing.

4. Conclusion on State Aid Law

This chapter examined the first form of environmental integration, where conflicts between environmental protection and the sectoral aim of preventing distortions of competition by State aid are prevented by clearly demarcating the scope of the prohibition, in the context of Article 107(1)TFEU. The current framework only offers very limited space for this form of integration. The *Altmark* test allows such integration but only for services of general economic interest. In the case of the market investor test the scope for such integration is more limited and only indirect. The suggested alternative reading of the selectivity criterion and the effect on competition could improve the current affairs under Article 107(1)TFEU. Furthermore, it helps to bring the analysis of the effect on competition under Articles 101(1)

¹⁶¹ Not seeing any room for integration under Article 107(2)TFEU eg Zils 1994:127; Geradin 2002.

and 107(1)TFEU in line, reduces the notifications received by the Commission and gives Member States more room to adopt their environmental and fiscal policies according to their needs. The alternative reading applies the polluter-pays principle and supports the consistency test in the context of selectivity. In cases where the polluter-pays principle is not upheld and the measure is selective, Article 107(1)TFEU applies. For a narrow group of cases Article 107(2)TFEU might then be used to achieve the first form of environmental integration. Those measures which do not pass these tests can, however, still be environmentally advantageous. The Commission or Courts examine very closely such exceptions to the polluter-pays principle as well as the associated negative effects on competition and balance the positive and negative effects. This second form of environmental integration (ie balancing) takes place either within the narrow exception of Article 106(2)TFEU¹⁶² or within Article 107(2)(3)TFEU.¹⁶³

¹⁶² See Part C, Section I, Chapter C.

¹⁶³ See Part C, Section I, Chapter B.

E. Free-Movement Law

1. Introduction

This chapter examines the first form of environmental integration in the area of free-movement law, ie the prevention of conflict between environmental protection measures and the freedoms. It will show that there is only limited room for such integration within the current framework. The chapter is subdivided into three parts and explores whether the concept of discrimination¹ and concepts beyond discrimination, like *Keck*² and market access, permit the first form of environmental integration. The chapter ends by suggesting changes that could bring about greater environmental integration in the form of preventing conflicts between the freedoms and environmental protection (first form).

2. General Conditions for Applying Free-Movement Law

Before considering how the restrictions of the freedoms have been defined by the Courts, the other requirements for their application are examined. It will be shown that these do not permit the first form of integration, ie preventing conflicts between environmental protection and free-movement law.

To decide whether free-movement law³ applies to a situation,⁴ five general elements need to be examined:⁵ (1) Does the individual or company possess an EU Member State's

¹ This chapter uses the terms discriminatory measures and distinctly applicable measures interchangeably. Where necessary the chapter distinguishes between directly and indirectly discriminatory measures. Directly discriminatory measures are measures which discriminate *de jure*, while indirect discrimination is *de facto* discrimination.

² Case C-267/91 and C-268/91 *Keck and Mithouard*.

³ On the approach taken under EU law versus WTO see Portwood 2000:33–51; Müller-Graff 2008, on climate change in particular Epps/Green 2010:142–159.

nationality? (2) Is the individual or company engaged in economic activity (if necessary)?
(3) Is the individual or company a worker, self-employed or a service provider, or a citizen?⁶
(4) Is there a cross-border element? (5) Does the public service or official authority
exception apply?⁷

Whether an individual or company possess an EU Member State's nationality is determined by the Member States' rules on nationality. These rules cannot be influenced by environmental considerations pursuant to Article 11 TFEU. Regarding the second question, that of engaging in economic activity, a comparison with the definition of economic activity in competition law can be made. In that context it has been shown that the defining element of 'undertaking' is the concept of economic activity and that environmental considerations cannot be integrated into this concept.⁸ The process of environmental integration in the freedoms seems even more difficult than in competition law. Although both competition and free-movement law require that goods or services are provided for remuneration, the definition of economic activity in competition law is narrower because it additionally requires the ability of the provider to make a profit from its activity.⁹ Hence, if environmental integration is not possible in competition law which places even more

⁴ The conditions do not require direct State involvement, so that the freedoms might also be applied in horizontal situations, see in this regard *Case C-438/05 ITF & FSU v Viking Lines*; *Case C-341/05 Laval un Partneri*; *Case C-36/74 Walrave and Koch*; *Case C-415/93 Bosman* and Dashwood; Krenn 2012; Schepel 2012; Davies 2013.

⁵ See Barnard 2013:231–233.

⁶ Or in the case of goods whether objects are taken across borders for commercial transactions cf eg *Case C-324/93 Evans Medical* ¶20; *Case C-2/90 Commission v Belgium* ¶26ff.

⁷ One could also subdivide the elements into issues of personal and territorial scope.

⁸ See Part B, Section I, Chapter A text to (n4ff).

⁹ Odudu 2009:232–233.

conditions upon the definition of economic activity, it is even less so in the context of the freedoms. The main limiting factor in competition law, the ability to make a profit, is missing in the freedoms. A similar argument could be made when investigating whether an actor is a worker, self-employed, a service provider or a citizen¹⁰ or whether a cross-border element exists.¹¹ The definitions of these terms are applied independently from environmental protection. The public service or official authority exceptions of Articles 45(4), 51 and 62 TFEU exclude the application of the freedoms where the ‘exercise of official authority’ is involved or in cases of ‘public service’. As explained, the definition of ‘exercise of official authority’ cannot be influenced by environmental factors.¹² Hence, environmental integration is not possible when examining the ‘exercise of official authority’. To establish whether a certain matter comes under the public service exception the Court uses a functional approach.¹³ The Court thus rejected the Member States’ proposition to apply the public service exception based upon formal or institutional factors in contrast to the official authority exception.¹⁴ For the public service exception to apply a position needs to ‘involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State’.¹⁵ The concept is, therefore, closely related to the exercise of public authority or, as an AG explained it, ‘the

¹⁰ With regard to the question of how to define a worker see eg Case 66/85 *Lawrie-Blum*, a self-employed see eg Case C-196/04 *Cadbury Schweppes*; Case C-268/99 *Jany* and a service provider see eg Case C-452/04 *Fidium Finanz*, with regard to the question of citizenship see eg Case C-434/09 *McCarthy*; Case C-34/09 *Ruiz Zambrano*.

¹¹ See in this regard eg Case 175/78 *Saunders*; Case 20/87 *Gauchard*; Case C-527/06 *Renneberg*; Case 53/81 *Levin*; Case C-384/93 *Alpine Investments*.

¹² See Part B, Section I, Chapter A text to (n36-66).

¹³ Beenen 2001:74, 95ff.

¹⁴ See Case 149/79 *Commission v Belgium*.

¹⁵ *Ibid* ¶10.

duties must involve acts of will which affect private individuals by requiring their obedience or, in the event of disobedience, by compelling them to comply. To make a list...is practically impossible'.¹⁶ While environmental protection measures can certainly involve coercion, it solely must be determined whether the matter involves coercion rather than whether it protects the environment. Hence, this concept does not permit the integration of environmental considerations either.

3. Restrictions in Free-Movement Law

The picture is more complex when determining whether the freedoms are restricted. While the Court previously focused on direct and indirect discrimination tests and later on product requirements and selling arrangements tests in the area of goods, it more recently adopted a market access test.¹⁷ These three tests will be examined below. It will be shown that the discrimination test seems more conducive to the first form of integration,¹⁸ while the current product requirements/selling arrangements and market access tests make such integration more difficult.

¹⁶ Opinion AG Mancini Case 307/84 *Commission v France* 1732, see also Opinion AG Mayras Case 152/72 *Sotgiu v Deutsche Bundespost* 171.

¹⁷ For the approach taken by the Commission when examining environmental measures and their compliance with the free-movement provisions European Commission, Single Market and Environment:¶17. See also with regard to goods in general European Commission *Free Movements of Goods Guide to the Application of Treaty Provisions Governing the Free Movement of Goods* and in particular goods and environmental protection Vial 2007.

¹⁸ The clear demarcation in order to prevent conflicts between environmental protection and free movement.

a) Discrimination

The Court's approach to defining restrictions in free-movement law can be divided into a test based on discrimination and tests which go beyond discrimination. This section shows that a test based on discrimination is more conducive to the first form of integration, although the discrimination test used by the Court does not permit the first form of integration.¹⁹

Under the discrimination test a measure is found to restrict the freedoms where domestic and foreign actors or products are treated differently.²⁰ This concept not only covers measures distinguishing on the basis of the origin but also cases where the measures apply legally without distinction but in fact make cross-border transactions more difficult.²¹ The CJ has thereby extended the scope of discrimination to cover not only direct but also indirect discrimination.²²

A classical example of discrimination is the application of different environmental standards to foreign and domestic products. At first glance this concept does not seem to permit the first form of environmental integration, ie clear demarcation in order to avoid conflict. This is because the question of whether two cases are treated differently seems to

¹⁹ Yet, it offers a good starting point for such integration, see text to (n99ff).

²⁰ See eg Case 154/85 *Commission v Italy*; Case 51-54/71 *International Fruit Company* for restrictions on the free movement of goods, Case 15/79 *Groeneweld v Produktschap* for export restrictions; Case C-527/06 *Renneberg* for restrictions of services; Case 81/87 *Daily Mail*; Case 107/83 *Klopp* for establishment; on taking up work Case 2/74 *Reyners* and on restrictions on the pursuit of work Case C-464/98 *Stefan*; Case C-224/01 *Köbler* for capital. On the question as to what extent the different freedoms display a common approach in general see eg Oliver/Roth 2004.

²¹ See eg Case 207/83 *Commission v Ireland* ¶17-18.

²² This also can be seen as setting the scene for the market access test examined below (n65-98), see eg Snell 2010:70ff.

be a neutral one, essentially concerned only with comparing foreign and domestic products.²³

However, the CJ in *Walloon Waste*²⁴ partially opened the door for such integration. *Walloon Waste* concerned a prohibition of imports of certain kinds of waste into the Belgian region of Wallonia.²⁵ The Court found that a measure prohibiting the importation of non-hazardous waste into the Wallonia was not discriminatory, although the measure treated foreign and domestic waste differently.²⁶ It held that:

[I]n assessing whether or not the barrier in question is discriminatory, account must be taken of the particular nature of waste. The principle that environmental damage should as a matter of priority be remedied at source, laid down by Article [191(2)]TFEU as a basis for action by the [Union] relating to the environment, entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste...It follows that having regard to the differences between waste produced in different places and to the connection of the waste with its place of production, the contested measures cannot be regarded as discriminatory.²⁷

Such reasoning seems to be a classical form of environmental integration. The environmental principles of proximity and self-sufficiency²⁸ are used in evaluating

²³ See eg Opinion AG Jacobs Case C-379/98 *PreussenElektra* ¶225.

²⁴ Case C-2/90 *Commission v Belgium*.

²⁵ On the reasoning of why Member States cannot demand that waste exported from their territory must be treated in compliance with its standards see Case C-324/99 *DaimlerChrysler* for a comment van Calster 2002.

²⁶ Cf also de Vries 2006:60.

²⁷ Case C-2/90 *Commission v Belgium* 34–36.

²⁸ With regard to the problems of *Walloon Waste* and the source principle see *von Wilmsky 1993*; *Chalmers 1994* 280–287.

discrimination. This seems to suggest that environmental integration is possible. However, such a conclusion cannot be drawn from this case for two reasons:

First, the Court has not used this approach again and could even be said to have retracted from this kind of reasoning in later judgments. For example, in the *Dusseldorp* case, the Court did not apply this reasoning in the context of waste for recovery. *Dusseldorp* concerned an export ban; such bans are inherently discriminatory. The Court found that the measure constituted a restriction that was not justified by the aim of ensuring the profitability of the recycling facility, which in turn was claimed to protect the environment by ensuring the recovery of waste.²⁹ Nonetheless, the Court's reasoning suggests the possibility of using the mandatory requirement of environmental protection to justify such a measure.³⁰ This could mean that the CJ viewed the measure as equally applicable since typically only indistinctly applicable measures can be justified by mandatory requirements.³¹ *Dusseldorp* was confirmed by *Sydbavnens* where the Court also rejected the claim that the application of proximity and self-sufficiency principles 'in particular in the case of waste destined for recovery' could justify the restriction.³² Moreover, in *Bluhme* the Court did not follow AG Fennelly who suggested an approach along the lines of *Walloon Waste* to find that

²⁹ Case C-203/96 *Chemische Afvalstoffen Dusseldorp* ¶40 The Court has been criticised for not sufficiently taking into account the principles of proximity and self-sufficiency, as the transport of waste as such can create environmental risks no matter whether the waste is hazardous or not, see Notaro 1999:1316.

³⁰ Notaro 2000:308.

³¹ This links back to the issue of whether discriminatory measures can be justified by mandatory requirements, see Part C, Section I, Chapter A, text to (n23ff).

³² Case C-209/98 *Sydbavnens Sten & Grus* ¶48.

a Danish measure which protected the local brown bee would be indistinctly applicable.³³ Instead, it found a restriction without examining whether the measure was distinctly or indistinctly applicable, focusing solely on its justification.³⁴ Only *Outokumpu* might at first sight be seen as supporting the *Walloon Waste* reasoning. The Court in *Outokumpu* allowed different tax levels ‘according to the manner in which the electricity is produced and the raw materials used for its production’.³⁵ Yet, the context of this finding in the judgment suggests that environmental protection was used as a justification. This justification itself was, however, subject to the proviso that it applied without discrimination.³⁶ Thus, it seems that the Court’s approach in *Walloon Waste* was not upheld in the subsequent case law.

Second, the *Walloon Waste* approach cannot be classified as the first form of integration. In *Walloon Waste*, the Court used the environmental principles only to find that the measure was not discriminatory. That does not, however, mean that the measure is excluded from the scope of the market freedom. The finding only opens the door for mandatory requirements to apply, for a measure to escape via *Keck* or to find that the measure is not hindering market access.³⁷ Thus, *Walloon Waste* cannot be seen as an example of the first form of integration, ie a clear demarcation between environmental protection and the freedoms in order to prevent conflicts. Instead, the *Walloon Waste* approach paves

³³ Opinion AG Fennelly Case C-67/97 *Criminal proceedings against Ditlev Blubme* ¶24-25. See also Opinion AG Geelhoed Case C-320/03 *Commission v Austria* ¶89-95 who examines the general context of the environmental protection measure and finds it not to be (indirectly) discriminatory. The Court again did not consider this question but mainly focused on the issue of justification.

³⁴ Case C-67/97 *Criminal proceedings against Ditlev Blubme* ¶23-38.

³⁵ Case C-213/96 *Outokumpu* ¶31.

³⁶ Cf *Ibid* ¶30-41.

³⁷ See Part C, Section I, Chapter A.

the way for the second form of integration, ie a balancing via mandatory requirements.³⁸ However, the judgment might establish the basis for an alternative approach that allows for the first form of integration in the area of the freedoms.³⁹

b) Beyond Discrimination

If a test beyond discrimination is used to determine a restriction, the first form of environmental integration is even more difficult to achieve. The Court's interpretation of restrictions beyond discrimination was most famously displayed in the *Dassonville* formula. The Court held that restrictions are 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially intra-community trade'.⁴⁰ This potentially all-encompassing definition also seems applicable in other freedoms.⁴¹ Originally, the Court seemed to have limited this broad definition by allowing only 'reasonable measure[s]'.⁴² This limiting factor was later developed into the mandatory requirements.⁴³ This broad interpretation meant that essentially all national measures were subjected to the mandatory requirements test. The *Dassonville* test in free-movement law would, thus, mean that all environmental measures would be within the scope of the market freedom and would subsequently need to be justified. Under such an approach the first

³⁸ Cf Opinion AG Jacobs Case C-203/96 *Chemische Afvalstoffen Dusseldorf* ¶46:

³⁹ Such an approach is developed below, see text to (n99ff).

⁴⁰ Case 8/74 *Dassonville* ¶5.

⁴¹ See eg Joined Cases C-369/96 and C-376/96 *Arblade* ¶33; Case C-76/90 *Säger* ¶12 for services; Case C-55/94 *Gebhard* ¶37 for establishment; Case C-415/93 *Bosman* ¶96 for workers.

⁴² Case 8/74 *Dassonville* ¶6.

⁴³ See Part C, Section I, Chapter A.

form, ie the clear demarcation in order to prevent conflicts, would not exist and the focus would solely be on balancing, the second form of integration.

The Court recognised that the broad *Dassonville* test created problems, as it gave traders the ability to challenge ‘any rule whose effect is to limit their commercial freedom’.⁴⁴ Consequently, it re-examined its case law and developed a more elaborate test.⁴⁵ This re-examination led to the *Keck* test for goods and the market access test in the other freedoms,⁴⁶ which was more recently also endorsed in the area of goods.⁴⁷ Both tests are examined below with regard to their potential to integrate environmental protection via the first form of integration.

i. Keck

The *Keck* judgment does not seem to offer room for environmental integration. In *Keck* the Court drew a distinction between ‘product requirement’ and ‘certain selling arrangements’.⁴⁸ While the *Dassonville* formula would apply to product requirements, ‘certain selling arrangements’ would not be a restriction if they were non-discriminatory.⁴⁹

⁴⁴ Case C-267/91 and C-268/91 *Keck and Mithouard* ¶14.

⁴⁵ *Ibid.*

⁴⁶ Eg establishment Case C-254/98 *TK-Heimdienst* ¶26-29; services Case C-518/06 *Commission v Italy* ¶70; workers Case 464/02 *Commission v Denmark* ¶36.

⁴⁷ See Case C-265/06 *Commission v Portugal* ¶33ff; Case C-110/05 *Commission v Italy* 56ff; Case C-473/98 *Toolex* ¶35ff; Case C-142/05 *Mickelsson and Roos* ¶25ff. See also Case C-205/07 *Gysbrechts* which extended the scope of export restrictions beyond discrimination. On *Gysbrechts* and its symmetry to MEQs see Defossez 2009; Brigola 2009; Weatherill 2009. See also Dawes 2009.

⁴⁸ The *Keck* approach based on the selling arrangement approach has been rejected in other freedoms see eg Case C-463/00 *Commission v Spain* 59–61; Case C-384/93 *Alpine Investments* ¶33-39; Case C-415/93 *Bosman* ¶102-104.

⁴⁹ Case C-267/91 and C-268/91 *Keck and Mithouard* ¶15-17.

The classification as product requirement or selling arrangement affects the burden of proof. While product requirements are seen as restrictions *per se*, selling arrangements are presumed to be outside the scope. This presumption would have to be rebutted by anyone challenging the rule.⁵⁰ For the integration of environmental considerations the distinction does not seem to make a difference although certain environmental measures such as environmental licences⁵¹ or obligations to sell environmentally harmful products in specific shops⁵² might not be restrictions because they are considered to be non-discriminatory selling arrangements. The *Keck* distinction is based solely on whether the measure is related to the product or to its selling; environmental factors cannot influence this classification.

Yet, the classification itself of environmental measures and other measures as product requirements or selling arrangements can be difficult, particularly where a national measure regulates the selling of a product but in fact affects the product as such. A typical example might be *Schwarz* which concerned a prohibition on the sale of non-packaged confectionery from vending machines for reasons of hygiene.⁵³ In such cases the Court seems to use a centre of gravity approach.⁵⁴ Another example is the so-called dynamic selling arrangements.⁵⁵ These are selling arrangements that are related to the act of selling rather than having a ‘territorial element’. Such measures could, for example, be certain safety requirements for the selling of environmentally dangerous substances or restrictions on

⁵⁰ Cf *Armstrong* 1995:181.

⁵¹ Cf Case C-20/03 *Burmanjer*.

⁵² Cf Case C-189/95 *Franzén*; Case C-391/92 *Commission v Greece*.

⁵³ Case C-366/04 *Schwarz*, see also cases such as Case C-158/04 and C-159/04 *Alfa Vita*; Case C-416/00 *Morellato*; Case C-244/06 *Dynamic Medien*.

⁵⁴ *Barnard* 2013:131–132.

⁵⁵ This distinction is developed in *Mortelmans* 1991.

advertising. Some have suggested that a prohibition on advertising for certain environmentally harmful products could be seen as a selling arrangement and thus not be subject to Article 34 TFEU.⁵⁶ However, even in such cases where the rule appears to be indistinctly applicable, the rule, in fact, may make entering the market more difficult, particularly in cross-border cases. This was emphasised in *De Agostini*⁵⁷ and *TK Heimdienst*.⁵⁸ The national courts were instructed to examine whether the prohibition of certain advertising would deprive the company of all effective means for advertising. The Court explained that not every selling arrangement with a different effect in cross-border situations (indirect discrimination) is a restriction. In *Karner*⁵⁹ and *Burmanjer*⁶⁰ it held that the negative impact of the selling arrangement must be substantial and not be 'too insignificant and uncertain to be regarded as being such as to hinder or otherwise interfere with'⁶¹ cross-border trade. This focus on whether the measure had a discriminatory effect⁶² by impeding access to the market⁶³ in cross-border cases is also prevalent in *DocMorris*⁶⁴ and seems to have paved the way for the market access test.

⁵⁶ Jans/Vedder 2008:238.

⁵⁷ Case C-34/95, C-35/95 and C-36/95 *De Agostini*.

⁵⁸ Case C-254/98 *TK-Heimdienst*.

⁵⁹ Case C-71/02 *Karner*.

⁶⁰ Case C-20/03 *Burmanjer*.

⁶¹ *Ibid* ¶31.

⁶² On whether discrimination in the *Keck* makes sense see Wilsher 2008.

⁶³ On whether discrimination in the *Keck* makes sense see *Ibid* and Davies 2010 who points out that equally applicable would as a matter of economic fact not impede market access and concludes that non-discriminatory rules impeding market access are 'more mystical than real'.

⁶⁴ Case C-322/01 *Deutscher Apothekerverband*.

ii. Market Access

The following part shows that the market access test in its current form prevents the first form of integration, ie the clear demarcation in order to prevent conflicts between environmental protection and the freedoms. Although the test was suggested as an overarching principle of the freedoms,⁶⁵ the Court had adopted a market access test in other freedoms before its explicit recognition in goods. In services, the Court considered any measure which would ‘prohibit, impede or render less advantageous’⁶⁶ as a restriction of Article 56 TFEU. Indistinctly applicable measures which require foreign providers ‘to re-think their business policy and strategy’⁶⁷ can come under this broad definition if this rethinking involves ‘changes and costs on such a scale...[that it makes] access to the...market less attractive’.⁶⁸ This principle was also used by the Court as a basis for its claim that Article 56 TFEU would bar all measures which are ‘liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services’.⁶⁹ In the same way the Court in the context of establishment⁷⁰ seemed to apply a test beyond discrimination early on. In *Gebhard* it found

⁶⁵ See eg Weatherill 1996; Barnard 2001.

⁶⁶ Case C-165/98 *Mazzoleni and ISA* ¶22; Joined Cases C-49/98, C-50/98, C-52-54/98 and C-68/98 to C-71/98 *Finalarte* ¶30; Case C-76/90 *Säger* ¶12; Joined Cases C-369/96 and C-376/96 *Arblade* ¶33.

⁶⁷ Case C-518/06 *Commission v Italy* ¶69.

⁶⁸ *Ibid* ¶70. Occasionally, the market access test is also linked back to the examination of whether cross-border operators would have to shoulder a heavier burden. See eg Case C-442/02 *CaixaBank* ¶13. Some claim that this differential impact test would not be found in persons (Barnard 2001:48ff), while others see the whole market access test as being based on an examination of the differential impact (Snell 2010; Enchelmaier 2012:191).

⁶⁹ Joined Cases C-544&545/03 *Mobistar and Belgacom Mobil* ¶29 see also Case C-275/92 *Schindler* ¶43; Case C-17/00 *De Coster* ¶29; Case C-43/93 *Vander Elst* ¶14.

⁷⁰ In the context of establishment and workers the role of citizenship should not be underestimated, see Case C-34/09 *Ruiz Zambrano*; Case C-434/09 *McCarthy*; Case C-256/11 *Dereci*; Case C-85/96 *Martínez Sala*; Case C-60/00 *Carpenter*; Case C-200/02 *Zhu and Chen*. On this matter see eg Condinanzi/Lang/Nascimbene 2008; Kochenov/Plender 2012; Shuibhne 2012.

that any measure ‘liable to hinder or make less attractive the exercise of fundamental freedoms’ would be a restriction.⁷¹ This definition is so broad that it even captured requirements to apply for prior authorisations,⁷² for example in an environmental context, and any measure which is ‘a serious obstacle to the pursuit of...activities via a subsidiary in the...Member State, affecting...access to the market’.⁷³ Regarding workers, the Court in *Bosman* found that all restrictions deterring ‘a national...[from exercising] his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality’.⁷⁴ Thus, it held in *Commission v Denmark* that a restriction would exist where the workers’ access to the market is hindered.⁷⁵ This means that even regulating only the pursuit but not the taking up of an activity can be a restriction.⁷⁶ A similar development of extending the scope beyond discrimination can be seen in the case law on capital.⁷⁷ Finally, the CJ, urged by its AGs⁷⁸ and in particular AG Bot,⁷⁹ explicitly

⁷¹ Case C-55/94 *Gebhard*¶37 see also Case C-299/02 *Commission v Netherlands*¶15 and Case C-299/02 *Commission v Netherlands*¶15; Joined Cases C-171/07 and C-172/07 *Apothekerkammer*¶22; Case C-400/08 *Commission v Spain*¶63; Case C-140/03 *Commission v Greece*¶27; Case C-140/03 *Commission v Greece*¶27; Case C-169/07 *Hartlauer*¶33; Case C-19/92 *Kraus*¶32.

⁷² Joined Cases C-171/07 and C-172/07 *Apothekerkammer*¶23; Case C-169/07 *Hartlauer*¶34.

⁷³ Case C-442/02 *CaixaBank*¶12 see also Case C-400/08 *Commission v Spain*¶64; Case C-518/06 *Commission v Italy*¶64.

⁷⁴ Case C-415/93 *Bosman*¶96 cf Case C-10/90 *Masgio v Bundesknappschaft*¶18-19.

⁷⁵ Case 464/02 *Commission v Denmark*¶36 citing Case C-190/98 *Gruj*¶23.

⁷⁶ Case 464/02 *Commission v Denmark*¶37. See also Joined Cases C-151/04 and C-152/04 *Nadin and Nadin-Lux*¶37.

⁷⁷ See Case C-174/04 *Commission v Italy*¶12; Case C-367/98 *Commission v Portugal*¶44-45 while double taxation is not a restriction cf Case C-128/08 *Damseaux*; Case C-513/04 *Kerckbaert and Morres* for more details see eg Snell 2007.

⁷⁸ See Opinion AG Trstenjak Case C-205/07 *Gjybrechts*¶59-61; Opinion AG Bot Case C-110/05 *Commission v Italy*¶108-138; Opinion AG Maduro Case C-158/04 and C-159/04 *Alfa Vita*¶45.

⁷⁹ Who did not think the *Keck* distinction was useful and called for consistency with the other freedoms towards, Opinion AG Bot Case C-110/05 *Commission v Italy*¶82-85; in a similar direction Opinion AG Maduro Case C-158/04 and C-159/04 *Alfa Vita*¶24-35.

adopted the market access test in the area of goods.⁸⁰ The Court, thus, recently reiterated that any dissuasive effect would be sufficient to find a restriction.⁸¹ It (even) claimed that Article 34 TFEU would contain three principles: non-discrimination, ‘mutual recognition of products lawfully manufactured and marketed in other Member States...[and] free access of EU products to national markets’.⁸² Yet, the issue remains as to whether the market access test must be considered as the overarching principle encompassing discrimination and *Keck* or if it is a third self-standing category.⁸³ From the perspective of environmental integration, this question is not important. Instead, the problem is whether a market access test would permit the first form of integration. To answer this question, one has to establish when market access is hindered. So far, the Court has not clearly detailed how the market access test must be applied and, more precisely, which measures would affect the market access.⁸⁴

A common suggestion based on AG Jacobs’ submission in *Leclerc-Siplec*⁸⁵ is to establish a *de minimis* rule for restrictions of the freedoms⁸⁶ applicable to cases where the

⁸⁰ See Case C-265/06 *Commission v Portugal* ¶33ff; Case C-110/05 *Commission v Italy* 56ff; Case C-473/98 *Toolex* ¶35ff; Case C-142/05 *Mickelsson and Roos* ¶25ff. See also Case C-205/07 *Gysbrechts* which extended the scope of export restrictions beyond discrimination. On *Gysbrechts* and its symmetry to MEQs see Defossez 2009; Brigola 2009; Weatherill 2009. See also Dawes 2009.

⁸¹ Case C-171/11 *Fra.bo* ¶22. Similarly, in *Bonnarde* the Court held that Article 34 TFEU would apply in all cases where the rules ‘may influence the behaviour of consumers and, consequently, affect the access...to the market.’ Case C-443/10 *Bonnarde* ¶30. See also Weatherill 2012: text to fn 11-14 who argues that such a formula with reference to substantial restrictions might lead back to the problem faced during the time of the Sunday Trading cases.

⁸² Case C-385/10 *Elenca* ¶23 see also Case C-456/10 *ANETTI* ¶33; Case C-484/10 *Ascafor* ¶53; Case C-108/09 *Ker-Optika* ¶48.

⁸³ Much has been written on the relationship between product requirement and market access test, see eg Davies 2007-2008; Prete 2008; Pecho 2009; Barnard 2009; Spaventa 2009a; Horsley 2009; Snell 2010; Derlén/Lindholm 2010. See also 2012. The Court however, seems to still use *Keck*’s distinction between selling arrangements and product requirements; see recently eg Case C-531/07 *LIBRO* ¶20.

⁸⁴ See however, the case law on when the effects are too remote and uncertain, text to (n86-99).

⁸⁵ Opinion AG Jacobs Case C-412/93 *Leclerc-Siplec v TFI* ¶45ff. See also Opinion AG Lenz Case C-391/92 *Commission v Greece* ¶18: ‘What should be determinative is the hindrance to the access to the

effect on market access is too remote or uncertain.⁸⁷ A *de minimis* approach creates certain tensions with the CJ's emphatic statement in *Van de Haar* that the degree of the restriction would not be decisive in its assessment.⁸⁸ However, this apparent inconsistency can be resolved. *Van de Haar* applies only after a measure is found to be within the scope of the provision by virtue of being discriminatory.⁸⁹

In *Francesco Guarnieri & Cie* the Court explained that the test of whether the effects of a measure are too remote and uncertain⁹⁰ should establish the 'causal link' between the measure and the restriction of the freedom.⁹¹ The judgment assigned a clear label to the test

market in imported goods'. See also Opinion AG Jacobs Case C-384/93 *Alpine Investments*,^{¶47} who argues for a functional approach examining whether access is substantially impeded rather than a discrimination approach. This test also seems to be supported by Opinion AG Fennelly Case C-190/98 *Graf*,^{¶20}.

⁸⁶ Barnard 2001:52ff. See also Oliver 2010:1469 and Horsley 2012 who explains that the *de minimis* would apply to non-discriminatory market circumstances rules.

⁸⁷ Others have suggested a remoteness test or one based on causation. The main objection against a *de minimis* standard is that it would require a numerical quantification; see Weatherill 1996:990–991; Hatzopoulos 2000:82, cf also Marengo 1984. In favour of a causation test eg Opinion AG La Pergola Case C-44/98 *BASt*,^{¶18}; Opinion AG Fennelly Case C-67/97 *Criminal proceedings against Ditlev Blubme*,^{¶19}; Biondi 1999–2000:487ff; Doukas 2006–2007:206; Spaventa 2009b:253; Pecho 2009:264. For a remoteness test eg Edward/Shuibhne 2008:256; Oliver/Enchelmaier 2010:95; Oliver 2010:1490; Gormley 2011:1599.

⁸⁸ Case 177&178/82 *Van de Haar*,^{¶13} see also Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz*,^{¶68}; Case C-126/91 *Schutzverband v Yves Rocher*,^{¶21}; Case 16/83 *Prantls*,^{¶20}.

⁸⁹ Horsley 2012:751 The distinction has also been described as statistical ('*de minimis*') versus legal (remoteness/causation), see Hatzopoulos 2000:82 who refers to Oliver 1999. Others still see inconsistency, Enchelmaier 2011:468.

⁹⁰ For measures where the effect was too remote and uncertain see eg Case C-134/94 *Esso Española*; Case C-190/98 *Graf*; Case C-291/09 *Francesco Guarnieri & Cie*; Joined Cases C-140/94, C-141/94 and C-142/94 *DIP*; Case C-211/08 *Commission v Spain*; Case C-412/97 *ED*; Case C-379/92 *Peralta*; Case C-93/92 *CMC Motorradcenter v Baskiciogullari*; Case C-69/88 *Krantz*; Case C-44/98 *BASt*; Case C-266/96 *Corsica Ferries France*; Case C-96/94 *Centro Servizi Spediporto* On too insignificant eg Case C-353/06 *Grunkin and Paul*; Case C-168/91 *Konstantinidis*; Case C-391/09 *Rumelić-Vardyn and Wardyn*; Case C-208/09 *Sayn-Wittgenstein*; Joined Cases C-544&545/03 *Mobistar and Belgacom Mobile*; Case C-134/03 *Viacom Outdoor*; Case C-134/03 *Viacom Outdoor*; Case C-231/03 *Coname*; Case C-190/98 *Graf*.

⁹¹ Case C-291/09 *Francesco Guarnieri & Cie*,^{¶17}.

as applied previously in other areas, eg in *Graf*.⁹² This causation approach can also be observed in *Moser*,⁹³ where the infringement was found to be purely hypothetical.⁹⁴ This case law on effects ‘too remote and uncertain’ can be compared to the *Keck* approach.⁹⁵ In both cases non-discriminatory ‘market circumstances rules’ are excluded from the scope⁹⁶ with the rationale that such rules do not affect cross-border trade.⁹⁷

In terms of environmental integration this means that the market access test and its outer boundaries in form of the ‘too remote and uncertain’ case law do not permit the integration of environmental considerations. Whether this test is constructed as a *de minimis* test in form of a quantitative threshold or as a qualitative threshold in form of a causation approach is immaterial. In both cases environmental factors cannot play a role, although the test might exclude certain environmentally beneficial measures from the scope of the freedoms. One example is *Peralta*, where an Italian law prohibited Italian vessels from discharging environmentally harmful caustic soda into the sea. This law decelerated tankers’ cleaning operations, as they could not be performed at sea anymore, and it forced Italian vessels to carry costly equipment thereby making imports of chemical products more

⁹² Case C-190/98 *Graf* ¶24-25.

⁹³ Case 180/83 *Moser*.

⁹⁴ Cf Horsley 2012:740.

⁹⁵ See eg Opinion AG Sharpston Case C-400/08 *Commission v Spain* ¶66-69, 75.

⁹⁶ Horsley 2012:746–747.

⁹⁷ Barnard 2001:51; Spaventa 2009b:264.

expensive. The Court found that this consequence of the prohibition was ‘too uncertain and indirect’ to be considered a restriction.⁹⁸

After having established that the current tests whether based on discrimination, market access or on the distinction between product requirements and selling arrangements (*Keck*) do not provide for the first form of environmental integration, this thesis suggests an alternative approach in the following section.

4. An Alternative Interpretation of Restrictions

An alternative approach to environmental integration in the free-movement law could provide the first form of environmental integration and assist in complying with of Article 11 TFEU. The starting point for such an approach is the *Walloon Waste*⁹⁹ case. In *Walloon Waste* the Court used the proximity and self-sufficiency principles to find that a measure was not discriminatory. These principles are employed to determine which groups of goods must be compared. Similarly, other environmental principles could be used. An example might be the polluter-pays principle which could equally be used to determine the comparable group. A first step in this direction can be witnessed in *Presidente del Consiglio dei Ministri*. The case concerned a Sardinian levy on tourist stopovers by private aircraft and recreational craft not having their tax domicile in Sardinia.¹⁰⁰ The Court established that this levy restricted service providers that originated outside the region or in other Member States because it would

⁹⁸ Case C-379/92 *Peralta* ¶24. The judgment adopts a similar reasoning with regard to services; see *Ibid* ¶52.

⁹⁹ Case C-2/90 *Commission v Belgium*.

¹⁰⁰ For more details see also Part C, Section I, Chapter A, text (n137ff).

make stopovers for them more costly.¹⁰¹ The measure thus, in fact, discriminated against providers from other Member States.¹⁰² When determining the comparable group the Court used the polluter-pays principle and held that

in terms of the consequences for the environment, all natural and legal persons who receive the services in question are – contrary to the contentions of the Region of Sardinia – in an objectively comparable situation with regard to that tax, irrespective of the place where they reside or are established.¹⁰³

This example demonstrates how the polluter-pays principle can be used to determine comparable groups. The Court seemed ready to accept the levy if it complied with the polluter-pays principle and was therefore applied in a consistent manner.¹⁰⁴ The levy would then apply to all operators on the relevant market producing the relevant pollution. However, some problems with such an approach remain:

First, how does this finding relate to the cases of *Dusseldorp*¹⁰⁵ and *Sydhavnens*?¹⁰⁶ One answer might be that in those cases the geographical market was larger. The measures restricted competition on this larger market and thereby prevented the development of more efficient recycling. This answer distinguishes these cases and seems to make sense from an integrated environmental and competition perspective.

¹⁰¹ Case C-169/08 *Presidente del Consiglio dei Ministri* ¶31.

¹⁰² This case might again highlight the problem of distinguishing between direct and indirect discrimination, as it might equally be argued that the law itself discriminated directly against all ‘foreign’ providers.

¹⁰³ *Ibid* ¶37.

¹⁰⁴ See also below, text to (n115ff).

¹⁰⁵ Case C-203/96 *Chemische Afvalstoffen Dusseldorp*.

¹⁰⁶ Case C-209/98 *Sydhavnens Sten & Grus*.

Second, the *Walloon Waste* approach raises theoretical issues. AG Jacobs highlighted that the *Walloon Waste* approach would be ‘flawed...[as] the question whether or not a measure applies without distinction is from a logical point of view a preliminary and neutral one’.¹⁰⁷ The Court’s reasoning would allow a nearly infinite number of measures to escape the classification as discriminatory, based solely on intrinsic qualities or the origin of the product.¹⁰⁸ As convincing as this might sound, the question of discrimination is hardly a neutral one. Every examination of discrimination needs a normative foundation; otherwise, it is impossible to determine whether treating two things differently is an unproblematic distinction or an illegal discrimination. In the case of EU law, such a normative foundation can be found in Article 18 TFEU which prohibits discrimination on grounds of nationality. This principle is admittedly strong and established in the Court’s jurisprudence on the freedoms but will not necessarily help determine which items can be compared. The line between comparable and non-comparable items can be drawn by establishing a certain relationship between two items. Only if such a relationship can be established are the items comparable.¹⁰⁹ The environmental principles of proximity and self-sufficiency or the polluter-pays principle which by definition provide for a differential treatment can be used to draw this line. Thus, *Walloon Waste* calls into question exactly this relationship which makes two items comparable. In other words Belgium was able to establish that the product’s origin was valid criterion for differentiating between apparently identical

¹⁰⁷ Opinion AG Jacobs Case C-379/98 *PreussenElektra* ¶225, see also Bernard 1996:94; Notaro 2000:307; Lorenz 2004:71; Kingreen 2010:540.

¹⁰⁸ Hancher/Sevenster 1993:362–364; Notaro 2000:307.

¹⁰⁹ To determine whether products are comparable a test drawing from the market definition in competition law has been suggested. Products would only be comparable if both would be within the relevant market, see Albin/Valentin 2007:539.

products.¹¹⁰ Moreover, the environmental principles contained in Article 191 TFEU might even be seen as conflicting with Article 18 TFEU's principle of non-discrimination. Thus, it would be overly simplistic to point to the seemingly 'preliminary and neutral' examination of discrimination. From a theoretical point of view the Court's approach cannot simply be dismissed. Instead, a more substantial and elaborate argument is needed to rebuke the Court's finding. Such an argument would need to engage with the concept of discrimination as such and with the way in which the question of comparability is answered. Additionally, the apparent conflict between the normative foundations of the principle of non-discrimination and proximity/self-sufficiency principle would need to be addressed.

Third, the breadth of such an approach would need to be established as well as the results that can be expected from it. As shown in the previous sections, restrictions can either take the form of discrimination, product requirements or substantial obstacles to market access.¹¹¹ Hence, the examination of discrimination might not bear great significance, because the measure can still fall within the two other categories. However, *Keck* and *Commission v Italy*¹¹² made clear that the issue of discrimination comes back into play when examining selling arrangements¹¹³ since only non-discriminatory selling arrangements escape the scope of Article 34 TFEU. In this sense, the *Walloon Waste* approach can provide the first form of integration, ie the prevention of conflict in cases of environmental selling arrangements which appear to be discriminatory. In other words, it would not be

¹¹⁰ Ortino 2004:179–180.

¹¹¹ Recently, Case C-142/05 *Mickelson and Roos*: ¶24; Case C-110/05 *Commission v Italy*: ¶34.

¹¹² Case C-110/05 *Commission v Italy*: ¶36-37; Case C-267/91 and C-268/91 *Keck and Mithouard*: ¶16.

¹¹³ See above, text to (n48-64).

discriminatory where an apparently discriminatory selling arrangement would implement the polluter-pay principle. Furthermore, the *Walloon Waste* approach can assist in achieving the second form of environmental integration by allowing mandatory requirements to come into play to balance the restriction and environmental protection. Yet, it remains to be seen to what extent the Court would follow such a *Walloon Waste*-based approach, in particular after *Dusseldorp* and *Sydhavnens* seem to have overruled it, at least partly.¹¹⁴ As explained above *Presidente del Consiglio dei Ministri* can be interpreted as an indication that the *Walloon Waste* approach can be applied, although this might be limited to cases of direct taxation.¹¹⁵ Finally, if the view is taken that the market access test is in essence also a question of discrimination,¹¹⁶ then the proposed *Walloon Waste* approach might have greater significance.

However, if the market access test is considered to be a separate test from discrimination, the next step is to examine whether the market access test would permit environmental integration. As explained above,¹¹⁷ the essential problem is determining a threshold beyond which market access is hindered, since nearly any national measure can cause a hindrance. Thus, it might be easier to identify cases where such access is not impeded. As explained above¹¹⁸ the current framework to identify such cases does not permit the integration of environmental considerations. However, drawing from competition law might help achieve such integration. In competition law certain measures aimed at environmental protection were identified and found not to restrict competition:

¹¹⁴ See above, text to (n29-39).

¹¹⁵ Case C-169/08 *Presidente del Consiglio dei Ministri* ¶34.

¹¹⁶ See Snell 2010; Enchelmaier 2012:191.

¹¹⁷ See text to (n65-98).

¹¹⁸ *Ibid*

(1) environmental measures without effect on the product and production diversity, (2) environmental measures with only so-called loose commitments and (3) cases where the restriction is needed to create a market for environmental reasons.¹¹⁹

Cases where an environmental protection measure has no effect on the product and production diversity can be compared to the distinction drawn in *Keck* between product requirements and selling arrangements. In the non-goods case law it corresponds to the Court's finding that market access is hindered where the economic actor must fundamentally rethink business policy and strategy.¹²⁰ Hence, this concept, developed in competition law, seems to add little to the market access test but rather reaffirms *Keck* and the fundamentally-rethink-business-policy-and-strategy approach.

Measures which aim at environmental protection but do not specify the precise way in which this aim should be achieved are not seen as restrictions of competition. An example from competition law is an agreement by undertakings to reduce their CO₂ or other emissions by a certain percentage but leave open how this feat is to be achieved. Transposed to the context of the freedoms this could mean that the State would require all undertakings in a certain market to improve their individual performance by a certain percentage. The problem, however, is that the cleanest operator which has already invested and is thus producing less pollution may face excessive costs to improve even further. Such a result would be contrary to the polluter-pay principle as it would impose the highest costs on the cleanest operator. The difference between competition law and the freedoms is that in the

¹¹⁹ See Part B, Section I, Chapter B, text to (n26ff).

¹²⁰ Case C-518/06 *Commission v Italy* ¶69.

case of loose commitments in competition law the environmental target is not set by the State but by the undertakings. It seems unlikely that undertakings would agree on such a standard that would involve excessive costs for the cleanest undertaking.¹²¹ Thus investigation is needed to determine whether the loose commitments principle could at least apply when States set standards with absolute rather than individual targets. This would be the case of classical environmental legislation where a certain standard must be met by all undertakings in a particular market. However, simply concluding that such environmental regulation would not restrict the freedoms because it does not restrict market access would be too far-reaching. Additionally, it seems at odds with the case law described earlier.¹²² Hence, the idea of loose commitments cannot easily be transposed to the freedoms to determine whether market access is restricted.

In competition law a restriction within the meaning of Article 101(1)TFEU cannot be established where the claimed restrictions are needed to establish a market for environmental reasons, as long as the market is not working properly. The same reasoning can be applied in the context of the market access test, as ‘a market access approach can only sensibly be applied when there is a market to access’.¹²³

¹²¹ The opposite is also unlikely, ie where the most polluting undertaking would face excessive costs. On the one hand, the involvement of undertakings would in general prevent excessive costs but, on the other hand, it might water down environmental standards.

¹²² See text to (n65-98).

¹²³ Odudu 2009:241.

However, a difficulty might arise from cases suggesting a ‘right to a market’. This issue is of particular importance for environmental protection measures because such measures often involve a total ban on the polluting activity or product.

A case of a ban in a non-environmental context suggesting a ‘right to a market’ is *Schindler*.¹²⁴ In this case a British rule prohibiting national lotteries was under scrutiny. A German provider residing in the Netherlands sent UK customers invitations to participate in the German national lottery. The Court found that the measure was non-discriminatory¹²⁵ but still restricted the freedom to provide services.¹²⁶ A similar pattern can be observed in the cases relating to the use of goods. In *Commission v Portugal*, prohibiting the attachment of tinted film to windows of motor vehicles restricted market access.¹²⁷ Equally, in *Commission v Italy* the Court found that prohibiting trailers designed for motorcycles ‘prevent[s] demand from existing in the market at issue for such trailers and therefore hinders their importation’.¹²⁸ But even where rules do not prohibit the use¹²⁹ but merely regulate the products’ use, market access can be hindered. This is demonstrated by *Mickelsson*. The Court in *Mickelsson* found that market access was restricted if the rules prevented ‘users of personal watercraft from using them for the specific and inherent purposes for which they were

¹²⁴ Case C-275/92 *Schindler*.

¹²⁵ *Ibid*¶47-48.

¹²⁶ *Ibid*¶45. Although it could be justified see, *Ibid*¶46ff.

¹²⁷ Case C-265/06 *Commission v Portugal*¶31-36.

¹²⁸ Case C-110/05 *Commission v Italy*¶57.

¹²⁹ On bans as restrictions see eg Oliver/Enchelmaier 2007:677ff; Reich 2008; Prete 2008:145–149 .

intended or...[if the rules would be] greatly restricting their use'.¹³⁰ In such a case the rules would affect the consumers' behaviour thereby restricting market access.¹³¹

Yet, these cases do not necessarily contradict the finding that a restriction does not exist where measures are needed to establish a market for environmental reasons. In all of these cases a market already existed and the application of a test to determine the market, eg the SSNIP test,¹³² would have resulted in the inclusion of the market at issue.¹³³ In *Schindler*, the geographical market was restricted by the prohibition. In *Mickelsson*, the Court even identified¹³⁴ the market as personal watercrafts and in *Commission v Italy* the Court held that the restriction 'prevent[ed] demand from existing *in the market at issue*'¹³⁵ (emphasis added). In other words, if it were not for the restriction the market would be geographically broader. In *Commission v Portugal*, the law meant that having tinted glass was legal if it complied with the light transmittance standard. And although the same result in terms of light transmittance could be achieved by fitting the relevant tinted film, the fitting was prohibited. Thus, the regulation artificially narrowed the market to only tinted glass. This explanation shows that these cases do not prevent the transposition of the concept that a restriction does not exist where a measure is needed to establish a market for environmental reasons. The cases suggesting a right to a market are essentially concerned with situations where a market

¹³⁰ Case C-142/05 *Mickelsson and Roos* ¶28.

¹³¹ *Ibid* ¶26-27.

¹³² The small but significant and non-transitory increase in price is one test used in competition to establish the relevant market. On the SSNIP test and other ways to determine the relevant market see eg Commission Notice on the Definition of Relevant.

¹³³ For a test along the line of market definition in competition law also Albin/Valentin 2007:539; Davies 2010.

¹³⁴ Although without any detailed analysis or test.

¹³⁵ Case C-110/05 *Commission v Italy* ¶57.

already exists. In contrast, in cases of environmental measures aimed at establishing a market, the market would not exist without the measure. Thus, the access to this market cannot be restricted.

5. Conclusion on Free-Movement Law

This chapter investigated the first form of environmental integration in free-movement law. It examined the extent to which the current framework of analysis allows for the first form of integration, ie integration which prevents conflicts between environmental protection and the freedoms, and showed that the room for such is limited. It also suggested an alternative approach to improve the first form of integration which draws on lessons from competition law and State aid law.

F. Conclusion Section I

Part B examines the first form of environmental integration, and this section investigated supportive integration which is concerned with the extent to which the legal framework (competition, State aid and free-movement law) can be interpreted to permit environmentally beneficial measures.

The section explained that competition law provides room for the first form of environmental integration, while free-movement law does not seem to. State aid law not only sits between competition law and free-movement law in that it aims to prevent the State from unduly distorting competition between undertakings, but it also takes the middle ground in terms of the first form of environmental integration. It permits for the first form of integration in some areas, but a general approach allowing such integration cannot be observed.

Section I showed that the aim of excluding public interests such as environmental protection¹ from the competition analysis led to the development of an elaborate framework that helps to clearly identify cases where environmental protection and competition law do not conflict. In such cases the aims may be pursued simultaneously or may even be mutually supportive. In contrast, free-movement law accepted early on that restrictions can be balanced against public interests such as environmental protection. The pressure to exclude environmental protection from the balancing that led to the above-mentioned framework for the first form of integration in competition law was absent in free-movement law. This

¹ On this debate see Part A text to (n141ff).

might explain why the current framework in the free-movement area does not offer room for such integration. Competition law's more developed framework seems to have partially inspired State aid law which, however, offers only limited space for this form of integration. State aid law might not have felt the need for a more general approach, as environmental protection could be balanced under Article 107(3)TFEU.

The suggested improvements which build upon the experience gained in the context of competition law should permit more environmental integration in State aid and free-movement law. However, it should be pointed out that the current framework of those areas means that the potential improvement is greater for State aid than for free-movement law.

After having examined the first form of integration in cases where a measure is aimed at improving environmental protection (ie supportive integration), the thesis turns to analysing preventative integration in the next section.

SECTION II: PREVENTATIVE INTEGRATION

Section I examined the first form of environmental integration with regard to supportive integration. This Section II will investigate the extent to which preventative integration is possible. In contrast to supportive integration where the relevant provisions are interpreted to allow environmentally beneficial action, preventative integration means that the provisions are interpreted so as to prevent actions that lead to environmental degradation. The chapter examines whether the first form of integration, ie the demarcation of the scope, can be used to pursue the objective of preventing environmental damage in competition, State aid and free-movement law by interpreting these provisions to prevent environmentally damaging behaviour. The first form of integration can either occur when defining the realm of application, ie the scope of the provision, or when the extent of the exception is determined. This section explains that such integration is not possible in competition, State aid law or free-movement law, because this would raise serious questions regarding the EU's competence and the rule of law.

A. Competition Law

The basic idea of preventative integration is to interpret the competition provisions of Articles 101 and 102 TFEU in a way which would prevent undertakings from engaging in conduct that increases pollution.¹ However, examples that are often given in this context do not show any specific environmental integration. Rather, they seem to reflect classical principles of competition law applied to environmental products.

For example, Kingston suggested that it would be unfair within the meaning of Article 102(a) TFEU if a dominant undertaking imposed the condition not to object to the environmentally harmful nature of a product or service.² Other examples under Article 102 TFEU could encompass the refusal to licence environmentally friendly technology, hindering market entrance of an environmentally friendly product or service, attempts to eliminate such products³ or cases of discrimination against environmentally friendlier customers.⁴ As these cases merely reflect general principles of competition law, it is not the environmental effect of the product or behaviour but the effect on competition that is decisive.

¹ It has been claimed that such an interpretation could be particularly useful as it could help to protect the 'freedom of action of market participants' see Müller-Graff 1992:22–23; Portwood 2000:13; Gasse 2000:143–144. This seems to be based on the idea that the competition provision protects the freedoms of action of market participants, which might itself be a contentious claim.

² See Kingston 2009:215 who is pointing to *GEMA II* and Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)*.

³ Lorenz 2004:146.

⁴ Kingston 2009:211.

Finding an agreement to be prohibited by Article 101(1)TFEU simply because its effect would be greater pollution (without causing competitive harm),⁵ finding that there is no consumer benefit nor improvement of production or distribution under Article 101(3)TFEU or similarly establishing an abuse solely on the basis of the negative environmental impact⁶ raises serious issues. One problem can be seen in the wording of the Articles, although the term ‘restriction of competition’ is an open concept with different interpretations.⁷ An extended total welfare approach,⁸ for example, might be used to argue that environmental degradation would reduce welfare. Yet, the issues raised by such an interpretation are more profound than questions of the applicable welfare standard or the wording: Part A explained that environmental integration can be compared to indirect effect and can be described as a form of internal indirect effect.⁹ Thus, the problems concerning environmental integration are similar to those occurring in the context of indirect effect. The problems are particularly virulent in the case of preventative integration as opposed to cases of supportive integration because the latter brings about positive effects for the individual or the Member State.¹⁰

⁵ Cf Kingston 2012:116–117.

⁶ If such impact can actually be shown. For example, the refusal to licence environmentally friendly technology might in fact be in the interest of the environment. Licences ensures an incentive to develop such technologies. In this sense arguments are the same as in other competition cases.

⁷ For a good overview see eg Fox 2002.

⁸ It is an approach which would look at the total welfare, taking into account the loss caused by environmental degradation.

⁹ See Part A text to (n104ff).

¹⁰ Under competition law, State aid and free-movement law measures might be allowed that would typically be prohibited, thus leading to advantages for private parties (undertakings) and to regulatory freedom for the Member States.

In the context of indirect effect, the CJ held in *Kolpinghuis*¹¹ and *Arcaro*¹² two vertical cases, ie cases concerning the relationship between the State and the individual, that the effects on individuals are an important factor in determining the limits of interpretation. Indirect effect cannot lead to the imposition of criminal liability on individuals. This applies equally in the context of environmental integration. Competition law can also be described as a vertical situation, since certain behaviour is prohibited by State or EU legislation. Moreover, infringements of competition law lead to criminal sanctions in some Member States,¹³ and EU sanctions are so severe that they could be described as being criminal in nature.¹⁴

Furthermore, preventative integration in the context of competition law raises issues regarding the division of powers. Preventing undertakings from increasing pollution by means of Articles 101 and 102 TFEU where no ‘competition problem’ exists is a matter for environmental legislation. It is up to the legislative, the Council and the European Parliament to adopt environmental legislation. Doing so via competition law undermines the division of powers and might even be seen as a misuse of it.¹⁵ This is so because in essence the Commission would be setting the standard for environmental protection in the EU if it found agreements or behaviour to violate Articles 101 or 102 TFEU only because of their negative environmental impact. This issue becomes even more complicated after the

¹¹ Case 80/86 *Kolpinghuis*.

¹² Case C-168/95 *Arcaro*.

¹³ For example the UK Enterprise Act 2002 Section 188, see eg Furse/Nash 2004; Lever/Pike 2005; MacCulloch 2007.

¹⁴ See eg Wouter 1996; Andreangeli 2008:29ff.

¹⁵ Townley 2009:247–248; Odudu 2010:13.

enactment of Regulation 1/2003 because national judges and competition authorities apply Articles 101(1) and (3) TFEU. Thus, even a decision by a judge or national competition authority would effectively set a minimum standard.¹⁶ This means that such a decision would not only prohibit conduct but would also in fact criminalise pollution even below the standard prescribed by criminal or environmental law. In other words the Commission, national competition authority or national judge would adopt a quasi-minimum standard which has not been enacted by the legislature. This creates additional problems with regard to transparency and legal certainty. Undertakings would not know in advance the standard against which they would be measured.¹⁷

Finally, it should be noted that the division-of-power issue applies equally with regard to the competence of the EU versus the Member States. This is important as the principle of conferral contained in Article 5 TEU determines that the Union can only act where a competence has been conferred upon it by the Member States. Environmental protection is a shared competence according to Article 4 TFEU, while the ‘competition rules necessary for the functioning of the internal market’ are an exclusive competence of the Union. How the shared competence must be exercised is stipulated in Title XX, Articles 191-193 TFEU. These rules contain safeguards to protect the competence and interest of the Member States. These safeguards would be circumvented and Member States would be deprived of their competences and influence if the Commission were to use Articles 101 and 102 TFEU in such a way as to prevent environmental degradation. Such

¹⁶ In the example above a minimum standard with regard to energy-efficiency.

¹⁷ See also Lavrijssen 2010:655 who also sees problems with regard to the ‘principle of legality.’

actions would infringe the principle of conferral and subsidiarity.¹⁸ Thus, it seems that preventative environmental integration is not possible within Articles 101 and 102 TFEU.

¹⁸ Cf also Bleckman/Koch 1995:117, 120-121 who argues that preventative integration would contradict the principle of enumerated powers.

B. Article 106TFEU

Whether preventative integration would be possible within Article 106TFEU is a different issue. Yet, the first form of preventative integration is equally impossible under Article 106TFEU.

In Article 106(2)TFEU preventative integration does not have the same effect as under Articles 101 and 102TFEU. First, an action is not directly illegal if Article 106(2)TFEU is barred due to the environmental impact. Only where the additional conditions of Articles 101 or 102TFEU are fulfilled would a measure be illegal under competition law. Second, in cases regarding Article 106(2)TFEU the Member State is often aiming to defend its actions which seem contrary to competition law.¹ Hence, the situation is closer to that of State aid or the free-movement provisions,² mainly concerning regulatory activities of the State, contrary to competition law which deals with the private actions within a regulatory framework.

Under Article 106(2)TFEU two different situations can be distinguished: cases where an undertaking is entrusted with a non-environmental service of general interest, eg the provision of public transport, and cases where it is entrusted with an environmental service of general interest, eg reforestation of a mined land.³ In cases of undertakings

¹ This can either take the form of a measure contrary to Article 106(1)TFEU, entrusting an undertaking with service of general economic interest which in turn seems to have violated Articles 101 or 102TFEU, or cases where the Member States want to compensate an undertaking for the provision of a service of general economic interest which could be contrary to Article 107TFEU.

² In this regard see below text to (n17-10).

³ Vedder 2003:275f.

entrusted with a non-environmental service of general interest, the first form of preventative integration would imply that these services are not considered to be in the general interest (anymore) because of the negative environmental impact. Such an argument faces the same division-of-powers problems explained earlier.⁴ The reach of Article 106 TFEU exacerbates this problem even further. The Courts have given Member States a wide discretion in defining services of general interest.⁵ This discretion is only limited by the condition that the service needs to be ‘universal and compulsory in nature’.⁶ Member States can, thus, employ services of general interest in all areas of their competence. Preventative integration in the context of Article 106 TFEU would limit this discretion, leading to an all-encompassing prohibition to entrust undertakings with services creating pollution. This result highlights that such an interpretation would severely limit the Member States’ competences.

In cases of a *prima facie* environmental service of general interest creating pollution, an assessment must be made whether the environmental benefits are outweighed by the environmental harm. If, for example, the reforestation of mined land would lead to a certain form of water pollution the reforestation benefit and pollution would need to be balanced. This balancing might lead to not granting the benefits of Article 106(2) TFEU. Balancing of this kind is the second form of integration and is examined in Part C.⁷

⁴ See Part B, Section II, Chapter A, text to (n11-18).

⁵ In more detail Part C, Section I, Chapter C, text to (n14ff).

⁶ Case T-289/03 *BUPA* ¶172.

⁷ See Part C, Section II, Chapter B.

Hence, preventative integration by means of the first form of integration is also not possible under Article 106 TFEU. Given that State aid law is intertwined with Article 106(2) TFEU this raises questions as to whether the same applies to it.

C. State Aid Law

It is occasionally argued that the wording of Article 107(1)TFEU, in contrast to Article 107(3)TFEU, would not allow for the integration of environmental considerations in order to prevent environmental degradation. In assessing Article 107(3)TFEU ‘environmental costs entailed by environmentally damaging aid [would need to be] taken into account’,¹ while taking these into account under Article 107(1)TFEU seems impossible.

In the context of Article 107TFEU two concepts might be used for preventative integration without balancing, ie the first form of integration: the concept of aid in Article 107(1) and the exception for projects of common European interest in Article 107(3)TFEU. The first form of preventative integration within Article 107TFEU would have different effects regarding these two concepts. In the context of Article 107(1)TFEU using the concept of aid to prevent environmental degradation means that a measure would be contrary to Article 107(1)TFEU because of its negative environmental effects. Yet, the measure could still escape the prohibition via Article 107(2) or (3)TFEU. In the context of Article 107(3)TFEU and the projects of common European interest, the situation is different. Aid, which would be contrary to Article 107(1)TFEU, could not escape via Article 107(3)(b)TFEU because of its negative environmental effects.²

Regarding the concept of aid in Article 107(1)TFEU, the polluter-pays principle might come to mind. It is used to determine whether a selective advantage is conferred upon

¹ Kingston 2012:431.

² The other options of Article 107(2) or (3)TFEU would, however, still be open.

the undertaking.³ *Adria-Wien*⁴ and *British Aggregates*,⁵ for example, concerned exemptions from environmental taxes which were found to be contrary to the polluter-pays principle and thereby conferred an advantage.⁶ Under these schemes undertakings that produced greater pollution were exempted from paying the higher tax burden which they would have had to pay if the polluter-pays principle had been adhered to. Yet, in these cases it is not the environmental degradation caused by the undertakings that leads to the finding of selectivity. The fact that aid is given to an environmentally degrading activity is irrelevant. Instead, the polluter-pays principle is used in assessing cases of supportive integration, ie cases where the measure is claimed to be environmentally beneficial. In the cases of environmental taxes, the tax is levied in order to achieve an environmental aim. In such cases the polluter-pays principle is used to assess whether the measure suspected of being State aid is consistent with the claimed environmental aim.⁷ Thus, the polluter-pays principle is not used for preventative integration but for supportive integration.⁸ Preventative integration cannot occur within the current framework of Article 107(1)TFEU. The negative environmental effects of a measure cannot lead to the finding that State aid is incompatible with the internal market. Only a Rule of Reason within Article 107(1)TFEU could achieve this result.

³ See Part B, Section I, Chapter D, text to (n105ff).

⁴ Case C-143/99 *Adria-Wien*.

⁵ Case T-210/02RENV *British Aggregates*; Case T-210/02 *British Aggregates*; Case C-487/06P *British Aggregates*.

⁶ On such tax scheme Community Framework for State Aid for Research and Development; van Calster 2000; Boeshertz 2003; Renner-Loquenz 2006.

⁷ See Part B, Section I, Chapter D, text to (n105ff).

⁸ *Ibid.*

Such a Rule of Reason would, however, be the second form of integration investigated in Part C.⁹

In terms of Article 107(3)(b)TFEU and projects of common European interest, the argument for preventative integration would be that environmentally damaging aid could not be a project of common European interest because a common European interest would not exist if the aid has negative environmental effects.¹⁰ This situation is similar to one described under Article 106(2)TFEU.¹¹ Environmental and non-environmental projects of common European interest can be distinguished, namely, as projects which do not aim to improve the environment and those which have such an objective. An example of the first type could be a research and development initiative,¹² while carbon capture and storage is an example of the second type.¹³ In cases of a *prima facie* environmental project of common European interest, the environmental benefits of the project need to be weighed against the environmental harm caused to establish the net effect. This balancing is the second form of integration and will be examined further in Part C.¹⁴ Another option would be to argue that any environmentally damaging project cannot be of common European interest *per se*. Hence, projects which would typically fall under Article 107(3)(b)TFEU could not fall under this clause due to their environmental harm. However, to determine what is within the common European interest, the aims of the European Union need to be taken into

⁹ See Part C, Section I, Chapter C.

¹⁰ The other options of Article 107(2) or (3)TFEU would, however, be still open.

¹¹ See Part B, Section II, Chapter B.

¹² See Community Framework for State Aid for Research and Development: heading 4.

¹³ Community Guidelines on State Aid for Environmental Protection (2008): ¶69.

¹⁴ See Part C, Section II, Chapter C.

account.¹⁵ The different aims would need to be balanced, considering not only the positive but also the negative effects of the measure.¹⁶ Thus, Article 107(3)(b) TFEU can also only offer the second form of integration.¹⁷

¹⁵ von Wallenberg/Schütte 2011 [45 Ergänzungslieferung]¶50.

¹⁶ Cremer 1995:147, 156; von Wallenberg/Schütte 2011 [45 Ergänzungslieferung]¶54.

¹⁷ See Part C, Section II, Chapter C.

D. Free-Movement Law

In the context of the free-movement law, it is likewise not possible to integrate environmental considerations in order to prevent environmental degradation. In particular the first form of integration seems difficult to achieve. The concepts that determine the application of the freedoms cannot easily be influenced by environmental considerations to prevent environmental degradation.

As explained in more detail above,¹ the freedoms apply to an individual or company (1) which has the nationality of an EU Member State, (2) which is engaged in economic activity (where needed), (3) which is a worker, self-employed or service provider, or a citizen, (4) where a cross-border element is present, (5) where the public service or official authority exception is not applicable and most importantly (6) if the restriction is not ‘justified’² by mandatory requirements.³

None of these elements can be used to integrate environmental considerations. This finding which has been made in the context of supportive integration,⁴ ie cases where environmental protection measures are at stake, applies equally to cases where a measure leads to environmental degradation, in other words preventative integration.

¹ See Part B, Section I, Chapter B, text to (n4ff).

² As explained the term ‘justified’ might be misleading as the application of the mandatory requirements doctrine leads to the finding that the measure is not to be within the scope of the prohibition. Yet, in cases of mandatory requirements as well as written justifications a balancing between the restriction and the legitimate aim of the measure takes place.

³ The term mandatory requirements is used here in the broad sense, meaning unwritten exceptions or justifications to the freedoms, thus also encompassing eg imperative requirements.

⁴ For the details of these concepts see Part B, Section I, Chapter E.

Possible options for supportive environmental integration in the context of the freedoms have been examined above.⁵ As explained, the Court uses the discrimination, the *Keck* and the market access test to determine whether a restriction exists. Regarding preventative integration, these tests need to be considered in terms of their suitability to prevent measures that cause environmental degradation. Yet, it is difficult to argue that a measure discriminates or hinders market access because it causes environmental damage. The question of the environmental effect is different from the question of discrimination and market access.⁶ Equally, the *Keck* distinction⁷ (based on selling arrangements and product requirements) cannot be interpreted in a way which takes account of the negative environmental effect of the measure. Rather, it examines whether the measure is product- or sales-related.⁸

Preventative integration seems possible only in the context of mandatory requirements. It could be argued that measures damaging the environment should not be allowed the benefit of mandatory requirements. These requirements operate differently from the other conditions already examined. They were created to allow the Court(s) to find that a measure, although *prima facie* a restriction, is not within the scope of the freedoms. The Court(s) performs a balancing test between the restriction and the legitimate interest of the

⁵ See Part B, Section I, Chapter E.

⁶ *Ibid.*

⁷ Case C-267/91 and C-268/91 *Keck and Mithouard* ¶15-17.

⁸ This distinction can, however, also be difficult, see with regard to *Keck* Part B, Section I, Chapter E text to (n48-64).

Member State.⁹ Such balancing means that the second form of integration would take place.

The issue of balancing will be examined in Part C.¹⁰

⁹ See in this regard Part C, Section I, Chapter A.

¹⁰ See Part C, Section II, Chapter D.

E. Conclusion Section II

This section examined the first form of environmental integration in the context of preventative integration, ie the extent to which the provisions can be interpreted so as to prevent actions that lead to environmental degradation. It has shown that such integration raises serious questions regarding the EU's competence and the rule of law and is thus not possible within competition, State aid or free-movement law.

CONCLUSION PART B

Part B investigated the first form of environmental integration both in terms of supportive and preventative integration. Section I examined the first form of integration with regard to supportive integration, namely the prevention of conflicts between environmental protection measures and competition, State aid and free-movement law. It showed that such integration currently occurs primarily within the context of competition law. Within State aid law there is very limited room for such integration while free-movement law does not currently offer any space for such integration due to the expansive definition ‘selectivity’ and ‘effect on competition’ in State aid and ‘restriction’ in free-movement law. The section suggested improvements based on the experiences gained in competition law which help to provide more room for such integration in State aid and free-movement law.

The second section examined whether the first form of integration is possible with regard to preventative integration, namely interpreting the competition, State aid and free-movement provisions in a way so as to prevent environmentally damaging measures. It explained that such integration is currently not possible and that it is moreover not advisable to aim for such integration as it raises serious problems in terms of the EU’s competence and the rule of law.

After having examined the first form of integration the thesis now turns to the second form of integration, balancing, in Part C.

PART C
THE SECOND FORM OF ENVIRONMENTAL INTEGRATION

INTRODUCTION PART C

Part B investigated the first form of environmental integration, the prevention of conflicts between environmental protection and competition, State aid and free-movement law. Part C turns the focus to the second form of integration.

As described earlier, the second form of integration occurs in cases of conflicts. It is concerned with the question of how balancing works in cases where environmental protection and competition, State aid or free-movement law come into conflict. The starting point of such a balancing exercise is the premise that the EU's aims of protecting the environment, competition and free-movement are of equal weight.¹ The balancing can take place either within written justifications or when determining whether a measure is within the scope of the relevant prohibition. Part C is likewise subdivided into two sections. The first section investigates supportive integration; the second, preventative integration.

¹ See in this regard Part A, text to (n74ff).

SECTION I: SUPPORTIVE INTEGRATION

This section examines supportive integration via the second form of integration. Namely, it examines whether and to what extent the different free-movement, State aid and competition provisions can be interpreted in a way that allows for environmental protection to be balanced against an alleged restriction. The section shows that free-movement law allowed such balancing exercises early on. State aid law followed swiftly by interpreting certain parts of the provisions so as to allow this form of balancing. In contrast, competition law did not implement balancing for a long time. Against the backdrop of the discussions about excluding environmental protection as public policy from the competition analysis² such balancing still poses challenges and may even be seen as contentious. This section suggests improvements for such a balancing framework, both for State aid as well as competition law. It thereby builds on the experience of free-movement law.

² See Part A, text to (n141ff).

A. Free-Movement Law

1. Introduction

This chapter examines the second form of environmental integration in the area of the freedoms; ie cases where environmental protection is balanced against a restriction of the freedoms. It shows that the concept of mandatory requirements¹ encompasses environmental protection, and it examines the extent to which environmental protection might be part of the written justification. The chapter highlights that environmental protection can possibly even justify discriminatory measures. Moreover, a framework for the relationship between harmonisation and environmental protection as a mandatory requirement is suggested. Subsequently, the main tools to balance environmental protection with restrictions of the market-freedoms are examined. This examination provides the basis for the concluding part which draws some lessons from State aid law in terms of environmental integration via balancing to further improve the balancing in the area of free-movement law.

2. Mandatory Requirements and Environmental Protection

The balancing of environmental protection in the free-movement area started even before the integration obligation became binding with the Single European Act in 1987. This is even more surprising because environmental protection is not listed in the written justifications of Articles 36, 45(3) 52(1), 63 and 65TFEU. Only Article 36TFEU makes reference to ‘the protection of health and life of humans, animals or plants’ in the context of

¹ The term *mandatory requirements* is used here in the broad sense, meaning unwritten exceptions/justifications to the freedoms, thus also encompassing imperative requirements.

free-movement of goods. Yet, the CJ held that these written justifications have to be interpreted narrowly.² Thus, the Court faced a problem when it broadened the scope of the freedoms beyond discrimination.³ The Court provided an answer in the *Cassis de Dijon*⁴ decision which brought to life the unwritten mandatory requirements exception. This exception can be used to justify restrictions⁵ where the proportionality requirement is fulfilled.⁶ The mandatory requirements exception encompasses a range of aims and can be described as an open-ended list.⁷ The Court only limited the list of justifications by the requirement that purely economic grounds cannot serve as justification.⁸

Regarding the environment, the CJ found in *ADBHU* in February 1985, just days before the Single European Act was signed, that environmental protection ‘is one of the [Union]’s essential objectives’ and that ‘restrictions [can be] justified by the pursuit of the

² See eg Case 29/72 *Marimex*; Case 41/74 *Van Duyn*; Case 113/80 *Commission v Ireland*.

³ See in this regard Part B, Section I, Chapter E, text to (n40ff).

⁴ Case 120/78 *Rene v Bundesmonopolverwaltung für Branntwein*¶8. But see also the earlier Case 8/74 *Dassonville*¶6 where the Court referred to ‘reasonable restrictions’ which would be allowed. With regard to workers see eg Case C-415/93 *Bosman*¶45; for free-movement of persons eg *Ibiza*¶96; Case C-190/98 *Graj*¶23; for services eg Case C-76/90 *Säger*¶12; Case 33/74 *Van Binsbergen*¶10-12; Case C-55/94 *Gebhard*¶37; for establishment eg Case C-55/94 *Gebhard*¶37; Case C-212/97 *Centros*¶43; Case C-503/99 *Commission v Belgium*¶27; Case 107/83 *Klopp*¶19 and for capital eg Case C-483/99 *Commission v France*¶45.

⁵ With regard to the questions whether all or only non-discriminatory restrictions can be justified by mandatory requirements see (n23-94).

⁶ See text to (n127-155).

⁷ See eg Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad*¶13; Case C-484/93 *Peter Svensson and Lena Gustavsson*¶14-16; Case C-55/94 *Gebhard*¶37; Case 120/78 *Rene v Bundesmonopolverwaltung für Branntwein*¶8; Case 113/80 *Commission v Ireland*¶10; Case 25/88 *Wurmser*¶10.

⁸ See Case C-212/08 *Zeturf*¶52; Case C-153/08 *Commission v Spain*¶43; Case C-367/98 *Commission v Portugal*¶52; Case C-398/95 *SETTG*¶23; Case C-171/08 *Commission v Portugal*¶71; Case C-243/01 *Gambell*¶61; Case C-265/95 *Commission v French Republic*¶62; Case C-484/93 *Peter Svensson and Lena Gustavsson*¶16; Case 288/83 *Commission v Ireland*¶28; Case C-35/98 *Verkooyen*¶48; Case C-388/01 *Commission v Italy*¶22.

objective of environmental protection which is in the general interest'.⁹ In 1988 the CJ explicitly recognised environmental protection as a mandatory requirement which can limit the free-movement of goods.¹⁰ To support this conclusion the CJ used its earlier finding,¹¹ that 'the protection of the environment is "one of the Community's essential objectives,"' which was supported further by the Single European Act.¹² The Single European Act had entered into force a year earlier and contained Article 130r(2)EC specifying that 'environmental protection requirements shall be a component of the Union's other policies'. The CJ's decision to include environmental protection in the list of mandatory requirements in the area of goods was also transposed to other freedoms.¹³ At times it appeared that export restrictions were different in this regard as the Court held that

the justification based on the protection of the environment, and in particular the principle...that environmental damage should as a priority be rectified at source, it must be pointed out that the protection of the environment cannot serve to justify any restriction on exports, particularly in the case of waste destined for recovery... . That is so a fortiori where, as in the case before the national court, environmentally non-hazardous building waste is involved.¹⁴

⁹ Case 240/83 *ADBHU* ¶13; 15.

¹⁰ Case 302/86 *Commission v Denmark* ¶8-9, the CJ quoted to Case 240/83 *ADBHU*. See also Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* ¶75; Case C-28/09 *Commission v Austria* ¶119; Case C-320/03 *Commission v Austria* ¶70; Case C-524/07 *Commission v Austria* ¶57; Case C-389/96 *Aber-Waggon* ¶19-20; Case C-463/01 *Commission v Germany* para75; Case C-142/05 *Mickelsson and Roos* ¶32.

¹¹ Case 240/83 *ADBHU* ¶13.

¹² Case 302/86 *Commission v Denmark* ¶8.

¹³ Although in these areas is called imperative requirements etc see eg Case C-384/08 *Attanasio Group* ¶50; Case C-400/08 *Commission v Spain* ¶74 establishment, Case C-169/08 *Presidente del Consiglio dei Ministri* ¶40ff services, Case C-302/97 *Konle* ¶40 capital.

¹⁴ Case C-209/98 *Sydhavnens Sten & Grus* ¶48.

Yet, this ruling has not to be read as preventing environmental protection to justify export restrictions in general.¹⁵ The CJ only held that it could not justify ‘any restriction’.¹⁶ Moreover, accepting environmental protection as a mandatory requirement also corresponds to cases such as *Gysbrechts* which suggests that mandatory requirements apply to export restrictions in the same way as to the other freedoms.¹⁷ The status of environmental protection as justification is, furthermore, exemplified by the Service Directive.¹⁸ Even the Service Directive, which severely limits the application of the mandatory requirements justification,¹⁹ allows environmental protection as a reason to restrict the freedom to provide services.²⁰ Waste management was removed from the scope of the directive altogether.²¹ This might be seen as an indication that environmental protection is different from other mandatory requirements.

Furthermore, environmental protection possesses other features which might distinguish it from other mandatory requirements. First, environmental protection is not just in the national interest as is, for example, the preservation of the financial stability of the national health care system.²² It often has a transnational dimension and can be based on

¹⁵ See also Notaro 2000a:310–311; Davies 2004:208; Jans/Vedder 2008:250.

¹⁶ Case C-209/98 *Sydhavnens Sten & Grus* ¶48.

¹⁷ Case C-205/07 *Gysbrechts* ¶45-47, see also Case C-161/09 *Kakavetsos-Fragkopoulos* ¶51.

¹⁸ Directive 2006/123/EC [2006] OJ 376/3668.

¹⁹ See Hatzopoulos 2007-2008:244ff; Chalmers/Davies/Monti 2010:827.

²⁰ See Article 16(1)(b).

²¹ From the point of view of the environmental integration obligation of Article 11 TFEU this would not have been necessary. The matter is however regulated in more detail in other directives, see eg Directive 2008/98/EC [2008] OJ 312/3 see in particular the Preamble ¶17 and 27.

²² See eg Case C-157/99 *Smits and Peerbooms* ¶72; Case C-385/99 *Müller-Fauré and van Riet* ¶73; Case C-158/96 *Kohl* ¶41; Case C-372/04 *Watts* ¶103. One could equally point to the mandatory requirement used in Sunday trading cases, see eg Case C-169/91 *Stoke-on-Trent*; Case 145/88 *Torfaen*.

primary Union law. This basis can be seen in Article 11 TFEU and in the aim of the European Union for a high level of environmental protection (Article 3(3) TEU) as well as the preamble of the TEU. The preamble calls for the promotion of ‘economic and social progression...taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection’.²³ Second, it seems that environmental protection might receive special treatment in cases of distinctly applicable measures. Such discriminatory measures cannot typically be justified by mandatory requirements which shall be examined in turn.

3. Environmental Protection and Distinctly Applicable Measures

After establishing that environmental protection is a mandatory requirement, the question of whether distinctly applicable measures can be justified by environmental protection requirements needs to be examined. This is because the Court consistently held that a measure can only escape the scope of the freedoms via mandatory requirements if the measure is proportional and applies without distinction.²⁴ Hence, discriminatory measures could not typically be justified by mandatory requirements.²⁵ Traditional case law holds that distinctly applicable measures warrant written justifications.²⁶ As such, environmental protection is not listed in the written justifications of Articles 36, 45(3) 52(1), 63 and

²³ See in this regard also Part A.

²⁴ Case C-243/01 *Gambell*¶65; Case C-55/94 *Gebhard*¶37; Case C-42/07 *Liga Portuguesa de Futebol Profissional*¶60; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica*¶49; Case 182/84 *Miro*¶10; Case 6/81 *Beel*¶7; Cases 788/79 *Gilli and Andres*¶6; Case 94/82 *Kikvorsch*¶6; Case C-67/88 *Commission v Italy*¶4.

²⁵ See eg Enchelmaier 2012:193. With regard to statements by the CJ in this direction see: Joined Cases C-1/90 and C-176/90 *Aragoneses de Publicidad*¶13; Case C-2/90 *Commission v Belgium*¶34.

²⁶ See eg Case C-451/03 *Servizi Ausiliari Dottori Commercialisti*¶36; Case C-263/99 *Commission v Italy*¶15; Case C-388/01 *Commission v Italy*¶19; Case C-153/08 *Commission v Spain*¶37.

65TFEU, although Article 36TFEU makes reference to ‘the protection of health and life of humans, animals or plants’. The other provisions only allow restrictions based on public policy, security or health. All of these provisions are said to be applied narrowly as they are exceptions to the general rule.²⁷

During the negotiations at the IGC on the Amsterdam Treaty, including environmental protection as a ground of justification was discussed, but the proposed change was not adopted. The reason the proposal was dropped is unclear. It might have been the result of some other disagreement between Sweden, Austria and Germany. While Sweden and Austria supported the inclusion of environmental protection as well as measures protecting the working conditions,²⁸ Germany wanted to include environmental protection and other aims but not the protection of working conditions.²⁹ It seems that the Member States did to not fully understand the difficulty the Court faced in cases of distinctly applicable measures. Rather, the Member States felt that changes were not necessary because such amendments would in any case only codify the Court’s case law, as Finland explained.³⁰ Given the disagreement over the inclusion of the protection of working conditions and the view that any change would only codify the case law it might have seemed sensible to the Member States to close the discussions without changes. Such an interpretation is supported

²⁷ See eg Case 29/72 *Marimex*; Case 41/74 *Van Duyn*; Case 113/80 *Commission v Ireland*.

²⁸ Swedish Submission to the IGC (24 September 1996):3; Austrian Submission to the IGC (20 September 1996):4; Austrian Submission to the IGC (23 May 1996).

²⁹ German Submission to the IGC (25 October 1996):2.

³⁰ Finnish Submission to the IGC (30 October 1996):1.

by the summary of the Irish Presidency which noted that an amendment of the written exception was put forward but not discussed conclusively.³¹

Hence, the Court was left with the problem of how to handle distinctly applicable measures which seemed to be justified by environmental protection.³² One option could be to allow a broader reading of the relevant written exception as encompassing environmental protection. Another option could be to apply the mandatory requirement case law although a measure is distinctly applicable.³³ Both routes would essentially require overturning the Court's established case law.

a) Broad Interpretation of Written Justifications

*Walloon Waste*³⁴ seemed to have foreclosed the route of interpreting the written justification of Article 36 TFEU more broadly so as to encompass environmental protection.³⁵ In *Walloon Waste*, the Court distinguished between environmental protection and health hazards in holding that the accumulation of waste 'before it becomes a health hazard, constitutes a danger to the environment'.³⁶ It thereby drew a distinction between environmental protection and the protection of health and life of humans, animals or plants. In contrast,

³¹ Introductory Note by the Irish Presidency to the IGC (17 September 1996):4.

³² Hence, the inclusion of environmental protection as written justification should be debated again in the next round of Treaty changes bearing in mind the problems the Courts face.

³³ Oliver 1999:804–805; Notaro 2000b:490–491.

³⁴ Case C-2/90 *Commission v Belgium*.

³⁵ See Jans/Vedder 2008:242–243 who also points to *Dusseldrop* as another example of the CJ's narrow reading of Article 36 TFEU.

³⁶ Case C-2/90 *Commission v Belgium* ¶30. A reason could be that human health could theoretically always be interpreted as encompassing environmental protection. Only a direct link between human health and environmental protection prevents this, see Zils 1994:94.

the later *Blubme* judgment suggests a more broad reading of the written justifications.³⁷ The case concerned a prohibition on importing bees other than the local brown ones to an island in Denmark, with the view of protecting biodiversity. The Court found that measures to maintain ‘biodiversity [are] aimed at protecting the life of those animals [concerned] and are capable of being justified under Article 36 of the Treaty’.³⁸ In this context, it might also be noted that the Court was lenient regarding whether such measures were possible solely to protect species from extinction or also to protect local populations. Additionally, the Court appears lenient regarding the aim for which the population was to be preserved. It found that Article 36 TFEU applies

so long as the populations in question have characteristics distinguishing them from others and are therefore judged worthy of protection either to shelter them from a risk of extinction that is more or less imminent, or, even in the absence of such risk, on account of a scientific or other interest in preserving the pure population at the location concerned.³⁹

This statement can be seen as a step towards interpreting the written justifications more broadly to integrate environmental protection. The link made between ‘the protection of health and life of humans, animals or plants’ as specified in Article 36 TFEU and the protection of biodiversity could equally be applied to environmental protection more generally. This conclusion is further supported by the broad scope offered by Court in terms of the reasons why the population deserves protection. Hence, Article 36 TFEU can be used

³⁷ Case C-67/97 *Criminal proceedings against Ditlev Blubme*. For a comment see Buschle 1999; Denys 1999b, see also McGillivray/Holder 2001:153f. Others have also pointed to *PreussenElektra* and the mentioning of the protection of humans, animals and plants in this case and in cases such as Case C-389/96 *Aber-Waggon*¶19 and Case C-473/98 *Toolex*¶39ff which would indicate that the written justifications are read more broadly, see Lorenz 2004:82-83, 85-86.

³⁸ Case C-67/97 *Criminal proceedings against Ditlev Blubme*¶33.

³⁹ *Ibid*¶34.

to integrate environmental protection requirements and to justify discriminatory measures by environmental protection.

Such an approach is not necessarily limited to the area of goods, although Articles 45(3) 52(1), 63 and 65 TFEU do not contain a reference to ‘the protection of health and life of humans, animals or plants’. In these areas, the option would be to interpret ‘public security’, ‘public policy’ or ‘public health’ more broadly in order to encompass environmental protection.⁴⁰ However, this interpretation might not be needed. Article 36 TFEU might also be used in the context of other freedoms, as the Court in *Coditel*⁴¹ clarified with regard to services.⁴² Yet, any approach which interprets the written justification more broadly raises fears of opening the floodgates and seems to contradict the Court’s case law that written justifications need to be interpreted narrowly.⁴³ Thus, the issue remains: Should mandatory requirements or a broad reading of the written justification be used to justify direct discrimination in cases of environmental protection and in particular in cases where the justification of Article 36 TFEU is not readily available? For example, recently the CJ in *Presidente del Consiglio dei Ministri*, did not follow the argument for a broad reading put forward by Sardinia. In this case concerning differential treatment of domestic and foreign service providers, Sardinia argued that environmental protection measures can be seen as

⁴⁰ For cases where environmental protection coincides with public health, the protection of animals and plants or public policy see *de Sadeleer/Blumann/Mégret/Dony* 2010:884-384. Another option would be to use the public security/health exception in all cases where the environmental protection measure can protect individuals from considerable harm caused directly by pollution, see *Zils* 1994:109, 117. The question would then be in what time frame the harm would need to occur.

⁴¹ Case 262/81 *Coditel*, ¶10ff.

⁴² It might be pointed out that this seems in direct contradiction to the statement that the written justifications need to be construed narrowly.

⁴³ Although, this case law seems to have already suffered a blow in *Blubme* and was already problematic after *Coditel* applied Article 36 TFEU in an area where the text of the Treaty had not made it available.

protecting public health.⁴⁴ The Court instead examined the environmental protection argument and the public health argument as distinct questions⁴⁵ thereby apparently confirming *Walloon Waste*.⁴⁶

b) Mandatory Requirements as Justification for Distinctly Applicable Measures

The other option in the cases concerning distinctly applicable rules is to abandon the case law that restricts the application of mandatory requirements to indistinctly applicable rules. This suggestion has been made by several Advocate Generals.⁴⁷ It seems surprising that environmental protection as a mandatory requirement should only justify indistinctly applicable measures⁴⁸ since the Treaty does not foresee an abstract hierarchy of different EU aims.⁴⁹

The CJ in *Dusseldorp* left open whether discrimination could be justified by environmental protection as a mandatory requirement or only by Article 36 TFEU.⁵⁰ It has been argued that the later *Sydhavnens* case indicated a move to allow environmental

⁴⁴ Case C-169/08 *Presidente del Consiglio dei Ministri* ¶40.

⁴⁵ *Ibid* ¶45.

⁴⁶ Case C-2/90 *Commission v Belgium* ¶30.

⁴⁷ See eg Opinion AG Trstenjak Case C-28/09 *Commission v Austria* ¶83, 89-91; Opinion AG Leger Case C-80/94 *Wielockx* ¶38; Opinion AG Jacobs Case C-136/00 *Danner* ¶40; Opinion AG Jacobs Case C-379/98 *PreussenElektra* ¶220-233, see also Opinion AG Tesouro Case C-120/95 *Decker* ¶51 who suggest that mandatory requirements should be available for cases of indirect discrimination, while formal/direct discrimination could only be justified by written justifications.

⁴⁸ Cf Opinion AG Trstenjak Case C-28/09 *Commission v Austria* ¶89; Nowak 2006 ¶25; Makowski 2007:159–160.

⁴⁹ See in this regard Part A, text to (n74ff).

⁵⁰ Case C-203/96 *Chemische Afvalstoffen Dusseldorp* ¶44 and 49. Cf also Temmink 2000:92–93; de Vries 2006:60.

protection as justification for discriminatory measures.⁵¹ *Sydhavnens* concerned a prohibition on exports of certain wastes for recovery to ensure that the recovery was economically viable. In this case, the CJ held that environmental protection could not ‘justify *any* restriction on exports’ (emphasis added).⁵² The conclusion drawn from this statement is that *some* export restriction can be justified by environmental protection. Since restrictions on exports are inherently discriminatory it follows that discriminatory measures could be justified by environmental protection.⁵³ Moreover, some also see *Aber-Waggon*⁵⁴ as supporting the conclusion that a distinctly applicable measure can be justified by environmental protection.⁵⁵

Yet, the Court has never formally endorsed such an approach. When AG Jacobs in *Danner* suggested applying mandatory requirements to distinctly applicable measures the CJ did not follow and rejected the proposed justifications.⁵⁶ In *Svensson* the CJ explicitly reiterated that ‘discrimination [can] only be justified on the general interest grounds referred to in’ Articles 36, 45(3) 52(1), 63 and 65 TFEU.⁵⁷ It also seems difficult to rely on *Aber-*

⁵¹ Notaro 2000a:308, 311; Vedder 2001:110f; Heselhaus 2001:646; Scheuing 2001:6; Lorenz 2004:76–77; de Vries 2006:61.

⁵² Case C-209/98 *Sydhavnens Sten & Grus* ¶48.

⁵³ See literature in (n51).

⁵⁴ Case C-389/96 *Aber-Waggon* ¶19.

⁵⁵ Opinion AG Jacobs Case C-379/98 *PreussenElektra* ¶227; Temmink 2000:91–92; de Vries 2006:61; Kingston 2010:794. See also Jans/Vedder 2008:248 who argues that mandatory requirements can apply to ‘differential measures...as long as there is an objective justification’ for the differential treatment.

⁵⁶ Case C-136/00 *Danner* ¶32.

⁵⁷ Case C-484/93 *Peter Svensson and Lena Gustavsson* ¶15f., although the CJ acknowledges that it held in Case C-204/90 *Bachmann* and Case C-300/90 *Commission v Belgium* ‘that rules liable to restrict both free-movement of workers and freedom to provide services could be justified by the need to maintain the integrity of the fiscal regime’ which however would not be the case here.

Waggon for the proposition that mandatory requirements can justify discrimination, since the CJ held that the measure could ‘be justified by considerations of public health *and* environmental protection’.⁵⁸ Thus, the written justification of public health was present. Hence it seems a stretch to interpret this case as precedent for justifying distinctly applicable measures by environmental protection. The statement in *Sydhavnens* could equally be interpreted as *Aber-Waggon*. Thus, environmental protection can justify a distinctly applicable measure when the measure can *also* be said to protect public health or the life of animals as in *Bluhme*.⁵⁹

Additionally, the Court’s reaction to AG Jacobs’ urgent call to clarify the case law on the matter in *PreussenElektra* must be taken into account. In *PreussenElektra* discrimination in a goods case was at stake.⁶⁰ Germany had imposed an obligation on energy companies to buy green energy produced in Germany.⁶¹ AG Jacobs found this to be a discriminatory and protectionist measure⁶² as it restricted traders obtaining such supplies from abroad. The Court was, thus, faced with the question of whether a discriminatory measure could be justified by mandatory requirements or only via the written justification of Article 36 TFEU. And although the Court had been invited explicitly by AG Jacobs to clarify the case law⁶³ the judgment seems to be deliberately unclear. The CJ used both the language of mandatory

⁵⁸ Case C-389/96 *Aber-Waggon* ¶19.

⁵⁹ Case C-67/97 *Criminal proceedings against Ditlev Bluhme*.

⁶⁰ *PreussenElektra* seems to contradict Case C-213/96 *Outokumpu* as the Court in *PreussenElektra* did not require to show that there was the possibility that the energy originated from renewable resources in another MS. On this see also Baquero Cruz/Castillo de la Torre 2001:498f.

⁶¹ On *PreussenElektra* in the light of the European commitment to renewable energy see Weigt 2009:130ff.

⁶² Opinion AG Jacobs Case C-379/98 *PreussenElektra* ¶220-221.

⁶³ *Ibid* ¶229.

requirement as well as that of Article 36TFEU. On the one hand, it held that in determining whether such a measure ‘is nevertheless compatible with [Article 34TFEU] account must be taken, first, of the aim of the provision in question, and, second, of the particular features of the electricity market’.⁶⁴ This statement suggests that the CJ was examining whether environmental protection as a mandatory requirement could justify the restriction. The Court mentioned Article 34TFEU and not Article 36TFEU and used the language that is typically found in mandatory requirement cases.⁶⁵ This reading is further supported by the Court’s finding that the measure would not be incompatible with Article 34TFEU.⁶⁶ On the other hand, this quote could be construed to mean that the discriminatory restriction was justified by Article 36TFEU and therefore not prohibited by Article 34TFEU. Such an interpretation is supported by the CJ’s finding that the ‘policy is also designed to protect the health and life of humans, animals and plants’⁶⁷ which mirrors the formulation of Article 36TFEU.⁶⁸ It has been argued that *PreussenElektra* is a case where the Court used Article 11TFEU to bridge the gap between mandatory requirements and the written justifications.⁶⁹ Yet, such a conclusion might be premature. In fact, the CJ did not hold that environmental protection could justify distinctly applicable measures, although it was specifically asked to

⁶⁴ Case C-379/98 *PreussenElektra* ¶72.

⁶⁵ Jans/Vedder 2008:248.

⁶⁶ Case C-379/98 *PreussenElektra* ¶81.

⁶⁷ *Ibid* ¶75.

⁶⁸ It might also be interesting to note that the Court did not explicitly find that the measure was discriminatory. This might be influenced by the CJ’s reasoning in Case C-2/90 *Commission v Belgium* ¶34 and the Commission’s suggestion in the case, see Opinion AG Jacobs Case C-379/98 *PreussenElektra* ¶222-233 which used the proximity principle to find that the measure was not discriminatory.

⁶⁹ de Vries 2006:51.

do so. Hence, the perceived gap remains. In the two *Commission v Austria* judgments⁷⁰ where the Court was once again faced with the issue, it did not even attempt to distinguish between distinctly and indistinctly applicable measures.⁷¹ Both cases concerned prohibiting lorries weighing more than 7.5t, carrying certain goods except for local traffic. In the first case, the Court simply referred to the settled case law on environment as mandatory requirement⁷² and claimed that in the case at hand it would be ‘undisputed that the contested regulation [would be] adopted in order to ensure the quality of ambient air in the zone concerned and is therefore justified on environmental protection grounds’.⁷³ It further pointed to the protection of the environment as a fundamental objective of the Union and Article 11 TFEU.⁷⁴ In the second judgment the Court was more cautious, after AG Trstenjak suggested allowing mandatory requirements as justification for distinctly applicable measures.⁷⁵ The CJ (again) linked environmental protection as a mandatory requirement with public health as written justification⁷⁶ and elaborated this link further. Environmental protection and public health would both be aimed at clean air and fundamental aims of the EU. Additionally, the protection of health would be one of the objectives of environmental

⁷⁰ Case C-320/03 *Commission v Austria*.

⁷¹ Although both AGs and Austria had raised the issue of whether the measure was discriminatory or not see Opinion AG Trstenjak Case C-28/09 *Commission v Austria* ¶83ff; Opinion AG Geelhoed Case C-320/03 *Commission v Austria* ¶89ff while the Court did not consider these questions see, Case C-28/09 *Commission v Austria* ¶87ff; Case C-320/03 *Commission v Austria* para:65ff.

⁷² Case C-320/03 *Commission v Austria* ¶70, 84-85.

⁷³ *Ibid* ¶71.

⁷⁴ *Ibid* ¶72-73.

⁷⁵ Opinion AG Trstenjak Case C-28/09 *Commission v Austria* ¶83, 89-91.

⁷⁶ Case C-28/09 *Commission v Austria* ¶119-123.

policy pursuant to Article 191(1)TFEU. Hence, the protection of health and environment would need to be considered in conjunction with each other.⁷⁷

c) Environmental Protection as a Special Mandatory Requirement

A third interpretation of the Court's mandatory requirement case law is that the Court sees environmental protection as special. Where environmental protection is pleaded as a justification the Court makes an exception from its usual rules that only indistinctly applicable measures can benefit from the mandatory requirements.⁷⁸ Different arguments could be advanced for such a special position of environmental protection.⁷⁹ First, unlike other mandatory requirements, environmental protection is not a case where a national objective is balanced against an EU objective. Rather, environmental protection is according to Article 3(3)TEU an objective of equal value that has the same rank as the internal market.⁸⁰ Moreover, it often has a transnational dimension. Second, Article 11TFEU can be used as an argument, which the Court referred to in its more recent case law.⁸¹ Third, Article 114TFEU further supports the special status of environmental protection as a reason to justify restrictions. In Article 114(3) and (4)TFEU environmental protection is named as one reason to deviate from harmonisation measures, while many other mandatory requirements

⁷⁷ *Ibid*¶123; see also Case C-142/05 *Mickelsson and Roos*¶33; Case C-524/07 *Commission v Austria*¶56. However, this does not seem to fit with Case C-2/90 *Commission v Belgium*¶30 and Case C-169/08 *Presidente del Consiglio dei Ministri*¶45 where the Court held that these claims need to be examined separately.

⁷⁸ See Mortelmans 2008:666 and Woods/Watson 2012:404–405, who describe environmental protection as exceptional, as the case law would not be consistent otherwise.

⁷⁹ Which in some cases might also apply to other mandatory requirements.

⁸⁰ See Part A, text to (n74ff).

⁸¹ See Case C-320/03 *Commission v Austria*¶72-73; Case C-379/98 *PreussenElektra*¶76.

and even written justifications are not permissible. Fourth, the same can be said about the Service Directive⁸² which abolishes mandatory requirements while allowing environmental protection as justification.⁸³

d) Mandatory Requirement and Indirect versus Direct Discrimination

Finally, an attempt could be made to distinguish⁸⁴ between directly- and indirectly-discriminatory measures.⁸⁵ It has been argued that only in cases of direct discrimination, the protectionist intent seems to be clear. Whereas in cases of indirect discrimination⁸⁶ merely the effect, which may not have been intended, is discriminatory.⁸⁷ Thus, while direct discrimination could only be justified by written justifications, mandatory requirements could be invoked in cases of indirect discrimination and equally applicable measures.⁸⁸ This

⁸² Directive 2006/123/EC [2006] OJ 376/3668.

⁸³ See Article 16(1)(b).

⁸⁴ On some of the problems that occur in trying to distinguish equally applicable and discriminatory measures, see Craig/de Búrca 2011:677f..

⁸⁵ Such an approach seems suggested by Opinion AG Tesouro Case C-120/95 *Decker* ¶45-51, see also European Commission, Single Market and Environment: ¶11. For full exclusion of environmental protection measures from the scope of the freedoms along the lines of Case C-67/96 *Albany* see Higgins/Demetriou 2003:200–201.

⁸⁶ For an overview of the CJ's approach on indirect discrimination see eg Case C-237/94 *O'Flynn* ¶18-19. A problem, however, occurs if the definition of indirect discrimination is applied. Some rules might not discriminate in law but are in fact designed in a way that makes only cross-border trade more difficult, eg Irish Souvenirs Case 113/80 *Commission v Ireland*. Moreover, a test based on indirect discrimination might be difficult to distinguish from a market access test, see Part B, Section I, Chapter E, text to (n66ff).

⁸⁷ Ortino 2004:167–168.

⁸⁸ A non-environmental case that might point in this direction is Case C-370/05 *Festersen* ¶25-28 where the Court held that residency requirements, typically indirectly discriminatory, can be justified by mandatory requirements.

interpretation could ensure that Member States are not limited unnecessarily in their regulatory freedoms.⁸⁹

e) Distinctly Applicable Measures and Environmental Integration

Having examined the different options to justify discriminatory measures based on environmental protection, the focus now turns back to Article 11 TFEU. From the point of view of Article 11 TFEU's environmental integration obligation, it does not matter whether environmental protection is balanced via mandatory requirement or via a broad interpretation of the written justifications. In terms of environmental integration, both options involve a balancing between environmental protection and the freedoms and thus display the second form of integration. In such cases, the essential hurdle is whether the environmental protection can pass the proportionality test. Thus, the focus is shifted to its application.⁹⁰ Yet, the picture could be different if mandatory requirements were only available in cases of indirect discrimination or equally applicable measures while written justifications were only permitted for direct discrimination. Article 11 TFEU demands the integration of environmental protection based on the premise of equal value with the other objectives of the EU.⁹¹ Thus, it must in theory⁹² be possible to justify direct discrimination by environmental protection. Although such a suggestion might conflict with the idea that in general direct discrimination cannot be justified by mandatory requirements. Yet, it would

⁸⁹ Ortino 2004:167–168.

⁹⁰ See text to (n126-155).

⁹¹ See in this regard Part A, text to (n7474ff).

⁹² In practice the differences might not exist, as direct discrimination hardly ever passes the proportionality test cf Chalmers/Davies/Monti 2010:878 and in more detail Ortino 2004:179, 183-192.

make no difference whether this result is reached by making an exception for environmental protection or by interpreting the written justifications more broadly. Moreover, it might be pointed out that the Court did not consider the question of whether the environmental measure was discriminatory or not in the recent cases. This trend is also apparent in the recent use of goods case law⁹³ where the Court does not seem concerned with whether the measure is discriminatory but rather focuses on market access and proportionality.⁹⁴

4. Environmental Protection beyond Harmonisation

Before explaining the application of the Court's proportionality test to balance environmental protection and restrictions of the freedoms, it is worth investigating the effect of harmonisation measures: Are Member States allowed to use environmental protection to justify a more stringent standard where the EU has already adopted a standard?⁹⁵ Occasionally, it is argued that '[a] Member State can invoke [written justifications] and the mandatory requirements only in the absence of Union rules'.⁹⁶ Such a statement stems from Court's *Cassis* judgment where it held that '*in the absence* of common rules relating to the production and marketing of alcohol...it is for the member states to regulate all matters' (emphasis added).⁹⁷ However, this statement seems overly simplistic⁹⁸

⁹³ See Case C-265/06 *Commission v Portugal* ¶37; Case C-142/05 *Mickelsson and Roos* ¶28, 31-33; Case C-110/05 *Commission v Italy* ¶58-59] and the more detailed discussion above text to (n65-98).

⁹⁴ The Court thereby also avoids distinguishing between direct and indirect discrimination which can be difficult.

⁹⁵ For an overview of the more recent cases see Jans/Vedder 2008:264.

⁹⁶ Barnard 2013:194; Similar statements can be found elsewhere, eg Zils 1994:97; de Vries 2006:51.

⁹⁷ Case 120/78 *Reve v Bundesmonopolverwaltung für Branntwein* ¶8.

⁹⁸ Later, Barnard and De Vries explain that Member States could eg enact more stringent rules in the case of minimum harmonisation de Vries 2006:254–255; Barnard 2013:662–663.

and at odds with the case law on minimum harmonisation.⁹⁹ Thus, it is often suggested that the distinguishing factor should be whether the harmonisation measure is exhaustive or only a form of minimum harmonisation.¹⁰⁰ This would have to be determined by interpreting the harmonisation measure itself.¹⁰¹ Justifying a different national standard based on environmental protection would, hence, not be possible where the harmonisation measure is found to be exhaustive.¹⁰² Only in the cases of minimum harmonisation could Member States use environmental protection to justify more stringent standards.¹⁰³ Some have limited this approach even further claiming that even in cases of minimum harmonisation a more stringent standard could only be applied in internal situations, not in cross-border cases.¹⁰⁴ Others¹⁰⁵ have observed a different approach in the case law¹⁰⁶ and outlined a test: EU measures that do not directly address more stringent national measures are permissible where the restriction of free-movement is justified. However, this test is subject to the following conditions: First, the Member State cannot regulate activities outside its territory, ie in another Member State. Second, the wider regulatory context of the EU measure cannot

⁹⁹ See recently eg Case C-234/12 *Sky Italia*.

¹⁰⁰ Woods 2004:285; Kaczorowska 2010:557–558; Craig/de Búrca 2011:676, 684. See also Christian Tietje 2011 [45 *Ergänzungslieferung*]¶41.

¹⁰¹ Slot 1996:382.

¹⁰² See eg Case C-77/97 *Unilever v Smithkline Beecham*; Case C-220/98 *Estée Lauder*; Case 148/78 *Ratti*; Case C-315/92 *Clinique*.

¹⁰³ See eg Slot 1996:385 arguing that a more stringent national standard is permissible where the directive itself does not prohibit such a standard.

¹⁰⁴ Bernard 1996:646–647; Grundmann 1996:278–279.

¹⁰⁵ Dougan 2000:872ff.

¹⁰⁶ On the one hand Case C-241/89 *JARPP*; Case 382/87 *Buet*; Case C-389/96 *Aber-Waggon* would suggest that stricter standards are still possible, see also Weatherill 1994:23–25; Oliver/Enchelmaier 2010:433–440, 468–471 who seem to support this position. On the other hand Case C-1/96 *Compassion in World Farming*; Case C-169/89 *Van den Burg* could be read as pointing to a prohibition on more stringent national standards.

be implicitly intended to let free-movement law prevail over stricter national standards.¹⁰⁷

This test offers an interesting starting point for the subsequent suggestions.

Allowing more stringent standards in the case of minimum harmonisation for internal situations only, creates problems. First, it would not make sense that harmonisation measures allow more stringent national standards only if they comply with other EU law.¹⁰⁸ Such a clause would be pointless if the measure would not apply in cross-border cases.¹⁰⁹ Second, allowing more stringent standards only in internal situations turns the idea of minimum harmonisation upside down.¹¹⁰ The intention of minimum harmonisation is to allow stricter national standards, not to prohibit them. The EU might, for example, adopt a harmonisation measure based on Article 192 TFEU in the area of environmental protection.¹¹¹ According to Article 193 TFEU more stringent standards than this minimum harmonisation¹¹² can be adopted at national level if the national measure is ‘compatible with the Treaties’. In these cases the Court mainly uses the freedoms as a yardstick so that environmental protection as a mandatory requirement can be invoked.¹¹³ However, the

¹⁰⁷ Dougan 2000:878.

¹⁰⁸ Leible/Streinzi 2011 [45 Ergänzungslieferung]¶126.

¹⁰⁹ In fact, interpreting such clauses as putting in place standards for internal situations faces serious problems with regard to the competence of the EU.

¹¹⁰ *Ibid.*

¹¹¹ On the competences in the field of the environment see eg Wennerås 2008.

¹¹² The minimum harmonisation measure itself shall ‘include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union’ (Article 191(2)(2.sub) TFEU). Where such a safeguard clause is not included this does not mean that the more stringent national measures are barred by the directive, as a directive cannot take away (amend) the right under Article 193 TFEU. Case C-203/96 *Chemische Afvalstoffen Dusseldorp* is an example where the Court used Article 193 TFEU in conjunction with the freedoms although it was argued that the directive was exhaustive.

¹¹³ See Case C-203/96 *Chemische Afvalstoffen Dusseldorp*¶50; Case C-510/99 *Tridon*¶49ff. See also Case 6/03 *Deponiezweckverband Eiterköpfe* on more stringent measures of environmental protection pursuant

freedoms are not always the yardstick, so that mandatory requirements cannot always be pleaded. If the harmonisation measure is, for example, based on Article 114 TFEU the picture is different. Article 114 TFEU is typically used in cases where restrictions on the freedoms are justified in order to overcome the problem of different regulations in different Member States.¹¹⁴ Such measures do not need to contain derogations for environmental protection themselves because primary law, in particular Articles 114(4) and (5) TFEU,¹¹⁵ allow for more stringent national measures.¹¹⁶ On the one hand, Articles 114(4) and (5) are thus overcoming the pre-emptive effect of exhaustive harmonisation. On the other hand, this means that the freedoms and mandatory requirements are barred from being applied.¹¹⁷ Article 114(4) TFEU allows stricter standards to be kept in force only on the basis of Article 36 TFEU, the protection of the environment or the working environment.¹¹⁸ Article 114(5) TFEU is even stricter. It allows the subsequent adoption of more stringent standards only on the basis of new evidence connected with the ‘protection of the environment or the working environment’. Moreover, the problem must be ‘specific to that Member State and arise after the adoption of the harmonisation measure’.¹¹⁹ The conditions

to article 194 TFEU and Case 100/08 *Commission v Belgium* in particular ¶70 on measures contrary to Article 34 TFEU.

¹¹⁴ Leible/Streinzi 2011 [45 Ergänzungslieferung] ¶125.

¹¹⁵ On the Commission’s approach see Communication from the Commission concerning Article 95 (paragraphs 4, 5 and 6).

¹¹⁶ The inclusion of Article 114(4) and (5) TFEU needs to be seen as a counterbalance to the introduction of the qualified majority in this area. See, Kahl 2011 ¶41. Critical with regard to the exceptions under Article 114 TFEU Pescatore 1987:16.

¹¹⁷ Cf Kahl 2011 ¶40.

¹¹⁸ With regard to the interpretation of the conditions of Article 114(4) TFEU, see eg Case C-41/93 *France v Commission* where Article 114(4) TFEU is considered the first time.

¹¹⁹ On Article 114(5) TFEU and its specific conditions imposed on scientific evidence seen in particular Joined Cases C-439/05P and C-454/05P *Land Oberösterreich v Commission*. In this case the CJ seems to have restricted the scope of Article 114(5) TFEU considerably allowing only new scientific evidence to

of Article 114(4) and (5) TFEU may be rigorous but show that a more stringent environmental standard at national level can be justified on environmental grounds irrespective of whether the harmonisation measure is exhaustive or only minimum harmonisation. The inclusion of environmental protection, next to the written justifications of Article 36 TFEU in Article 114(4) TFEU shows the strong position of environmental protection as a reason for derogating from EU law. Article 114(5) TFEU further strengthens this position of environmental protection. Environmental protection is considered a valid justification while many written justifications are barred from being raised. Thus, it seems difficult to accept that the distinction between exhaustive and minimum harmonisation should determine whether environmental protection can or cannot justify a more stringent national standard. Moreover, a simple examination of the harmonisation measure to see whether it is exhaustive or not also contradicts the principles that secondary law cannot amend primary law. This means that even if the harmonisation measure seems to be exhaustive it cannot exclude Member States from relying on derogations made available by the Treaty.

Yet, the CJ still seems to use this basic distinction in order to determine whether a Member State can impose more stringent standards and whether Member States also need to comply with the freedoms beyond the harmonisation measure. For example, in *Commission v Belgium* the Court recently held that in cases of exhaustive regulation Member States ‘cannot rely on one of the grounds of general interest defined in Article 36 TFEU or

support a derogation. Critical with regard to the way in which EU frames questions of risk see Krititikos 2009 critical on the current application of Article 114(5) TFEU Krämer 2007; Epiney 2007. See also, Albin/Bär 1999; Epiney 2008.

one of the overriding requirements laid down in the case law of the Court'.¹²⁰ In *Commission v Germany* the CJ subjected the national measures to the freedoms because the matter had not been fully harmonised.¹²¹

The following framework is suggested to align the Court's case law with the established results regarding primary law: The examination of the exhaustive versus non-exhaustive/minimum harmonisation should take into account the basis for the harmonisation measure instead of only focusing on the wording and intent of the harmonisation measure. This assessment could be seen as adopting the examination of the wider regulatory context of the EU measure¹²² at the stage of examining whether the harmonisation measure is exhaustive or not. The examination at this stage is also supported by the fact that 'in the absence of transitional provisions, new rules [implemented by a Treaty amendment] apply immediately to the future effects of a situation which arose under the old rules'.¹²³ This means that Article 114(4) and (5)TFEU would also apply to new cases where a harmonisation measure would now have to be based on Article 114TFEU.¹²⁴ Exhaustive harmonisation would only be found where both the harmonisation measure and its legal basis do not foresee derogations.¹²⁵ Thus, environmental protection could not justify

¹²⁰ Case C-150/11 *Commission v Belgium* ¶79, see to that effect also Case C-324/99 *DaimlerChrysler* ¶32; Case C-322/01 *Deutscher Apothekerverband* ¶64; Case C-37/92 *Vanacker and Lesage* ¶9; Case C-132/08 *Lidl Magyarország* ¶43; Case C-463/01 *Commission v Germany* ¶36.

¹²¹ Case C-404/05 *Commission v Germany* ¶31, see also Case C-257/05 *Commission v Germany* ¶18; Case C-514/03 *Commission v Spain* ¶23.

¹²² Suggested by Dougan 2000:878.

¹²³ Case C-512/99 *Germany v Commission* ¶47-51.

¹²⁴ *Ibid* ¶46, see also Case C-162/00 *Pokrzęptowicz-Meyer* ¶50; Case 270/84 *Licata v WSA* ¶31.

¹²⁵ An example might be harmonisation measures in the agriculture area (based on Article 43TFEU) which do not foresee derogations. See eg Case C-3/00 *Denmark v Commission* where the CJ did not

a more stringent national standard only in these cases. However, in cases where the EU measure is not exhaustive harmonisation the more stringent national measure could be justified based on environmental protection if

(1) the harmonisation measure allows more stringent national environmental standards *or*

(2) the primary law allows derogation on the grounds of environmental protection (eg Article 114(4)(5)TFEU) *or*

(3) the primary law generally allows more stringent standards as long as they are consistent with other Treaty provisions and in particular the freedoms (eg Article 193TFEU).

In such cases, a more stringent national environmental standard is permissible if it complies with the respective requirements (the harmonisation measure, Article 114(4) and (5)TFEU or Article 193TFEU in conjunction with the freedoms). However, these more stringent standards could not regulate activities which occur outside the Member State's territory.¹²⁶

5. Proportionality Test and Environmental Integration

After establishing that environmental protection can justify restrictions of the market-freedoms, either as a mandatory requirement or written justification, the chapter now turns to the proportionality test. The proportionality test is the core of the second form of integration where the environment and other aims are balanced. The CJ seems to use the typical proportionality test to balance environmental protection and the restriction of the fundamental freedoms finding that a measure to 'protect the environment must not "go

allow Denmark to derogate using Article 114TFEU as the measure was based on Article 43TFEU and not Article 114TFEU. For a comment see Bucker/Schlacke 2004.

¹²⁶ Cf Dougan 2000:872–878 and the cases cited therein.

beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection”¹²⁷. Essentially, the test has three parts: suitability, necessity and proportionality *stricto sensu*¹²⁸ although certain inconsistencies can be observed regarding the precise test performed under each of these three elements.¹²⁹ When examining the case law on proportionality of restrictions on the freedoms¹³⁰ three interesting features can be identified related to the motive of protecting environmental protection: (1) the importance of international agreements and secondary EU legislation, (2) a consistency test and (3) a certain deference in cases of scientific uncertainty (the precautionary principle).

The three features are all related to the Member State’s claim that its measure restricting free-movement is in the interest of the environment. The features can either be included in the context of the three elements of the proportionality test or may be examined separately even before the proportionality test. An examination before the proportionality test ensures that environmental protection is only relied upon where the aim is a genuine one.¹³¹

The first feature that the CJ frequently uses in the environmental context is the reference to international agreements or Union legislation supporting the environmental

¹²⁷ Case 302/86 *Commission v Denmark* ¶11 quoting from Case 240/83 *ADBU* ¶15. See also eg Case C-212/06 *Government of the French Community and Walloon Government* ¶55; Case C-150/04 *Commission v Denmark* ¶46; Case C-169/08 *Presidente del Consiglio dei Ministri* ¶42.

¹²⁸ Emmert 1996:336; Emiliou 1996:134–135; Jacobs 1999:1. Others describe the test as having two elements, suitability and necessity, see Tridimas 1999:68; Barnard 2013:177.

¹²⁹ Emiliou 1996:134–135 see also *Ibid*:191–193 where the different tests are explained and the overlap becomes visible.

¹³⁰ On the proportionality test in the environmental context see also Scott 2001:141ff; Jans/Vedder 2008:252–258.

¹³¹ See Case C-169/08 *Presidente del Consiglio dei Ministri* ¶42.

protection aim.¹³² These references are seen as adding legitimacy to the national measure. So where a measure aims at achieving environmental protection as specified by international agreements or Union law, the national measure is more likely to be seen as a genuine environmental protection interest. Moreover, the reference to international agreements in this context is a tool by which the CJ can safeguard international obligations related to the environment. As explained by the Court in *Kadi*,¹³³ derogations even from the internal market rules are possible to comply with international law. Thus, restrictions of the market-freedoms are possible as long as the fundamental principles of EU law such as liberty, democracy and human rights are not derogated from.¹³⁴

In other cases the extent to which the environmental concern is genuine might be difficult to establish. In absence of direct evidence pointing to a purely protectionist intent, the Court seems to use a consistency test. This consistency test forms¹³⁵ part of the necessity requirement and is applied in areas where moral questions are involved, such as gambling.¹³⁶ In other areas such as the environment where concerns would be more of a scientific nature the Court would only check whether the measure is based on sound scientific facts.¹³⁷ Yet,

¹³² See Case C-2/90 *Commission v Belgium* 34–36; Case C-67/97 *Criminal proceedings against Ditlev Blubme* ¶36; Case C-379/98 *PreussenElektra* ¶74ff.

¹³³ Joined Case C-402/05 and 415/05P *Kadi and Al Barakaat International Foundation* ¶300-304.

¹³⁴ Ziegler 2009:297.

¹³⁵ Case C-243/01 *Gambelli* 62, 68; Case C-67/98 *Zenatt* ¶35-36; Case C-265/06 *Commission v Portugal* ¶43; Case C-46/08 *Carmen Media Group* ¶64ff; Case C-500/06 *Corporación Dermoestética* ¶39-40; Joined Cases 115/81 and 116/81 *Adoui and Cornuaille v Belgium* ¶8; Case 121/85 *Conegate v HM Customs & Excise* ¶14-16; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* ¶53, 58; Case C-169/07 *Hartlauer* ¶55.

¹³⁶ Chalmers/Davies/Monti 2010:880–881.

¹³⁷ *Ibid.*

the consistency test is not always examined under the necessity requirement.¹³⁸ Moreover, recently it has also been applied in environmental cases. In *Presidente del Consiglio dei Ministri Sardinia* tried to use environmental grounds to justify a regional tax on tourist stopovers by private aircraft and recreational craft not having their tax domicile in Sardinia. The Court applied the consistency test, examining whether the environmental aim was pursued ‘in a consistent and systematic manner’¹³⁹ and found that it was not.¹⁴⁰ The case might have offered the perfect gateway to also apply the consistency test in the area of the freedoms and environmental protection.¹⁴¹ This is because *Presidente del Consiglio dei Ministri* also posed questions of State aid, and the consistency test was readily applied when examining the proportionality of aid.¹⁴² The test in the area of State aid supports the polluter-pays principle and helps achieve consistency of Member States’ policies thereby supporting the integration demanded by Article 11 TFEU. Thus, *Presidente del Consiglio dei Ministri* must be welcomed as it did not only apply the consistency test but also used the polluter-pays principle. The CJ found that the rules imposed were not consistent with the said principle.¹⁴³ Although private aircraft and recreational craft are sources of pollution, aircraft and boats of residents and non-residents alike would contribute to the environmental damage.¹⁴⁴ A tax which would

¹³⁸ See for example Case C-169/07 *Hartlauer* ¶55 where the Court examined it under suitability/appropriateness. See also Case C-169/08 *Presidente del Consiglio dei Ministri* ¶42 where the Court distinguished between appropriateness and necessity holding that the question of whether the objective pursued by the national measure is genuine is part of the appropriateness.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* ¶44-45.

¹⁴¹ But see also Case C-142/05 *Mickelson and Roos* ¶38 where the Court a couple of months earlier applied the consistency test as part of the necessity criterion.

¹⁴² See Part B, Section I, Chapter E, text to (n100100ff).

¹⁴³ Case C-169/08 *Presidente del Consiglio dei Ministri* ¶41ff.

¹⁴⁴ *Ibid* ¶44.

only be levied upon those who have their tax domicile outside the territory of Sardinia would thus not be consistent and could thus not

be justified on grounds relating to environmental protection since the basis for applying the regional tax on stopovers introduced by that legislation is a distinction between persons which is unrelated to that environmental objective.¹⁴⁵

AG Kokott, to whom the CJ made reference, considered the polluter-pays principle in more detail and found that measures like the Sardinian one would be contrary to it.¹⁴⁶

Finally, environmental protection measures often involve an assessment of risk based on scientific expertise.¹⁴⁷ An important element in such cases is the precautionary principle of Article 191(2) TFEU which must be integrated according to Article 11 TFEU.¹⁴⁸ The GC described the precautionary principle¹⁴⁹ as a general principle of EU law,¹⁵⁰ which also applies other areas of EU law.¹⁵¹ In cases involving the assessment of risk and

¹⁴⁵ *Ibid.* ¶45.

¹⁴⁶ Opinion AG Kokott Case C-169/08 *Presidente del Consiglio dei Ministri* ¶74 She also refers to her Opinion in Case C-254/08 *Futura Immobiliare* where she explains the polluter-pays principle as a ‘reflection of the principle of proportionality’ (para 32) and a ‘specific expression of the principle of equal treatment or non-discrimination...[which would] ensure fair competition if it is applied consistently and uniformly to undertakings’ (para 33).

¹⁴⁷ On environmental risks and its management see eg Löfstedt 2005; Fisher 2010; Renn 2010.

¹⁴⁸ See Part A, text to (n60-73), and moreover in the context of the protection of human health, Case C-180/96 *UK v Commission* ¶100 highlighting that this principle needs to be integrated into the definition and implementation of other policies.

¹⁴⁹ On the precautionary principle see eg Commission Communication on the Precautionary Principle; Alemanno 2001; Leben/Verhoeven 2002; de Sadeleer 2006; Arndt 2009; Szajkowska 2010.

¹⁵⁰ Case T-392/02 *Solvay Pharmaceuticals v Council* ¶121.

¹⁵¹ Case C-15/10 *Etimine*; Joined Cases C-58/10 to C-68/10 *Monsanto*; Case C-236/01 *Monsanto Agricoltura Italia*; Case C-425/08 *Enviro Tech (Europe)*; Case C-425/08 *Enviro Tech (Europe)*; Case C-446/08 *Solgar Vitamin's France*; Joined Cases C-14/06 and C-295/06 *Parliament and Denmark v Commission*; Case T-199/96 *Bergaderm and Goupil*; Case C-157/96 *National Farmers' Union*; Case C-180/96 *UK v Commission*; Case C-121/00 *Hahn*; Case T-70/99 *Alpharma v Council*; Case C-6/99 *Greenpeace France*.

uncertainties or doubt, the Court leaves a margin of discretion to the Member States but requires them to provide evidence for their position.¹⁵² In terms of the burden of proof and the proportionality requirement, the Member State is required to provide an ‘analysis of the appropriateness and proportionality of the restrictive measure adopted...[and] precise evidence’ to substantiate its position.¹⁵³ However, this requirement does not mean that the Member State would have to show positively that no other means are available to achieve the aim.¹⁵⁴ Thus, the Court requires the Member State to show a sound assessment of the situation and the measure before implementing it.¹⁵⁵

6. Lessons from Environmental Protection as a Mandatory Requirement

Two lessons from free-movement law might be interesting for the integration of environmental considerations in the form of balancing, ie the second form of integration. The first relates to whether environmental protection measures beyond EU standards are possible and the second to the principles that the CJ uses in its proportionality assessment. Adopting more stringent environmental standards at a national level is possible if the harmonisation measure allows more stringent standards.¹⁵⁶ These more stringent standards are also permissible if the primary law allows such standards and the measure complies with

¹⁵² See eg Case C-236/01 *Monsanto Agricoltura Italia* ¶106; Case C-192/01 *Commission v Denmark* ¶49; Case C-95/01 *Greenham and Abe* ¶36ff see also Case C-473/98 *Toolex* ¶41-46 where the Court examined the necessity of a measure in the light of uncertainty.

¹⁵³ Case C-161/07 *Commission v Austria* ¶36; Case C-400/08 *Commission v Spain* 83.

¹⁵⁴ Case C-110/05 *Commission v Italy* ¶66.

¹⁵⁵ On measures which are typically permissible and the proceduralisation of the proportionality test see eg Barnard 2013:180ff.

¹⁵⁶ Either explicitly or implicitly.

the respective requirements.¹⁵⁷ This approach to the adoption of a higher environmental standard than the EU standard may be applied in State aid and competition law.¹⁵⁸

7. Lessons from State Aid

In State aid law the issue is whether aid can be granted for undertakings' measures which go beyond an EU environmental standard.¹⁵⁹ In such instances¹⁶⁰ the Commission ensures that the aid intensity does not go beyond what is necessary. For example, the aid intensity must be reduced due to the green image of the undertaking.¹⁶¹ The State aid approach uses the polluter-pays principle to support the finding that aid is possible where a more stringent standard than the EU standard should be reached. State aid measures not exceeding the necessary costs,¹⁶² are allowed because from the perspective of EU law and the polluter-pays principle, the undertaking is complying with all of its obligations under EU law and thus bears the full costs of its pollution.¹⁶³ On the one hand, the State aid and the freedoms approach share certain similarities as both allow cases of more stringent national standards and typically apply a proportionality test either in the form of the freedoms¹⁶⁴ or in form of Article 107(3)TFEU. On the other hand, the outcome of the assessments is not necessarily

¹⁵⁷ Provided that the national measure complies with (a) the requirements of the harmonisation measure, (b) Article 114(4)(5)TFEU or (c) Article 193TFEU in conjunction with the freedoms.

¹⁵⁸ See Part C, Section I, Chapter B, text to (n113ff) and Chapter D text to (n263ff).

¹⁵⁹ See on this question Part C, Section I, Chapter B.

¹⁶⁰ Examples might be aid for the acquisition of transport vehicles that go beyond Union standards, aid for improving environmental performance where no Union standard exists or in cases of aid for the early adaptation of Union standards.

¹⁶¹ Community Guidelines on State Aid for Environmental Protection (2008):¶32.

¹⁶² With regard to the cost calculation in the general and the specific forms of aid see *Ibid*:71–146.

¹⁶³ See Part B, Section I, Chapter D, text to (n134ff).

¹⁶⁴ Or under other provisions like Article 114TFEU or the secondary legislation.

the same. Problems can occur, for example, where an EU environmental protection measure is not based on the environmental competence or the internal market competence but on Article 43 TFEU (agriculture), and the measure is considered to be exhaustive. In this case more stringent national regulatory measures would not be possible, while environmental aid still would be. For environmental aid cases the bases of the EU legislation is not decisive. A second problematic issue is the case of national standards stricter than EU standards, which also regulate activities occurring outside the Member State's territory. As explained¹⁶⁵ such regulatory measures are not permissible under the freedoms while there is nothing to suggest that State aid could not be granted.¹⁶⁶ The difference in treatment of regulatory activity expanding across borders might be normatively justified by trying to preserve each State's regulatory autonomy. However, a normative justification is more difficult to find where the EU environmental protection measure itself and the Treaty provision on which it is based do not allow more stringent standards at the national level. Finding a normative justification is particularly difficult because other areas where a strong preference for exhaustive regulation at EU level could be expected (ie the internal market) offer room for more stringent national measures. Additionally, it makes little sense to prohibit one option, regulatory barriers, but to allow aid measures, given that the effects on cross-border trade may be similar. Moreover, State aid measures might also be considered as restrictions of the freedoms and vice versa.¹⁶⁷ There are three suggestions to overcome this inconsistency: First, the Treaty provisions preventing more stringent national environmental standards

¹⁶⁵ See text to (n95-126).

¹⁶⁶ However, it might be pointed out that aid in such cases is unlikely. A State would typically not have incentives to provide aid to achieve effects outside its territory.

¹⁶⁷ An example might be where certain regulatory provisions provide for a differential treatment of national and cross-border cases. See eg Case C-169/08 *Presidente del Consiglio dei Ministri*.

could be brought in line with the environmental and the internal market provisions via Treaty amendment. Second, it could be argued that Article 11TFEU requires the Union legislature to choose the legal basis that generally offers more stringent national environmental standards, ie Article 114TFEU or Article 193TFEU, where there is room to choose the legal basis. Third, the Court could adopt an approach based on a principle *in dubio pro* environment and thus contra exhaustiveness when faced with uncertainty about whether an EU measure based on a Treaty provision such as Article 43TFEU (agriculture) must be considered as exhaustive harmonisation.¹⁶⁸ Such a finding by the Court would then allow more stringent national environmental standards.

The consistency test now evident in the freedoms is well-established in State aid. Under 107(3)TFEU the Commission performs a consistency test as part of assessing whether aid is necessary. The Commission links the consistency test with the polluter-pays principle¹⁶⁹ identifying it as a guideline for the legislature to implement the polluter-pays principle in as many areas as possible. Additionally, it needs to be ensured that the polluter pays all costs it must bear under the current legal framework. In the freedoms an intermediary test fitting between these two tests could be applied. The freedoms are concerned with whether measures are obstructing cross-border trade¹⁷⁰ and whether they are justified. Hence, the Court typically examines measures which have already been implemented by the Member State (*ex post*) as compared to the typically preventive (*ex ante*) State aid analysis. Such an intermediate approach between the guideline for legislature and

¹⁶⁸ Although, the Court might rarely find that there is uncertainty about whether a measure is exhaustive or not.

¹⁶⁹ Cf Part B, Section I, Chapter D, text to (n134ff).

¹⁷⁰ See above text to (n2ff).

ensuring that the polluter in fact pays for the pollution can be seen in *Presidente del Consiglio dei Ministri*. The Court used the consistency test and in particular examined the polluter-pays principle when assessing whether certain polluters could be exempted from the regional tax.¹⁷¹ However, the *Presidente del Consiglio dei Ministri* approach is also very much akin to the test used in determining whether selectivity exists in Article 107(1)TFEU. Hence, lessons might be learned from the Court's approach in this area. Of particular interest is the CJ's approach in *British Aggregates*¹⁷² as explained in Part B.¹⁷³ In *British Aggregates* the Court required that an effects-based approach be used to determine which undertakings were covered by the scheme. It was necessary that 'all similar activities which have a comparable impact on the environment' be taxed.¹⁷⁴ The Court examined whether the legislation/measure ensured that all undertakings were covered by the measure which performed a specific economic activity and created the form of pollution addressed by the system. Where this is not the case, the polluter-pays principle is not upheld and a selective advantage is found. In a similar way, the assessment of the consistency test in the area of the freedoms could be applied. Where a measure complies with these criteria it satisfies the consistency test which would mean that the measure is necessary.¹⁷⁵ The Commission explains in its Guidelines on Environmental Aid that in cases where the consistency test/polluter-pays principle are not complied with, aid can still be justified in exceptional

¹⁷¹ See above text to (n135-146).

¹⁷² Case C-487/06P *British Aggregates* ¶81ff.

¹⁷³ See Part B, Section I, Chapter D, text to (n117ff).

¹⁷⁴ *Ibid* ¶86.

¹⁷⁵ If the consistency test is considered to be part of the necessity requirement.

cases.¹⁷⁶ There seems to be no reason why this logic should not also apply to the freedoms. Thus, it would be possible to show that an exception is warranted when a measure is necessary but does not comply with the polluter-pays principle/consistency requirement.

8. Conclusion on Free-Movement Law

This chapter investigated the second form of environmental integration in the freedoms, ie balancing between the restriction and environmental protection. It explained that environmental integration via balancing appeared early on. Environmental protection as a mandatory requirement was considered as was the idea that environmental protection can justify discriminatory measures. The chapter also elaborated on the relationship between harmonisation and environmental protection. Finally, some improvements in terms of environmental integration were suggested which are informed by this form of integration in State aid law.

¹⁷⁶ See Community Guidelines on State Aid for Environmental Protection (2008):¶140 with regard to the special case of tradable permits.

B. State Aid Law

1. Introduction

This chapter examines the second form of environmental integration in the context of the exceptions and exemptions under Article 107(3)TFEU and the potential rule of reason under Article 107(1)TFEU. It first shows that a rule of reason approach under Article 107(1)TFEU should not be taken in environmental cases. Then, it highlights that the Commission has developed a framework that allows environmental considerations to be integrated into Article 107(3)TFEU although there is room for improvement in terms of Article 107(3)(b) and (c)TFEU. However, the general approach under Article 107(3)TFEU can serve as a model for other areas where environmental protection needs to be balanced with other interests. Finally, the chapter suggests some lessons that can be learned from free-movement law.

2. A Rule of Reason in Article 107(1)TFEU

A balancing between a restriction and an environmental objective by means of a rule of reason would generate the second form of environmental integration within Article 107(1)TFEU.¹ The advantage of this approach is that the notification requirement would not apply.² Against such a rule of reason it has been submitted that just like Article 101(1)TFEU, Article 107(1)TFEU is limited to economic considerations.³ The problem with this argument is that Article 101(1)TFEU is not limited to economic considerations as the

¹ See in this line Wieberneit 1997:313ff. For a test based on the question of whether the discrimination is justified by a legitimate objective Bartosch 2010:742–743.

² Lorenz 2004:192.

³ *Ibid.*

Wouters/Meca-Medina rule of reason shows. Hence, a closer look at the effects of such a rule of reason in Article 101(1)TFEU versus Article 107(1)TFEU is helpful. An examination of the *Wouters/Meca-Medina* rule of reason in Article 101(1)TFEU⁴ shows that its scope is limited and that the approach was possibly needed only because of the narrowness of Article 101(3)TFEU and the fact that the case occurred before Regulation 1/2003.⁵ This cannot be said about Article 107TFEU. Article 107(2)-(3)TFEU offer ample space for exemption.⁶ Moreover, the benefits that are achieved by the aid are not examined by such a vigorous standard as the benefits under Article 101(3)TFEU.⁷ Regarding the argument that a rule of reason would avoid the notification, one should ask: Why is there a notification requirement in the first place? The notification requirement in State aid cases addresses a concern about the State's genuine intentions and the fear of protectionism. In the case of Article 101(1)TFEU there is an equal concern about the genuine intentions. The fear is that environmental protection is used to disguise anticompetitive agreements. In this sense, Articles 101(1)TFEU and 107(1)TFEU can be compared. In both cases the genuineness of the intentions needs to be ensured by a form of oversight. If such supervision is established the measure may escape the application of Articles 101(1)TFEU and 107(1)TFEU respectively. The rule of reason in form of *Wouters/Meca-Medina* under Article 101(1)TFEU and the *Altmark* route under Article 107(1)TFEU⁸ provide an escape route where a certain form of oversight is ensured. This supervision is either ensured via procedures (*Altmark*) or

⁴ For an examination see below, Part C, Section I, Chapter D, text to (n3-67).

⁵ The Court would have rendered the agreements void if found to infringe Article 101(1)TFEU.

⁶ See also Hancher 2003b:367.

⁷ For an examination see below, Part C, Section I, Chapter D, text to (n68-168).

⁸ See in this regard Part B, Section I, Chapter D, text to (n17ff).

via a specific form of State involvement (*Wouters/Meca-Medina*).⁹ A rule of reason in Article 107(1)TFEU would not provide such oversight. Moreover, if the condition of selectivity is interpreted as suggested,¹⁰ so as to allow environmental objectives to be pursued as long as the objective is applied consistently, notifications are further reduced. Finally, the availability of Article 106(2)TFEU¹¹ in the area of State aid also reduces the need for a rule of reason. Hence, a general rule of reason in environmental cases under Article 107(1)TFEU is not necessary to avoid the notification requirement and should thus be rejected. Moreover, such a rule of reason would only offer the second form of integration, ie balancing in case of conflict. Yet, the first and preferable form of integration where conflicts between environmental protection and other objectives such as competition are prevented by clear demarcation cannot be achieved via a rule of reason. From the perspective of the environmental integration obligation of Article 11TFEU, it makes no difference whether the second form of integration occurs within Article 107(1)TFEU or Article 107(2)(3)TFEU.

3. Article 107(3)TFEU

The main area where the second form of environmental integration occurs in the context of State aid is Article 107(3)TFEU. Article 107(3)TFEU defines conditions under which the Commission can exempt aid and gives the Commission a broad discretion.¹² The

⁹ With regard to the state involvement see below, Part C, Section I Chapter D, text to (n234ff).

¹⁰ See Part B, Section I, Chapter D, text to (n104ff).

¹¹ On Article 106(2)TFEU see below, Part C, Section I, Chapter C.

¹² See eg Joined Cases C 75/05P and C 80/05P *Germany v Kronofrance*¶59; Case 142/87 *Belgium v Commission*¶56; Case C-39/94 *SFEI*¶36; Case C-333/07 *Regie Networks*¶78; Case C-225/91 *Matra v Commission*¶41; Joined Cases T-244/93 and T-486/93 *TWD*¶82; Case T-149/95 *Ducros*¶63; Case T-380/94 *AIUFFASS and AKT*¶55; Case 310/85 *Deufil v Commission*¶18.

Commission has developed a framework where it balances the positive versus the negative effects of the aid.¹³

Article 107(3)(a)TFEU can be used to exempt aid for certain areas of serious underemployment or with an abnormally low living standard. Article 107(3)(b)TFEU applies to cases where the aid promotes an ‘important common European interest’ or when it is supposed to remedy ‘a serious disturbance’ of a Member State’s economy. The broadest scope in Article 107(3)TFEU seems to be offered by Article 107(3)(c)TFEU. Under this provision for horizontal aid, a measure for ‘the development of certain economic activities or certain economic areas’ can be exempted as long as it is not affecting ‘trading conditions to an extent contrary to the common interest’. In addition Article 107(3)(d)TFEU applies to cases where the aid promotes ‘culture or the conservation of heritage’. Apart from the exemption of Article 107(3)TFEU, block exemptions exist.¹⁴

The Commission’s main basis for developing the framework for integrating environmental considerations seems to be Article 107(3)(c) and (b)TFEU.¹⁵ The efforts to integrate environmental considerations started even before Article 11TFEU was introduced into the Treaty. The first Community framework for environmental aids in 1974 had a particular focus on the polluter-pays principle.¹⁶ The Commission explained that the polluter-pays principle would ensure that environmental protection and competition are

¹³ Hildebrand/Schweinsberg 2007:451, for an economic overview see also Meiklejohn 1999:25.

¹⁴ Cf Commission Regulation (EC) No 800/2008 [2008] OJ L214/3; Council Regulation (EC) No 994/98 [1989] OJ L142/1 Commission Regulation (EC) No 1628/2006 [2006] OJ J302/29

¹⁵ de Vries 2006:138 sees the main focus on Article 107(3)(c)TFEU.

¹⁶ See European Commission 1975, which seems to be initiated by the Council Recommendation Regarding Cost Allocation and Action by Public Authorities on Environmental Matters.

mutually supportive.¹⁷ Any aid measure where the State would pay for rectifying environmental damage would upset this principle and would be allowed only transitionally until the full implementation of the polluter-pays principle. In 1980 this framework was extended until 1986. However, some modifications were included as the Commission realised that it would not be that easy to fully implement the polluter-pays principle.¹⁸ The 1986 framework was first extended until 1992¹⁹ and then until 1993.²⁰ In 1994, the first separate Guidelines on Environmental Aid²¹ were adopted. They were updated in 2001²² and 2008.²³ Some months after the 2008 Guidelines were adopted, the Commission furthermore included provisions on environmental aid in the General Block Exemption.²⁴ The Block Exemption covers certain areas also covered in the Guidelines:

Investment aid enabling undertakings to go beyond Community standards,²⁵
aid for the acquisition of new transport vehicles,²⁶ aid for early adaptation to

¹⁷ 4th Report on Competition Policy: 101¶176.

¹⁸ 10th Report on Competition Policy 1980:157¶226.

¹⁹ 16th Report on Competition Policy :173¶255.

²⁰ XXIIInd Report on Competition Policy :251¶448.

²¹ Community Guidelines on State Aid for Environmental Protection (1994). Previously sections on environmental aid had existed in general State aid guidelines. On the different guidelines with regard to environmental issues from 1974-1994, see Krämer 1993:68–70; Evans 1997:357–374.

²² Community Guidelines on State Aid for Environmental Protection (2001). For some critical comment on the older guidelines which have been partially remedied by the new regime see Holmes 2006; Branton 2006. Moreover, on the development of this area van Calster 2000.

²³ Community Guidelines on State Aid for Environmental Protection (2008). For an overview of the changes introduced see Sánchez Rydelski 2001. In practice, one of the most important innovations of the 2008 guidelines is that the simplified procedure (Commission Notice on a Simplified Procedure) applies as long as the aid is under certain thresholds see Community Guidelines on State Aid for Environmental Protection (2008)¶13.

²⁴ Commission Regulation (EC) No 800/2008 [2008] OJ L214/3. For a critical account of the Guidelines and Block Exemption see Soltész/Schatz 2009, who argues that the combination of Guidelines and Block Exemption would lead to regulation of an area in which there is no EU competence.

²⁵ Article 18 of the Regulation, Community Guidelines on State Aid for Environmental Protection (2008):¶43, 72ff.

future Community standards for SMEs,²⁷ environmental investment aid for energy saving measures,²⁸ environmental investment aid for high-efficiency cogeneration,²⁹ environmental investment aid for the promotion of energy from renewable energy sources,³⁰ aid for environmental studies,³¹ [and] aid in the form of reductions in environmental taxes.³²

Some differences exist between the Block Exemption and the Guidelines, including various procedural matters: On the one hand the provisions in the Block Exemption differ from the Guidelines in that the latter have a broader scope of application. The Guidelines unlike the Block Exemption also deal with aid for energy-efficient district heating,³³ waste management,³⁴ the remediation of contaminated sites,³⁵ the relocation of undertakings,³⁶ aid involved in tradable permit schemes³⁷ and aid for early adaptation to future Union standards for *large* undertakings.³⁸ Moreover, the Guidelines are also broader than the General Block Exemption because operating aid can only be granted under the Guidelines.³⁹ Even in terms

²⁶ Article 19 of the Regulation, *Ibid*¶44, 85ff.

²⁷ Article 20 of the Regulation, the Guidelines are wider in this regard, as they also cover large undertakings, see *Ibid*¶45, 87ff.

²⁸ Article 21 of the Regulation, *Ibid*¶47, 94ff.

²⁹ Article 22 of the Regulation, *Ibid*¶51, 112ff.

³⁰ Article 23 of the Regulation, *Ibid*¶48ff, 101ff. See also Delvaux 2003; Weigt 2009.

³¹ Article 24 of the Regulation, Community Guidelines on State Aid for Environmental Protection (2008):¶46, 91ff.

³² Article 25 of the Regulation, *Ibid*¶57, 151ff. See also van Calster 2000; Flett/Walkerova 2008.

³³ Community Guidelines on State Aid for Environmental Protection (2008):¶120ff.

³⁴ *Ibid*¶52, 126ff.

³⁵ *Ibid*¶53, 132ff.

³⁶ *Ibid*¶54, 135ff.

³⁷ *Ibid*¶55, 139ff. See also Case C-279/08P *Commission v Netherlands*; Lorenz 2004; Merola/Crichlow 2004; Döring/Ewringmann 2004; Schweer/Ludwig 2004; Johnston 2006; de Sépibus 01 September 2007; Vedder 2009:61–65; Weishaar 2009; Sauter/Vedder 15 February 2012; Philippe 2012.

³⁸ Community Guidelines on State Aid for Environmental Protection (2008):¶45, 87ff.

³⁹ Since operating aid is typically more likely to distort competition than investment aid.

of investment aid, the Guidelines are broader because they do not only cover aid for initial investments but also aid for replacement investments.

On the other hand, the Block Exemption offers a simplified method of cost calculation with fewer benefits taken into account. In turn, the aid intensity is typically lower.⁴⁰ In terms of Article 107(3)TFEU, the Block Exemption specifies that environmental aid would be legal ‘under Article [107](3)’ while the Guidelines explain in more detail which subsection of Article 107(3)TFEU applies.

The Block Exemption combines the Commission’s experience integrating environmental considerations in Article 107(3)TFEU with the advantages in terms of legal certainty of a clearly defined exemption. However, the fine-tuned balancing exercise under Article 107(3)TFEU that is examined in more detail below had to be altered. While the case-by-case examination in the individual exemption process⁴¹ allows the Commission to scrutinise all the advantages and disadvantages in detail and arrive at a well-adjusted solution, the Block Exemption shows less flexibility. This is reflected in the simplified method of cost calculation and lower aid intensity. These differences are the price that must be paid for legal certainty. Yet, it should not be forgotten that it is always possible to apply for an individual exemption within or beyond the Environmental Guidelines.

⁴⁰ Heidenhain 2010:437.

⁴¹ Both under the Guidelines and to an even greater extent for aid beyond the guidelines.

a) Article 107(3)(a)TFEU

Article 107(3)(a)TFEU can be used to exempt aid for certain areas of serious underemployment or with an abnormally low living standard. The comparison takes place with regard to the EU level and not the national level.⁴² This examination seems unlikely to provide room to integrate environmental considerations because the issue of whether a certain area has serious underemployment as compared to the EU level is a question where environmental considerations cannot play a role. Yet in the context of an ‘abnormally low living standard’ the situation might be different. This condition could be interpreted so as to encompass areas where the environmental degradation has reached such levels that the living standard is so poor that State aid is justified. An example could be an area which has been degraded by continuous small-scale oil spills which accumulated making the living standard abnormally low. Yet, such cases where the soil has been polluted might also be addressed under aid for contaminated sites which the Commission currently deals with under Article 107(3)(c)TFEU. One option to distinguish the scope could be the size of the affected area. Article 107(3)(a)TFEU could be applied where a whole region, not just an individual contaminated site, is concerned.

b) Article 107(3)(b)TFEU

Article 107(3)(b)TFEU offers more room for the second form of environmental integration. This Article applies to cases where the aid is supposed to remedy ‘a serious disturbance’ of a Member State’s economy or promotes an ‘important project of common European interest’.

⁴² Case 730/79 *Phillip Morris v Commission* ¶25; Case 248/84 *Germany v Commission* ¶19, see with regard to the criteria the Commission will use in its assessment Guidelines on National Regional Aid for 2007-2013.

In the area of aid for ‘a serious disturbance’ of a Member State’s economy, an unusual way of integrating environmental considerations within the recent framework for the financial and economic crisis can be observed. A more traditional way of integration takes place regarding aid promoting an ‘important common European interest’ by interpreting the conditions so as to accommodate environmental protection requirements. The 2008 Guidelines on the one hand widen the scope of Article 107(3)(b)TFEU. On the other hand the Commission tried to impose stricter conditions to ensure that competition is only restricted to the extent necessary. This raises new issues which are covered in the following section.

Where the aid is aimed to remedy ‘a serious disturbance’ of a Member State’s economy the entire national economy needs to be affected by the exceptional situation.⁴³ So far this provision has not been used to integrate environmental considerations as demanded by Article 11TFEU. Notwithstanding, this Article might offer room for such integration. A widespread environmental disaster could be considered ‘a serious disturbance’. However, the main limiting factor in this regard is that the Member State’s entire national economy needs to be affected. Environmental disasters of this magnitude are extremely rare and might produce such major economic effects even less frequently in larger Member States. Although the Commission has not yet acknowledged the possibility of this form of environmental integration within Article 107(b)TFEU, it has adopted the Temporary Union

⁴³ Case C-156/98 *Germany v Commission* ¶52ff; Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen* ¶132ff; Joined Cases C-57/00P and C-61/00P *Freistaat Sachsen* ¶39ff. With regard to the serious disturbance the Commission in wake of the financial crisis made clear that the disturbance can also affect several Member States see, Communication from the Commission on the Application of State Aid Rules to Support Measures in Favour of Banks in the Context of the Financial Crisis; Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis (2011).

Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis⁴⁴ in the wake of the financial crisis. Environmental considerations were addressed within this framework. The Commission allowed aid based on Article 107(3)(b) TFEU in the form of an interest rate reduction since

environmental goals should remain a priority despite the financial and economic crisis. The production of more environmentally friendly, including resource and energy-efficient products, is in line with the Europe 2020 Strategy, is in the Union's interest and it is important that the crisis should not impede that objective.⁴⁵

To exempt the environmental investment, the aid must meet the following conditions: (1) It must be aid for the investment in new products with significantly improved environmental performance that will be put on the market within two years. (2) The environmental improvement must be an early adoption of a Union standard or go beyond such a standard. (3) The investment does not amount to a production capacity of more than 3% of the product markets. (4) The firm is not in financial difficulty and (5) The aid is necessary.⁴⁶ This form of aid via interest rate reductions for the production of more environmentally friendly products goes beyond what is demanded by Article 11 TFEU in the context of Article

⁴⁴ Temporary Union Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis (2011) which updated the 2009 Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis (2009) in terms of Green products by reducing the aid intensity.

⁴⁵ Temporary Union Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis (2011):point 2.5.

⁴⁶ *Ibid.* Based on this the Commission has approved several national aid schemes, eg *Competitiveness Plan of the Automotive Sector - Realisation of Investments Aimed at the Manufacture of More Environmental Friendly Products*; *Temporary Aid for the Production of Green Products*; *Régime temporaire de prêts bonifiés pour les entreprises fabriquant des produits verts*; *Federal Framework for Low Interest Loans for the Production Of Green Products*; *Federal Framework for Low Interest Loans for the Production Of Green Products*.

107(3)(b)TFEU.⁴⁷ However, it can still be described as a (laudable) political choice which might have been influenced by Article 11TFEU.⁴⁸

The more traditional way of integration occurs under the condition of an ‘important project of common European interest’ in Article 107(3)(b)TFEU. The term is interpreted in *Glaverbel* by the CJ as encompassing environmental protection.⁴⁹ The Commission followed with its Environmental Guidelines and clarified that environmental protection projects can be important projects of common European interest.⁵⁰ The ‘common European interest’ is generally defined in the opening Articles of the TEU but can also be found in other parts of the Treaty, secondary legislation and action programmes.⁵¹ However, the scope for integrating environmental considerations has limits. The Court held that the Commission could require that the project ‘forms part of a transnational European programme supported jointly by a number of governments of the Member States, or arises from concerted action by a number of Member States to combat a common threat’.⁵²

However, it seems unclear why ‘a common threat’ cannot be addressed by a single Member State, given that effects of environmental protection are often transnational⁵³ in

⁴⁷ See in this regard Part A, text to (n60ff).

⁴⁸ Since Article 11TFEU only requires the interpretation of the current standard in the light of environmental protection requirements but not the adoption of new standards. Yet, it is conceivable to construct the obligation in such a way. However this is beyond the framework of the current project.

⁴⁹ Case 62 & 72/87 *Exécutif régional wallon* ¶3; 22ff.

⁵⁰ Community Guidelines on State Aid for Environmental Protection (2008): ¶147.

⁵¹ Cf Heidenhain 2010:200. Others claimed that even national interest might be exempted under the common European interest provision, see de Vries 2006:139.

⁵² Case 62 & 72/87 *Exécutif régional wallon* ¶3.

⁵³ See Cremer 1995:144f; Vedder 2003:300.

nature. What is the justification for demanding that more than one Member State must act?

And when can pollution be considered a common threat?

The Commission has now relaxed its position in the 2008 Guidelines by also approving aid granted only by one Member State.⁵⁴ This apparent broadening of this provision's scope goes hand in hand with conditions aimed at ensuring that competition is only restricted to the extent necessary. As such it requires that the terms and participants of projects must be 'specific and clearly defined'.⁵⁵ Projects must also have clear objectives, means and effects.⁵⁶ Moreover, the projects should 'contribute in a concrete, exemplary and identifiable manner' to the Union's interest of environmental protection. The contribution can be ascertained by reference to the Union's environmental strategy.⁵⁷ Additionally, the aid must not only foster a Union environmental protection project, but the measure must foster the environmental protection project substantially, by having a substantial size and by producing substantial environmental benefits.⁵⁸ A detailed analysis is required of how the actions supported by the aid would enable 'significant progress...towards achieving specific environmental objectives of the [Union]'.⁵⁹ Finally, the benefits of the project must extend to the whole Union.⁶⁰ It is not readily understandable why the criterion specifying the reach

⁵⁴ Yet, the Commission will look at aid which is given to undertakings from different Member States more favourably, Community Guidelines on State Aid for Environmental Protection (2008):¶149.

⁵⁵ *Ibid*¶147.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*¶148.

⁶⁰ For an opposite view see Lorenz 2004. In *UK Emission Trading* the Commission held that it would not exclude 'that projects of trading systems could be considered as projects of common European

of the environmental benefit is needed to ensure that competition is only restricted to the extent necessary. Yet, it helps to distinguish the scope of Article 107(3)(b)TFEU from that of Article 107(3)(c)TFEU. While Article 107(3)(c)TFEU applies to environmental benefits that occur at a more locally limited level, Article 107(3)(b)TFEU applies to benefits which have a Union dimension. The impact of such measures at Union level means that higher levels of aid intensity are available under Article 107(3)(b)TFEU. From an economic point of view, this higher level also seems to make sense, namely with respect to negative externalities. In the Article 107(3)(b)TFEU cases, the total negative externality is spread across larger numbers of people/countries and thus the effect is smaller at the individual level. The smaller effect at the individual level reduces the Member States' incentive to minimise the negative externality or remedy the market failure by regulation. Where the effect is spread in such a way, the Member States have only a reduced incentive to remedy this market failure by regulation. The Commission tries to offset the reduced incentive by allowing a higher aid intensity than is available under Article 107(3)(c)TFEU.⁶¹ Yet, one question remains unanswered: When is a contribution 'substantial' enough to warrant an exemption under Article 107(3)(b)?

interest.' *UK Emissions Trading Scheme* 10. Although, it needs to be pointed out that the Commission usually uses Article 107(3)(c)TFEU in such cases.

⁶¹ Because the benefits for the undertaking from performing the environmentally friendly measure, eg a greener image, are difficult to estimate, the Commission typically lowers the aid intensity. Only in the case of a competitive tender full compensation is possible, see Community Guidelines on State Aid for Environmental Protection (2008):¶32, 77, 97, 104, 116, 123 supportive Kingston 2012:427.

c) Article 107(3)(c)TFEU

The exemption for horizontal aid under Article 107(3)(c)TFEU is the most frequently used route in cases of environmental aid.⁶² The framework adopted by the Commission is mainly explained in the Environmental Guidelines.⁶³ The Guidelines not only specify the Commission's approach to the aid but also elaborate the more general analytical framework adopted in other cases building the foundation for the different categories of aid contained in the Guidelines. This analytical framework is rich in detail and tries to limit the restriction of competition to the extent necessary while aiming at improving the quality of the environment. Striking this balance is a delicate task, and years of experience in this area have led to a refined exercise which can serve as model in other areas where such balancing needs to be performed.

Aid for a specific industrial sector or a region that is less developed than the rest of that Member State can be exempted under Article 107(3)(c)TFEU.⁶⁴ The provision is less restrictive and offers more flexibility than the other exemption provisions under Article 107(3)TFEU.⁶⁵ Sectoral aid must generally be degressive and granted for a limited time.⁶⁶

⁶² Hancher/Ottermanger/Slot 2006 ¶4-025.

⁶³ Beyond the different guidelines, environmental aid for carbon capture and storage (CCS) has been exempted under Article 107(3)(c)TFEU and the Commission stated that it would 'have a generally positive attitude' (Community Guidelines on State Aid for Environmental Protection (2008): ¶69). With regard to CCS see *CCS Project in Rotterdam Harbour Area; CO2 Catch-up Pilot Project at Nuon Buggenum Plant; CCS Demonstration Competition, FEED* and Vedder 2008; Giannino 28 May 2011; Kingston 2012:410 fn 136.

⁶⁴ The Commission has elaborated on the details in the Guidelines on National Regional Aid for 2007-2013.

⁶⁵ Facenna 2005:249.

⁶⁶ Heidenhain 2010:318.

Operating aid cannot normally be exempted under Article 107(3)(c) TFEU since the *development* of economic activities must be fostered by the aid.⁶⁷

In the Environmental Guidelines, the Commission details how it assesses aid measures not covered by different categories in the Guidelines, ie environmental aid in general. The Commission's aim in the area of environmental aid

is to ensure that State aid measures will result in a higher level of environmental protection than would occur without the aid and to ensure that the positive effects of the aid outweigh its negative effects in terms of distortions of competition, taking account of the polluter-pays principle.⁶⁸

The Commission explains that it would perform a balancing exercise where the positive environmental impact is weighed against 'potentially negative side effects, such as distortion of trade and competition'.⁶⁹ This balancing takes the form of a three-step analysis:

(1) Is the aid 'aimed at a well-defined' environmental protection interest?

(2) Is the design of the aid delivering an improvement in environmental terms by addressing a 'market failure or other objective?' In answering this question the Commission investigates whether State aid is an appropriate policy instrument, whether an incentive effect can be established⁷⁰ and whether the aid is proportional, ie whether the amount of aid is necessary for changing the undertakings' behaviour.

⁶⁷ Vesterdorf/Nielsen 2008¶1058.

⁶⁸ Community Guidelines on State Aid for Environmental Protection (2008):¶6.

⁶⁹ *Ibid*¶16.

⁷⁰ This examines whether a change of the undertakings' behaviour is achieved by the aid or whether the undertaking would have behaved in the same way without the aid.

(3) Is the distortion of competition and the effect on trade limited so that it can be said ‘that the overall balance is positive?’⁷¹

The Commission then explains in more detail the relevant analytical steps: The aim of the aid should address a market failure which leads ‘to a sub-optimal level of environmental protection’.⁷² Those market failures can take the form of negative externalities where undertakings have no incentive for environmental protection.⁷³ Where this market failure is not addressed at Union level, Member States might decide to aim for a higher level of environmental protection unilaterally.⁷⁴ This level can be achieved either by providing individual incentive for higher environmental performance in the form of environmental aid, or by regulation addressing the negative externalities. The route of regulation can increase the costs for certain undertakings. Given the size of the undertaking, the ‘market position, technology and other specificities’⁷⁵ the increase in costs can become unbearable. In such a case, aid to lessen the burden may be necessary for ‘the most affected undertakings...thereby enable[ing] Member States to adopt national environmental regulation that is stricter than [Union] standards’.⁷⁶

Regarding the appropriateness of environmental aid, the Commission explains that the polluter-pays principle,⁷⁷ as the guiding principle, ensures that all costs are borne by the

⁷¹ *Ibid.*

⁷² *Ibid.*¶19.

⁷³ *Ibid.*¶20.

⁷⁴ Or a higher level of environmental protection than at Union level.

⁷⁵ *Ibid.*¶22.

⁷⁶ *Ibid.*

⁷⁷ 1972 OECD recommendations seem to be the source of the polluter-pays principle in the policy area, OECD 26 May 1972. The original aim of the polluter-pays principle was an economic one, namely to prevent the distortion of international trade Stoczkiewicz 2009:172 the economic nature is

polluter. State aid would only be the second-best option and should only be granted where the principle is not fully implemented.⁷⁸ State aid would unfortunately still be needed as the polluter-pays principle could not easily be fully implemented. Full implementation would be difficult because the exact costs of pollution are hard to establish⁷⁹ and the immediate full implementation of the principle may lead to an abrupt steep rise of prices which ‘may act as an external shock and create disturbances in the economy’.⁸⁰ This statement by the Commission seems to bring together two distinct understandings of the polluter-pays principle, the broad and the narrow reading. As explained in Part B⁸¹ the broad interpretation to which the Commission refers when stating that the polluter-pays principle could not easily be fully implemented seems to be mainly a guideline for legislator.⁸² The more narrow reading⁸³ of the principle is used by the Commission to establish whether the aid is legal or can be exempted. The narrow reading provides that the polluter must bear the costs which occur when complying with the current legal framework for environmental protection.⁸⁴ This narrow sense of the polluter-pays principles as a guiding principle ensures that all costs are borne by the polluter. This definition then links with the broader concept of the polluter-pays principle. A sudden introduction of this principle in an area of the economy can create disturbances in the economy, and State aid might come into play to

also stressed in the guidelines see Community Guidelines on State Aid for Environmental Protection (2008) see also Jans/Vedder 2008 and on the development of the polluter-pays principle eg Gainest 1991; Vandekerckhove 1993; Stevens 1994.

⁷⁸ Community Guidelines on State Aid for Environmental Protection (2008):¶24.

⁷⁹ *Ibid*¶25(a).

⁸⁰ *Ibid*¶25(b).

⁸¹ See Part B, Section I, Chapter D, text to (n112ff).

⁸² Stevens 1994:578

⁸³ Also referred to as non-subsidisation principle, see OECD 26 May 1972¶4.

⁸⁴ *Ibid*, see also Stevens 1994:579; Stoczkiewicz 2009:173.

alleviate them. In this sense, State aid can have a role in the implementation of the polluter-pays principle and thus increase environmental protection.⁸⁵

Concerning the necessity of such aid and its incentive effect, the Commission explicates that investments in environmental protection may be sensible economically. They may decrease costs or increase revenues. Thus, whether the aid has an incentive effect needs to be examined. In other words, it is established via a counterfactual analysis whether or not the investment would be made without the aid.⁸⁶ The aid is only necessary if the investment would not have been made without it.

Regarding the examination of the proportionality of aid, the Commission states: ‘Aid is considered to be proportional only if the same result could not be achieved with less aid’.⁸⁷ When evaluating proportionality the Commission ensured that only the net extra costs to achieve the environmental benefit are offset. This is accomplished by subtracting any additional economic benefit connected with the investment such as savings in the production process or the advantage of a ‘green image’ from the amount of aid.⁸⁸ Where additional investment costs cannot be calculated eg in cases of environmental tax reductions or tradable permits schemes, the proportionality requirement is fulfilled where the criteria

⁸⁵ Cf Vesterdorf/Nielsen 2008¶3-030; Quigley 2009:271–275. On the polluter-pays principle and in a WTO context see Kim 2000.

⁸⁶ Community Guidelines on State Aid for Environmental Protection (2008):¶27-28. An example of the counterfactual analysis might be the case where an undertaking must meet mandatory Union standards. In this case the aid is not necessary since the undertaking would have to meet these in any event.

⁸⁷ *Ibid*¶30.

⁸⁸ *Ibid*¶31-32. The Commission explains that this means that typically less than 100% of the eligible investment cost can be granted as aid. Only in the case of ‘genuinely competitive bidding process on the basis of clear, transparent and non discriminatory criteria’ the amount may reach 100%. With regard to the cost calculation see *Ibid*¶80-84.

for granting aid ensure that the benefit is not excessive and that the ‘selectivity of the measure is limited to the strict minimum’.⁸⁹ An additional point to consider under proportionality is whether the aid granted is significantly lower than the environmental harm that is prevented by the investment, namely the cost effectiveness of the aid.⁹⁰ This cost effectiveness point corresponds with the obligation of Article 11 TFEU to integrate the criteria of Article 191(3) TFEU where possible.⁹¹ Article 191(3) TFEU details that ‘potential benefits and costs of action or lack of action’ must be considered.

The final step in the Commission’s analysis is determining whether the effects on competition and trade are limited to the necessary extent. The overall balance must be positive. The Commission observes that where the aid only encompasses the ‘actual extra costs linked to a higher level of environmental protection, the risk that the aid will unduly distort competition is normally rather limited’.⁹² However, where the aid is not proportional or necessary, aid will distort competition and might lead to keeping inefficient firms in the market, obstruct dynamic efficiencies, create market power or artificially alter the flow of trade or the location of production.⁹³ Finally, the Commission highlights that in cases where the aid places environmentally friendlier products at a competitively advantageous position *vis-à-vis* the more polluting ones it will take into account the overall environmental effect when assessing the market position of the disadvantaged products. The effect on the market

⁸⁹ *Ibid* ¶33.

⁹⁰ *Ibid* ¶35. The Commission explains that this is however only applicable in exceptional cases and that the normal calculation of aid follows the costs directly related to the additional costs for the undertaking.

⁹¹ See Part A, text to (n60ff).

⁹² *Ibid* ¶36.

⁹³ *Ibid*.

position will have a higher importance in the Commission's examination where the environmental benefit of the aid is low.

d) Article 107(3)(d)TFEU

Under Article 107(3)(d)TFEU aid to promote culture and aid for heritage conservation can be exempted. The additional value of this Article has been questioned as the Commission would have previously allowed aid in the cultural context under Article 107(3)(c)TFEU.⁹⁴ So far the Article 107(3)(d)TFEU has been used to exempt aid, for example, to the film industry or for book exports.⁹⁵ However, the Article can also be used for the second form of environmental integration. While the Guidelines do not refer to this Article, elements can be found in the Guidelines for State Aid in the Agriculture and Forestry sector. Under these Guidelines 'aid for the conservation of traditional landscapes and buildings shall be declared compatible with Article 87(3)(c) or (d) of the Treaty'⁹⁶ if it complies with Article 5 of Regulation 1857/2006.⁹⁷ The integration of environmental considerations takes place by interpreting 'the conservation of heritage' as encompassing environmental heritage. As

⁹⁴ Vesterdorf/Nielsen 2008¶1061.

⁹⁵ See Case T-155/98 *SIDE*; Case T-49/93 *Case SIDE*.

⁹⁶ Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007 to 2013:¶30. The limit of EUR 10.000 fixed in Article 5(2) of Regulation 1857/2006 can be exceeded in justified cases. Based on these guidelines the Commission, for example, granted an exemption under Article 107(3)(c)TFEU to a scheme for the protection of the natural biodiversity and natural rural heritage in Saxony *Measures for the Protection of the Natural Biodiversity and the Natural Rural Heritage in Saxony* and the amended scheme *Directive of the Saxony Environment and Agriculture Ministry on Support Measures Aiming At Safeguarding Natural Biological Diversity And Natural Rural Heritage in Saxony*. The new draft Regulation (up for public consultation on 15/10/2013) goes even further and exempts such aid from the notification requirement, even in cases of aid to large undertakings, see¶60.

⁹⁷ Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State Aid to Small and Medium-sized Enterprises Active in the Production of Agricultural Products [2006] OJ L358/3.

comments about Article 107(3)(d)TFEU being superfluous⁹⁸ suggest, the question is how to distinguish between this paragraph and the more generally used Article 107(3)(c)TFEU. First, Article 107(3)(d)TFEU is more specifically tailored to such situations. Moreover, the aid intensity under Article 107(3)(d)TFEU for the conservation of environmental heritage is higher than under Article 107(3)(c)TFEU. Second, the drafting seems to suggest a different aim for the various forms of aid. While Article 107(3)(a)(b) and (d)TFEU seem to address cases where the aim of the aid measure is to support an objective that encompasses benefits for a larger group of citizens, Article 107(3)(c)TFEU encompasses aid to a much more clearly defined group of undertakings. In the cases of Article 107(3)(a)(b) and (d)TFEU, it could be argued that the benefits are close to being public goods, ie non-excludable and non-rivalrous.⁹⁹ The aid exempted under these paragraphs should bring about ‘economic development’, foster ‘an important project of common European interest’, provide ‘remedies against serious disturbances in the economy’ or foster ‘culture and heritage conservation’. In contrast, the case of Article 107(3)(c)TFEU supports *certain* undertakings. Although, the Courts and the Commission have ensured that aid under Article 107(3)(c)TFEU also promotes a public interest, the drafting suggests that a difference remains: The aid given under Article 107(3)(a)(b) and (d)TFEU only indirectly benefits certain undertakings while aid under Article 107(3)(c)TFEU only indirectly benefits the public interest. This might explain why the aid intensity of Article 107(3)(c)TFEU seems to be lower. Moreover, the distinction suggests that it is worth asking whether the examination

⁹⁸ Vesterdorf/Nielsen 2008¶1061.

⁹⁹ With regard to public goods and their significance in competition law see the discussion under the term undertaking, Part B, Section I, Chapter A, text to (n 18ff).

of certain environmental aid measures should take place under Article 107(3)(a)(b) and (d) rather than (c) TFEU.

4. The Second Form of Environmental Integration in the Context of Article 107(3) TFEU: A Model for Other Areas

This section explains the sophisticated model of balancing under Article 107(3) TFEU and the lessons that can be learned for the second form of environmental integration in other areas. Integrating environmental considerations in State aid law cannot simply mean all aid with an environmental motive is allowed due to the integration obligation of Article 11 TFEU.¹⁰⁰ Instead, a more nuanced approach is warranted since a superiority of environmental protection does not correspond to the idea of equal value between the environment and other aims of the Union.¹⁰¹ Moreover, it conflicts with the idea of the polluter-pays principle and leads to unintended distortions of competition. Such preferential treatment can lead to a situation where the polluter would not pay for the damage caused thereby distorting competition and upsetting the polluter-pays principle. To prevent this outcome the Commission used a more balanced approach. As shown above the main area where the second form of environmental integration (balancing) takes place is Article 107(3)(c) TFEU.

The Commission balances the environmental benefit against ‘potentially negative side effects, such as distortion of trade and competition’.¹⁰² The Commission’s analysis is

¹⁰⁰ See however Portwood 2000:194.

¹⁰¹ See Part A, text to (n102ff).74

¹⁰² Community Guidelines on State Aid for Environmental Protection (2008):¶16.

modelled after a proportionality test. First, the environmental benefit needs to be clearly defined. Second, the design of the aid is examined in terms of its ability to provide the benefit. Third, it is ensured ‘that the overall balance is positive’.¹⁰³ The test clarifies that any distortion of competition through State aid needs to be justified by a genuine environmental protection interest. This theme requiring a justification for any restriction can also be found in competition law and free-movement law.

This test examining the justification for the distortion of competition was the basis on which the Commission decided its cases and later adopted the Guidelines and the Block Exemption. Two principles are used to balance competition and environmental protection: the incentive effect/principle and the polluter-pays principle. Aid can only be given where an incentive effect can be established. This means that the aid must have been the driving force for the undertaking’s behaviour. Aid cannot be granted in situations where the undertaking would have acted without it. As such, the incentive effect inhibits free-riding and ensures only necessary aid is granted so that distortions of competition are minimised. From an environmental perspective, the polluter-pays principle is used as a guiding principle, as Article 11 TFEU requires its integration.¹⁰⁴ In this regard, three different forms of integrating the polluter-pays principle in Article 107(3) TFEU can be distinguished: (1) aid measures which support the polluter-pays principle, (2) aid measures which do not infringe the principle and (3) aid measures which infringe the principle but are justified.

¹⁰³ *Ibid.*

¹⁰⁴ Part A, text to (n60ff).

Where the aid helps resolve market failures in the form of negative externalities, it supports the implementation of the polluter-pays principle. Cases of this kind help ensure the competitive balance between different forms of production. An example might be establishing the competitive balance between cheap production which generates negative externalities versus more expensive production where costs are internalised. Moreover, cases where aid is given to non-polluting undertakings can be seen as being in line with the principle. Examples of such aid include aid measures for renewable energy, environmentally friendlier bio-fuels, cogeneration and energy-efficient district heating. Furthermore, some cases do not directly create pollution and thus support the principle, for example, aid for environmental studies or the management of waste generated by another undertaking or cases of an undertaking receiving aid to clean up a site which was polluted by another undertaking.¹⁰⁵

Where aid is given to go beyond an environmental standard set by the EU the polluter-pays principle is not infringed because the relevant EU legal framework does not require the polluter to pay for this pollution. Some examples are aid for the acquisition of transport vehicles that go beyond Union standards, aid for improving environmental performance where no Union standard exists and cases of aid for the early adaptation of Union standards.¹⁰⁶ From the perspective of EU law, the undertaking is complying with all

¹⁰⁵ See Stoczkiwicz 2009:185–187. However, it might be questioned whether this is aid in the first place. In particular the application of the market investor test should mean that these cases are already outside the scope of Article 107(1)TFEU.

¹⁰⁶ *Ibid*:188. The Commission's approach seems to be even more stringent than the polluter-pays principle, since other benefits like the green image reduce the aid intensity, see Community Guidelines on State Aid for Environmental Protection (2008):¶32.

its obligations under EU law and thus bears the costs of its pollution thereby not infringing the principle.

Finally, there are cases which infringe the polluter-pays principle but where the aid is justified by the high importance of the overall aim of the system.¹⁰⁷ Examples of such cases might be aid involved in tradable permits systems, exemptions and reductions of environmental taxes or the aid for relocation of environmentally harmful undertakings.¹⁰⁸ Often, only the availability of aid in cases of tradable permits and environmental tax exemptions ensures that the overall system of tax or tradable permits can be introduced in the first place. While in the case of relocation, the undertaking's emissions will typically be the same in both locations. The reduced effect on the environment in the new location or particular environmental value of the old location justifies the infringement of the polluter-pays principle and hence the aid.

What lesson can be learned from Article 107(3)TFEU for competition or free-movement law in terms of the balancing of different values and environmental integration? The Commission's approach in the Environmental Guidelines determines (1) whether the environmental protection aim is well defined, (2) whether the design of the measure addresses a 'market failure', ie the necessity of the measure and (3) whether the measure is proportional and whether the distortion of competition and the effect on trade is limited so that it can be said 'that the overall balance is positive'.¹⁰⁹ These steps mirror those of the

¹⁰⁷ Cf also Bleckman/Koch 1995:122 who highlights that the infringement of the polluter-pays principle is justified by Article 3(3)TEU's aim of increasing the level of environmental protection.

¹⁰⁸ Stozkiewicz 2009:190–191.

¹⁰⁹ Community Guidelines on State Aid for Environmental Protection (2008):¶16.

proportionality analysis in competition and the free-movement and thus may inform the analysis in those areas. The first two requirements listed above should ensure that it is a genuine environmental protection aim. The Commission in Article 107(3)TFEU uses the incentive effect in Article 107(3)TFEU to establish the necessity of aid. The incentive effect cannot easily be transferred to other areas. Yet, where the environmental protection measure is economically sensible the Commission finds that an incentive effect cannot be established.

Possibly the most fundamental point of environmental integration in State aid is the integration of the polluter-pays principle. It takes place when looking at the proportionality of a restriction. The basic distinction here should be between the narrow and the broad readings of the principle. While whether the undertaking pays the full costs of its pollution imposed by the current legal framework is examined under the narrow reading, the broad reading is typically a guiding principle for the legislator.¹¹⁰

Where the measure leads to undertakings not having to bear the full costs of their pollution imposed by the current legislation it deserves rigorous scrutiny and will be justifiable in exceptional cases by the overall aim of the system. This will typically only be possible in cases where the system cannot be implemented without the measure. In this regard it needs to be determined whether the benchmark for deciding the current legal framework should be EU law or national law. The Environmental Guidelines suggest that the relevant benchmark should be EU law. Arguably, this could bring about a clear delineation of competences between the EU and the Member States. However, from an

¹¹⁰ See also Part B, Section I, Chapter D, text to (n112ff).

economic point of view competition can also be distorted where national obligations to bear the costs of pollution are circumvented.

However, in cases where the aid measures upset the polluter-pays principle with regard to the current legal standard (whether EU or national) the measure might still help resolve a market failure in form of negative externalities. In such cases the measure ensures the competitive balance between cheaper production creating the negative externality and a more expensive one internalising these costs. Achieving this competitive balance can either take the form of reducing the costs of the more expensive production or of increasing the costs for the one which creates negative externalities. Such a measure would support the polluter-pays principle thereby tilting the balance in its favour. Where the market position of environmentally friendlier products is improved *vis-à-vis* environmentally more harmful ones the Commission, as explained in the Environmental Guidelines, examines the magnitude of the environmental benefit in relation to the effect on market position.¹¹¹ Such an approach which ensures that the environmental benefit is not disproportional to the effect on competition examines the cost-effectiveness of the measure.¹¹² The Commission in this context uses the principle that where only the ‘actual extra costs linked to a higher level of environmental protection [are offset], the risk that [the measure] will unduly distort competition is normally rather limited’.¹¹³

¹¹¹ *Ibid*¶36ff.

¹¹² *Cf Ibid*¶35.

¹¹³ *Ibid*¶36.

5. Lessons from Free-Movement Law

If the second form of integration in State aid law is compared with free-movement law, the use of international agreements and Union legislation deserves attention. In free-movement law such agreements and legislation are used to highlight the importance and increase the legitimacy of the environmental protection aim. In State aid law, using international agreements and Union legislation is uncommon. In fact, aid given to achieve a Union standard is considered to conflict with the polluter-pays principle and is thus illegal. Aid is only possible where the EU standard is not yet binding, ie in cases of early adaptation of EU standards. However, on closer inspection this issue of aid for achieving EU standards can be compared to the question of minimum standard harmonisation and the freedoms. In a way, the EU standard sets the minimum standard to which undertakings need to comply without aid from the Member States. Hence, it seems that EU legislation can also be used in State aid to highlight the importance and increase the legitimacy of the environmental protection aim. This can happen, for example, in cases where the EU has set a standard but Member States are allowed to provide aid to undertakings for going beyond the standard. Expressing more clearly that an environmental protection aim is additionally supported by international agreements and EU legislation can also increase the legitimacy of a measure under investigation in State aid law.

Furthermore, the treatment of scientific uncertainty can be compared. Of particular importance in the freedoms is the precautionary principle which leads to a certain deference to the Member State's decision in cases involving scientific uncertainty. The use of the precautionary principle is not as common in State aid. However, the precautionary principle

and the flexibility offered thereby to the Member States may not be as important in State aid as it is for the freedoms, for in State aid the general principle is that aid for undertakings to go beyond EU standards (and only that) should be allowed. This already gives the Member States the leeway to foster a higher environmental protection standard so that the room offered by applying the precautionary principle in the freedoms may not be necessary.

6. Conclusion on State Aid

This chapter examined the second form of environmental integration in Article 107 TFEU. This form, which balances competition and environmental protection, takes place only in Article 107(3) TFEU. Integration is possible under Article 107(3)(a)(b)(c) and (d) TFEU. While the test under Article 107(3)(b) TFEU shows a systematic approach which in some instances seems unnecessarily narrow, the scope and test under Article 107(3)(d) TFEU is less clear. In general, the Commission seems to prefer exempting aid under Article 107(3)(c) TFEU as it allows the largest leeway. This provision is designed to exempt aid to *certain* undertakings rather than the more specific Articles 107(3)(a)(b) and (d) TFEU. Although, some minor improvements based on free-movement law have been suggested, the sophisticated proportionality test under Article 107(3) TFEU provides a model for other areas where a conflict between environmental protection and competition or the internal market calls for balancing.

C. The Article 106TFEU Exception

1. Introduction

This chapter focuses on the second form of environmental integration via Article 106TFEU. Article 106(2)TFEU is the main tool within Article 106TFEU that allows balancing of environmental protection and competition, ie the second form of environmental integration. The chapter explains that Article 106(2)TFEU offers great flexibility to the Member States regarding the second form of integration, in particular through the definition of services of general economic interest (SGEI) which can encompass environmental protection and provides for the second form of environmental integration. The main factor limiting the use of Article 106(2)TFEU in environmental cases is the condition of entrustment. The balancing exercise itself also provides much flexibility and can benefit from some of the experiences gained in the market-freedoms.

2. Article 106TFEU

Article 106TFEU contains, as explained,¹ three paragraphs. The first and last ones do not have a stand-alone function but are dependent on other provisions. Thus, the second form of environmental integration cannot take place within Article 106(1) or (3)TFEU. The relevant paragraph is therefore paragraph two, which allows Member States to entrust undertakings with the provision of SGEIs² or revenue-producing monopolies even if doing

¹ See Part B, Section I, Chapter C.

² The importance of services of general interest is further highlighted by Article 14TFEU, the Protocol (No 26) on services of general interest and Article 36 of the EU Charter of Fundamental Rights. On the significance and effect of the introduction of its predecessor's provision, Article 16 EC, see Ross 2000. Whether Ross's proposition to extend the reach of this Article has actually materialised needs to be questioned. On the difference to the new Lisbon version see Krajewski 2008:392–393, pointing

so restricts competition. This action is not prohibited as long as the restriction is necessary and does not affect trade to an extent contrary to the interests of the Union.

The entrustment with a SGEI does not necessarily ‘presume that the operator entrusted with that mission will be given an exclusive or special right. ...The grant of a special or exclusive right to an operator is merely the instrument, possibly justified, which allows that operator to perform a SGEI’.³ The function of Article 106(2)TFEU is thus ‘to reconcile the Member States’ interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the [Union]’s interest in ensuring compliance with the rules on competition and the preservation of the unity of the [internal] market’.⁴ However, not only Member States but also undertakings can rely on the provision.⁵

The balancing performed under Article 106(2)TFEU can cause the competition provisions not to apply in a specific case. A national court must thus establish whether the undertaking is entrusted with the operation of an SGEI⁶ and whether the application of competition law would obstruct this task⁷ before applying the competition provisions. Prior to the decentralisation of Article 101(3)TFEU, an argument could be made that the assessment under Article 106(2)TFEU and in particular whether the development of trade

out that the question would arise whether other competences must be used to adopt directives in the area of SGEI as Article 14TFEU could only be used for regulations.

³ Case T-289/03 *BUPA* ¶179.

⁴ Case C-67/96 *Albany* ¶103; Case C-265/08 *Federutility* ¶28; Case C-463/00 *Commission v Spain* ¶82; Case 202/88 *France v Commission* ¶12; Case C-157/94 *Commission v Netherlands*.

⁵ Eg Case C-475/99 *Ambulanz Glöckner*; Joined Cases C-147/97 and C-148/97 *Deutsche Post*; Case C-209/98 *Sydbavnens Sten & Grus*; Case C-266/96 *Corsica Ferries France*; Case C-67/96 *Albany*.

⁶ Cf Case 127/73 *BRT v SABAM*. The court may apply the competition rules only if the undertaking is not subject to the Article 106(2)TFEU justification, cf Case 155/73 *Sacchi*.

⁷ Case C-393/92 *Gemeente Almelo* ¶50; Case C-320/91 *Corbeil* ¶16-20; Case C-260/89 *ERT v DEI* ¶34.

would be affected to an extent that would be contrary to the interests of the Union should be reserved for the Commission. The application of Article 106(2)TFEU at the national level could have circumvented the Commission's exemption monopoly under Article 101(3)TFEU.⁸ However, after the decentralisation such an argument cannot be so easily retained. Hence, national courts must assess whether the conditions of Article 106(2)TFEU are fulfilled, as the Article is directly effective.⁹ This interpretation finds support in cases like *Corbeau*.¹⁰ There, the CJ neither examined the question of whether the effect on trade would be contrary to the Union's interest nor whether a national court could conduct this assessment. Instead, the Court left it to the national court to decide whether Article 106(2)TFEU would apply depending on the particular facts of the case.¹¹ This means that the national Court must assess all of the requirements of Article 106(2)TFEU in a given case.

3. Article 106(2)TFEU

The final condition of Article 106(2)TFEU, that trade cannot be affected to the extent contrary to the interests of the Union, can be compared to the conditions of adverse effect on trade under competition law, State aid law and the market-freedoms.¹² In practice,

⁸ Eg the decision in Case 10/71 *Muller* could be interpreted in such a way.

⁹ However, it might still be argued that the element of adverse effect on trade is an assessment in the light of the Union's interest and should be reserved for the Commission. Cf Whish 2009:239; Jones 2011. It could, however, also be seen as part of the general proportionality test under Article 106(2)TFEU, Faull/Nikpay 2007¶6.205.

¹⁰ Case C-320/91 *Corbeau*. See also eg Case C-260/89 *ERT v DEP*; Case 66/86 *Ahmed Saeed Flugreisen*; Case C-475/99 *Ambulanx Glückner*; Case C-393/92 *Gemeente Almelo*.

¹¹ See also Case C-265/08 *Federutility*¶34: 'It is for the referring court to assess, in the context of the dispute in the main proceedings, whether that requirement of proportionality is fulfilled' and Opinion AG Jacobs Case C-203/96 *Chemische Afvalstoffen Dusseldorf*¶106; Case C-393/92 *Gemeente Almelo*¶50.

¹² Cf Duisberg 1997:129; Jones 2011:616; Whish/Bailey 2012:238ff.

however, it seems to have no particular relevance and is part of the proportionality test.¹³ The main conditions of Article 106(2)TFEU are, therefore, (1) the existence of a SGEI or a revenue-producing monopoly, (2) an undertaking must be entrusted and (3) the resulting restrictions on competition must be proportional.

a) Services of General Economic Interest

A SGEI can be a task of environmental protection task thus allowing for the balancing exercise between competition and environmental protection. The term *SGEI* can be described as a subcategory of service of general interest.¹⁴ While a service of general interest includes all kinds of services whether economic in nature or not, an SGEI is the narrower category as it only covers services which have an economic nature. In contrast to non-economic services which escape the realm of competition law by virtue of the definition of an undertaking,¹⁵ SGEIs are services provided by undertakings and are generally within the realm of competition law although such services may escape via Article 106(2)TFEU.¹⁶ Thus, it may be said that the term service of general economic interest is an ‘unfortunate’ one¹⁷ since it is not the interest that must be economic but the service. Unfortunately, the

¹³ Jones 2011:616. See eg *De Post-La Poste* ¶81 where the Commission found that sealing-off of a national market impedes trade to an extent contrary to the Community interest.

¹⁴ Cf Case T-289/03 *BUPA* ¶86 Also sometimes called public services.

¹⁵ See in this regard Part B, Section I, Chapter A.

¹⁶ Cf eg Makowski 2007:128f; Jones 2011:568–570. This has also been the long-standing position of the Commission, Communication from the Commission, Services of General Interest in Europe:Annex II; European Commission, White Paper on Services of General Interest:Annex 1; Communication from the Commission, Services of General Interest, Including Social Services of General Interest:4. Criticising the concept of service of general interest *vis-a-vis* service of general economic interest as creating confusion, Krajewski 2008:385–388. The fact that non-economic services do not fall under competition law is now, moreover, clarified by Protocol No 26 Article 2.

¹⁷ Jones 2011:569. The term ‘economic’ in SGEI has also been described as redundant as Article 106TFEU does only apply if the service is economic, Maillo 2007:605.

Court does not seem very careful in its use of the terms as it uses the terms service of general interest and service of general economic interest interchangeably.¹⁸

A SGEI does not have to be universal or address a common need of the whole population. It can thus have a limited territorial or material scope catering only to a limited group.¹⁹ Classic examples of SGEIs are utilities.²⁰ Besides basic postal services and utilities the Court has accepted several other services as SGEIs. Examples of SGEIs include the operation of public service broadcasting,²¹ unprofitable air routes,²² administration of major waterways,²³ mooring services in a port,²⁴ emergency ambulances,²⁵ sectoral pension funds with mandatory membership²⁶ and private health insurance with a mandatory system to ensure risk alignment.²⁷ The wide range of cases exemplifies the Member States' wide discretion in defining SGEI.²⁸ This discretion regarding the public interest is rooted in the *subsidiarity* principle.²⁹

¹⁸ See eg Case C-393/92 *Gemeente Almelo* ¶46-48.

¹⁹ Case T-289/03 *BUPA* ¶186-187.

²⁰ See XXIIInd Report on Competition Policy .

²¹ Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark*; Case 155/73 *Sacchi*; Case 155/73 *Sacchi*.

²² Case 66/86 *Ahmed Saeed Flugreisen*.

²³ Case 10/71 *Muller*.

²⁴ Case C-266/96 *Corsica Ferries France*.

²⁵ Case C-475/99 *Ambulanz Glöckner*.

²⁶ Case C-67/96 *Albany*.

²⁷ Case T-289/03 *BUPA*.

²⁸ See Case T-106/95 *FFSA* ¶215-228; Case T-17/02 *Olsen v Commission* ¶99.

²⁹ Cf also Case T-289/03 *BUPA* ¶167. Only in areas where harmonisation has taken place may mean that limitations apply.

The first time the idea of environmental protection as a SGEI appeared before the Court appears to be the Opinion of AG Rozès³⁰ in *Inter Huiles*. This case arose even before the Single European Act was signed and, hence, before the environmental integration obligation was introduced into the Treaty. The Court did not consider whether environmental protection could be a SGEI, as it found that what is now Article 106(2)TFEU had no direct effect. After it later declared that Article 106(2)TFEU was directly effective³¹ it made a step towards such interpretation in *Almelo*.³² The case came to the Court after the Maastricht Treaty came into force, which implemented the integration obligation by changing the wording from ‘shall be a component of’ to ‘must be integrated into the definition and implementation of other Community policies’. However, the task in this case was not directly an environmental protection task but concerned the supply of energy. The Court found that the undertaking was performing a SGEI. It would be necessary to take into account all costs that legislation would impose on the undertaking ‘particularly concerning the environment’.³³ Although the Court did not directly rule that environmental protection was a SGEI³⁴ the judgment shows that environmental considerations can come into play in the analysis.³⁵

³⁰ Opinion AG Rozès Case 172/82 *Inter Huiles* 581.

³¹ See eg Case C-260/89 *ERT v DEP*; Case 66/86 *Ahmed Saeed Flugreisen*; Case C-393/92 *Gemeente Almelo*; Case C-320/91 *Corbeau*; Case C-475/99 *Ambulanz Glöckner*.

³² Case C-393/92 *Gemeente Almelo*.

³³ *Ibid*¶49.

³⁴ And could not have gone so far due to the fact of the case.

³⁵ Cf Vedder 2003:271.

After its signing but before the Amsterdam Treaty came into force, the Court in *Dusseldorp*³⁶ had the first opportunity to rule on whether an environmental protection task can be considered a SGEI. This Treaty placed the integration obligation under the heading Principles among its first Articles. Yet, the CJ did not position itself in a clear manner. *Dusseldorp* concerned an exclusive right granted to AVR Chemie for the treatment of waste oil filters which was secured by an export ban in order to ensure economic viability of the treatment facility. The Court found that even if the environmental protection task were a SGEI an assessment would still be needed to determine whether the restriction of competition would go beyond what was necessary.³⁷

Later, with the Amsterdam Treaty in force, the CJ³⁸ clarified that ‘the management of particular waste may properly be considered to be capable of forming the subject of a service of general economic interest, particularly where the service is designed to deal with an environmental problem’.³⁹ Thus, one can conclude that the CJ considers that an undertaking entrusted with handling environmental problems may be entrusted with a SGEI.⁴⁰

³⁶ Case C-203/96 *Chemische Afvalstoffen Dusseldorp* for a critical comment on this case see Denys 1999a.

³⁷ Vedder 2003:272 even identifies the CJ’s scepticism regarding the question of whether this would constitute a SGEI. Yet, one could also argue that the Court was rather sceptical with regard to the actual justification/necessity so the question whether the undertaking was entrusted and whether the service was a SGEI was only secondary.

³⁸ This time as a full Court instead of a chamber as before.

³⁹ Case C-209/98 *Sydhavnens Sten & Grus* for a comment Notaro 2000a.

⁴⁰ In this line equally Geradin 2002:142–143; Vedder 2003:273; Maillo 2007:605; Jans/Vedder 2008:287; de Sadeleer/Blumann/Mégret/Dony 2010¶363, more critical de Vries 2006:166.

However, one additional element must be fulfilled before an environmental protection task can be considered a SGEI. The GC in *BUPA*⁴¹ explained that although the concept of SGEI was not an ‘*objective, automous, communautaire [one]*’⁴² and the Member States were free to define what constituted a SGEI, such a service needs to be ‘universal and compulsory in nature’.⁴³ Universality, however, does not mean that the service needs to be available to the whole population.⁴⁴ It can equally be available only to a smaller group defined by territorial or other criteria. The compulsory element of a SGEI is defined as

meaning that the operators entrusted with the SGEI mission...are, in principle, required to offer the service in question on the market in compliance with the SGEI obligations which govern the supply of that service. From the point of view of the operator...that compulsory nature – which in itself is contrary to business freedom and the principle of free competition – may consist, inter alia, particularly in the case of the grant of an exclusive or special right, in an obligation to exercise a certain commercial activity independently of the costs associated with that activity.⁴⁵

The GC portrayed the universality condition as the flip side of the position on the market which was gained by the entrustment. Where no transferral of special or exclusive rights takes place, the compulsory element might be seen in an obligation imposed by the State to serve every customer who requests the service. Moreover, the GC made clear that the compulsory element does not preclude a certain room for independence for the

⁴¹ Case T-289/03 *BUPA*.

⁴² Ross 2009:131.

⁴³ Case T-289/03 *BUPA*¶172.

⁴⁴ Case C-266/96 *Corsica Ferries France*¶45; Case T-17/02 *Olsen v Commission* 186ff; Case T-289/03 *BUPA*¶186; Case 66/86 *Ahmed Saeed Flugreisen*¶55.

⁴⁵ Case T-289/03 *BUPA*¶188.

undertakings.⁴⁶ The Court pointed out that one decisive element might be that the operator of a SGEI 'is obliged to contract, on consistent conditions, without being able to reject the other contracting party. ...[which distinguishes this SGEI] from any other activity carried out in complete freedom'.⁴⁷ Therefore, before an environmental protection task performed by an undertaking can be considered a SGEI, it is necessary to establish that the undertaking is obliged to serve every customer who requests the service. An example might be an undertaking entrusted with the clean-up of oil spillages in a harbour which is required to offer this service to docking ships. At first this case seems to have similarities with *Diego Cali*.⁴⁸ However, in *Diego Cali* the company was not only entrusted with clean-up of oil spillages. It was performing a task of public authority, ensuring compliance with the legal requirements. It was therefore not an undertaking.⁴⁹ The clean-up services that were also provided by the company were directly linked to the exercise of public authority within the meaning of *Selex*.⁵⁰

This interpretation that allows the concept of SGEI to encompass environmental protection ensures that competition and environmental protection can be balanced and thus provides the second form of environmental integration in line with Article 11 TFEU. The

⁴⁶ *Ibid* ¶188-190. With regard to the degree of independence see also Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV2/Danmark* ¶117ff

⁴⁷ Case T-289/03 *BUPA* ¶190.

⁴⁸ Case C-343/95 *Diego Cali & Figli*.

⁴⁹ See in this regard Part B, Section I, Chapter A, text to (n18ff).

⁵⁰ Case C-113/07P *Selex Sistemi Integrati*. On this case and the issue of direct link see also Nowag 2010.

Commission also seems to adopt this approach. It explained that one mission of SGEIs is to ensure a high level of environmental protection.⁵¹ The Commission stressed that

in line with the Union's policy on sustainable development, due consideration has to be taken also of the role of [SGEIs] for the protection of the environment and of the specific characteristics of services of general interest directly related to the environmental field, such as the water and waste sectors.⁵²

The result of this statement can be seen in the Commission's decision in *AVR*.⁵³ This case concerned payments to AVR by the Netherlands for treating hazardous waste prior to disposal. The case has been described as an 'excellent example of the Commission's incorporating environmental policy principles (eg, the polluter-pays principle and the principles of self sufficiency in waste and disposal of waste close to the source) into its application of Article [106(2)TFEU]'.⁵⁴ As the Member States are relatively free to define what constitutes a SGEI the focus shifts to whether complying with the Treaty obligations would obstruct this task and whether the undertakings were entrusted.⁵⁵

b) Revenue-Producing Monopolies

The Article 106(2)TFEU exception also applies to revenue-producing monopolies. Such monopolies are State-established monopolies with the sole purpose of producing revenue. Typical examples include gambling, alcohol, or tobacco businesses. However, as the aim of

⁵¹ Communication from the Commission, Services of General Interest, Including Social Services of General Interest:3; Communication from the Commission, Services of General Interest in Europe:¶8-10.

⁵² European Commission, White Paper on Services of General Interest:section 3.4.

⁵³ *Aid measures implemented by the Netherlands for AVR for dealing with hazardous waste*.

⁵⁴ Kingston 2009:244.

⁵⁵ Faull/Nikpay 2007¶6.147:

producing such revenue can be achieved in nearly all cases by less restrictive means which do not eliminate competition⁵⁶ the justification for such monopolies⁵⁷ is nearly always another public interest.⁵⁸ Hence, the focus within Article 106(2) TFEU shifts to SGEIs as justification.

In terms of environmental integration, at first sight it seems that the expression ‘revenue-producing monopolies’ would not allow an interpretation that would encompass environmental protection. Revenue-producing monopolies should exist for the sole purpose of producing revenue. However, an interpretation allowing the second form of environmental integration seems possible because during examinations of whether such monopolies are justified, the focus shifts towards a public-interest justification. Thus, it might be possible that a revenue-producing monopoly is created by the State in the interest of the environment. However, this monopoly could only be justified as long as it is necessary to protect the environment.⁵⁹ Yet, given that market mechanisms which lead to ‘putting a price tag’ on environmental protection might be more effective than a monopoly such a case would need to be an exceptional one.

c) Entrusted

It is not sufficient that the undertaking is performing a SGEI or is a revenue-producing monopoly. For Article 106(2) TFEU to apply, the undertaking must also be ‘entrusted’.

⁵⁶ Such as non-discriminatory taxation. See in this regard the Recommendation de la Commission à la République française au sujet de l'aménagement du monopole national à caractère commercial des tabacs manufacturés and also *Wainwright* 1990:248.

⁵⁷ Also under Article 37 TFEU.

⁵⁸ See *Faull/Nikpay* 2007¶8.66-8.73.

⁵⁹ The same would be the case if Article 31 TFEU were applied to such a monopoly.

Whenever an undertaking performs an environmental protection task and the State has placed a *specific* environmental obligation on a particular sector or a group of undertakings the entrusted criterion is satisfied.⁶⁰ However, a specific obligation is placed on an undertaking in environmental as well as in non-environmental SGEI.⁶¹ The GC explained in *BUPA* that a clear mandate must be given to the undertaking by the State.⁶² This mandate may take the form of a concession.⁶³ However, it is not necessary for the mandate to specify all the details of the operation although a simple authorisation or approval is not sufficient.⁶⁴ In *BUPA* the question arose as to whether insurers which were obliged to make payments between each other depending on whether they had a higher or lower rate of average risk could be considered as entrusted within the meaning of Article 106(2) TFEU. The GC found that a comparison between Article 106(1) and (2) TFEU would show that a SGEI does not necessarily have to involve the conferral of exclusive or special rights. Thus, the GC concluded that imposing an obligation on a large number or even all market participants could equally be seen as the act of entrusting.⁶⁵ It was, therefore, not necessary for every undertaking to be entrusted by a separate act.⁶⁶ Yet, the Court made clear that there must be a *specific obligation* to which this group of undertakings is subjected.⁶⁷ Hence, even though a large group of or even all undertakings in a certain market might be subject to an obligation,

⁶⁰ Kingston 2009:242.

⁶¹ Cf *Ibid* for the view that the environmental integration obligation would affect this criterion.

⁶² Case T-289/03 *BUPA* ¶179.

⁶³ Case C-393/92 *Gemeente Almelo* ¶47.

⁶⁴ *Uniform Eurocheques* ¶29; Case T-17/02 *Olsen v Commission* ¶188; Gyselen 2010:494.

⁶⁵ Case T-289/03 *BUPA* ¶178-180.

⁶⁶ *Ibid* ¶183.

⁶⁷ *Ibid* ¶180-184. Hence, an obligation imposed on all monopolies is also not sufficient, *GEMA*.

this obligation must be specific to the extent that it distinguishes these undertakings in this market from all other undertakings. This definition shows similarities to AG Jacobs' earlier definition and elaborated the CJ's cases law. The CJ held that an obligation must be linked to the SGEI and contribute to its achievement. General obligations regarding the environment or regional policy are, therefore, not sufficient 'unless such obligations are specific to those undertakings and to their business'.⁶⁸ The AG had explained that entrustment means that the undertaking must be subject to certain obligations imposed by the State.⁶⁹ Moreover, the *BUPA* reasoning seems to explain why the CJ did not follow its AG in *Wouters*.⁷⁰ AG Léger suggested in *Wouters* that the lawyers in the Netherlands were entrusted with a service of general economic interest⁷¹ and, therefore, came to the conclusion that the regulation by the bar could escape the application of competition law via Article 106(2) TFEU.⁷² However, the 'right of audience before all courts'⁷³ only entails a right for a lawyer and not an obligation that distinguishes these undertakings from all others.⁷⁴ Moreover, even if one accepts that the lawyers were entrusted with a SGEI this would not necessarily lead to the conclusion that the bar would be entrusted with a SGEI. Thus, the criterion of entrustment is not fulfilled in cases such as *Wouters* where no specific obligation is imposed on an undertaking, a group, or an association of undertakings that distinguishes them from other undertakings.

⁶⁸ Case C-159/94 *Commission v France* ¶69.

⁶⁹ Opinion AG Jacobs Case C-203/96 *Chemische Afvalstoffen Dusseldorp* ¶103.

⁷⁰ Case C-309/99 *Wouters*.

⁷¹ Opinion AG Léger Case C-309/99 *Wouters* ¶177.

⁷² *Ibid* ¶200.

⁷³ *Ibid* ¶177.

⁷⁴ Cf Makowski 2007:130.

While the definition of SGEI is broad and leaves the Member States much room to manoeuvre in terms of environmental protection, the second criterion, entrustment, is more stringent. It limits the scope of Article 106(2) TFEU considerably by requiring that a *specific* obligation be placed upon the undertakings entrusted.

d) Proportionality or Obstructing the Performance of the Particular Task

Article 106(2) TFEU specifies that the competition rules shall apply to undertakings entrusted with a SGEI or a revenue-producing monopoly only ‘in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them’.

This cumbersome wording has led the Court to apply the condition ‘obstruct the performance’ in a strict way in its early case law.⁷⁵ Only with *Corbeau*⁷⁶ did the Court deviate from this strict reading of a proportionality test.⁷⁷

The two important cases in terms of environmental protection and SGEIs are *Dusseldorp*⁷⁸ and *Sydhavnens*⁷⁹ which both concern the grant of an exclusive right combined with export restrictions for non-hazardous waste. In both cases the Court accepted that ensuring the economic viability of waste treatment facilities can be a legitimate concern of

⁷⁵ Eg Case C-179/90 *Merci v Gabrielli*; Case C-41/90 *Höfner and Elser*; Case 18/88 *RTT v GB-Inno-BM*.

⁷⁶ Case C-320/91 *Corbeau* ¶16ff

⁷⁷ Opinion AG Darmon Case C-393/92 *Gemeente Almelo* ¶144; Jones 2011:606.

⁷⁸ Case C-203/96 *Chemische Afvalstoffen Dusseldorp*.

⁷⁹ Case C-209/98 *Sydhavnens Sten & Grus*.

protecting the environment in the context of Article 106(2)TFEU.⁸⁰ Under this test – established since *Corbeau*⁸¹ – the State must show that the restriction is necessary to ensure economic viability of the provision of the SGEI.

This approach which allows fostering environmental protection only indirectly (ie by means of an economically viable business model) contrasts with the approach under the market-freedoms⁸² and State aid. In the context of the market-freedoms ensuring economic viability is considered an economic reason which cannot serve as justification.⁸³ This difference can be seen in *Dusseldorp* where the court rejected the economic viability argument in the context of the freedoms⁸⁴ but accepted it under Article 106(2)TFEU.⁸⁵ Similarly in State aid, the aid cannot ensure the economic viability of an undertaking. Aid can only offset the additional costs of an environmental protection measure.⁸⁶ In practice, offsetting an undertaking's additional costs from an environmental protection measure may be the same as ensuring the economic viability of the provision of an environmental SGEI because in both cases the costs of the environmental benefit are covered. Yet, an important difference remains: The conditions imposed on showing that only additional costs are offset are more

⁸⁰ Case C-209/98 *Sjdbavnens Sten & Grus*¶77; Case C-203/96 *Chemische Afvalstoffen Dusseldorp*¶66-68.

⁸¹ See also eg Joined Cases C-115/97 to C-117/97 *Brentjens*¶107; Case C-219/97 *Drijvende Bokken*¶97; Case C-437/09 *AG2R Prévoyance*¶76; Case C-67/96 *Albany*¶107. This more generous approach has also been observed in the BUPA judgment, Ross 2000:136.

⁸² See also de Vries 2006:163 who observes a more generous approach under 106(2)TFEU.

⁸³ See eg Case C-212/08 *Zeturf*¶52; Case C-153/08 *Commission v Spain*¶43; Case 288/83 *Commission v Ireland*¶28.

⁸⁴ Case C-203/96 *Chemische Afvalstoffen Dusseldorp*¶44.

⁸⁵ *Ibid*¶66-68.

⁸⁶ See Community Guidelines on State Aid for Environmental Protection (2008):¶36.

rigorous⁸⁷ than allowing measures to ensure economic viability. This difference might result from the subsidiarity principle and the leeway that the European Courts have given Member States in deciding whether and to what extent they want to make use of undertakings as SGEI providers.

In terms of the balancing exercise by means of proportionality the CJ in *Dusseldorp*⁸⁸ clarified that the State must show that the entrustment was proportional.⁸⁹ However, it seems unnecessary to prove that less restrictive means would not be able to ensure viability.⁹⁰ In this line the CJ in *Commission v France* held that the

burden of proof cannot be so extensive as to require the Member State, when setting out in detail the reasons for which, in the event of elimination of the contested measures, the performance of the tasks of general economic interest under economically acceptable conditions would, in its view, be jeopardized, to go even further and prove, positively, that no other conceivable measure, which by definition would be hypothetical, could enable those tasks to be performed under the same conditions.⁹¹

Thus, the claimant would need to suggest less restrictive options.⁹² There is a certain difference to the test under the market-freedoms in this regard. Under the market-freedoms

⁸⁷ See for example the detailed approach described in Chapter 3 of the *Ibid*.

⁸⁸ Case C-203/96 *Chemische Afvalstoffen Dusseldorp* ¶67.

⁸⁹ This move has been described as departing from the more liberal approach in *Corbeau*, see Jones 2011:609. However, the Court might have clarified and not changed the burden of proof, because there are no reasons in *Corbeau* for supporting the view that burden of proof regarding the proportionality should not rest on the party that invokes Article 106(2)TFEU. Moreover, this allocation of the burden of proof can be seen even in earlier case law, eg Case 155/73 *Saatchi* ¶15.

⁹⁰ Lavrijssen 2010:644–645. However, it has been argued that the GC in Case T-260/94 *Air Inter* would have adopted a stricter approach Maïllo 2007:607–611 which later seems to be relaxed again, Sauter 2008:136. Yet it appears that this was rather a question of facts than a substantive one. In this line also Faull/Nikpay 2007:6.196-6.198. See also Sauter 2008 who identifies the issue of whether pre-emption applies or not as the main reason for the differences.

⁹¹ Case C-159/94 *Commission v France* ¶101.

⁹² Hancher 2003a:733.

the Member State must provide an ‘analysis of the appropriateness and proportionality of the restrictive measure adopted...[and] precise evidence’⁹³ although the Member States do not have to positively show that no other means were available.⁹⁴

However, the test also shares similarities with the necessity test under the four freedoms.⁹⁵ Borrowing from the area of the four freedoms it has been suggested that the proportionality test might be stricter when a form of pre-emption has occurred, ie a Union norm is occupying the field.⁹⁶ This idea seems to make sense in particular in the light of the subsidiarity principle. The Member States enjoy wide discretion with regard to the definition and organisation of SGEIs. However, if the Union has already acted in the field the discretion is more limited. Yet, the fact that not every measure by the Union has pre-emptive force⁹⁷ needs to be taken into account. To determine whether such pre-emptive force exists the following factors were used in the context of the freedoms and should also play a role here:

(1) Does the EU measure allow more stringent national environmental measures?

(2) Does the primary law allow derogation on environmental grounds (eg Article 114(4)(5)TFEU) or does it allow derogations generally, where the measure is consistent with other Treaty provisions and in particular the freedoms (eg Article 193TFEU)?

⁹³ Case C-161/07 *Commission v Austria* ¶36; Case C-400/08 *Commission v Spain* 83.

⁹⁴ Case C-110/05 *Commission v Italy* ¶66.

⁹⁵ Cf in this line Opinion AG Léger Case C-438/02 *Hannet* ¶140-142; Opinion of AG Bot Case C-42/07 *Liga Portuguesa de Futebol Profissional* ¶221-223; cf also Notaro 2000a:311 explaining this with reference to Case C-209/98 *Sydhavnens Sten & Grus*.

⁹⁶ Sauter 2008:186–187 drawing upon Case C-159/94 *Commission v France*; Case C-158/94 *Commission v Italy*; Case C-157/94 *Commission v Netherlands*.

⁹⁷ See Part C, Section I, Chapter A, text to (n95ff).

4. Conclusion on Article 106TFEU

This chapter examined the second form of environmental integration in the context of Article 106TFEU and showed that such integration takes place via Article 106(2)TFEU. Against the background of the subsidiarity principle and the strengthening of the position of SGEIs by Article 14TFEU, Protocol (No 26) on SGEIs, and Article 36 of the EU Charter of Fundamental Rights, the Member States are given flexibility in defining and organising their SGEIs. This allows the interpretation that the concept of SGEIs and revenue-producing monopolies encompass environmental protection. This 'liberal' approach can also be observed in the assessment of the proportionality of such measures. The biggest hurdle to using Article 106(2)TFEU for the second form of environmental integration – balancing – is the entrustment condition.

D. Competition Law

In competition law the second form of environmental integration can take place either under Article 101(1)TFEU's European rule of reason and Article 101(3)TFEU or under the objective justification and efficiency defence in the examination of Article 102TFEU. This chapter first addresses Article 101(1) and (3)TFEU before it turns to Article 102TFEU. The chapter considers in particular the extent to which environmental protection can be balanced against restrictions of competition under the different tests, because such balancing is contentious.¹ In the final section this chapter conceptualises the relationship between the different forms of balancing in Article 101(1) and 101(3)TFEU, the objective justification and the efficiency defence under Article 102TFEU, and their interaction with Article 106(2)TFEU. It shows that each of these options for balancing has its own area of application, and finally it suggests some lessons from State aid and free-movement law.

1. Article 101TFEU

In the context of Article 101TFEU, the second form of environmental integration (ie balancing between competition and environmental protection) can take place within Article 101(1)TFEU and under Article 101(3)TFEU. The following section explains the framework for this form of integration.

¹ See Part A, text to (n141ff).

a) Article 101(1)TFEU

This part on the second form of environmental integration (balancing) in Article 101(1)TFEU first examines cases of horizontal agreements² before it turns to vertical³ ones.

When examining Article 101(1)TFEU and the restriction of competition, the rule of reason might come into play. The term rule of reason is associated with two different concepts. The first relates to whether an ‘effect’ on competition within the meaning of Article 101(1)TFEU can be established, namely whether the pro- and anticompetitive effects may be weighed against each other. It thus corresponds to the American-style rule of reason.⁴ Whether such a rule of reason can be identified in European competition law is contentious.⁵ The Courts have consistently rejected this kind of rule of reason which examines the so-called ‘net effect’ on competition under Article 101(1)TFEU.⁶ Some of these issues are addressed under ‘Object and Effect on Competition’ in Part B;⁷ others are

² Agreements amongst competitors.

³ Agreements in the upstream-downstream relationship, eg manufacturer and distributor.

⁴ Established in *Standard Oil Co of New Jersey v United States*, see also *State Oil v Khan*; *Leegin Creative Leather Products, Inc v PSKS, Inc*; *California Dental Association v Federal Trade Commission*; *Continental TV Inc v GTE Sylvania*; *National Collegiate Athletic Association (NCAA) v Board of Regents of University of Oklahoma*. With regard to the US rule in general see Posner 2001:39f; Areeda/Hovenkamp 2003:335ff; Hovenkamp 2005:chapter 6.4, 11.1, 11.6; Elhauge/Geradin 2011:182ff.

⁵ See in this regard eg Schechter 1982; van Houtte 1982; Steindorff 1984; Peeters 1989; Ackermann 1997; Odudu 2001; Robertson 2007; Lasok 2008. For a detailed analysis of the rule of reason under Article 101(1) and looking at the net effect of the agreement, see Caspar 2001 arguing in favour of such an approach. On the different concepts that are considered under the rule of reason see Wesseling 2005 and on the concept of rule or reason in European Law in general Schrauwen 2005.

⁶ Case T-65/98 *Van den Bergh Foods*¶106-107; Joined Cases T-374/94, T-375/94, T-384/94 & T-388/94 *European Night Services*¶136; Case T-112/99 *M6 v Commission (Metropole II)*¶72-77; Case T-328/03 *O2 (Germany)*¶69; Case C-235/92P *Montecatini v Commission*¶133. The argument mounted against such an approach is that Article 101(3)TFEU would become superfluous. See eg Makowski 2007:116–118 with further references. Hence, even agreements that have in economic terms an overall neutral or positive effect on consumer welfare and allocative efficiency might be caught under Article 101(1)TFEU, Faull/Nikpay 2007¶3142.

⁷ See text to Part B, Section I, Chapter B, text to (n1ff).

addressed below in the analysis of Article 101(3)TFEU.⁸ The second concept of rule of reason refers to a line of cases where the Courts found that although a certain behaviour may have an effect on competition, the behaviour is not subjected to the prohibition of Article 101(1)TFEU. While others use the term ancillary restraints to explain these cases,⁹ this section refers to this concept as European rule of reason¹⁰ because it is a generic concept in European competition law. It must be understood as a transposition of the market-freedoms' rule of reason case law to competition law,¹¹ ie the transposition of the mandatory/imperative requirement justification¹² into Article 101(1)TFEU.

The European rule of reason can provide for the second form of environmental integration in competition law, the balancing of environmental protection with restrictions of competition. European rule of reason is often explained by reference to *Albany*,¹³ *Wouters*¹⁴ and *Meca-Medina*¹⁵ and was recently confirmed in *OTO*¹⁶ and *CNG*.¹⁷ In these

⁸ See below Part C, Section I, Chapter D, text to (n68-234ff).

⁹ For such an 'inherent restriction' or ancillary restraints approach, van de Gronden 2005:84; Jones 2011:231ff; Whish/Bailey 2012:130ff see also Martínez-López 2000:13:628f.

¹⁰ Cf Monti 2002:1086; Monti 2008:112 who, however, uses the term to distinguish between European and National interests.

¹¹ Cf eg Steinbeck 1998:561; Monti 2002:1087; Mestmäcker/Schweitzer 2004:§ 7 Rechtsvergleichende Grundlagen¶60; Whish/Bailey 2012:131ff. On the similarities between *Wouters* and the free-movement law in particular: Mortelmans 2001; Baquero Cruz 2002:153; Monti 2002; O'Loughlin 2003; Forrester 2006:277ff; Komninos 2006:462ff.

¹² See in this regard Part C, Section I, Chapter A.

¹³ Case C-67/96 *Albany*¶53-60.

¹⁴ Case C-309/99 *Wouters*.

¹⁵ Case C-519/04P *Meca-Medina and Majcen v Commission*.

¹⁶ Case C-1/12 *OTO*.

¹⁷ Case C-136/12 *Consiglio Nazionale dei Geologi and Autorità Garante della Concorrenza e del Mercato*.

cases the CJ found that certain activities which apparently restrict competition do not infringe Article 101(1)TFEU if these activities are proportional to their aims.

*Wouters*¹⁸ concerned a regulation of the Dutch bar which prohibited lawyers from forming partnerships with other professions, eg accountants. According to the CJ the rule would not constitute a restriction of competition within the meaning of Article 101(1)TFEU. However, the CJ's ruling first established that the regulation would be liable to restrict competition by limiting production and technical development within the meaning of Article 101(1)(b)TFEU.¹⁹ Yet, it held that in the 'overall context' there is no restriction of competition since the regulation aimed at ensuring 'that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience'.²⁰ This was a legitimate aim of the bar and was pursued in a way so as to ensure that the restriction on competition did not go beyond what was necessary.²¹

¹⁸ Case C-309/99 *Wouters*.

¹⁹ Since the rule would hinder possible advantages such as offering a wider range and possibly new services and might also prevent lower prices that might be offered because of economies of scale, *Ibid*:86–90.

²⁰ *Ibid*¶97.

²¹ *Ibid*¶105, 107. It should be noted that the CJ did not follow the AG who had argued Article 101(1)TFEU would be 'a *purely competitive* balance-sheet of the effects of the agreement...[and that] the only legitimate goal which may be pursued...is exclusively competitive in nature.'(citation omitted) Opinion AG Léger Case C-309/99 *Wouters*¶104. He suggested an escape route for the regulation based on Article 106(2)TFEU *Ibid*:155–201. This approach also seems to be advocated by Korah 2007:83; Jones/Sufrin 2008:266, fn 227 while this preference seems to be abandoned in Jones 2011:237 fn 204. See also Szyszczak 2004:195; van de Gronden 2005:88–89. However, tackling these cases via Article 106(2)TFEU would require changing the case law on 'entrusted' in Article 106. With regard to 106(2)TFEU, see Part C, Section I, Chapter C.

The same line of reasoning can be found in *Meca-Medina*.²² In this case rules relating to anti-doping tests by the International Olympic Committee were challenged by two swimmers who tested positive for doping. The Commission²³ did not identify a restriction of competition, a decision confirmed by the GC²⁴ and ultimately the CJ. The CJ found that Article 101(1)TFEU was not infringed because the rules were enacted for ‘competitive sport to be conducted fairly...[ie in order] to safeguard equal chances for athletes, athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport’.²⁵ Moreover, as not every restriction of the freedom of action would amount to restriction of competition and the described legitimate objective could justify the restriction,²⁶ the rules did not infringe Article 101(1)TFEU.²⁷ It should be pointed out that the CJ did not follow the GC findings that the rules were as such outside the scope of competition law²⁸ but instead adopted the *Wouters* approach by using a proportionality test to find that Article 101(1)TFEU was not infringed.²⁹

²² Case C-519/04P *Meca-Medina and Majcen v Commission*.

²³ *Meca Medina et Majcen* See in particular ¶42f where the Commission essentially applies the *Wouters* test.

²⁴ Case T-313/02 *Meca-Medina and Majcen v Commission*.

²⁵ Case C-519/04P *Meca-Medina and Majcen v Commission* ¶43.

²⁶ *Ibid* ¶45.

²⁷ *Ibid* ¶47-56.

²⁸ The GJ had distinguished *Meca-Medina* and held that *Wouters* was not applicable in this context but that the ‘rules are purely sporting rules’ and would therefore be outside the scope of competition law as these rules concerned a non-economic sphere, Case T-313/02 *Meca-Medina and Majcen v Commission* ¶61-66.

²⁹ Stephen Weatherill 2006:651f; Miège 2006:2227; Szyszczak 2007:104; Monti 2008:113; Townley 2009:65; Goyder/Goyder/Albors-Llorens 2009:115–116; Ezrachi 2012:97.

In the two recent decisions of *OTOC*³⁰ and *CNG*³¹ the CJ clarified that behaviour restricting competition would not be caught by Article 101(1)TFEU as long as the behaviour was proportional to its aims. Both cases concerned professional associations (accountants in *OTOC* and geologists in *CNG*) to which everyone in the profession was a member. Their respective regulations restricted competition but were only prohibited by Article 101(1)TFEU if the national court would establish that they were disproportional.³²

Albany is occasionally also included in the discussion about the European rule of reason although it did not fit into this line of case law. In *Albany* the CJ found that a collective agreement was outside the scope of the competition regime, because including it would seriously undermine the ‘social policy objectives pursued by such agreements’.³³ The Court based its reasoning extensively on the social objectives pursued by the EU.³⁴ The CJ, thus, found in *Albany* that competition law does not apply to the agreement at all. This case did not involve any kind of proportionality test but completely excluded such agreements from the scope of the competition provisions. Thus, *Albany* should not be linked to the European rule of reason like *Wouters* and *Meca-Medina* which adopted a proportionality test to establish whether Article 101(1)TFEU applies.³⁵ The CJ’s *Albany* judgment might be

³⁰ Case C-1/12 *OTOC*.

³¹ Case C-136/12 *Consiglio Nazionale dei Geologi and Autorità Garante della Concorrenza e del Mercato*.

³² Case C-136/12 *Consiglio Nazionale dei Geologi and Autorità Garante della Concorrenza e del Mercato* 54–55; Case C-1/12 *OTOC* ¶93-100.

³³ Case C-67/96 *Albany* ¶59; this line of reasoning was confirmed by Joined Cases C-115/97 to C-117/97 *Brentjens* and Joined Cases C-180/98 to C-184/98 *Pavlov*.

³⁴ Case C-67/96 *Albany* ¶53-60.

³⁵ See in this regard also eg Monti 2008:113; Goyder/Goyder/Albors-Llorens 2009:116; Jones 2011:237.

better located in the context of whether the activity is an economic one³⁶ within the meaning of competition law, ie the jurisdiction *ratione personae*.³⁷ Therefore, the question of the European rule of reason is confined to *Wouters*, *Meca-Medina* and the recent *OTO*C and *CNG* cases where a proportionality test within Article 101(1)TFEU meant that the restriction of competition was outweighed by other public policy aims.³⁸ The European rule of reason offers a wide margin of discretion particularly with respect to whether there is a less restrictive way to achieve the aim.³⁹ In this sense *Wouters* and *Meca-Medina* have been described as transpositions of the market-freedoms case law to competition law.⁴⁰ Thus, it has been suggested that under the European rule of reason national policies can be justified while EU policies would only be balanced under Article 101(3)TFEU.⁴¹ However, such a distinction between national and EU public policies seems problematic. First, it is not always clear whether national and EU public policies can be differentiated. Instead, they often

³⁶ See in this regard Part B, Section I, Chapter A, text to (n7ff).

³⁷ In fact the judgment itself does not seem to clearly indicate what kind of test is performed. See also Odudu 2006:53f. who suggests that in *Wouters* the question of whether there is an economic activity or not might have been the better turning point for the case.

³⁸ Cf Townley 2009:130; Kingston 2012:235–242, see also Baquero Cruz 2002:152f; Forrester 2006:291f..

³⁹ Gilliams 2006:328f..

⁴⁰ See eg Steinbeck 1998:561; Ludwigs/Lamping 1999:57; Andresen 2002:687; Monti 2002:1087; Mestmäcker/Schweitzer 2004:§ 7 Rechtsvergleichende Grundlagen¶60; Roth 2006:426f; Makowski 2007:167; Whish/Bailey 2012:131. On the similarities between *Wouters* and the free-movement law in particular: Mortelmans 2001; Baquero Cruz 2002:153; Monti 2002; O'Loughlin 2003; Forrester 2006:277ff; Komninos 2006:462ff or as a version of the ancillary restraints doctrine, in form of regulatory ancillarity, cf van de Gronden 2005:84; Ezrachi 2012:104; Whish/Bailey 2012:130. Regulatory ancillarity seems to be a narrower concept only allowing measures to sustain the market. Thus, it seems interesting that Whish/Bailey 2012:131 speak of a transposition of the four freedoms case law while at the same time postulating regulatory ancillarity. One reason that makes the adoption of a free-movement approach more likely is that that the rules could have also been challenged under the free-movement provisions. By applying the same principles the CJ could ensure that a rule that could be justified under the free-movement provision would not fall short because of competition law. This becomes particularly evident if the rule would have been enacted in another MS by the State and could thus not be challenged under competition law, see Monti 2002:1088–1089. For more differences between *Wouters* and the ancillary restraints doctrine see Townley 2009:131–133.

⁴¹ Monti 2002:1087.

overlap especially in the area of shared competences.⁴² Second, in the area of the market-freedoms the CJ has accepted both EU policies and national policies as justifications under the mandatory requirements doctrine.⁴³ Finally, in cases like *Publisher Association v Commission*⁴⁴ a national interest was considered under Article 101(3)TFEU.⁴⁵ Hence, it seems unclear why the European rule of reason should apply only to national public policies. The European rule of reason approach is broad and can also be applied to many other areas including environmental protection.⁴⁶ This broad understanding is also highlighted in *OTOC* where the CJ explained that when examining the conduct or ‘its effects...account must be taken of its objectives’.⁴⁷ Moreover, a comparison to environmental protection as a recognised mandatory requirement in the market-freedoms suggests that environmental protection can be relevant in the context of the European rule of reason under Article 101(1)TFEU.⁴⁸ The exact scope *vis-à-vis* Article 101(3)TFEU is examined below.⁴⁹

After having shown that the European rule of reason can deliver the second form of integration (balancing in cases of conflict) for horizontal cases under Article 101(1)TFEU, in this section the thesis turns to the concept of objective justification which is particularly

⁴² Townley 2009:137.

⁴³ See in this regard Barnard 2013:171ff.

⁴⁴ Case C-360/92P *Publishers Association v Commission*.

⁴⁵ Townley 2009:135–136.

⁴⁶ Cf Opinion AG Cosmas Joined Cases C-51/96 and C-191/97 *Deligdis* ¶10; Monti 2002:1089–1090; Vedder 2003:149; Cooke 2006:236f; Kingston 2012:238–242; Ezrachi 2012:104. Problems between competition and other aims such as the environment should be dealt with under Article 101(1)TFEU in form of the European rule of reason, see egKominos 2006:462ff; Makowski 2007:167ff; 178. Against applying a European rule of reason in environmental cases but rather supporting use of Article101(3)TFEU Bernuth 1996:140–144, see also Pernice 1992:141.

⁴⁷ Case C-1/12 *OTOC* ¶93.

⁴⁸ With regard to mandatory requirements, Part C, Section I, Chapter A.

⁴⁹ See Part C, Section I, Chapter D, text to (n234ff).

relevant in vertical cases. This concept can also help to provide the second form of environmental integration although the area of application might be more limited than the European rule of reason.

The Guidelines on Vertical Restraints⁵⁰ explain that selective distribution systems can be objectively justified if (1) the product in question necessitates a selective distribution system,⁵¹ (2) resellers are chosen based on objective non-discriminatory criteria of quality and (3) the criteria are necessary.⁵² This approach seems to be inspired by the CJ's *Metro I*⁵³ judgment and can also be found in the Vertical Block Exemption.⁵⁴

The concept of objective justification, also called commercial ancillarity⁵⁵ or ancillary restraints,⁵⁶ is based on the idea that the main transaction is not anticompetitive and the clause which potentially restricts competition is necessary for the main transaction. Thus, Article 101(1)TFEU does not apply.⁵⁷ The test applied in the case of objective justification⁵⁸

⁵⁰ Guidelines on Vertical Restraints.

⁵¹ This means as the Commission explains, that the 'system must constitute a legitimate requirement, having regard to the nature of the product concerned, to preserve its quality and ensure its proper use', *Ibid.*¶175.

⁵² *Ibid.*

⁵³ Case 26/76 *Metro v Commission (Metro I)*¶20-21, see with regard to selective distribution also Case 107/82 *AEG v Commission*¶35; Case T-19/91 *Vichy*¶65; Case T-88/92 *Leclerc*¶11; Case 31/80 *L'Oréal v PVBA*¶15-16.

⁵⁴ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

⁵⁵ Whish/Bailey 2012:128–130.

⁵⁶ For the Commission's view of such restraints see Guidelines on the Application of Article 81(3) of the Treaty:¶29.

⁵⁷ Such decisions concerned amongst others, selective distribution agreements (eg Case 26/76 *Metro v Commission (Metro I)*), exclusive copyright agreements (eg Case 262/81 *Coditel*), restrictions on the seller's right to compete with the new owners of the sold company (eg Case 42/84 *Remia*), franchise agreements (eg Case 27/87 *Erauw Jacquery Erauw-Jacquery*), restrictions on dual membership in a

is a balancing test which may allow for the second form of environmental protection. The ‘objective qualitative criterion’, *Metro I* and the Guidelines can easily be interpreted in a way that captures objective environmental quality criteria such as the environmental performance of the retailer.⁵⁹ For instance, the manufacturer of an environmental product could ensure that the environmental qualities of the product are not jeopardised by the retailers. So where a manufacturer uses no additives or has a policy that ensures that the carbon footprint is minimised, it could oblige retailers to comply with these requirements.

However, this objective justification/commercial ancillary approach might be more limited than the European rule of reason. In the objective justification/commercial ancillary cases the object of the restriction is a commercial one, like the distribution of a product or establishing a franchise. As such, the environmental protection aim is not the main aim but rather part of the overall commercial aim of the transaction.

However, it seems less clear whether the CJ would also adopt such a strict distinction between objectively necessary restrictions and the European rule of reason. In *Pierre Fabre*⁶⁰ the Court found that the public health and safety claims advanced were not sufficient to justify the system. The case concerned a selective distribution system for luxury

purchasing co-operative (eg Case 250/92 *Gottrup-Klim*). In all of these cases the restriction on competition was objectively necessary and proportional. However, the ancillary restraints theory does not always seem sound, for one might argue that the restrictive clauses at issue in Joined Cases 56 and 58/64 *Consten and Grundig* and in Case 161/84 *Pronuptia* were part of an overall non-restrictive agreement and that without those clauses the overall agreement would not have been concluded in the first place. See Jones 2011:230.

⁵⁸ It shares some similarities with the concept of objective justification under Article 102 TFEU but is not identical, see below, Part C, Section I, Chapter D, text to (n172ff).

⁵⁹ Cf also Jacobs 1993:52; Kingston 2012:253–254. Regarding quality under Article 101(3) TFEU see also Part C, Section I, Chapter D, text to (n124ff).

⁶⁰ Case C-439/09 *Pierre Fabre Dermo-Cosmétique*.

cosmetics products. The system required that the product be sold in a ‘physical space where a qualified pharmacist must be present’.⁶¹ The CJ found that this system amounted to an effective prohibition on internet sales which was not necessary for the product. A prescription was not needed to buy it and, moreover, the product was not dangerous.⁶² The aim to maintain the luxury brand image was not even recognised as a legitimate objective for the scheme.⁶³

It seems difficult to see a clear message in this judgment. On the one hand it rejected a valid commercial aim, the maintaining of the luxury brand image. On the other hand the case might also be read as rejecting the arguments of public health and safety.⁶⁴ Yet, the arguments of public health and safety were rejected because they were, as the AG pointed out, ‘objectively unfounded’.⁶⁵ The situation is thus not clear, although the AG explained that

in certain exceptional circumstances, private voluntary measures limiting the sale of goods or services via the internet could be objectively justified, by reason of the nature of those goods or services or the customers to whom they are sold. ...[T]here may exist...situations where the ban on internet sales is objectively justified even in the absence of national or Community regulation. Private voluntary measures, if included in an agreement, may fall outside the scope of Article [101(1)TFEU] provided the limitations imposed are appropriate in the light of the legitimate objective sought and do not go beyond what is necessary...[T]he legitimate objective sought must be of a public law nature and therefore aimed at protecting a public good and extend

⁶¹ *Ibid*¶47.

⁶² *Ibid*¶44.

⁶³ *Ibid*¶46, for which the Court does not seem to give further reasons.

⁶⁴ A similar argument has been made with regard to Case C-53/92P *Hilt* and Case C-333/94P *Tetra Pak v Commission (Tetra Pak II)* in the context of Article 102TFEU, see Part C, Section I, Chapter D, text to (n194ff).

⁶⁵ Cf Opinion AG Mazák Case C-439/09 *Pierre Fabre Dermo-Cosmétique*¶34.

beyond the protection of the image of the products concerned or the manner in which an undertaking wishes to market its products.⁶⁶

Such an interpretation would essentially merge the European rule of reason and the objective justification thus allowing for the second form of environmental integration in even more cases. This conflation of the horizontal and vertical exceptions under Article 101(1)TFEU would increase the importance of deciding which cases should be analysed under Article 101(1)TFEU and which should be left to Article 101(3)TFEU.⁶⁷

⁶⁶ References omitted, *Ibid* ¶35.

⁶⁷ Examined below see Part C, Section I, Chapter D, text to (n234ff).

b) Article 101(3)TFEU

Having outlined how the second form of integration can be delivered by Article 101(1)TFEU, the chapter turns to the balancing exercise of Article 101(3)TFEU. This section first explains the framework for Article 101(3)TFEU and how environmental benefits were treated prior to the decentralisation and modernisation. Then, the section highlights the re-orientation and narrowing of Article 101(3)TFEU's scope introduced with the decentralisation of Regulation 1/2003. Next, it explores the crucial issue of how narrowly or broadly 'benefits' must be construed under Article 101(3)TFEU. The section then shows that Article 101(3)TFEU can deliver the second form of integration in a number of cases but not all. Finally, it draws attention to the proportionality requirement of Article 101(3)TFEU.

i. Article 101(3)TFEU and Block Exemptions

When faced with an agreement which is subject to Article 101(1)TFEU, it should first be examined whether the agreement is subject to a block exemption regulation.⁶⁸ If the conditions of the block exemption regulation are not met, an analysis of Article 101(3)TFEU may follow.

The application of block exemption regulations is generally straightforward. However, in the exceptional case where it is not clear whether an environmentally beneficial agreement is subject to a regulation, two points should be borne in mind: First, Article

⁶⁸ Although there is no Environmental Block Exemption, the 'normal' block exemptions might be applicable.

11TFEU can mandate a broad interpretation of the block exemption regulation.⁶⁹ Second, the finding in *Delimitis v Henninger Bräu*⁷⁰ that block exemptions should be interpreted narrowly no longer seems necessary. The Commission is no longer the only institution that can apply Article 101(3)TFEU. Consequently, the danger of encroaching on the Commission's monopoly over Article 101(3)TFEU does not exist.

Where the block exemptions cannot be used eg because the market share thresholds is not met Article 101(3)TFEU applies directly. Although the 'four cumulative criteria' of Article 101(3)TFEU are sometimes referred to, Article 101(3)TFEU defines only one criterion ('improving the production or distribution of goods or...promoting technical or economic progress'). This criterion is then further qualified by the three other criteria of consumers' benefits, indispensability and non-elimination of competition.⁷¹ When applying the Article, it should be approached from the perspective of the burden of proof. The burden of proof rests on the undertaking that invokes the benefit of this provision as Article 2 of Regulation 1/2003 explains.⁷²

ii. Environmental Integration before Regulation 1/2003

It took some time before environmental integration within Article 101(3)TFEU took hold.

*ACEC/Berliet*⁷³ from 1968 seems to be the first case where the facts presented in a decision

⁶⁹ Eg the pump's environmental benefits in *KSB/Goulds/Lovara/ITT* can be seen as 'technical knowledge' in the sense of the Block Exemption on Research and Development, Regulation 418/85 [1985] OJ L53/5. See also the interpretation of technical progress below.

⁷⁰ Case C-234/89 *Delimitis* ¶46.

⁷¹ Sufrin 2006:933.

⁷² See also Case T-29/92 *SPO*.

⁷³ *ACEC/Berliet*.

showed some positive effect on the environment. The case concerned an R&D agreement, containing exclusivity clauses, which was aimed at developing an electric engine for buses. The development would have increased, *inter alia*, the fuel efficiency, thereby reducing polluting and CO₂ emissions. Yet, the Commission did not mention these environmental effects in its decision but focused solely on the ‘simplification of the mechanics, a more efficient engine and better operating conditions, [and] furthermore greater passenger comfort’.⁷⁴

In the 1992 report on competition policy the Commission explained that anticompetitive behaviour is prohibited, even where it yields environmental benefits. However, the application of Article 101(3) TFEU was not precluded.⁷⁵ In the subsequent year the report acknowledged that the new integration clause would apply to competition policy as in any other policy area.⁷⁶ This led the Commission to conclude in the 1994 and 1995 reports that competition and environmental protection must be balanced in accordance with the proportionality principle, while ensuring vigorously that no market barrier are created.⁷⁷ In the report of 1998 the market barriers disappeared. Instead, the Commission emphasised the idea of integration of environmental considerations and said it would look upon environmental benefits favourably.⁷⁸ Finally, in the 2000 report the Commission found that ‘environmental concerns are in no way incompatible with competition policy, provided that restrictions of competition are proportionate and

⁷⁴ *Ibid*:9, as translated by the author.

⁷⁵ XXIInd Report on Competition Policy:¶77.

⁷⁶ XXIIIrd Report on Competition Policy:¶185.

⁷⁷ XXIIIrd Report on Competition Policy:¶170; XXVth Report on Competition Policy:¶85.

⁷⁸ XXVth Report on Competition Policy:¶129.

necessary for achieving the environmental objectives pursued'.⁷⁹ After 2000, the Commission's reports do not address the integration of environmental protection requirements anymore. The approach in the reports mirrors the Commission's decisional practice.⁸⁰

The Commission started using environmental considerations in *Carbon Gas Technologie*. In this case the Commission seems to use the environmental benefits as a supporting element in the context of a consumer benefit explaining that '[m]oreover, using the resulting gas in the conversion process of power stations should be more efficient and less harmful to the environment than direct combustion of coal'.⁸¹ This decision was adopted even before the inclusion of the references to the environment with Single European Act in 1987. Later, the Commission continued this approach in *BBC/Brown Boveri*,⁸² and *Assurpol*⁸³ and also in *KSB/Goulds/Lowara/ITT* where it explained under the heading 'Consumers' Advantages': 'Moreover, two aspects of the new pumps, ie energy conservation and the fact that the fluids handled by the pump are not polluted, are environmentally beneficial'.⁸⁴ The decisions seem to suggest that the environmental

⁷⁹ XXXth Report on Competition Policy 2000:¶95.

⁸⁰ Cf, also *Ibid*¶95-97.

⁸¹ *Carbon Gas Technologie* 19.

⁸² *BBC/Brown Boveri*¶23.

⁸³ *Assurpol*.

⁸⁴ *KSB/Goulds/Lowara/ITT*¶27.

advantages are additional benefits to the consumer which are separate from the agreement's contribution to technical and economic progress.⁸⁵

After the Maastricht Treaty amended the integration clause in 1993,⁸⁶ the Commission in *Exxon/Shell*,⁸⁷ *Philips/Osram*⁸⁸ and *Ford/Volkswagen*⁸⁹ decided environmental advantages do not only benefit the consumers but also constitute an improvement of production thereby contributing to technical and economic progress.⁹⁰ The GC seems to have also accepted this approach as it did not reject the Commission's finding in *DSD* that the consumers would benefit because of the improvement of the environment.⁹¹ Instead, the GC summarised the reasons for applying Article 101(3) TFEU as 'the production of goods and...technical or economic progress [is improved] because it enables environmental objectives to be met, while reserving a fair share of the resulting benefit to consumers'⁹² and expressly referred to paragraph 148 of the Commission's decision, where the environmental benefits are described as consumers' benefit.

⁸⁵ The environmental benefits are seen as external or non-competition benefits which, however, might be used in the decision whether to grant an exemption.

⁸⁶ The Treaty changed wording of the integration clause from 'shall be a component of' to 'must be integrated' and included environmental protection in Article 3(3) TEU.

⁸⁷ *Exxon/Shell* ¶67-68 and 71.

⁸⁸ *Philips/Osram* ¶25-26 and 27.

⁸⁹ *Ford/Volkswagen* ¶26, the GC confirmed the decision and stressed that the Commission used this reason only in a complementary way, Case T-17/93 *Matra Hachette* ¶163.

⁹⁰ *Assurpol* might have paved the way as the decision gently suggests a connection between environmental benefits and technical progress. See also *EEIG EFCC (European Fuel Cycle Consortium)* ¶6. The CJ also considered the preservation of jobs in difficult economic conditions to be an 'improvement' (Case 42/84 *Remid* ¶42; Joined Cases 209-215 and 218/78 *Van Landuyck* ¶182; Case 26/76 *Metro v Commission (Metro I)* ¶43). The GC applied a similar reasoning for cultural considerations, ie the provision of TV programmes that would otherwise be uneconomical (Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision* ¶116 ff).

⁹¹ *DSD (COMP/34493)* ¶148.

⁹² Case T-289/01 *DSD* ¶38.

The pinnacle was reached⁹³ in *CECED*⁹⁴ which was decided just after the enactment of the Amsterdam Treaty which moved the integration obligation from the second sentence of Article 130r(2)EC to the front of the EC Treaty under ‘Principles’. The case concerned an agreement between the main producers and importers of washing machines used in households. The agreement was intended, *inter alia*, to ban the production and import of the least energy-efficient washing machines, those in categories D to G. The agreement prevented competition throughout the full range of energy categories. It, moreover, limited consumers’ choices to washing machines with energy efficiency categories A to C. However, the agreement was exempted by the Commission pursuant to Article 101(3)TFEU. The Commission declared that the agreement would foster economic and technical progress as

The agreement is designed to reduce the potential energy consumption of new washing machines by at least 15 to 20%...[and]...7,5 TWh would be saved in 2015...⁹⁵

Washing machines which...consume less electricity are objectively more technically efficient. Reduced electricity consumption indirectly leads to reduced pollution from electricity generation. The future operation of the total of installed machines providing the same service with less indirect pollution is more economically efficient than without the agreement.⁹⁶ ...

[The] potential improvement in four years...is remarkable, compared to improvements in the past. Were energy efficiency to improve at the same rate as it did between 1978 and 1994 without any agreement, the attainment of a 20% improvement would require eight years, instead of four. ...⁹⁷

⁹³ Although the Commission never mentioned the integration obligation in its decisions, the 2000 Report on Competition Policy in the context of the *CECED* decision expressly refers to the integration principle of Article 11TFEU, XXXth Report on Competition Policy 2000:¶95.

⁹⁴ *CECED*.

⁹⁵ *Ibid*¶47.

⁹⁶ *Ibid*¶48.

⁹⁷ *Ibid*¶49.

[T]he pollution avoided [is estimated] at 3,5 million tons of carbon dioxide, 17.000 tons of sulphur dioxide and 6.000 tons of nitrous oxide per year in 2010... . Although such emissions are more efficiently tackled at the stage of electricity generation, the agreement is likely to deliver both individual and collective benefits for users and consumers.⁹⁸

The Commission then elaborated on the benefits of the agreement for the consumer, carefully distinguishing between the individual consumer of the product and collective environmental benefits. With regard to the individual consumer the Commission estimated that a typical consumer could recoup the higher purchase costs of the more energy-efficient washing machine within a period of nine to forty months.⁹⁹ The Commission further explained that the agreement would *possibly* lead to stronger competition and lower prices in the energy efficiency categories A to C.¹⁰⁰ The Commission also considered the collective environmental benefits and found that:

According to Article [191 TFEU], environmental damage should be rectified at source. The [Union] pursues the objective of a rational utilisation of natural resources, taking into account the potential benefits and costs of action. Agreements like CECED's must yield economic benefits outweighing their costs and be compatible with competition rules. Although electricity is not a scarce resource and consumption reductions do not tackle emissions at source, account can also be taken of the costs of pollution. (footnote omitted)¹⁰¹

The Commission reasonably estimates the saving in marginal damage from (avoided) carbon dioxide emissions (the so-called "external costs") at EUR 41 to 61 per ton of carbon dioxide. On a European scale, avoided damage from sulphur dioxide amounts to EUR 4000 to 7000 per ton and EUR 3000 to 5000 per ton of nitrous oxide. On the basis of reasonable assumptions, the benefits to society brought about by the CECED agreement appear to be

⁹⁸ *Ibid*¶51.

⁹⁹ *Ibid*¶52.

¹⁰⁰ *Ibid*¶53.

¹⁰¹ *Ibid*¶55.

more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines. (footnote omitted)¹⁰²

So, the Commission concluded that

The expected contribution to furthering energy efficiency both within the current technological limits of categories A to C and beyond the limits of category A, the cost-benefit ratio of the standard and the return on investment for individual users point to the conclusion that the agreement is likely to contribute significantly to technical and economic progress whilst allowing users a fair share of the benefits.¹⁰³

The Commission took the same approach in *EACEM*¹⁰⁴ where 16 major manufactures of video recorders and televisions agreed to reduce the electricity consumed during the standby mode. The Commission closed the case via a comfort letter saying ‘the energy saving and environmental benefits of the scheme clearly represented technical and economic progress and, by their nature, would be passed on to consumers’.¹⁰⁵

¹⁰² *Ibid*¶56.

¹⁰³ *Ibid*¶57.

¹⁰⁴ XXVth Report on Competition Policy:152. See also *ACEA, EUCAR Ibid*:151 and Commission Press Release IP/98/865. Moreover, in the 1998 report the Commission mentions the negative clearance for equivalent commitments by the Association of Japanese Automobile Manufacturers and the Association of Korean Automobile Manufacturers. XXVth Report on Competition Policy:160. A further example is *CEMEP*, where the Commission granted negative clearance to an agreement to improve energy efficiency of electric motors for similar reasons Commission Press Release IP/00/508.

¹⁰⁵ XXVth Report on Competition Policy:152. A similar line of reasoning can also be found in *DSD (COMP/34493)* which was preceded by *Valpak* XXVth Report on Competition Policy:152–153, where the Commission issued a comfort letter. The GC upheld the Commission’s finding of an improvement of production and promotion of technical and economic progress ‘because it enables environmental objectives to be met’, Case T-289/01 *DSD*¶38. This case was also the basis for the later cases of *ARA, ARGEV, ARO; Eco-Emballages*. On waste management systems see also: *DG Competition Paper Concerning Issues of Competition in Waste Management Systems* and generally with regard to the Articles 101(1) and 102TFEU Kienapfel/Miersch 2006.

Going back to *CECED*,¹⁰⁶ the case at first glance seems to be another case where environmental benefits have a supportive role, as the Commission outlines that the consumers could recoup the additional costs and that it was possible that the agreement would lead to lower costs for washing machines with energy efficiency categories A to C. However, it should be borne in mind that solely the consumers' ability to recoup the additional cost would not normally be sufficient for an agreement to qualify for an exemption under Article 101(3)TFEU. The consumers would not be better off. They would be financially in the same position as before but would still be faced with a reduction in consumer choice in terms of washing machines in categories D to G. The consumers would therefore not receive a fair share of the resulting benefit. Thus, the crucial advantages for the consumer seem to be, firstly, the abstract potential for stronger competition and lower prices in energy efficiency categories A to C and, secondly, the collective environmental benefits.

Moreover, the Commission acknowledged that it is sufficient that only collective environmental benefits occur in order to qualify for an exemption. The Commission held that 'such environmental results for society would adequately allow consumers a fair share of the benefits even if *no benefits* accrued to *individual purchasers* of machines' (emphasis added).¹⁰⁷ Therefore, the *CEDED* decision appears to be the first where collective environmental advantages had a *decisive role*. This finding is supported by the proportion of the decision's reasoning that considers the environmental advantage versus the proportion of other advantages. Moreover, it is the first time that the Commission was engaged in

¹⁰⁶ *CECED*.

¹⁰⁷ *Ibid*¶56.

economic quantification of environmental benefits finding that the reduction of indirect pollution caused by washing machines is economically efficient.¹⁰⁸ This approach was reapplied in cases concerning dishwashers¹⁰⁹ and water-heaters.¹¹⁰ It arguably extends the scope of Article 101(3)TFEU in terms of the consumer's benefit and seems to move from a consumer welfare to a total welfare approach.

iii. Environmental Integration after the Consolidation Phase Initiated by Regulation 1/2003

With the decentralisation introduced by Regulation 1/2003¹¹¹ and the modernisation process of competition law¹¹² the Commission seemed to have moved towards excluding environmental concerns from Article 101(3)TFEU.¹¹³ This mindset became clear in the draft version of the Guidelines on Article 81(3) which explained in paragraph 38 that '[i]t is not, on the other hand, the role of Article [101TFEU] and the authorities enforcing this Treaty provision to allow undertakings to restrict competition in the pursuit of general interest

¹⁰⁸ *Ibid*[48]. Moreover, it is also interesting to note that it was the first competition decision which engaged in an analysis of the principle that environmental damage should be rectified at source, enshrined in Article 191TFEU. Monti sees this decision as transforming the definition of economic efficiency to include sustainable development, Monti 2002:1078.

¹⁰⁹ *CECED Dishwashers*.

¹¹⁰ *CECED Water-Heaters*. With regard to these two cases see also the Commission's press release, Commission Press Release IP/01/1659 and Martínez-López 2002.

¹¹¹ Allowing national courts and authorities to apply Article 101(3)TFEU directly.

¹¹² See in particular the White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty and the arguments advanced for excluding environmental consideration in a decentralised system explained in Part A, text to (n141ff)

¹¹³ See also Lavrijssen 2010:643.

aims.¹¹⁴ The changed attitude also results in the Guidelines on Article 81(3) not mentioning environmental benefits.¹¹⁵

The Guidelines explain that the purpose of Article 101(3)TFEU is to balance the pro- and anticompetitive aspects of the agreement.¹¹⁶ Thus, under the first condition only the ‘cost efficiencies’¹¹⁷ and ‘qualitative efficiencies’¹¹⁸ should be considered.¹¹⁹ A notable difference to the *CECED* approach is also the second condition, the definition of consumers. The Guidelines defined them as ‘all direct or indirect users of the products covered by the agreement...[ie] customers of the parties to the agreement and subsequent purchasers’¹²⁰ while *CECED* and the old Horizontal Guidelines adopted a twofold test: assessing first the benefits at the individual level and then the advantages for society.¹²¹ The

¹¹⁴ Draft Commission Notice - Guidelines on the Application of Article 81(3) of the Treaty:¶38. However, this passage was changed to the milder version of¶42 in the Guidelines:‘Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101(3)TFEU].’

¹¹⁵ Although the example of shared logistics, that would ‘reduce the number of vehicles employed’ to deliver a product (Guidelines on the Applicability of Article 81 to Horizontal Co-operation Agreements:¶66-67), could have been an opportunity to stress the reduction in CO₂ emissions and pollution. However, a certain middle ground might have been taken in¶85 where the Commission explains that ‘fewer resources [are] being used to produce the output consumed or to the production of more valuable products and thus to a more efficient allocation of resources.’

¹¹⁶ Guidelines on the Application of Article 81(3) of the Treaty:¶11. What has been called by some the ‘full-blown efficiency defence’ see:Sufrin 2006:941.

¹¹⁷ Guidelines on the Application of Article 81(3) of the Treaty:¶64-68.

¹¹⁸ *Ibid*¶69-72. Explained in¶54 as ‘new or improved products, greater product variety etc’.

¹¹⁹ *Ibid*¶59.

¹²⁰ *Ibid*¶84.

¹²¹ See Guidelines on the Applicability of Article 81 to Horizontal Co-operation Agreements:¶194.

GC likewise moved towards a narrower interpretation of consumers by increasingly focusing on the benefits for final consumers of the product.¹²²

The approach advanced with the decentralisation and modernisation process limits the scope for the second form of integration in Article 101(3)TFEU considerably by focusing purely on consumer welfare. The next section examines to what extent the second form of integration is currently still possible.

iv. The Extent of Environmental Integration under Article 101(3)TFEU

This section explains the extent to which the second form of integration is still possible under the current framework for Article 101(3)TFEU. From a legal perspective this is essentially the question of how broad or narrow consumers' benefit should be construed. In economics this corresponds to the choice between adopting a narrow consumer welfare standard with a focus only on the current final individual consumer or a different welfare standard (eg a broader consumer welfare, a total welfare or even a happiness standard¹²³). This section shows that the second form of environmental integration is possible under both the narrow and the broader standard.

Under the narrow standard there must be a consumer welfare gain for the current final individual consumer. A welfare gain for the current individual final consumer can be

¹²² Case T-213/01 *Österreichische Postsparkasse* ¶113-115; Case T-168/01 *GlaxoSmithKline Services* ¶147 185, 273.

¹²³ Bruni/Porta 2005; Bruni/Porta 2007; Anielski 2007.

seen in quality improvements.¹²⁴ Such a qualitative improvement¹²⁵ can be the environmental quality of the product¹²⁶ because the higher quality can be established by material or immaterial differences between products.¹²⁷ Such differentiation can also be made in terms of the environmental quality of a product.¹²⁸ This difference is also acknowledged in the current Horizontal Cooperation Guidelines. These explain that '[s]tandards on, for instance, quality, safety and environmental aspects of a product may also facilitate consumer choice and can lead to increased product quality'.¹²⁹ However, quality seems to be a subjective criterion and can be defined as the extent to which product characteristics meet the subjective needs of the consumer.¹³⁰ Thus, the concept of quality contains a multitude of components which the individual consumers might rank differently. This subjective element

¹²⁴ Cf Guidelines on the Application of Article 81(3) of the Treaty:33.

¹²⁵ On benefits of self-regulation in terms of quality, see OFT The Competition Impact of Environmental Product Standards 2008; OFT The Economics of Self-regulation in Solving Consumer Quality Issues 2009.

¹²⁶ Pernice 1992:142; Jacobs 1993; Krämer 1993:47–83 61; Ehle 1997:153; Gasse 2000:148; Portwood 2000:133-134, 153; Monti 2008:119–120 .

¹²⁷ See for example *Yves Saint Laurent Parfums*.

¹²⁸ Case C-2/90 *Commission v Belgium* ¶33 where the Court held that even physically identical products can be treated differently if the environmental quality differs.

¹²⁹ Guidelines on the Applicability of Article 101 to Horizontal Co-operation Agreements ¶308. However, the Guidelines are not unequivocal because they explain later when setting out a case along the line of *CECED* that 'newer, more environmentally friendly products are more technically advanced, offering qualitative efficiencies in the form of more washing machine programmes which can be used by consumers. Furthermore, there are cost efficiencies for the purchasers of the washing machines resulting from lower running costs in the form of reduced consumption of water, electricity and soap' (para 329). So while previously environmental improvements were considered quality improvements, the Guidelines now seem to go a different direction. They explain that the environmental friendliness would lead to 'more washing machine programmes'. The logical connection between the better environmental performance and more programmes does not seem clear. Machines might have new programmes but if these are the qualitative improvements then the environmental benefits would only be a side effect. This conclusion is even more remarkable, as the cost savings are directly related to the improvement of environmental performance, and the new programmes do not seem to be in the *CECED* decision after which this example is modelled.

¹³⁰ Lemmink/Kasper 1994:51.

makes measuring and including quality in the competition analysis challenging.¹³¹ Examining the willingness to pay in line with the theory of revealed preferences¹³² would be one option. However, such an examination would instead measure the value the consumers attach to the environmental dimension of a product and would therefore reveal the ranking of their subjective preferences. To examine whether environmental friendliness is part of the quality dimension a comparison needs to be made. One needs to compare whether consumers prefer an environmentally friendly product over the same product without this characteristic, all other factors, including price, being equal. There is some evidence that supports the view that the environmental performance of one of two otherwise physically identical products constitutes a higher quality and therefore a welfare gain for consumers.¹³³ It could be argued that all kinds of environmental benefits, even those that do not occur within the same relevant market, can be seen as an increase in quality. In essence it would, however, be an empirical question whether consumers would still see the environmental benefit as part of the environmental quality of the product. Where this empirical question is answered negatively, it needs to be asked whether a broader standard should apply.

A broader standard could be construed in different ways. The OFT suggested differentiating between indirect economic benefits which occur in another market and those benefits that do not even occur in another market but are solely beneficial for the society as

¹³¹ Leaving aside price related issues, such as whether to buy a light bulb that lasts one year for 2 pounds versus buying a light bulb that lasts three years for 5 pounds.

¹³² Samuelson 1938.

¹³³ See for example Cairncross 1993:189 ff; Conrad 2005; OFT Article 101(3) - A Discussion of Narrow Versus Broad Definition of Benefits 2010¶3.4, see also Mohr/Webb/Harris 2001; Mohr/Webb 2005; Eifenbein/McManus 2010; Ferreira/Avila/Dias de Faria 2010.

a whole.¹³⁴ Although it is questionable whether this distinction is always straightforward in practice,¹³⁵ it seems useful from a theoretical point of view. It draws the distinction between cases where the benefits occur in another market and those where there are only benefits for the society, ie collective environmental benefits. This distinction provides a yardstick for the degree of remoteness from the product concerned.

For cases of indirect economic benefits the Commission adopts a cautious approach in its Guidelines. It explains that competitive harm in one market cannot ‘generally...be compensated by positive effects elsewhere. [Only] where two markets are related...[and] the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same’¹³⁶ can such benefits be taken into account. Yet, in a number of cases the Commission takes positive effects on different markets into account where the consumers are not substantially the same. For example, R&D agreements¹³⁷ will typically not benefit the current consumers of the product but yield dynamic efficiencies.¹³⁸ The benefits for future consumers are relevant in the analysis although a discount is necessary.¹³⁹ These future consumers can be considerably different from those consumers that are affected by the restriction. For instance, where competitors agree to develop a new product. The new

¹³⁴ OFT Article 101(3) - A Discussion of Narrow Versus Broad Definition of Benefits 2010¶3.2-3.17.

¹³⁵ The OFT uses the example of standard setting for mobile phone chargers. This standard would have as a non-economic benefit the reduction in landfill because chargers could be reused with the new mobile phone. It might be asked whether this can really be seen as a non-economic benefit, as this reduction will certainly also have effects on the waste management market.

¹³⁶ Guidelines on the Application of Article 81(3) of the Treaty:¶43.

¹³⁷ With regard to an R&D agreement which had the benefit of reducing CO₂ emissions, Guidelines on the Applicability of Article 101 to Horizontal Co-operation Agreements¶149.

¹³⁸ See also Porter/van der Linde 1995; Kingston 2001:134–135.

¹³⁹ Guidelines on the Application of Article 81(3) of the Treaty:¶87; ACM (Netherlands Authority for Consumer & Markets) (July 2013):15.

product may create a new market or be offered on a different market. It would therefore neither benefit the current nor the future consumers in the relevant market. Another example is the effects on downstream markets¹⁴⁰ which are typically relevant in the 101(3)TFEU analysis of consumer benefit.¹⁴¹ In these cases the restriction is upstream and the benefit occurs several steps down the value chain. These benefits are considered, although it is difficult to say that the upstream buyer and the final consumers are substantially the same.

The courts have reaffirmed that advantages in other markets can be considered without endorsing the condition that the affected consumers need to be substantially the same. The GC recently in *GSK* explained that ‘advantages may arise not only on the relevant market but also on other markets’.¹⁴² Similarly, the CJ in *ASNEF-EQUIFAX* held that ‘under Article [101(3)TFEU]...the beneficial nature of the effect on *all consumers* in the relevant *markets* [are] taken into consideration, not the effect on each member of that category of consumers’.¹⁴³ Considering welfare gains in other markets also seems sensible against the backdrop of the difficulties in defining markets.¹⁴⁴

However, the Article 101(3)TFEU case law could also be read differently and such a reading also bears relevance for cases where no benefit for the individual consumer and only benefits for the society result from the agreement. This different reading suggest that two

¹⁴⁰ Cf Townley 2011a:491.

¹⁴¹ Guidelines on the Application of Article 81(3) of the Treaty:¶84.

¹⁴² Case T-168/01 *GlaxoSmithKline Services*¶248. See also Case T-213/00 *CMA CGM*¶227; Stigler 1964¶343.

¹⁴³ Case C-238/05 *ASNEF-EQUIFAX*¶70, emphasis added.

¹⁴⁴ Townley 2011a:491–492 see also Odudu 2001:273–274.

welfare standards are applied in the context of the Article 101(3) TFEU analysis. In this regard it is helpful to remember the structure of the Article. Its first condition is an improvement of production or distribution or the promotion of technical or economic progress. This broad condition is then further qualified by the fair share for the consumer. The case law highlights that the agreement needs to provide ‘objective advantages’, so the agreement is not only advantageous to its parties.¹⁴⁵ The CJ in *JCB Service* recently explained that the agreement must yield benefits ‘inter alia, for consumers’.¹⁴⁶ In other words not all benefits of the agreement must reach the consumer.¹⁴⁷ This can equally be seen in *ASNEF-EQUIFAX*. The CJ explained that the agreement would have the following benefits: Banks would be able to evaluate the probability of repayment more precisely and thus could reduce costs for borrowers less likely to default;¹⁴⁸ the agreement would increase the mobility of consumers of credit;¹⁴⁹ and it would facilitate market access,¹⁵⁰ help to prevent over-indebtedness¹⁵¹ and increase the overall availability of credits.¹⁵²

¹⁴⁵ Joined Cases 25-26/84 *Fordwerke* ¶33; Joined Cases 209-215 and 218/78 *Van Landuyck* ¶185; Joined Cases 56 and 58/64 *Consten and Grundig* 348; Case T-168/01 *GlaxoSmithKline Service* ¶247; Case T-65/98 *Van den Bergh Foods* ¶139; Case T-7/93 *Langnese-Iglo* ¶180-181.

¹⁴⁶ Case C-167/04P *JCB Service v Commission* ¶162-163.

¹⁴⁷ This might also explain the cautious approach of the current horizontal guidelines which on the one hand highlights the general benefits, but on the other applies a narrow consumer benefit criterion, eg reduced CO₂ emission versus lower consumption of fuel (para 149), environmental benefit by reduced packaging versus lower transport and packaging costs (para 331) and environmentally friendly products that are more technically advanced versus new programmes and cost efficiencies (para 329). On environmental standardisations agreements in particular see OFT The Competition Impact of Environmental Product Standards 2008:section 4; Schweitzer 2012.

¹⁴⁸ Case C-238/05 *ASNEF-EQUIFAX* ¶55.

¹⁴⁹ *Ibid* ¶56.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid* ¶67, 69.

¹⁵² *Ibid* ¶67, 71.

Thus, it could be said that two standards are applied: one broader within the first criterion and one narrower standard under the consumer benefit part. Consequently, the issue is not which standard is applied in the context of Article 101(3)TFEU but rather how the two standards interact with each other. The consumer benefit condition suggests that the limit of Article 101(3)TFEU is reached in cases where there are only benefits for the society. Such benefits are too remote to warrant an exception on their own.¹⁵³ However, where such benefits are combined with benefits to the consumers Article 101(3)TFEU can apply to the agreement.¹⁵⁴ The *CECED* decision seems to suggest that this benefit for the consumer can be extremely small. The Commission in *CECED* estimated that consumers could have recovered the increased costs of the washing machines after 9-40 months.¹⁵⁵ This small benefit for the individual consumer of the product plus the benefit for the society and its citizens warranted the conclusion that Article 101(3)TFEU applied. This finding can be expressed in the following formula:

$$B_{101(3)} = B_I + B_S, B_I \geq 0 \text{ \& } B_{101(3)} > 0$$

$B_{101(3)}$ is the benefit necessary for Article 101(3)TFEU to apply, which must be greater than zero.
 B_I is the benefit for the individual consumer, which must be equal to or greater than zero.
 B_S is the benefit for the society.

¹⁵³ For the contrary view see eg Kingston 2012:277–278 who argues that consumers must be interpreted broadly so as to include benefits to the society at large. This would be so, as (1) it would make no sense to include benefits to the society in the first criterion just to exclude it again under consumer benefit, (2) integration obligation would require broad interpretation as there would be ‘no conflict with the goals of competition policy’, (3) a governance perspective further supported by Article 7TFEU would also demand this broad reading and (4) economic argument would also support this broad reading.

¹⁵⁴ Cf Makowski 2007:122–123; Monti 2008:93–94 .

¹⁵⁵ *CECED* ¶52.

The application of the formula entails a sliding scale: The lower the benefits for the individual consumer of the product, the greater the benefits must be to society to satisfy Article 101(3)TFEU. The burden of proof is greater where an undertaking claims benefits which occur only at the level of the society benefits, because these are more difficult to quantify and prove due to their ‘diffuse nature’.¹⁵⁶ This addresses the point that undertakings would mainly act out of self-interest and their claims of promoting the public good should be viewed sceptically.¹⁵⁷

After having established that a benefit within the meaning of Article 101(3)TFEU exists, the proportionality of the restriction must be assessed. The proportionality requirement enshrined in the third and fourth conditions (ie necessity and no elimination of competition respectively) operates in environmental cases in the same way as in all other cases.¹⁵⁸ The third condition, which requires that the restriction not be indispensable, might best be described as a necessity test.¹⁵⁹ First, the direct link between the restrictive agreement and the environmental benefit must be substantiated, ie the agreement must be necessary.¹⁶⁰ Second, it must be established that there are no less restrictive means to achieve these

¹⁵⁶ Vedder 2003:172–173, see also Boute 2006:155. It should, however, be possible applying environmental valuation techniques, Kingston 2012:176–189 for such techniques see Pearce/Barbier 2000; Garrod/Willis 2001; Perman 2003; Gowdy 2004, regarding the valuation of landscape Willis/Garrod 1991, regarding valuation of biodiversity ten Brink/and others 2009. With regard to environmental agreements in particular see Lehmann 2000.

¹⁵⁷ See Part A, text to (n201ff).

¹⁵⁸ See also:Vedder 2003:180–185; Kingston 2012:287–292.

¹⁵⁹ Cf Case 258/78 *Nungesser* ¶¶76-78; Geradin 2002:154; Nicolaides 2005:138; Steenbergen 2008; Lübbig 2008. See also XXIIIrd Report on Competition Policy ¶170 where the Commission expressed that ‘it will examine carefully all agreements...to [see] if they are indispensable to attain [the] environmental objectives’.

¹⁶⁰ It might be suggested that this is nearly always the case, since the benefits already had to be substantiated in the context of the first condition of Article 101(3) TFEU.

benefits within the given restrictive agreement.¹⁶¹ It must be shown that more benefits ‘are produced with the agreement or restriction than in the absence of the agreement or restriction’.¹⁶² In cases of environmental agreements which seem *prima facie* not to be indispensable ‘a cost-effectiveness analysis showing that alternative means of attaining the expected environmental benefits would be more economically or financially costly’¹⁶³ is needed. The burden of proof would be on the plaintiff who has to suggest less restrictive means after the defendant has established the direct link between the restrictive agreement and the environmental benefit. The defendant would then have to prove that these suggested means were not available or were not as effective. However, the Commission and national competition authorities would not actively examine possible alternatives but would only object if clear, realistic and feasible alternatives have not been adopted.¹⁶⁴

The fourth condition requires that competition not be eliminated.¹⁶⁵ In this context an examination of whether any *actual* or *potential* competition exists must be performed.¹⁶⁶ In terms of actual competition a comparison between the degree of competition prior to and after the agreement must be made.¹⁶⁷ Regarding potential competition, it is the defendant’s

¹⁶¹ Guidelines on the Application of Article 81(3) of the Treaty:¶73.

¹⁶² *Ibid.*

¹⁶³ Guidelines on the Applicability of Article 81 to Horizontal Co-operation Agreements:¶196.

¹⁶⁴ Lavrijssen 2010:647; ACM (Netherlands Authority for Consumer & Markets) (July 2013):16. An example can be *Ansac* where the product was more harmful than others to the environment but the Commission could not be convinced that the restrictive agreement was needed to sell the product in Europe.

¹⁶⁵ This criterion is sometimes also used to support the view that other pro-competitive arguments can be taken into account, because a pro-competitive benefit can by definition not lead to an elimination of competition, see Caspar 2001:33–34.

¹⁶⁶ Guidelines on the Application of Article 81(3) of the Treaty:¶108, 114; see also Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line*.

¹⁶⁷ Guidelines on the Application of Article 81(3) of the Treaty:¶107.

duty to establish that the market has low entry barriers and to substantiate why the source of potential competition ‘constitute[s] a real competitive pressure’.¹⁶⁸

c) Conclusion on Article 101 TFEU

This part examined the second form of environmental integration via Article 101(1) and (3) TFEU. It focused on the European rule of reason established in *Wouters* and *Meca-Medina* and on the extent to which environmental benefits can be used in the context of Article 101(3) TFEU. It showed that the European rule of reason can provide for the second form of environmental integration by which environmental considerations are balanced against a restriction of competition. Similarly, Article 101(3) TFEU can provide for such integration in cases where the environmental quality is improved and even in cases where this improvement would occur in another market. However, in contrast to Article 101(1) TFEU, Article 101(3) TFEU seems to impose a limit on the integration where the benefits occur only at an aggregated society level. In such cases the consumers of the product must at least gain a nominal benefit. This difference places the spotlight on the issue of the relationship between the two provisions which is examined at the end of this chapter.¹⁶⁹

¹⁶⁸ *Ibid.* ¶114.

¹⁶⁹ See Part C, Section I, Chapter D, text to (n234ff).

2. Article 102 TFEU

This section investigates the second form of integration in the context of Article 102 TFEU. It explains that both the concept of objective justification and the efficiency defence can be used to provide this balancing of environmental protection and restriction of competition, although to a different extent. The section first elaborates on the concept of objective justification and how environmental protection can come into play. Then it explains that the cases of *Hilti*¹⁷⁰ and *Tetra-Pak*¹⁷¹ do not contradict this finding, before the efficiency defence is examined in the final part.

a) Objective Justification

As already explained, an allegedly abusive behaviour can be objectively justified.¹⁷² Where such an objective justification is not present the behaviour is abusive.¹⁷³ The concept of objective justification was developed in *Sirena v Eda*.¹⁷⁴ It requires that the undertaking be reacting to an external factor beyond its control¹⁷⁵ and that the reaction be proportional.¹⁷⁶

¹⁷⁰ Case T-30/89 *Hilti*.

¹⁷¹ Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)*.

¹⁷² See Part B, Section I, Chapter B, text to (n69ff).

¹⁷³ For an overview of the different forms the objective justification can take see van der Vijver 2012.

¹⁷⁴ Case 40/70 *Sirena v Eda* ¶17. However, one might also identify such an approach in Case 24/67 *Parke, Davis & Co v Probel* 72. But see also Case 78/70 *Deutsche Grammophon*. Another classic example seems to be Case 311/84 *CBEM v CLT and IPB* ¶27 stressing the ‘objective necessity’.

¹⁷⁵ See: Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty ¶29; Rousseva 2006:39; Albors Llorens 2007:1746; Rousseva 2007:262f.. Case 77/77 *BP* and Case 250/92 *Gottrup-Klim* are among the few cases where the Court has accepted an objective justification.

¹⁷⁶ Rousseva 2006:37; Jones 2011:276–277; Whish/Bailey 2012:211. See also the Courts’ decisions eg Case T-30/89 *Hilti*; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)*; Case 395/87 *Tournier*; Case 127/73 *BRT v SABAM*; Case 250/92 *Gottrup-Klim*. Some authors draw a general comparison between

In terms of environmental protection it seems that the only case¹⁷⁷ that involved Article 102TFEU at Union level is *COBAT*.¹⁷⁸ The case was decided in 2000, the same year that the *CECED*¹⁷⁹ decision was adopted. The COBAT consortium was tasked by the Italian State with collecting and recycling lead waste in particular batteries. The case was closed after COBAT altered its *modus operandi* and abolished its restrictions on exports and the assignment of exclusive territories. However, an objective justification based on environmental considerations was not raised, apparently because COBAT realised that no environmental justification for the restrictions existed.¹⁸⁰ Moreover, the case seems to be more concerned with the proportionality of the restriction under Article 106(2)TFEU than with Article 102TFEU.¹⁸¹ Hence, only limited conclusions can be drawn from this case.

At national level a case from Luxembourg addresses the application of Article 102TFEU and environmental protection as objective justification. The Conseil de la Concurrence (the national competition authority) decided on the application of Article 102TFEU and the national equivalent in a cases concerning the market of transport of petroleum products by ship to Luxembourg and their stockage there. The dominant undertaking had enacted certain standards ensuring personal and environmental safety when

the objective justification under the Article 102TFEU and the free-movement provisions. See eg Rousseva 2006:34f; Albors Llorens 2007:1729ff; Craig/de Búrca 2011:1041.

¹⁷⁷ One other case might be Case C-343/95 *Diego Cali & Figli*, which was, however, handled at the level of the definition of an undertaking or could have been decided under Article 106(2)TFEU. Another case is *DSD (Case COMP D3/34493)*, however, DSD did not advance environmental protection as such but argued that it was required by law to act in such a way. See with regard to the definition of undertaking and the State action/compulsion defence see Part B, Section I, Chapter A.

¹⁷⁸ Commission Press Release IP/00/1351. Unfortunately no other official documents are available in this regard. See however Baccaro 2001.

¹⁷⁹ *CECED*.

¹⁸⁰ Baccaro 2001:40.

¹⁸¹ Baccaro 2001:40; Kingston 2009:215–216.

handling oil products during the transfer from the ships to the stockage in the port.¹⁸² The competition authority established that the rules could be justified by safety concerns such as environmental protection as an objective justification. Moreover, it took into account the GC's decisions¹⁸³ in *Hilti* and *Tetra-Pak*.¹⁸⁴

Such an approach could equally be expected at EU level since the concept of objective justification is an open one which can accommodate environmental protection requirements,¹⁸⁵ even though such considerations have not yet been used in the context of Article 102 TFEU at the EU level.¹⁸⁶ Yet, it should be pointed out that behaviour in favour of the environment would also be subject to the strict proportionality test applied in Article 102 TFEU. In fact, the Commission's Guidance Paper might further exemplify a readiness to allow the second form of integration by means of the concept of objective justification. The Commission explains that 'conduct may, *for example*, be considered objectively necessary for health or safety reasons related to the nature of the product in question' (emphasis added).¹⁸⁷ The decisional practice shows hardly any cases where such health and safety/environmental

¹⁸² There was furthermore a general legal obligation to ensure that oil and oil products are handled in a non-hazardous way.

¹⁸³ Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)*; Case T-30/89 *Hilti*.

¹⁸⁴ Conseil de la Concurrence *S.A. Tanklux* ¶50-54.

¹⁸⁵ Cf Portwood 2000:175ff; Davies 2009:564–565; Østerud 2010:261ff; Kingston 2012:307–309 .

¹⁸⁶ Some commentators argue that environmental reasons were pleaded in *DSD (Case COMP D3/34493)*. See Vedder 2003:215–217; Lorenz 2004:147. However, a closer look at the decision clarifies that the defence regarding the environment was a State action defence. DSD argued that German environmental legislation which stipulated the recycling obligation required such 'abusive' behaviour. This also seems to be the position of the GC, confirmed by the CJ, Case C-385/07P *DSD* ¶135-147; Case T-151/01 *DSD* ¶150-155. Also arguing that in *DSD* environmental considerations were not at stake Kingston 2012:316–317.

¹⁸⁷ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty ¶29. This statement is, however, qualified with the restrictions the Courts have specified in *Hilti* and *Tetra-Pak*, analysed in detail in the next section.

reasons were considered. However, this is not surprising as the Commission would typically not pursue a case where it is obvious that such reasons exist. A notable exception is the *Football World Cup* decision. In this case the Commission explained that '[e]nsuring effective security at football matches is essential and may, in particular circumstances, justify the implementation of special ticket sales arrangements by tournament organisers',¹⁸⁸ although the arrangements in this case were not suitable and went beyond what was necessary.¹⁸⁹

Hence, a behaviour might not be considered abusive for environmental protection reasons. Yet, the case law on Article 102 TFEU shows that only a minimal number of cases exists where the defence of objective justification was successful. Hence an objective justification based on environmental reasons seems unlikely to succeed in practice. The reason for this is primarily institutional. A brief examination of the most important cases¹⁹⁰ where an objective was successful shows that these cases were preliminary references. One of the few cases where such a defence was successful in proceedings brought by the Commission is *BP v Commission*.¹⁹¹ This supports the view that the Commission usually only initiate proceedings where an objective justification is very unlikely. The situation is different in terms of private enforcement, ie cases that arrive at the CJ in the form of preliminary references where more objectively justified cases can be identified. Often, private actions are not targeted as public enforcement actions. Claims that behaviour would be contrary to Article 102 TFEU might, for example, be made in other commercial litigation as a form of

¹⁸⁸ *Football World Cup* ¶105.

¹⁸⁹ See also Weatherill 2003:64–65.

¹⁹⁰ Case 53/87 *CICRA v Renault*; Case 127/73 *BRT v SABAM*; Case 395/87 *Tournier*; Case 77/77 *BP*; Case 250/92 *Gottrup-Klim*; Case 24/67 *Parke, Davis & Co v Probel*.

¹⁹¹ Case 77/77 *BP*.

'by-product'. However, it can also be expected¹⁹² that more guidance on what exactly constitutes an abuse via case law and the Commission's Guidance Papers means that fewer cases with successful objective justification defences will appear. Such guidance reduces the number of questions that are actually considered in preliminary references.¹⁹³ It could therefore be concluded that cases where an objective justification is pleaded on an environmental reason are unlikely to succeed. However, because this result stems mainly institutional factors, the opposite might equally be argued: The objective justification in environmental cases is extremely successful; no cases arise because neither by the Commission nor by the national competition agencies or courts considered such cases to be abusive in the first place.

b) Hilti and Tetra-Pak as a Contradiction to the Second Form of Integration

After having explained that the second form of environmental integration is possible by means of the concept of objective justification, the extent to which *Hilti*¹⁹⁴ and *Tetra-Pak*¹⁹⁵ contradict this finding is examined. In *Hilti* and *Tetra-Pak* the undertakings failed to defend their tying practice based on consumer health/safety. It is occasionally argued that the GC made clear that so-called public policy reasons and therewith environmental reasons cannot

¹⁹² And a look at the successful objective justifications in preliminary references cases supports this. Those cases are mainly earlier cases.

¹⁹³ Either because the national courts decide the cases accordingly or because the CJ rejects the preliminary reference as the matter has already been sufficiently elaborated by previous case law.

¹⁹⁴ Case T-30/89 *Hilti* ¶118. On appeal to the CJ Case C-53/92P *Hilti*.

¹⁹⁵ Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* On appeal to the CJ Case C-333/94P *Tetra Pak v Commission (Tetra Pak II)*.

be used to ‘justify’ abusive behaviour. Similarly to the value judgement argument¹⁹⁶ it could be argued that it is not the task of an undertaking to make such a political decision. A decision which balances a reduction in competition against another public policy should not be made by an undertaking or a court¹⁹⁷ but should be left the legislature.¹⁹⁸

Hilti concerned the tying of nails and nail cartridges to the nail gun. The GC formulated the often quoted sentence that ‘it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products’.¹⁹⁹

In *Tetra-Pak*, the GC had to address the tying of liquid foods packaging machines with the packaging. Tetra-Pak advanced consumer health and safety. It suggested that ‘segregating aseptic filling machines and aseptic cartons may involve grave risks for public health and serious consequences for Tetra-Pak’s customers’.²⁰⁰ When addressing the public health argument the GC explained that ‘the remedy must lie in appropriate legislation or regulations, and not in rules adopted unilaterally by manufacturers, which would amount to prohibiting independent manufacturers from conducting the essential part of their business’.²⁰¹

¹⁹⁶ See Part A, text to (n174ff).

¹⁹⁷ Where the case comes to court.

¹⁹⁸ The GC judgments seem to hint at this kind of argument. This line of argument has been examined in Part A, text to (174ff). Surprisingly, this argument does not seem to be advocated so strongly and loudly with regard to Article 102TFEU as it is in the context of Article 101TFEU.

¹⁹⁹ Case T-30/89 *Hilti*¶118 the appeal was not successful in this regard see Case C-53/92P *Hilti*¶11-16.

²⁰⁰ Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)*¶79.

²⁰¹ *Ibid*¶84.

A similar line of reasoning was recently advanced by the CJ in *Slovenská sporiteľňa*²⁰² although the case concerned Article 101 TFEU. In this case major Slovakian banks after having been charged with excluding a Czech competitor in the field of cashless foreign exchange transactions from the Slovakian market (suddenly) raised the argument that the Czech competitor was acting illegally. Whether this was in fact true was unclear. While the Slovakian law could have been interpreted in such a way, EU law, in particular freedom to provide service, seems to have suggested otherwise. As the banks had not raised the issue before their action with the national authorities and only after having been fined for an infringement of Article 101 TFEU the CJ found:

[I]t is for public authorities and not private undertakings or associations of undertakings to ensure compliance with statutory requirements. The Czech Government's description of Akcenta's situation is evidence enough of the fact that the application of statutory provisions may call for complex assessments which are not within the area of responsibility of those private undertakings or associations of undertakings.²⁰³

Based on these statements it can be argued that so-called public policy concerns cannot be advanced as objective justification.²⁰⁴

Although the cases seem to support this view, a closer look reveals a different scenario. Hilti claimed that the competitors' nails were incompatible and of inferior quality

²⁰² Case C-68/12 *Slovenská sporiteľňa*.

²⁰³ *Ibid.* ¶20.

²⁰⁴ Eg Loewenthal 2005:463 see also Lowe 2004:171 who is however not so clear: setting out on the one hand that public policy might be an objective justification but stating on the other that it is 'not for the undertaking concerned but for the public authorities to protect those public interest objectives'. Possibly also Whish 2009:207.

and thus put Hilti at risk for liability under the producer liability laws.²⁰⁵ In this context, Hilti did not directly resort to tying to protect consumer safety. Hilti (only) argued that this action protected the company from liability in case the incompatible and poor quality nails would cause harm. However, as Hilti's argument was that it had a duty of care as a manufacturer, this argument is different from a direct consumer safety argument. It could be seen as an attempt to argue that Hilti was in effect protecting consumer safety.²⁰⁶ Furthermore, the Commission's submission to the GC should be borne in mind: Hilti's claimed concern for safety was not supported by the facts. Hilti never contacted the authorities nor the other manufacturers or consumers in this regard. Indeed, the expert opinion on the duty of care as a manufacturer submitted by Hilti to the GC showed that Hilti's primary duty would have been to issue a warning. Finally, it should be noted that Hilti even prohibited its salesmen to record any safety concerns in writing.²⁰⁷ Thus, it appears as if the Court is not objecting to the argument as such. However, the GC seems to check the facts and assess the proportionality of the measure adopted by Hilti.²⁰⁸ This conclusion is, moreover, supported by the paragraphs where the GC addressed the argument of health and safety concerns. The GC found that Hilti had the chance to contact the authorities. Doing so would not – as Hilti had claimed – be *more* harmful to the competitors than Hilti's practice of tying. Hence, this case cannot be seen as a general rejection of arguments based on so-called public policy

²⁰⁵ Case T-30/89 *Hilti* ¶102-107.

²⁰⁶ Which seems to be a predominant view. See Rousseva 2006:39–40; Monti 2008:210–211; Jones 2011:378; Ezrachi 2012:262; Whish/Bailey 2012:211.

²⁰⁷ Case T-30/89 *Hilti* ¶108-111.

²⁰⁸ See also Monti 2008:210.

concerns.²⁰⁹ Instead, it should be seen as a statement that such claims are to be scrutinised thoroughly²¹⁰ to ensure that the company is not disguising anticompetitive behaviour.

A similar point can be made about *Slovenská sporiteľňa*. In this case the Court actually explained that the real object of the agreement was excluding a competitor and not preventing illegal behaviour. In this regard the CJ pointed in particular to the fact that such arguments were only raised after a fine was imminent.²¹¹ In other words, the arguments could not succeed in this and the other cases because they were not supported by the facts. Thus these cases cannot exclude the possibility that such an argument may be raised successfully where a real environmental protection concern exists, as shown in *Tanklux*.²¹²

At first sight the quotation from *Tetra-Pak* that it is not the undertaking's task 'to take steps on its own initiative to eliminate products' supports that the so-called public policy consideration cannot be advanced as objective justification. However, a thorough examination of the context of the quotation in the judgment reveals that the GC in essence applied a strict proportionality test.²¹³ The GC concluded that there would have been other

²⁰⁹ Rousseva 2006:39–42; Monti 2008:210–211; Jones 2011:276–377. See also Albors Llorens 2007:1746; Townley 2009:59.

²¹⁰ See Mestmäcker/Schweitzer 2004:§ 17¶33; Furse 2008:314. The Commission also seems to be of this opinion as it names 'health or safety reasons' as one possible objective justification and explains that in such cases a thorough examination with regard to the proportionality will take place. Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty¶29.

²¹¹ Case C-68/12 *Slovenská sporiteľňa*¶19.

²¹² Conseil de la Concurrence *S.A. Tanklux*. Moreover, particular in an international context it is often difficult to argue that it is the State's responsibility to regulate environmental protection issues. Undertakings maybe in a better position to take these actions due to their superior knowledge or because the State legislature and law enforcement is not functioning.

²¹³ See also Rousseva 2006:40–41; Rousseva 2007:389–390; Monti 2008:210 or the interpretation of the Commission Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty¶29. Occasionally it is also argued that this test would examine whether the motivation is genuine. See Albors Llorens 2007:1746.

less restrictive means than tying to achieve this aim. For example, Tetra-Pak could have informed the other producers of the specifications needed. The GC then, but only supererogatorily, followed the assumptions of *Tetra-Pak* and argued that the restriction imposed by *Tetra-Pak* would be too far-reaching in safeguarding public health. It would effectively amount to prohibiting an essential part of independent manufacturers' business.²¹⁴ This approach is in line with a classic proportionality test in which a complete prohibition of a certain product is not necessary if mere regulation of it could also achieve the desired result. Hence, it cannot be said that the judgments would preclude any form of so-called public policy arguments, and thus environmental protection could serve as an objective justification.²¹⁵ Finally, the European rule of reason case law²¹⁶ which could be transposed to Article 102TFEU²¹⁷ illustrates how and when public policy can be used as a justification. Moreover, the application of the European rule of reason's principles would also address some of the accountability arguments as the principles ensure a higher level of democratic accountability.²¹⁸

c) Efficiency Defence

The Commission's Guidance Paper²¹⁹ formally introduced an efficiency defence to Article 102TFEU after introducing the concept in the Discussion Paper on the Application of

²¹⁴ Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* ¶84.

²¹⁵ Cf Davies 2009:564–565 .

²¹⁶ See Part C, Section I, Chapter D, text to (n3ff).

²¹⁷ Rousseva 2006:40–41; Albors Llorens 2007:1746; Rousseva 2007:390–391; Rousseva 2007:267–268; Monti 2008:210; Jones 2011:276–377.

²¹⁸ See Part C, Section I, Chapter D, text to (n227ff).

²¹⁹ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty.

Article 82 of the Treaty to Exclusionary Abuses.²²⁰ The CJ also acknowledged the existence of an efficiency defence in Article 102 TFEU.²²¹

Hence, one way an undertaking can escape the prohibition of Article 102 TFEU is to show that the efficiencies resulting from the conduct outweigh the competitive harm.²²² The Commission seems to distinguish between two different concepts: the objective justification and the question of whether the restriction of competition is justified by ‘substantial efficiencies which outweigh any anti-competitive effects on consumers’.²²³ Thus, although it is also possible to see this defence as part of the objective justification,²²⁴ it should be considered separately. While an objective justification is an external factor beyond the control of the undertaking the efficiency defence typically examines efficiencies which occur within an undertaking(s). The CJ also seems to see these as two separate justifications explaining that an ‘undertaking may demonstrate...either that its conduct is objectively necessary...or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency’.²²⁵

²²⁰ *DG Competition Discussion Paper* December 2005 ¶84-92.

²²¹ Case C-52/09 *TeliaSonera Sverige* ¶76; Case C-95/04P *British Airways* ¶86; Case C-209/10 *Post Danmark* ¶41ff pointing also to Case C-95/04P *British Airways* ¶54-55. See also in this line Case T-228/97 *Irish Sugar* ¶189. Thus, claims of Rouseva 2006:66–68 and Loewenthal 2005:464 that such an approach would not find support in the case law must be rejected. These cases accepting the efficiency defence also overrule Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line* ¶1112 and partly Case T-340/03 *France Télécom*.

²²² Very critical with regard to such an approach Waelbroeck 2010.

²²³ Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty ¶28.

²²⁴ See eg Jones 2011:278.

²²⁵ Case C-209/10 *Post Danmark* ¶41. See also -Case T-193/02 *Laurent Piat* ¶115-117 where the GC held that the behaviour was justified under Article 102 TFEU as it was under 101(3) TFEU.

The Commission in its Guidance Paper explains the requirements for the ‘efficiency defence’ which are modelled on Article 101(3)TFEU.²²⁶ Thus, a company could justify its conduct if (1) it improves production or distribution of goods or promotes technical or economic progress, (2) the restriction is indispensable for this improvement, (3) the improvement outweighs the harm on competition and consumer welfare, (4) competition is not eliminated and (5) the company provides evidence in this regard.²²⁷ It is interesting to note that the requirement of a fair share for the consumer, placed so prominently in the analysis of Article 101(3)TFEU, is not mentioned. Does this mean that efficiencies which do not benefit the consumer could also justify an abuse of dominance? Another explanation might be that the Commission considers that the benefits are automatically transferred to the consumer. Such an interpretation might find support in the fact that the Courts and the Commission have never extensively considered whether the consumers have actually received a fair share. Yet given the fundamental importance of how to define consumer,²²⁸ it is surprising that the Commission only mentions consumers in the analysis of the efficiency defence in the context of efficiencies that outweigh the ‘negative effects on competition and consumer welfare’.²²⁹ The CJ seems clearer in this regard and explains that there needs to be ‘advantages in terms of efficiency that also benefit consumers’.²³⁰

²²⁶ The Commission even refers to its Guidelines on 81(3)TFEU. Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty¶30-31. The conditions for the efficiency defence have been described as ‘strikingly similar to those in Article [101(3)TFEU], *Albors Llorens* 2007:1758. See also the CJ’s explanation in Case C-209/10 *Post Danmark*¶41.

²²⁷ Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty¶30.

²²⁸ See in this regard Part C, Section I, Chapter D, text to (n73ff).

²²⁹ *Ibid*¶19 fn 2.

²³⁰ Case C-209/10 *Post Danmark*¶41.

As explained, the second form of integration is possible under Article 101(3)TFEU analysis.²³¹ Thus, such integration is equally possible if the efficiency defence under Article 102TFEU is modelled along Article 101(3)TFEU.²³² Yet, two things need to be borne in mind. First, if a conduct satisfies the criteria under Article 101(3)TFEU this does not automatically mean that the conduct does not infringe Article 102TFEU. Second, the proportionality test might be harder to satisfy under Article 102TFEU than under Article 101(3)TFEU due to the special market conditions in the case of dominance.

d) Conclusion on Article 102TFEU

This part explained the second form of environmental integration under Article 102TFEU. It highlighted that ostensibly abusive behaviour is not considered abusive if an objective justification exists. Environmental protection can be such a justification although the scope for such balancing is narrow. First, the Courts and the Commission have established a vigorous examination of such claims to ensure that undertakings do not hide anticompetitive interests under the veil of environmental reasons.²³³ Second, the case law and decisional practice show that the objective justification defence rarely succeeds. This, however, seems to be the result of institutional factors rather than substantive issues. Yet, it might equally be argued that cases where an environmental objective justification exist never reach the final enforcement stage of a Commission or court case.

²³¹ Part C, Section I, Chapter D, text to (n73ff).

²³² In the same line Kingston 2012:309.

²³³ See also Gormsen 2013:244, who argues that it is hard to see how dominant undertakings can successfully advance any of these defences if the conduct in question excludes a competitor as efficient as the dominant undertaking.

The second form of integration is also possible under Article 102 TFEU's efficiency defence as it is modelled on of Article 101(3) TFEU. The crucial issue is, as under Article 101(1) and (3) TFEU, how the objective justification and the efficiency defence relate to each other. This issue is addressed in the next section which conceptualises the relationship between Article 101(1) TFEU and 101(3) TFEU, the objective justification and the efficiency defence under Article 102 TFEU and Article 106(2) TFEU. Lastly, it suggests some lessons from the second form of environmental integration in competition law.

3. Conceptualising the Second Form of Integration in Competition Law

This part explains the relationship between Article 106(2)TFEU and the different options of balancing in Article 101 and 102TFEU. Thus, it explains the interaction between the three options of balancing in Articles 106(2)TFEU, Article 101(1)TFEU and 101(3)TFEU. Likewise, it elaborates on the interaction between Article 106(2)TFEU, Article 102TFEU's objective justification and Article 102TFEU's efficiency defence. It is shown that each of the options to potentially perform the second form of integration has its own defined area of application along a sliding scale depending on the level of State involvement. Finally, this part highlights lessons from the market-freedoms and State aid for the second form of integration in competition law.

a) Options for the Second Form of Environmental Integration under Articles 101TFEU, 102TFEU and 106(2)TFEU

As explained in the previous chapters, the second form of environmental integration, that is balancing between environmental protection and competition, can be achieved under Articles 106(2)TFEU, 101(1)TFEU and 101(3)TFEU and Article 102TFEU's objective justification and efficiency defence. The following section compares between the different forms of balancing within Articles 101TFEU and 102TFEU with the balancing under Article 106(2)TFEU.²³⁴

²³⁴ Leaving aside the how to distinguish between unilateral and collective behaviour, ie Articles 102 and 101TFEU respectively.

The scope of the European rule of reason under Article 101 TFEU established in *Wouters* and *Meca-Medina* is sometimes described as being unclear.²³⁵ It becomes pertinent to determine European rule of reason's scope, in particular if one sees it as transposition of mandatory requirements²³⁶ into competition law.²³⁷ The mandatory requirements were developed as a reaction to the broad *Dassonville* formula for determining restrictions.²³⁸ However, in competition law the concept of restricting competition involves a much more detailed analysis.²³⁹ The rationale behind the European rule of reason seems, therefore, to be less clear. While some have suggested a similar broad scope for the European rule of reason as for mandatory requirements,²⁴⁰ this section suggests a more-cautious reading.

A more-cautious reading²⁴¹ suggests that the European rule of reason concerns cases of self-regulation by collective bodies where the restriction of competition is justified by legitimate objectives inherent in the organisation and proper conduct of the regulated activity. The European rule of reason would then cover self-regulation where it is seen 'as legitimate in principle with a view to an act of State delegation or the nature of a given

²³⁵ Whish/Bailey 2012:132–133.

²³⁶ Developed in *Cassis de Dijon*, Case 120/78 *Reue v Bundesmonopolverwaltung für Branntwein* ¶8. See above Part C, Section I, Chapter A.

²³⁷ In this line also Steinbeck 1998:561.

²³⁸ Case 8/74 *Dassonville* ¶5. That captures all rules that are capable of 'hindering, directly or indirectly, actually or potentially' trade between Member States.

²³⁹ See Part B, Section I, Chapter B.

²⁴⁰ E.g. de Vries 2006:196; Breuer 2013:633ff, also Enchelmaier 2012:195–199 who wants to apply the rule of reason only to effect cases; which is, however, contradicted by the recent Case C-136/12 *CNG* concerning price fixing.

²⁴¹ Schweitzer 2007:3f. see also Gilliams 2006:323f.

activity'.²⁴² As a consequence the CJ would assess such regulation under the same standard as State regulation.

This reading has been criticised²⁴³ because the Court did not mention any regulated activity of Member States in *Meca-Medina* and only focused on the objective of the agreement. Moreover, such an interpretation does not take into account that several agreements of professional organisations²⁴⁴ have been found to violate Article 101(1)TFEU.

To develop a more cautious interpretation of the European rule of reason the divide with regard to the burden of proof under Article 101(1) and 101(3)TFEU should be borne in mind. After Regulation 1/2003 this procedural distinction between Article 101(1) and 101(3)TFEU is of particular importance. While it is up to the party alleging the infringement to prove the infringement of Article 101(1)TFEU, it is up to the accused undertaking to prove that the conditions of Article 101(3)TFEU are fulfilled.²⁴⁵ From this procedural point of view, the European rule of reason has a privileging function in terms of the burden of proof: Although, the undertakings need to show that they are covered by the European rule of reason, the general allocation of the burden of proof has consequences for the assessment. The assessment under Article 101(1)'s European rule of reason is more lenient than under Article 101(3)TFEU. For example, the Court requires every agreement (even

²⁴² Schweitzer 2007:3. A similar approach seems to be taken by Davies 2009:566–567 arguing that in cases of delegation and sufficient supervision by the State Article 101(1)TFEU would not apply.

²⁴³ Townley 2009:133–134.

²⁴⁴ Such as Joined Cases T-213/95 and T-18/96 *SCK and FNK*; Case T-193/02 *Laurent Piau*; *CECED*; *ONP*.

²⁴⁵ See Article 2, Regulation 1/2003.

object restrictions) to be analysed in its legal and economic context.²⁴⁶ Moreover, the assessment of the benefits of the agreement under Article 101(1)'s rule of reason is lenient. While in Article 101(1)TFEU an abstract (environmental) benefit²⁴⁷ is sufficient, the standard of proof is higher under Article 101(3)TFEU. Under the latter the environmental benefit cannot be described in abstract terms but must be translated into the efficiency language of Article 101(3)TFEU and must be substantiated.²⁴⁸ Hence, the undertakings must prove the quality and quantity of the claimed environmental benefit. In this sense the European rule of reason is a privilege²⁴⁹ in terms of the burden of proof. However, the standard of proportionality review is even more lenient under Article 106(2)TFEU, even allowing measures that ensure the economic viability.²⁵⁰ But which standard applies in which case?

The difference in terms of review standard for the actions is related to the level of supervision by the State, so that a sliding scale emerges. In the cases of Article 106(2)TFEU the level of State supervision is the greatest, while the review of the undertakings' actions is the most lenient. On the other side of the scale are purely private actions without an element of State supervision; these can only rely on Article 101(3)TFEU.

²⁴⁶ Eg Case C-32/11 *Allianz Hungária* ¶36; Case C-8/08 *T-Mobile Netherlands* ¶27; Case 56/65 *Société Technique Minière*; Case C-226/11 *Expedia* ¶21.

²⁴⁷ See, eg *Wouters* which aimed at providing 'sound administration of justice', Case C-309/99 *Wouters* ¶97.

²⁴⁸ See Part C, Section I, Chapter D, text to (n68ff).

²⁴⁹ A further indication of the privilege given by the Court might be seen in the broad discretion that the Court gave the Bar in *Wouters* regarding how to achieve the public interest or regarding the threshold for doping in *Meca-Medina*.

²⁵⁰ See Part C, Section I, Chapter C, text to (n75ff). See also Baquero Cruz 2005:at 187-197 who argues that the standard under article 106(2)TFEU is different. For a different view Davies 2009:573–575, seeing no difference in terms of standard of review under Article 106TFEU as compared to the market-freedoms and competition law.

The level of State supervision under Article 106(2) TFEU is the greatest because an undertaking must be entrusted with a SGEI. Thus, the undertaking needs to provide a specific service, namely a services that must be ‘universal and compulsory in nature’.²⁵¹ Moreover, a *specific* (environmental) obligation must be placed on them by the State in order to fulfil the entrustment criterion.²⁵² This means the State has a high level of influence to ensure that the undertaking is pursuing a public (environmental) interest and is not restricting competition purely out of profit-maximising motives. In the case of Article 101(1) TFEU’s rule of reason, the level of State influence is lower as the undertaking is not entrusted within the meaning of Article 106(2) TFEU. However, there is still a sufficiently strong link to the State,²⁵³ as the State has given the undertaking(s) a regulatory mandate (*Wouters, OTOC, CNG*).²⁵⁴ *Meca-Medina*²⁵⁵ does not fit directly into this category: Sports are special in that they are traditionally governed by self-regulation. Yet after it became apparent that the rules adopted by the sporting bodies were not sufficient to effectively protect the public interests identified in *Meca-Medina* as clean and fair sport, there are nowadays protected by criminal law in some countries. Thus, it could be said that the European rule of reason applies to cases²⁵⁶ (1) where the State has given a mandate to a group of undertakings to regulate and protect certain interests (eg the environment) or (2) where the group of

²⁵¹ Case T-289/03 *BUPA* ¶172.

²⁵² See Part C, Section I, Chapter C, text to (n60ff).

²⁵³ Thus, not all matters of self-regulation are covered as Townley 2009:133–134 explains, pointing to Case T-193/02 *Laurent Piau*; Joined Cases T-213/95 and T-18/96 *SCK and FNK; CECED*.

²⁵⁴ Case C-136/12 *Consiglio Nazionale dei Geologi and Autorità Garante della Concorrenza e del Mercato*; Case C-1/12 *OTOC*; Case C-309/99 *Wouters*. See van de Gronden 2005:85 viewing the European rule of reason as a reaction to a case of ‘public-private arrangements’ in the public interest.

²⁵⁵ Case C-519/04P *Meca-Medina and Majcen v Commission*.

²⁵⁶ See also Kingston 2012:239–241 who argues that it applies to all environmental regulatory tasks.

undertakings was historically in charge of regulating such an area.²⁵⁷ Only where a group of undertakings has not been entrusted with an SGEI or mandated to regulate a certain area would the undertakings involved have to bear the full burden of Article 101(3)TFEU.

A similar approach should be applied to Article 102TFEU's objective justification and efficiency defence. This would bring the Article 102TFEU analysis in line with Article 101TFEU by comparing the objective justification to the rule of reason and the efficiency defence to Article 101(3)TFEU.

However, when comparing the objective justification under Article 102TFEU to the European rule of reason it becomes clear that the objective justification has two functions: First, it encompasses cases where the environmental protection aim is not the main aim but rather part of the overall commercial aim of the transaction. The second function encompasses cases where the motive is primarily environmental protection. The first group can be compared to the objective justification/commercial ancillary defence for vertical restraints,²⁵⁸ while the second group catches the cases which the European rule of reason encompasses under Article 101(1)TFEU. Such an interpretation finds some support in the GC's *Piau* judgment which concerned the FIFA's rules for players' agents. The Court found that there was no abuse as the conditions of Article 101(3)TFEU were fulfilled.²⁵⁹ A similar point might be made regarding *Meca-Medina*. The GC's initial judgment²⁶⁰ concerned both

²⁵⁷ An example might be the Tribunal de las Aguas de la Vega de Valencia, which has historically been in charge of adjudicating water disputes, most likely since the time when the Arabs ruled. Later Spanish laws have acknowledged the jurisdiction of the tribunal.

²⁵⁸ Part C, Section I, Chapter D, text to (n62ff).

²⁵⁹ Case T-193/02 *Laurent Piau*, ¶109-117.

²⁶⁰ Case T-313/02 *Meca-Medina and Majcen v Commission*.

Articles 101 and 102 TFEU. Although the CJ in the appeal did not explicitly rule on Article 102 TFEU it could be expected that the Court would have addressed the issue if the outcome under Article 102 would have been different to that of Article 101 TFEU.²⁶¹

This would mean that the objective environmental justification would only be available where a group of undertakings has been charged with regulating an area in the interest of the environment. This would limit the availability of the defence and would bring the case law on Articles 101 TFEU and 102 TFEU in line. It would, furthermore, increase the importance of the efficiency defence as standard and provide a further explanation of why the public policy defence in *Hilti* and *Tetra-Pak* did not succeed.²⁶² Under the efficiency defence, the undertakings in *Hilti* and *Tetra-Pak* would have needed to provide clear, convincing evidence to allow an assessment of the quality and quantity of their claimed improvements to safety. The mere abstract claim that this would improve safety was not sufficient as they were not a group of undertakings charged with regulating the area in the interest of health and safety.

b) Lessons from Free-Movement and State Aid Law

When examining whether lessons can be learned from State aid and free-movement law, it is important to bear in mind that competition law typically involves private parties, not States,

²⁶¹ In particular as the Court in Case C-309/99 *Wouters* ¶111-115 also addressed the issue of Article 102 TFEU.

²⁶² Another reason might be that tying will hardly ever be proportional to achieve such aims.

adopting environmental protection measures.²⁶³ In such cases the measures would typically go beyond the current EU or national environmental standard.

Regarding the State aid assessment of environmental protection measures the Commission explains in its Guidelines that in its assessment it would establish (1) whether the environmental protection aim is well defined, (2) whether the design of the measure addresses a ‘market failure’, ie the necessity of the measure and (3) whether the measure is proportional and the distortion of competition and the effect on trade is limited so that it can be said ‘that the overall balance is positive’.²⁶⁴ These steps mirror those of the proportionality analysis in competition law and might inform the analysis. The first requirement of a clearly defined environmental aim and the second necessity requirement should ensure that only genuine environmental protection aims are considered.

The requirement of clearly defining the environmental aims can also help in competition law, in particular in terms of the necessity assessment and in order to prevent further actions restricting competition, like in cases such as *Consumer Detergents*.²⁶⁵

With regard to examining what aims can be pursued by undertakings the issue of whether measures by undertakings go beyond the current EU or national standard is relevant. It can be linked to the precautionary principle, as questions of whether private parties can adopt actions based on the precautionary principle to address an environmental

²⁶³ However, as explained in the previous section there might still be a varying degree of State involvement.

²⁶⁴ Community Guidelines on State Aid for Environmental Protection (2008):¶16.

²⁶⁵ *Consumer Detergents*,¶53, especially if read in conjunction with Commission Press Release IP/11/473.

danger created by pollution might arise. At first sight the situation does not seem very different from the situation faced in the free-movement or State aid law which suggests that the precautionary principle would apply. However, the case may be different where the State has also made an assessment.

In cases where no State measure is in place there could be instances where the State or EU has made an assessment and found that no or only limited action was needed and cases where action has not been considered at State or EU level. In the second instance, there is no reason why the precautionary principle could not be applied thereby allowing an undertaking to adopt environmental protection measures. This argument might be supported by *Piau* which concerned rules regarding professional and ethical standards for football players' agents.²⁶⁶ In this case the GC stressed the lack of national rules governing this problem.²⁶⁷ However, where the State or EU has considered the risk but decided not to act in a certain way, or in cases where the State has adopted more limited measures the situation may be different. In particular accountability-related concerns could be raised to pre-empt (further) action by undertakings.²⁶⁸ Prohibiting undertakings from taking action in such cases would ensure that State or EU decisions are not second-guessed. Nonetheless, competition law is not aimed at protecting State or EU decisions from being second-guessed by private parties.²⁶⁹ How would such protection against second-guessing look? Would all

²⁶⁶ Case T-193/02 *Laurent Piau*, ¶102-104.

²⁶⁷ See Townley 2013.

²⁶⁸ Kieran 2013, Regarding the accountability argument see also Part A, text to (n174ff).

²⁶⁹ Although the aim of protecting the political process against influence of private economic power can be traced back to the root of many competition laws. See eg Eucken 1950:263f, the other ordoliberalists were, however, also concerned with private power translating into political influence. With regard to ordoliberal thinking see the so-called Ordoliberal Manifesto by Eucken, Böhm and Großmann-Doerth

second-guessing of the legislature automatically mean that the behaviour is anticompetitive? Or would second-guessing act as a second condition, so that action would only be anticompetitive if there is also second-guessing? Or would such a requirement mean that an additional condition needs to be fulfilled before a measure can benefit from the exceptions? In other words, could a measure only escape competition law if it did not second-guess the legislature?

In general it seems that competition law does not prohibit second-guessing by private parties as such. Instead, it leaves the market participants to make their own choices at their own commercial risk. Only in the case where the restriction of competition goes beyond what is necessary does competition law tend to restrict the undertakings' freedom to determine their business conduct. However, the issue of previous State action could come into play in the context of the necessity requirement, as the cases *Hilti*, *Tetra-Pak* and *Slovenská sporiteľňa*²⁷⁰ show. This issue of pre-emption can be compared to the free-movement law. It needs to be asked whether the EU or national legislative action or inaction should be seen as exhaustive or only as setting the minimum standard. This must be answered by examining the legislation (or the parliamentary debate where no legislation was adopted), the legal basis on which the legislation was based and other parts of the legal framework which might provide a foundation for adopting more stringent standards.²⁷¹ An important factor in this regard could also be time. If the legislator had decided in 1960 that

Böhm/Eucken/Großmann-Doerth 1937b; Großmann-Doerth 1933; Böhm/Eucken/Großmann-Doerth 1937a; Eucken 1950.

²⁷⁰ Case C-68/12 *Slovenská sporiteľňa*; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)*; Case T-30/89 *Hilti*.

²⁷¹ See also on more stringent standards and minimum harmonisation, Part C, Section I, Chapter A, text to (n95ff).

there was no need to regulate the CO₂ emissions and there has not been a debate about this issue since, it might be concluded that the pre-emptive force that the decision had in the 1960s is not that strong anymore.

Thus, it can be argued that the precautionary principle can also be applied in favour of undertakings in competition law although the issue of necessity might be problematic where a legislator has made an exhaustive decision. This finding is also supported by Article 11 TFEU which requires the integration of the precautionary principle into competition law²⁷² and the idea that this principle is a general principle of EU law.²⁷³

Under Article 101(3) TFEU, undertakings are already required to provide clear evidence of the environmental threat and the improvements that their actions will bring.²⁷⁴ In this regard lessons can be learned from the application of the precautionary principle in the market-freedoms. Undertakings would need to show that they carried out an ‘analysis of the appropriateness and proportionality of the restrictive measure...[and] evidence enabling its arguments to be substantiated’.²⁷⁵ Undertakings would not need to positively show that no other options are available²⁷⁶ but that a sound assessment of the situation, the measure and its implementation has been carried out. However, this does not mean that the normal necessity requirement in competition law should be abandoned. It would still apply.

²⁷² See Part A.

²⁷³ Case T-392/02 *Solvay Pharmaceuticals v Council* ¶121.

²⁷⁴ See Part C, Section I, Chapter D, text to (n⁷⁴ff).

²⁷⁵ Case C-161/07 *Commission v Austria* ¶36; Case C-400/08 *Commission v Spain* 83.

²⁷⁶ Cf Case C-110/05 *Commission v Italy* ¶66.

In terms of the necessity requirement it must also be borne in mind that both free-movement and competition law need to establish whether the environmental protection aim is genuine or a disguised protectionist restriction of the freedoms or restriction of competition, respectively. As in free-movement law competition law could adopt an approach where the legitimacy of the environmental aim is increased if the proclaimed environmental interest finds a basis in international agreements or EU law. In this way, the reference to international agreements and EU law may address concerns regarding accountability and also might give the issue of legislative action at EU level additional significance. As such, the environmental aim is then defined by democratic means and only the implementation is taken over by the private parties. Additionally, the application of the consistency test and in particular the polluter-pays principle as developed in the freedoms can ensure the environmental aim is genuine and not a disguised restriction of competition. This would mean that the measure would need to cover all economic activities by the participating undertakings which are producing a specific pollution. This broad concept would be limited by the factor that only those undertakings within a specific market are taken into account. In other words, the competitive balance is being upheld because the undertakings must bear the costs of their individual pollution. To a certain extent this idea can already be found in competition law. In *VOTOB*²⁷⁷ an agreement was prohibited that imposed a fixed charge, separately invoiced,²⁷⁸ to offset environmental damage caused. The uniform charge did not take into account the actual pollution the individual undertaking

²⁷⁷ XXIIInd Report on Competition Policy¶177ff.

²⁷⁸ The Commission also highlighted the separate invoicing as it would appear to the consumers as being imposed by the State. In retrospect, however, it seems that the separate invoicing only became an issue because there was a fixed charge.

caused thereby rewarding the least environmentally friendly competitor.²⁷⁹ The effect of the agreement was that the competitor who was already closer to the target could not use this competitive advantage with regard to offering a lower price.²⁸⁰ Thus, the fixed charge would have turned the polluter-pays principle upside down distorting competition.²⁸¹

Lessons can also be drawn from State aid law and the market-freedoms for the polluter-pays principle in competition law. Environmental claims in competition cases deserve rigorous scrutiny where the polluter-pays principle is not upheld and will only be justified in exceptional cases by the overall aim of the system. Cases where the measure of the undertaking(s) supports the polluter-pays principle might help resolve a market failure in the form of negative externalities. The measure needs to be designed in a way to ensure the competitive balance between cheaper production creating the negative externality and more expensive ones internalising these costs. This can be achieved either by reducing the costs of the more expensive production or by increasing the costs for the production creating negative externalities. In such cases the Commission under the State aid Environmental Guidelines examine the magnitude of the environmental benefit in relation to the effect on market position²⁸² to ensure that the environmental benefit and the effect on competition are not disproportional. The Commission explains in the Environmental Guidelines that a measure which only addresses the ‘actual extra costs linked to a higher level of

²⁷⁹ See also Report from the Nordic Competition Authorities 2010:50.

²⁸⁰ Moreover, the restriction affected dynamic efficiencies by reducing the incentive to innovate in this area to reduce the costs for the environmental protection measure.

²⁸¹ The fixed charge would have meant that the undertaking with the greatest pollution would be shielded from competitors that do not pollute as much. The greatest polluters could pass on all the costs for reaching the environmental target, and the competitors could not use the advantage of being closer to the target by lowering their prices.

²⁸² Community Guidelines on State Aid for Environmental Protection (2008):¶36ff.

environmental protection, [has only a limited] risk that [it] will unduly distort competition.²⁸³

This can equally serve as a guideline in competition law.

In the necessity examination in Article 107(3)TFEU the Commission uses the incentive effect to establish if aid is necessary. Where the environmental protection measure is economically sensible the Commission finds that an incentive effect cannot be established. Although the incentive effect cannot easily be transferred to competition law, this finding can be transposed to it. As such, economically sensible environmental protection measures should typically be left to competition, and additional reasons would be needed to justify why this presumption is not applicable.

4. Conclusion on Competition Law

This chapter showed that in competition law the second form of environmental integration can occur in the context of the European rule of reason under Article 101(1)TFEU, Article 101(3)TFEU or in Article 102TFEU's objective justification and efficiency defence. It explained that the scope of Article 101(1)TFEU's European rule of reason is broad and allows balancing between environmental protection and competition. In Article 101(3)TFEU the scope is more limited because the environmental benefits need to be clearly quantified, qualified and proven. The second form of integration is also more limited as an improvement of the environmental quality of the product needs to be shown. Beyond such improvements, integration becomes increasingly burdensome. Although improvements in other markets can be taken into account where there is a casual connection that is not too

²⁸³

Ibid¶36.

remote, Article 101(3)TFEU imposes a limit in cases where an environmental benefit would *only* occur at an aggregated society level.²⁸⁴ This difference between Article 101(1) and 101(3)TFEU increases the importance of determining which standard applies. In the context of Article 102TFEU the chapter has explained that environmental protection can be an objective justification and that the second form of integration is also possible under Article 102TFEU's efficiency defence because it is modelled on Article 101(3)TFEU.

Finally, the chapter suggested a framework of how the tests under Article 106(2)TFEU and Articles 101TFEU (European rule of reason and Article 101(3)TFEU) and 102TFEU (objective justification and the efficiency defence) relate to each other. This framework suggests a sliding scale depending on the level of State supervision of the undertakings' actions: The lower the level of supervision the higher the burden of proof for the undertakings to justify their restrictive actions which are aimed at environmental protection. The chapter finally suggested some lessons that could be learned from free-movement and State aid law. These areas have a longer history of accepting that environmental protection can be balanced against a restriction. This history has led to the development of principles for the balancing exercise that can be equally applied in competition law.

²⁸⁴ These very rare cases as in most cases one of the other conditions will be fulfilled.

E. Conclusion Section I

Section I of Part C has investigated supportive integration via the second form of integration. It was concerned with the extent to which the legal framework of free-movement, State aid and competition law can be interpreted in a way to allow environmentally beneficial measures to escape the relevant prohibition by way of balancing.

The section has highlighted the sophistication that the balancing exercises in the free-movement and State aid law developed over the years. This development results from their accepting early on that environmental protection can serve as a justification and may be balanced against the relevant restriction. In contrast, in competition law balancing environmental protection with restrictions of competition faced resistance. Although the section showed that the second form of integration is possible in competition law, the degree to which it is possible varies. Based on the experience of free-movement and State aid law, the section suggested some principles that can be used in competition law when environmental protection claims and restrictions of competition need to be assessed.

Having examined the second form of integration in terms of supportive integration (ie cases where a measure is aimed at improving environmental conditions), in the next section the thesis examines preventative integration, ie cases where the free-movement, State aid and competition law are used to prevent environmental degradation.

SECTION II: PREVENTATIVE INTEGRATION

Section II of Part C is concerned with cases of the second form of integration in regard to preventative integration, that is to say whether the balancing exercises performed can be employed so as to prevent environmental degradation. In contrast, under supportive integration the relevant provisions are interpreted to allow environmentally beneficial action. The section first examines competition law, then State aid and free-movement law. It argues that the environmental damage can only play a role in the context of balancing under Article 107(3)TFEU.

A. Competition Law

In the context of competition law the second form of preventative integration, balancing to prevent environmental degradation, could be possible under Article 101(1)TFEU's rule of reason,¹ Article 101(3)TFEU² and Article 102TFEU in cases of objective justification and the efficiency defence.³ Yet, in the following chapter it will be shown that the second form of preventative integration cannot and should not take place within the current framework competition law.

The rule of reason in Article 101(1), Article 101(3)TFEU and the concepts of objective justification and efficiency defence under Article 102TFEU have commonalities. For example, a restriction of competition is balanced against the benefit derived from the restriction. To allow the second form of preventative integration would mean that a restriction of competition is balanced against the benefit derived from the restriction but only where this benefit would not lead to excessive environmental degradation. Measures which would not be prohibited under 'normal' circumstances could not benefit from the relevant exception because their environmental impacts outweigh their benefits.

The relevant analysis in Article 101(3)TFEU would be 'consumers' benefit'. It could be argued that in cases where the environmental degradation caused by the measure outweighs the other benefit to the consumer(s), a consumer benefit within the meaning of

¹ See Part C, Section I, Chapter D, text to (n2f).

² See Part C, Section I, Chapter D, text to (n73).

³ See Part C, Section I, Chapter D, text to (n172ff).

Article 101(3)TFEU cannot be established.⁴ Such preventative integration via balancing is said to be sensible as Article 11TFEU requires environmental integration and the Commission already gives ‘negative weight’ to consumer protection and market integration.⁵ Hence, post-transaction environmental damages should be taken into account in the analysis.⁶ The same argument could be made regarding the rule of reason under Article 101(1)TFEU and Article 102TFEU’s objective justification and efficiency defence. Thus, in all of these cases measures would be prohibited which produce considerable environmental degradation that outweighs the other benefits. The measures could not benefit from Article 101(1)TFEU’s rule of reason, Article 101(3)TFEU or Article 102TFEU’s objective justification or efficiency defence.

While such a valuation assigning ‘negative weight’ to environmental degradation might make sense depending on how welfare is measured⁷ such an approach creates similar problems to those outlined earlier.⁸ Reducing the scope of the exception in competition law in such a way might lead to imposing criminal liability or at least liability for high fines under competition law. This is problematic in terms of legal certainty, in particular regarding Article 101(3)TFEU. If an agreement fulfils the conditions of Article 101(3)TFEU no

⁴ Müller-Graff 1992:22–23; Portwood 2000:157,159; Weidemann 2009:197–198; Kingston 2010:790, 801; Townley 2011b:447; Vedder 2003:187-188 and 180-185 citing Geradin 2002:123 ff, or as an additional requirement, in particular under the old exemption system where the Commission had discretion, see Jacobs 1993:58; Portwood 2000:157, 159.

⁵ Townley 2011b:447.

⁶ Kingston 2010:790; 801; Kingston 2012:191.

⁷ It is whether the measurement should include environmental costs and benefits or not. The structure of Article 101TFEU seems to suggest that under Article 101(1)TFEU the costs are examined while Article 101(3)TFEU would concern the benefits. Yet, in the context of Article 101(1)TFEU’s rule of reason and Article 102TFEU’s objective justification it seems more difficult to draw a clear line between the costs and benefits analysis.

⁸ Part B, Section II, Chapter A, text to (n55ff).

further conditions or obligations can be imposed.⁹ This right to be exempted would be threatened by imposing the further obligation that the general improvement must outweigh the environmental harm. Additionally, the competition provisions do not stipulate any environmental requirements in their exception. Importing such requirements via the consumer benefit criterion, for example, creates uncertainty regarding the exact standard against which undertakings will be measured. It also creates problems regarding the division of power and the principle of conferral. It is up to the legislature and not the Commission and the national courts which apply Article 101(3) TFEU to adopt environmental standards. Additionally, such legislation might be within Member States' competence rather than within the EU's.

Furthermore, such a form of integration places additional burdens on the undertakings for it is the undertaking which must prove that the conditions of the relevant exception are fulfilled.¹⁰ Given that all EU aims are of equal value the sole focus on environmental protection, market integration and consumer protection as factors of 'negative weight' seems to upset the balance of EU aims. Thus, if these aims are considered to have 'negative weight' the other EU aims should have such weight equally. However, this means that undertakings would also need to show that their measure would not hinder 'social progress', promote 'social exclusion and discrimination', reduce 'linguistic diversity' or endanger 'Europe's cultural heritage', just to name a few aims of the EU. Such a requirement seems excessive. The burden to prove that all aims have been complied with will eventually

⁹ Which is clarified by Article 1(2) of Regulation 1/2003 see also: Case T-17/93 *Matra Hachette* ¶85; Joined Cases 56 and 58/64 *Consten and Grundig* 330–331; Weiß 2007; Schröter 2003:269.

¹⁰ Cf Article 2 of Regulation 1/2003.

lead to over-enforcement (type I errors), as hardly any undertaking would be able to provide such proof. Such over-enforcement is also not in line with the idea that competition has the same value as the other EU aims.¹¹ Hence, the second form of preventative integration, ie balancing the negative environmental effect against the otherwise positive effect in order to prevent environmental degradation, should not take place in the context of the exceptions to competition law. Neither the rule of reason under Article 101(1)TFEU, Article 101(3)TFEU nor the objective justification and efficiency defence under Article 102TFEU are suitable to provide a framework for such integration.

¹¹ See chapter Part A, text to (n74ff).

B. Article 106TFEU

Although the balancing in Article 106(2)TFEU is similar to that under Articles 101 and 102TFEU in that the necessity of the restriction of competition is assessed, the function of Article 106(2)TFEU is different. First, as explained,¹ an environmentally damaging measures is not prohibited *per se*, if Article 106(2)TFEU is not applied. The measures would also need to be contrary to Articles 101 and 102TFEU. In this sense the effects of preventative integration would not necessarily be the same as under Articles 101 and 102TFEU. Second, Article 106(2)TFEU is typically invoked by a Member State. Member States aim to defend their actions and competence against the EU either under Article 106TFEU or Article 107TFEU. The scenario is closer to that of State aid and the freedoms² than to competition law.

As explained,³ two situations can be distinguished: cases of undertakings entrusted with non-environmental services of general interest and cases of undertakings entrusted with environmental services of general interest.⁴ In both cases the second form of preventative integration would mean that these services would not benefit from the exception of Article 106(2)TFEU. The environmental harm would be subtracted from the general benefit of the service which would then have to be weighed against the restriction of competition. However, under Article 106(2)TFEU, the extent of a service's benefit as such is not

¹ See Part B, Section II, Chapter C.

² *Ibid.*

³ *Ibid.*

⁴ Above the examples of public transport as a non-environmental service of general economic interest and reforestation of a mined land as an environmental service of general economic interest have been used.

examined. The Article is merely concerned with ensuring that the restriction of competition does not go beyond what is necessary to perform the service.⁵ The service itself is not examined in detail but is left to the discretion of the Member States. The only requirement is that the service must be ‘universal and compulsory in nature’.⁶ Hence, the extent of the benefit itself is not assessed. The extent can indirectly play a role only in the context of deciding whether the restriction is proportional.⁷ Yet, the second form of preventative integration would severely limit the Member States’ competences and discretion by imposing the additional requirement that the benefit of the service needs to outweigh the increased pollution. This limitation by means of an additional unwritten requirement would not take into account whether the area is a shared or exclusive competence and thus raises similar questions regarding division of powers and the principle of conferral as discussed before.⁸ Hence, preventative integration via the second form, ie balancing, is also not possible under Article 106(2)TFEU.⁹

⁵ See Part C, Section I, Chapter C, text to (n75ff).

⁶ Case T-289/03 *BUPA*¶172.

⁷ In the sense that a greater benefit might make it easier to justify a restriction. However, this is not the only consideration as the issue of competence needs to be taken into account as well, especially as the Court has given the Member States a wide discretion. Applying the proportionality test too strictly would take away this freedom.

⁸ See Part B, Section II, Chapter A, text to (n11ff).

⁹ A similar conclusion seems to be reached by Vedder 2003:275f, his argument is based on the fact that national courts and not the Commission makes the assessment of Article 106(2)TFEU. Yet, he seems to admit that such an effect may be possible.

C. State Aid Law

Preventative integration could take place in State aid law and in particular in the context of Article 107(3)TFEU which allows the Commission to exempt certain forms of aid. Under Article 107(1)TFEU such integration is not possible. Article 107(1)TFEU could only offer the second form of integration, balancing, if a rule of reason approach were taken.¹ However, such an approach must be rejected as explained elsewhere.²

In contrast, under Article 107(3)TFEU preventative environmental integration in the form of balancing could take place. Article 107(3)(b)TFEU determines that aid to support an ‘important project of common European interest’ may be exempted. Articles 107(3)(c) and (d)TFEU offer room to exempt development aid and aid in cultural matters where the ‘aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest’.

In the context of the ‘important project of common European interest’ under Article 107(3)TFEU, preventative integration in the form of balancing could take place.³ As in the section Article 106TFEU above, two scenarios can be distinguished: measures with an environmental aim and measures with non-environmental aims. When examining whether the projects can be considered as projects of common European interest the different aims need to be balanced taking into equal account the positive and the negative effects of the

¹ See Part C, Section I, Chapter B, text to (n1ff).

² *Ibid.*

³ Cremer 1995:144 ff; von Wallenberg/Schütte 2011 [45 Ergänzungslieferung]¶54.

measure.⁴ In cases of a *prima facie* environmental project of common European interest,⁵ the environmental benefits are weighed against the environmental harm caused by the project. In cases where the measure has non-environmental aims, a balancing between those and environmental protection must take place. This balancing exercise is based on the premise that all aims of the EU are of equal weight.⁶ Where the result of this balancing leads to the conclusion that the measure produces a negative net effect, the measure cannot be considered of ‘common European interest’.⁷ Hence, in cases where environmental damage is greater than the gains in terms of other aims of the EU the measure could not be seen as in the common European interest. The Commission’s current Environmental Guidelines seem to support such a view. The Commission explains that a carbon capture and storage facility could be exempted under Article 107(3) TFEU ‘provided that they are environmentally safe and contribute to environmental protection’.⁸

A second option for such integration seems to materialise in the context of the recently drafted Regulation for aid in the agriculture and forestry sector and in rural areas. In this draft the Commission highlights that aid is not exempted where the supported measure would require an environmental impact assessment.⁹ Moreover, investments cannot be

⁴ Cremer 1995:147, 156; von Wallenberg/Schütte 2011 [45 Ergänzungslieferung]¶54.

⁵ The Commission’s example is carbon capture and storage facilities, see Community Guidelines on State Aid for Environmental Protection (2008):¶69.

⁶ See Part A, text to (n74ff).

⁷ See also Cremer 1995:156. In turn this also means that environmental measures could equally be found not to be in the common European interest where they substantially impact on other EU aims.

⁸ Community Guidelines on State Aid for Environmental Protection (2008):¶69.

⁹ Articles 15(6), 17(4), 35(5), 40(4), 41(4) and 41(7).

exempted, if they would have a negative effect on ground and surface water where their status is less than good.¹⁰

A third option for integration could be applied more widely in the context of Article 107(3)TFEU. The negative environmental consequences could be taken into account whenever the Commission has discretion.¹¹ This would not, however, mean that all aid measures leading to environmental degradation would be prohibited because they could not benefit from Article 107(3)TFEU.¹² This is because the balancing exercise is based on the premise that all EU aims have equal weight. Hence, the measure would not be exempted only in cases where the balancing shows a negative net effect. Yet, such an obligation to consider all possible effects on all aims of the EU is difficult to perform in practice in particular since the EU has such a wide range of aims.¹³ Thus, the CJ has limited the Commission's obligation to ensure that 'State aid, certain conditions of which contravene other provisions of the Treaty, cannot be declared...to be compatible with the [internal] market'.¹⁴ While this obligation does not extend to examining whether the project also complies with secondary legislation,¹⁵ it means that the Commission must take account of primary law. In *Nuova Agricast* the CJ used this reasoning to find that the Commission was

¹⁰ Article 15(7)(f)(iii).

¹¹ See Cremer 1995:156; Portwood 2000:189-190, 195; Frenz 2011:104; Kingston 2012:431-433.

¹² Portwood 2000:189-190, 195 however, seem to support such a broad reading.

¹³ Cf Case C-280/93 *Germany v Council*¶47; Case C-44/94 *Fishermen's Organisations*¶37; Case 139/79 *Maiçena v Council*¶23; Case 5/73 *Balkan-Import-Export GmbH*¶24; Case 29/77 *SA Roquette Frères*¶30.

¹⁴ Case C-390/06 *Nuova Agricast*¶50 see also Case C-204/97 *Portugal v Commission*¶41; Case T-359/04 *British Aggregates*¶91-92; Case C-156/98 *Germany v Commission*¶78; Case C-113/00 *Spain v Commission*¶78; Case C-21/88 *Du Pont de Nemours Italiana*¶20.

¹⁵ Case T-158/99 *Thermenhotel Stoiser Franz*¶156-161. Critical in this regard Kingston 2012:432-433 arguing that aid should also not be approved in these cases.

wrong not to raise objections against a transitional aid scheme for investment in the less-favoured regions of Italy on the basis of the principle of equal treatment.¹⁶ Such an argument could, likewise, be made in the context of Article 11 TFEU's integration obligation. Hence, where an aid measure would, for example, blatantly contravene the principles of Article 191(2) TFEU, such as the polluter-pays principle, aid could not be exempted.¹⁷ Thus, under Article 107(3) TFEU preventative integration in the form of balancing can take place and the Commission needs to ensure that environmental protection requirements are complied with. There are two possible reasons for this result: First, within Article 107(3) TFEU the Commission has discretion, contrary to the current framework of competition law's legal exception and Article 107(1) and (2) TFEU. Second, in terms of restricting the competence of the Member States the effect of integration under Article 107(3) TFEU is less than in the other areas. The Member States (still) have the option of using Article 106(2) TFEU and the *Altmark*¹⁸ exception.¹⁹

¹⁶ Case C-390/06 *Nuova Agricast* ¶51.

¹⁷ However, the Commission only has to take account of the information it has available, see Case C-276/02 *Spain v Commission* ¶31; Joined Cases C-74/00P & C-75/00P *Falck and Acciaierie di Bolzano* ¶168; Case C-234/84 *Belgium v Commission* ¶16.

¹⁸ Case C-280/00 *Altmark Trans*.

¹⁹ See in this regard Part C, Section I, Chapter B and C.

D. Free-Movement Law

After having examined competition and State aid law, the section now turns to the market-freedoms. In the market-freedoms balancing occurs either in the form of mandatory requirements or in the form of the written justifications such as Articles 36, 45(3) 52(1), 63 and 65TFEU.¹ However, neither the mandatory requirements doctrine nor the written justifications can be used for preventative integration.

The mandatory requirements exception covers a range of aims which can justify apparent restrictions of the freedoms.² So far the Court has only limited the list of mandatory requirements by rejecting justification based on purely economic grounds.³ While these concepts have to be interpreted in the light of Article 11TFEU,⁴ preventative integration is difficult to achieve. There is only one conceivable way to achieve such integration: to argue that a measure cannot be justified by a mandatory requirement or by the written justifications if it produces environmental degradation that is not outweighed by other benefits. Such a proposition, however, faces problems.

¹ See in this regard Part C, Section I, Chapter A.

² See eg Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad*¶13; Case C-484/93 *Peter Svensson and Lena Gustavsson*¶14-16; Case C-55/94 *Gebhard*¶37; Case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein*¶8; Case 113/80 *Commission v Ireland*¶10; Case 25/88 *Wurmser*¶10.

³ See Case C-212/08 *Zetor*¶52; Case C-153/08 *Commission v Spain*¶43; Case C-367/98 *Commission v Portugal*¶52; Case C-398/95 *SETTG*¶23; Case C-171/08 *Commission v Portugal*¶71; Case C-243/01 *Gambelli*¶61; Case C-265/95 *Commission v French Republic*¶62; Case C-484/93 *Peter Svensson and Lena Gustavsson*¶16; Case 288/83 *Commission v Ireland*¶28; Case C-35/98 *Verkoijen*¶48; Case C-388/01 *Commission v Italy*¶22.

⁴ See Nettesheim 2011 [45 Ergänzungslieferung]¶31 and Part C, Section I, Chapter A.

First, given that environmental protection has the same value as the other EU aims⁵ the balancing would also need to include those aims. Such a balancing of all aims with each other would be nearly impossible to achieve in practice because of the wide range of aims. The task to determine all possible effects on the wide range of objectives the EU has and the extent to which they are affected seems a colossal task. Second, such an interpretation leads to a dramatic reduction of the Member States' competences and raises the same problems with regard to the division of power and the principle of conferral explained earlier.⁶ Thus, the second form of preventative integration where the environmental damage is balanced against the other benefits of the measure should not take place within the framework of the market-freedoms.

⁵ See Part A, text to (n74ff).

⁶ See Part B, Section II, Chapter A, text to (n5ff).

E. Conclusion Section II

This Section investigated preventative integration: The question of the extent to which competition, State aid law and the market-freedoms can be interpreted so as to prevent environmental degradation. In contrast to supportive integration, which was analysed in the previous section, preventative integration via the second form of integration – ie balancing – is only possible in State aid law. In the areas of competition law and market-freedoms the design of the provisions and arguments regarding competence and the rule of law impede preventative integration.

CONCLUSION PART C

Part C investigated the second form of environmental integration. This form occurs where the free-movement, State aid and competition provisions can be interpreted in a way to allow a balancing between environmental protection and the restriction of competition or free-movement. In other words it investigated how the balancing works in cases where environmental protection and competition, State aid or free-movement law come into conflict.

Part C, Section I examined supportive integration. It highlighted how, over the years, free-movement and State aid law have developed a sophisticated framework for balancing environmental protection with the relevant restrictions. In competition law, by contrast, balancing faced resistance which might explain why the degree to which balancing is possible varies. Based on the findings in the different areas the Section suggested improvements for the balancing exercise in all of them: free-movement, State aid and competition law.

Section II examined preventative integration by means of the second form of integration. This form of preventative integration occurs where free-movement, State aid and competition law are interpreted to prevent environmental degradation where this degradation outweighs the other benefits of the measure. This Section showed that such balancing can raise concerns with regard to competences and the rule of law and is therefore only possible in the context of Article 107(3)TFEU.

CONCLUSION

This thesis set to help put the environmental integration obligation into practice in the areas of competition law, State aid law and the market-freedoms by mapping out how environmental integration can function in these areas. In addition, the comparison of the three different areas of law also offered insights into conceptual issues such as what is considered a restriction and how the balancing is applied.

In Part A the thesis elaborated on the basic framework for analysis and examined the integration obligation under Article 11TFEU. It considered the history and development of Article 11TFEU and explained that the obligation is relevant whenever EU law is applied. The obligation affects the general policy stage but is also applicable when individual decisions are adopted. Part A also defined the environmental integration under Article 11TFEU as an obligation to maximise synergies between economic and environmental objectives by preventing conflicts (the first form of environmental integration) or by balancing (the second form of integration). The balancing is built on the premise that the economic and environmental objectives are of the same constitutional value and is applied only where the first form is not possible. The scope and limit for environmental integration is set by the flexibility offered by the current framework for the market-freedoms, State aid and competition law. Part A also investigated whether competition law can be seen as an exception to which the environmental integration obligation is not applicable. It showed that neither the wording of the Treaty nor arguments based on legal certainty, justiciability and

uniform application of EU law are sufficient to justify an outright exclusion of competition law from the scope of the environmental integration obligation.

Part B investigated the first form of integration. In other words, it examined how the relevant provisions can be applied to avoid conflicts and balancing between environmental protection and competition, State aid or free-movement prohibitions. Part B was divided into two sections. Section I examined supportive integration or the extent to which the legal framework can be interpreted to allow environmentally beneficial measures without engaging in a balancing. It highlighted that such integration could be observed primarily in the context of competition law. While State aid law offers at least limited space for such integration, the market-freedoms did not seem to exhibit this form of environmental integration. In competition law mainly two developments seem to be the cause for this finding: The aim to exclude environmental protection as public policy consideration from competition law to avoid any balancing between competition and public policy. The second, interrelated reason seems to be the adoption of the more economic approach that led to a more detailed analysis of whether competition is actually restricted by an environmental protection measure. In contrast, free-movement and State aid law accepted early on that environmental protection can serve as justification. Therefore, there was no particular need or effort to develop a framework for determining whether a restriction (ie conflict) actually existed as environmental protection could in any case be balanced against the restriction. On the basis of the comparison of the different tests in competition, State aid and free-movement law improvements have been suggested. These improvements would allow more room for the first form of environmental integration in State aid and free-movement law.

Section II of Part B examined preventative integration, namely whether the competition, State aid and free-movement provisions can be interpreted so as to prevent environmentally damaging measures. It explained that such an interpretation seems currently impossible and would raise serious questions in terms of the EU's competence and the rule of law.

Part C explored the second form of environmental integration. It examined how the process of balancing works in cases where environmental protection comes into conflict with competition, State aid or free-movement law. Like Part B, it was divided into two sections. Section I investigated cases of supportive integration, ie the extent to which the three areas of law can be interpreted to allow a balancing so that environmentally beneficial measures can escape the relevant prohibition. It explained the sophisticated balancing performed under free-movement and State aid law. This framework for balancing results from accepting early on that environmental protection can serve as a justification and can be balanced. Hence, in these areas there was sufficient time and a sufficient number of cases for the law to evolve. Although the section illustrated that balancing is also possible in competition law, the degree of integration varies in this area. Finally, the section demonstrated how the principles developed in free-movement and State aid law might be used to inform the balancing carried out in competition law. Section II of Part C highlighted that preventative integration –interpretation in order to prevent environmentally damaging measures by way of balancing – may face the same objections based on competence and rule of law as highlighted in Part B, although such balancing seemed possible under Article 107(3)TFEU.

The thesis provided a framework for environmental integration in the areas of competition law, State Aid law and the market-freedoms. The examination of environmental integration in these area illustrated the current limitations for the first and second form of environmental integration. The surprising result that can be drawn from this thesis is that competition law appears more advanced than State aid and free-movement law in terms of the first form of environmental integration. This form of integration – that is, preventing conflicts between environmental protection and other aims – is generally preferable to the second form of integration, ie balancing in cases of conflict.¹ At the same time there is a tendency in competition law not to go any further with environmental integration thereby preventing the second form of integration, ie where conflicts occur. The comparative element between of the thesis provided an opportunity for cross-fertilisation so that improvements to the current state of competition law, State aid and free-movement law were made. The suggested framework for integration and the proposed improvements help to pave the way for a more transparent and consistent integration of environmental protection. Yet, measuring the degree of environmental integration will only become feasible² after taking additional steps. As Krämer suggested, an important step may be to compel the European institutions to explain and make transparent how they have integrated

¹ See in this regard Part A, text to (n119ff).

² A first attempt to empirically study the relationship between competition law and environmental protection has been made by Henrique/Montoya Diaz/Guimarães/Benoehr 2013 although with a different methodology.

environmental considerations in their decisions³ It is in this explanation that the framework offered in this thesis may also be of help.

³ Krämer 2013:91–92, he expounds that such an obligation to explain how environmental protection was integrated would be based on a combined reading of the transparency rule and Article 37 of the Charter of Fundamental Rights, and the Aarhus Convention.

Bibliography

Thomas Ackermann *Art. 85 Abs. 1 EGV und die Rule of Reason: Zur Konzeption der Verhinderung, Einschränkung oder Verfälschung des Wettbewerbs* (Heymann, Köln 1997)

Agence Europe: (1990) No.5234 (1990)

Christian Ahlborn and Claudia Berg, 'Can State Aid Control Learn From Antitrust?: The Need for a Greater Role for Competition Analysis under the State Aid Rules' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union* (OUP, Oxford 2005)

Christian Ahlborn and Daniel von Brevern, 'General Court Confirms Commission's Approach to Applying the Market Economy Investor Principle to Capital Contributions by Public Authorities' (2010) 1 *Journal of European Competition Law & Practice* 324–326

Josef Aicher and others, 'EGV Art. 81 [Verbot wettbewerbsbeschränkender Vereinbarungen und Verhaltensweisen] (Nizza-Fassu' in Eberhard Grabitz and Meinhard Hilf (eds), *Das Recht der Europäischen Union: [Kommentar]* (Beck, München 2009 [40th Ergänzungslieferung])

Silke Albin and Stefani Bär, 'Nationale Alleingänge nach dem Vertrag von Amsterdam: Der neue Art. 95 EGV: Fortschritt oder Rückschritt für den Umweltschutz?' (1999) 21 *Natur und Recht* 185–191

Wolf Albin and Florian Valentin, 'Dassonville oder doch Keck: zwei anstehende Urteile des EuGH zur Anwendung des Art. 28 EG auf Verwendungsbeschränkungen' (2007) *Europäisches Wirtschafts- und Steuerrecht* 533–540

Albertina Albors Llorens, 'The Role of Objective Justification and Efficiencies in the Application of Article 82 EC' (2007) 44 *Common Market Law Review* 1727–1761

Alberto Alemanno, 'Le principe de précaution en droit communautaire' (2001) *Revue trimestrielle de droit européen* 917-953.

Giuliano Amato *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart, Oxford 1997)

Arianna Andreangeli *EU Competition Enforcement and Human Rights* (Edward Elgar, Cheltenham u. a. 2008)

Ole Andresen, 'Verbot von Sozietäten zwischen Rechtsanwälten und Wirtschaftsprüfers als Wettbewerbsbeschränkung' (2002) *Deutsche Verwaltungsblatt* 685–688

Paris Anestis and Stephen Mavrogheis, 'The Market Investor 'Test' in Michael Sánchez Rydelski (ed), *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade* (Cameron May, London 2006) 109–127

Mark Anielski *The Economics of Happiness: Building Genuine Wealth* (New Society Publishers, Gabriola, B.C 2007)

Phillip Areeda and Herbert Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application Vol VII* (2nd edn Wolters Kluwer, Austin 2003)

Kenneth A Armstrong, 'Regulating the Free Movement of Goods: Institutions and Institutional Change' in Josephine Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press, Oxford 1995)

Birger Arndt *Das Vorsorgeprinzip im EU-Recht* (Mohr Siebeck, Tübingen 2009)

Sue Arrowsmith *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (CUP, Cambridge 2009)

- Isabella Atanasiu and Claus-Dieter Ehlermann, 'The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the EC Courts' (2002) 23 *European Competition Law Review* 72–80
- Steffen Augsberg *Rechtssetzung zwischen Staat und Gesellschaft: Möglichkeiten differenzierter Steuerung des Kapitalmarktes* (Duncker & Humblot, Berlin 2003)
- Joao P de Azevedo and Mike Walker, 'Market Dominance: Measurement Problems and Mistakes' (2003) 24 *European Competition Law Review* 640–643
- Vincenzo Baccaro, 'Collecte et recyclage des batteries usagées en Italie: droits exclusifs, exigences environnementales et droit de la concurrence' (2001) *Competition Policy Newsletter* 39–41
- David Baldock and others *The Integration of Environmental Protection Requirements into the Definition and Implementation of other EC policies* (London 1992)
- Julio Baquero Cruz *Between Competition and Free Movement: The economic constitutional law of the European Community* (Hart, Oxford 2002)
- Julio Baquero Cruz, 'Beyond Competition: Services of General Interest and European Community Law' in Gráinne de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (OUP, Oxford 2005) 169–212
- Julio Baquero Cruz and Fernando Castillo de la Torre, 'Note on PreussenElektra' (2001) 26 *European Law Review* 489–501
- Stefani Bär and Andreas Kraemer, 'European Environmental Policy after Amsterdam' (1998) 11 *Journal of Environmental Law* 313–330
- Catherine Barnard, 'Fitting the remaining pieces into the goods and persons jigsaw' (2001) 26 *European Law Review* 35–59
- Catherine Barnard, 'Trailing a New Approach to Free Movement of Goods' (2009) 68 *Cambridge Law Journal* 288–290
- Catherine Barnard *The Substantive Law of the EU: The Four Freedoms* (4th edn OUP, Oxford 2013)
- Andreas Bartosch, 'Ruling in BUPA - Clarification or Modification of Altmark' (2008) *European State Aid Law Quarterly* 211–212
- Andreas Bartosch, 'Is there a Need for a Rule of Reason in European State Aid Law?: Or how to Arrive at a Coherent Concept of Material Selectivity?' (2010) 47 *Common Market Law Review* 729–752
- Andreas Bartosch, 'The Concept of Selectivity' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar, Cheltenham, UK 2011) 176–192
- Halil R Basaran, 'How Should Article 81 EC Address Agreements that Yield Environmental Benefits?' (2006) 27 *European Competition Law Review* 479–484
- Jürgen Basedow, 'Zielkonflikte und Zielhierarchien im Vertrag über die Europäische Gemeinschaft' in Ole Due and Ulrich Everling (eds), *Festschrift für Ulrich Everling* (Nomos, Baden-Baden 1995) 49–68
- Jolanda E Beenen *Citizenship, Nationality and Access to Public Service Employment: The Impact of European Community Law* (Europa Law Publishing, Groningen 2001)
- David Benson and Andrew Jordan, 'Environmental Policy' in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds), *European Union Politics* (4th edn OUP, Oxford 2013) 325–337
- Nicholas Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45 *International and Comparative Law Quarterly* 82–108

- Nicolas Bernard, 'The Future of European Economic Law in the Light of the Principle of Subsidiarity' (1996) 33 *Common Market Law Review* 633–666
- Wolf H v Bernuth *Umweltschutzfördernde Unternehmenskooperationen und das Kartellverbot des Gemeinschaftsrechts* (Nomos, Baden-Baden 1996)
- Thomas Beyer, 'Europa 1992: Gemeinschaftsrecht und Umweltschutz nach der Einheitliche Europäische Akte' (1990) *Juristische Schulung* 962–967
- Andrea Biondi, 'In and Out of the Internal Market: Recent Developments on the Principle of Free Movement' (1999–2000) 1999 *Yearbook of European Law* 469–491
- Albert Bleckman and Tanja Koch, 'Das Verhältnis zwischen dem Beihilfeverbot und den Umweltbestimmungen' in Ole Due and Ulrich Everling (eds), *Festschrift für Ulrich Everling* (Nomos, Baden-Baden 1995) 113–125
- Eric Blomme, 'State Action as a Defence Against 81 and 82 EC: State Action as a Defence Against 81 and 82 EC' (2007) 30 *World Competition* 243–361
- Matthias Bock, 'Umweltrechtliche Prinzipien in der Wettbewerbsordnung der Europäischen Gemeinschaft' (1994) *Europäische Zeitschrift für Wirtschaftsrecht* 47–52
- Daniel Boeshertz, 'Community State Aid Policy and Energy Taxation' (2003) 12 *EC Tax Review* 214–219
- Armin von Bogdandy, 'Article 2 EC' in Eberhard Grabitz and Meinhard Hilf (eds), *Das Recht der Europäischen Union: [Kommentar]* (Beck, München 2009 [40th Ergänzungslieferung])
- Franz Böhm, Walter Eucken and Hans Großmann-Doerth (eds) *Ordnung der Wirtschaft* (Kohlhammer, Stuttgart, Berlin 1937a)
- Franz Böhm, Walter Eucken and Hans Großmann-Doerth, 'Unsere Aufgabe: Geleitwort der Herausgeber zur Schriftenreihe' in Franz Böhm, Walter Eucken and Hans Großmann-Doerth (eds), *Ordnung der Wirtschaft* (Kohlhammer, Stuttgart, Berlin 1937b) VII–XXI
- Julie Bousin and Jorge Piernas, 'Developments in the Notion of Selectivity' (2008) *European State Aid Law Quarterly* 634–653
- Julie P J Bousin, 'Developments in the Notion of Selectivity' (2008) *European State Aid Law Quarterly* 634–653
- Anatole Boute, 'Environmental Protection and EC Anti-Trust Law: The Commission's Approach for Packaging Waste Management Systems' (2006) 15 *Review of European Community and International Environmental Law* 146–159
- Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 *European Law Journal* 447–468
- Christopher Bovis, 'Transforming the Application of EC Competition Laws' (2001) 12 *European Business Law Review* 98–104
- Ward S Bowman, 'Tying Arrangements and the Leverage Problem' (1957) 67 *Yale Law Journal* 19–36
- Graham Branton, 'Environmental Aid: A Case for Fundamental Reform (1)' (2006) 31 *European State Aid Law Quarterly* 729–733
- Ludger Breuer *Das EU-Kartellrecht im Kraftfeld der Unionsziele: Die finale Programmierung der Unionstätigkeit durch die Querschnittsklauseln am Beispiel des Art. 101 AEUV* (Nomos, Beck, Baden-Baden 2013)

- Rüdiger Breuer, 'Umweltschutzrecht' in Eberhard Schmidt-Aßmann and Peter Badura (eds), *Besonderes Verwaltungsrecht* (12th edn de Gruyter Recht, Berlin 2003) 505–678
- Alexander Brigola, 'Die Figur der Marktaustrittsbeschränkungen als Korrelat der Figur der Marktzugangsbeschränkungen' (2009) *Europäische Zeitschrift für Wirtschaftsrecht* 479–484
- Derick Brinkerhoff, 'Process Perspectives on Policy Change: Highlighting Implementation World Development' (1996) 24 *World Development* 1395–1401
- Gabrielle Britz and Marlene Schmidt, 'Die institutionalisierte Mitwirkung der Sozialpartner an der Rechtsetzung der Europäischen Gemeinschaft' (1999) *Europarecht* 467–498
- Luigino Bruni and Pier L Porta *Economics and Happiness: Framing the Analysis* (OUP, Oxford 2005)
- Luigino Bruni and Pier L Porta *Handbook on the Economics of Happiness* (Edward Elgar, Cheltenham, UK, Northampton, MA 2007)
- Brussels Airport* Commission Decision 95/364/EC [1995] OJ L216/8
- Andreas Bücker and Sabine Schlacke, 'Rechtsangleichung im Binnenmarkt: Zur Konkretisierung verfahrens- und materiell-rechtlicher Anforderungen an nationale Alleingänge durch den EuGH' (2004) *Neue Zeitschrift für Verwaltungsrecht* 62–66
- José L Buendía Sierra *Exclusive Rights and State Monopolies under EC Law: Article 86 (formerly Article 90) of the EC Treaty* (OUP, Oxford 1999)
- Jochen Burrichter, 'The Application of Article 81 (3) by National Courts: Some Remarks from the Point of View of a Practitioner' in Claus-Dieter Ehlermann and Isabella Atanasiu (eds), *Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart, Oxford 2001) 521–550
- Dirk Buschle, 'Artenschutz und Warenverkehrsfreiheit,' (1999) *European Law Reporter* 10–11
- Gavin Bushell and Melissa Healy, 'Expedia: The de minimis Notice and 'by object' Restrictions' (2013) 4 *Journal of European Competition Law & Practice* 224–226
- Frances Cairncross *Costing the Earth: The Challenge for Governments, the Opportunities for Business* (Harvard Business School Press, Boston, Mass. 1993)
- California Dental Association v Federal Trade Commission* 526 US 756 (1999)
- Christian Calliess, 'Article 6 EC' in Christian Calliess and Matthias Ruffert (eds), *EUV - EGV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta [Kommentar]* (3rd edn Beck, München 2007)
- Christian Calliess, 'Die neue Querschnittsklausel des Art.6 ex 3c EGV als Instrument zur Umsetzung des Grundsatzes der nachhaltigen Entwicklung' (1998) 113 *Deutsche Verwaltungsblatt* 559–568
- Roberto Caranta, Martin Trybus and Caranta-Trybus (eds) *The Law of Green and Social Procurement in Europe* (Djøf Pub, Kopenhagen 2010)
- Donal Casey, 'Disintegration: Environmental Protection and Article 81 EC' (2009) 15 *European Law Journal* 362–381
- Ute Caspar *Wettbewerbliche Gesamtwürdigung von Vereinbarungen im Rahmen von Art. 81 Abs. 1 EGV: Ein Beitrag zur Auslegung des Tatbestandsmerkmals der Wettbewerbsbeschränkung im europäischen Kartellverbot* (Heymanns, Köln 2001)
- Gabriel Castañeda, 'Competition Policy Objectives: Working Paper' in Claus-Dieter Ehlermann and Lareine L Laudati (eds), *The Objectives of Competition Policy* (Hart, Oxford 1998) 41–52

- Fernando Castillo de la Torre, 'State Action Defence in EC Competition Law' (2005) 28 *World Competition* 407–431
- Damian Chalmers, 'Community Policy on Waste Management' (1994) 14 *Yearbook of European Law* 257–312
- Damian Chalmers, Gareth T Davies and Giorgio Monti *European Union law: Cases and materials* (2nd edn CUP, Cambridge, New York 2010)
- Christian Tietje, 'EU-Arbeitsweisevertrag Art. 114' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (Beck, München 2011 [45 Ergänzungslieferung])
- Massimo Condinanzi, Alessandra Lang and Bruno Nascimbene *Citizenship of the Union and Free movement of Persons* (Martinus Nijhoff Publishers, Boston 2008)
- Klaus Conrad, 'Price Competition and Product Differentiation: When Consumers Care for the Environment' (2005) 31 *Environmental & Resource Economics* 1–19
- John D Cooke, 'Changing Responsibilities and Relationships for Community and National Courts: The Implications of the White Paper', *The Modernisation of European Competition Law: The Next Ten Years* (CELS Occasional Paper No. 4 2000) 57–72
- John D Cooke, 'Vocations as Commodity' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2004: The Relationship between Competition Law and the (Liberal) Professions* (Hart, Oxford 2006) 229–237
- Richard Cornes and Todd Sandler *The Theory of Externalities, Public Goods, and Club Goods* (2nd edn CUP, Cambridge 1999)
- Paul P Craig, 'Subsidiarity, a Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72–87
- Paul P Craig and Gráinne de Búrca *EU Law: Text, Cases, and Materials* (5th edn OUP, Oxford 2011)
- Wolfram Cremer *Forschungssubventionen im Lichte des EGV: Zugleich ein Beitrag zu den gemeinschaftsrechtlichen Rechtsschutzmöglichkeiten gegenüber Subventionen* (Nomos, Baden-Baden 1995)
- Jose Luis da Cruz Vilaca, 'Material and Geographic Selectivity in State Aid: Recent Developments' (2009) 34 *European State Aid Law Quarterly* 443–451
- Alan Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect' 2007-2008 *Cambridge Yearbook of European Legal Studies* 525–540
- Gareth Davies, 'Welfare as a Service' (2002) 29 *Legal Issues of Economic Integration* 27–40
- Gareth Davies, "'Process and Production Method"-based Trade Restrictions in EU Law' (2007-2008) 20 *Cambridge Yearbook of European Legal Studies* 69–97
- Gareth Davies, 'Article 86 EC: The EC's Economic Approach to Competition Law, and the General Interest' (2009) 5 *European Competition Journal* 549–584
- Gareth Davies, 'Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law' (2010) *German Law Journal* (2010) 11 *German Law Journal* 671–704
- Gareth Davies, 'Freedom of Contract and the Horizontal Effect of Free Movement Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart, Oxford 2013) 53–70

Peter G G Davies *European Union Environmental Law: An Introduction to Key Selected Issues* (Ashgate, Aldershot 2004)

Anthony Dawes, 'A Freedom Reborn? The New Yet unclear Scope of Article 29' (2009) 34 *European Law Review* 639–649

Alexandre Defossez, 'L'histoire d'une divergence et d'une possible réconciliation: l'article 29 CE' (2009) *Cahiers de Droit Européen* 409–461

Bram Delvaux, 'The EC State Aid Regime regarding Renewables: Opportunities and Pitfalls' (2003) 12 *European Energy and Environmental Law Review* 103–112

Harold Demsetz, 'Two Systems of Belief about Monopoly' in Harvey J Goldschmid, Harold M Mann and John F Weston (eds), *Industrial Concentration: The New Learning* (Little Brown, Boston 1974) 164–184

Christine Denys, 'European Court of Justice: Case Report' (1999a) 8 *European Energy and Environmental Law Review* 21–30

Christine Denys, 'European Court of Justice: Case Report' (1999b) 8 *European Energy and*

Arved Deringer, 'Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag (Art. 81 und 82 EG)' (2000) *Europäische Zeitschrift für Wirtschaftsrecht* 5–11

Mattias Derlén and Johan Lindholm, 'Article 28 EC and Rules in Use: A Step Towards a workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions' (2010) 16 *Columbia Journal of European Law* 191–231

Nele Dhondt *Integration of Environmental Protection into other EC policies: Legal Theory and Practice* (The Avosetta series, Europa Law Publishing, Groningen 2003)

Aaron Director and Edward H Levi, 'Law and the Future: Trade Regulation' (1959) 51 *Northwestern University Law Review* 281–296

Thomas Döring and Dieter Ewringmann, 'Europäischer CO₂-Emissionshandel, nationale Gestaltungsspielräume bei der Vergabe von Emissionsberechtigungen und EU-Beihilfenkontrolle' (2004) *Zeitschrift für Umweltpolitik & Umweltrecht* 27–46

Michael Dougan, 'Minimum Harmonization and the Internal Market 37 CML Rev. (2000),' (2000) 37 *Common Market Law Review* 853–885

Dimitrios Doukas, 'Untying the Market Access Knot: Advertising Restrictions and the Free Movement of Goods and Services' (2006-2007) 9 *Cambridge Yearbook of European Legal Studies* 177–215

Meinrad Dreher, 'Der Rang des Wettbewerbs im europäischen Gemeinschaftsrecht' (1998) 48 *Wirtschaft und Wettbewerb* 656–666

Alexander Duisberg *Die Anwendung der Artikel 85 und 86 EG-Vertrag in den Fällen der staatlichen Einflußnahme auf Unternehmensverhalten: Zur Frage möglicher Rechtfertigungen und Entlastungen der Unternehmen* (Lang, Frankfurt am Main 1997)

Ronald Dworkin *Political Judges and the Rule of Law* (Maccabean lecture in jurisprudence, British Academy, London 1978)

Ronald Dworkin *Justice in Robes* (The Belknap Press of Harvard University Press, Cambridge 2006)

Ronald M Dworkin *Law's Empire* (3rd edn Harvard Univ. Press, Cambridge, Mass. 1991)

Frank H Easterbrook, 'Workable Antitrust Policy' (1986) 84 *Michigan Law Review* 1696–1713

David Edward and Niamh N Shuibhne, 'Continuity and Change in the Law Relating to Services' in Anthony Arnall and Francis G Jacobs (eds), *Continuity and change in EU law: Essays in honour of Francis Jacobs* (OUP, Oxford 2008) 243–259

Dirk Ehle *Die Einbeziehung des Umweltschutzes in das Europäische Kartellrecht: Eine Untersuchung zu Art. 85 EGV unter besonderer Berücksichtigung kooperativer abfallrechtlicher Rücknahme- und Verwertungssysteme* (Heymann, Köln 1997)

Claus-Dieter Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution' (2000) *Common Market Law Review* 537–590

Thomas Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search Of Clearer And More Coherent Standards For Anti-Competitive Abuses' (2005) 42 *Common Market Law Review* 129–177

Daniel W Elfenbein and Brian McManus, 'A Greater Price for a Greater Good?: Evidence That Consumers Pay More for Charity-Linked Products' (2010) 3 *American Economic Journal: Economic Policy* 28–60

Einer Elhauge and Damien Geradin *Global Competition Law and Economics* (2nd edn Hart, Oxford 2011)

Nicholas Emiliou *The Principle of Proportionality in European law: A Comparative Study* (Kluwer Law International, London 1996)

Sam Emmerechts and Ann Goossens, 'Case C-379/98, PreussenElektra AG v. Schleswag AG, Judgment of the Full Court of 13 March 2001' (2001) 38 *Common Market Law Review* 991–1010

Frank Emmert *Europarecht* (Beck, München 1996)

Stefan Enchelmaier, 'Always at your service (within limits): the ECJ's case law on article 56 TFEU (2006-11)' (2011) 36 *European Law Review* 615–650

Stefan Enchelmaier, 'Mandatory Requirements' under Article 101(3) TFEU? The Complementary Relationship between EU Competition and Free Movement Law' (2012) 11 *Competition Law Journal* 182–199

Astrid Epiney, 'Umweltrechtliche Querschnittsklausel und freier Warenverkehr: Einbeziehung umweltpolitischer Belange über die Beschränkung der Grundfreiheit' (1995) 17 *Natur und Recht* 497–504

Astrid Epiney, 'Environmental Principles' in Richard Macrory (ed), *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* (The Avosetta series, Europa Law Publishing, Groningen 2006) 19–39

Astrid Epiney, 'Zur Auslegung des Art. 95 V EGV: Anmerkung zu T-366/03,' (2007) 29 *Natur und Recht* 111–114

Astrid Epiney, 'Die Rechtsprechung des EuGH zur Zulässigkeit „nationaler Alleingänge' in Jörn Ipsen and Bernhard Stürer (eds), *Europa im Wandel: Festschrift für Hans-Werner Rengeling ; zum 70. Geburtstag am 25. Februar 2008* (Heymanns, Köln 2008) 215–232

Tracey Epps and Andrew Green *Reconciling Trade and Climate: How the WTO can help address climate change* (Elgar, Cheltenham 2010)

Antonio de Estella Noriega *The EU Principle of Subsidiarity and its Critique* (OUP, Oxford 2005)

Walter Eucken *The Foundations of Economics: History and Theory in the Analysis of Economic Reality, Original Title Gundlagen der Nationalökonomie* (William Hodge, London, Edinburgh, Glasgow 1950)

- Andrew Evans *European Community Law of State Aid* (Clarendon Press, Oxford 1997)
- Ariel Ezrachi *EU Competition Law: An Analytical Guide to the Leading Cases* (3rd edn Hart, Oxford 2012)
- Gerry Facenna, 'State Aid and Environmental Protection' in Andrea Biondi, Piet Eeckhout and James Flynn (eds), *The Law of State Aid in the European Union* (OUP, Oxford 2005) 245–264
- Jonathan Faull and Ali Nikpay *The EC Law of Competition* (2nd edn OUP, Oxford 2007)
- Daniela A Ferreira, Marcos G Avila and Marina Dias de Faria, 'Corporate Social Responsibility and Consumers' Perception of Price' (2010) 6 *Social Responsibility Journal* 208–221
- Francis Ferris, 'Towards the Application of Article 81(3) by National Courts (an English perspective)' (2001) 2 *ERA-Forum* 12–14
- Wolfgang Fikentscher, 'Das Unrecht einer Wettbewerbsbeschränkung: Kritik an Weißbuch und Verordnungsentwurf zu Art. 81, 82 EG-Vertrag' (2001) 51 *Wirtschaft und Wettbewerb* 446–457
- Elizabeth Fisher *Risk Regulation and Administrative Constitutionalism* (Hart, Oxford 2010)
- James Flett and Katerina Walkerova, 'An Ecotax under the State Aid Spotlight: The UK Aggregates Levy' in Francisco Santaolalla Gadea (ed), *EC state aid law: Liber Amicorum Francisco Santaolalla Gadea = Le droit des aides d'Etat dans la CE* (Kluwer Law International, Alphen aan den Rijn 2008) 223–237
- Ian S Forrester, 'Where Law Meets Competition: Is Wouters Like a Cassis de Dijon or a Platypus' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2004: The Relationship between Competition Law and the (Liberal) Professions* (Hart, Oxford 2006) 271–294
- Nicholas Forwood, 'The Content and Meaning of Article 81(3) EC' (2004) 5 *ERA-Forum* 27–38
- Eleanor M Fox, 'What is Harm to Competition?: Exclusionary Practices and Anticompetitive Effect' (2002) 70 *Antitrust Law Journal* 371–411
- Eleanor M Fox, 'State Action in Comparative Context: What if Parker vs. Brown Were Italian?' in Barry E Hawk (ed), *International Antitrust Law & Policy: Annual proceedings of the Fordham Corporate Law Institute 2003* (Juris, Huntington, NY 2004) 463–474
- French Submission to the IGC (22 October 1996) CONF 3958/96
- Walter Frenz, 'Umwelt- und Tierschutzklausel im AEUV' (2011) 33 *Natur und Recht* 103–107
- Mark Furse *Competition Law of the EC and UK* (6th edn OUP, Oxford 2008)
- Mark Furse and Susan Nash *The Cartel Offence* (Hart, Oxford 2004)
- Sanford E Gainest, 'The Polluter-Pays Principle: From Economic Equity to Environmental Ethos' (1991) 26 *Texas International Law Journal* 463–496
- Guy Garrod and Kenneth G Willis *Economic Valuation of the Environment: Methods and Case Studies* (Edward Elgar, Cheltenham 2001)
- Dirk Gasse *Die Bedeutung der Querschnittsklauseln für die Anwendung des Gemeinschaftskartellrechts* (Lang, Frankfurt am Main 2000)
- Michael Gaus, 'Ökologische Kriterien in der Vergabeentscheidung: eine Hilfe zur vergaberechtskonformen nachhaltigen Beschaffung' (2013) 14 *Neue Zeitschrift für Baurecht und Vergaberecht* 401–409

- Markus W Gehring, 'Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law' (2006) 15 *Review of European Community and International Environmental Law* 172–184
- Damien Gerad *EU Competition Policy after Lisbon: time for a review of the "state action doctrine"?* (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533842> accessed 06 July 2010
- Damien Geradin, 'EC Competition Law and Environmental Protection: Conflict or Compatibility?' (2002) 2 *The Yearbook of European Environmental Law* 117–154
- Michele Giannino, 'State Aid for CCS Plants: The Views from the European Commission' (28 May 2011) <<http://ssrn.com/abstract=1854863>> accessed 08 June 2012
- Hans Gilliams, 'Competition Law and Public Interest: Do We Need to Change the Law for the (Liberal) Professions?' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2004: The Relationship between Competition Law and the (Liberal) Professions* (Hart, Oxford 2006) 295–333
- Eric Gippini Fournier, 'Artikel 81(1) EC' in Ulrich Loewenheim, Karl M Meessen and Alexander Riesenkampff (eds), *Europäisches Recht* (Kartellrecht, Beck, München 2005) para 1-103; 178–196
- Clive Gordon and Russell Richardson, 'Collective Dominance: the Third Way?' (2001) 22 *European Competition Law Review* 416–423
- Benjamin Görlach, Friedrich Hinterberger and Philipp Schepelmann *From Vienna to Helsinki: Environmental Requirements in the Process of Integrating Environmental Issues into other Policy Areas of the European Union* (Wuppertal 1999) <http://web205.vbox-01.inode.at/Data/data/publications/bg/SERI_European%20Policy%20Paper%20Nr%204.pdf> accessed 14 January 2014
- Laurence Gormley, 'Free Movement of Goods and Their Use: What Is the Use of It?' (2011) 33 *Fordham International Law Journal* 1589–1628
- Liza Gormsen, 'Are Anti-competitive Effects Necessary for an Analysis under Article 102 TFEU?' (2013) 36 *World Competition* 223–245
- John M Gowdy, 'The Revolution in Welfare Economics and Its Implications for Environmental Valuation and Policy' (2004) 80 *Land Economics* 239–257
- Dan G Goyder, Joanna Goyder and Albertina Albers-Llorens *Goyder's EC Competition Law* (5th edn OUP, Oxford, New York 2009)
- Eberhard Grabitz and Christian Zacker, 'Die neuen Umweltkompetenzen der EWG' (1998) *Neue Zeitschrift für Verwaltungsrecht* 297–303
- Rosa Greaves, 'Autonomous Regions, Taxation and EC State-Aid Rules' (2009) 34 *European Law Review* 779–793
- David Grimeaud, 'The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development' (2000) 9 *European Energy and Environmental Law Review* 207–218
- Hans Großmann-Doerth *Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht* (Wagner'sche Universitätsbuchhandlung, Freiburg 1933)
- Stefan Grundmann, 'EG-Richtlinie und nationales Privatrecht' (1996) 51 *Juristen Zeitung* 274–287
- Magnus Gustafsson, 'Some Legal Implications Facing the Realisation of the Commission White Paper on Modernisation of EC Antitrust Procedure and the Role of National Courts in a Post-White Paper Era' (2000) 27 *Legal Issues of Economic Integration* 159–184

- Luc Gyselen, 'The Substantive Legality Test under Article 81-3 EC Treaty: Revisited in Light of the Commission's Modernization Initiative' in Arnim von Bogdandy and others (eds), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer Law International, The Hague 2002) 181–198
- Luc Gyselen, 'Service of General Economic Interest and Competition under European Law: A Delicate Balance' (2010) 1 *Journal of European Competition Law & Practice* 491–499
- Jens Hamer, 'Die Durchsetzung der EG-Wettbewerbsregeln im Rahmen der VO 1/2003: Volume 5, Number 1 / March, 2004' (2004) 5 *ERA-Forum* 7–26
- Peter J Hammer, 'Antitrust beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs' (1999-2000) 98 *Michigan Law Review* 849–925
- Leigh Hancher, 'Community, State and Market' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP, Oxford 2003a) 721–743
- Leigh Hancher, 'Towards a New definition of a State Aid under European Law: Is there a New Concept of State Aid Emerging?' (2003b) *European State Aid Law Quarterly* 365–373
- Leigh Hancher and José-Luis Buendía Sierra, 'Cross-Subsidization and EC Law' (1998) 35 *Common Market Law Review* 901–946
- Leigh Hancher and Saskia Lavrijssen, 'Networks on Track (2009) 36 *Legal Issues of Economic Integration* pp. 23–55: From European Regulatory Networks to European Regulatory "Network Agencies"' (2009) 36 *Legal Issues of Economic Integration* 23–55
- Leigh Hancher, Tom Ottervanger and Piet J Slot *EC State Aids* (2nd edn Sweet & Maxwell, London 1999)
- Leigh Hancher, Tom Ottervanger and Pieter J Slot *EC State Aids* (3rd edn Sweet & Maxwell, London 2006)
- Leigh Hancher and Hanna Sevenster, 'Comment on Case 2/90 Commission v Belgium' (1993) 30 *Common Market Law Review* 351–367
- Vassilis G Hatzopoulos, 'Recent Developments of the Case Law of the ECJ in the Field of Services' (2000) 37 *Common Market Law Review* 43–82
- Vassilis G Hatzopoulos, 'Killing National Health and Insurance Systems but Healing Patients?: The European Market for Health Care Services After the Judgements of the ECJ in Vanbraekel and Peerbooms' (2002) 39 *Common Market Law Review* 683–729
- Vassilis G Hatzopoulos, 'Assessing the Service Directive (2006/123/EC)' (2007-2008) 10 *Cambridge Yearbook of European Legal Studies* 215–261
- Barry E Hawk and Nathalie Denaeijer Stanton, 'The Development of Articles 81 and 82: Legal Certainty and Efficiency' , *The Modernisation of European Competition Law: The Next Ten Years* (CELS Occasional Paper No. 4 2000) 43–56
- Martin Heidenhain *European State Aid Law: Handbook* (Beck, München 2010)
- Pacini Henrique and others, 'Environmental and Competitive Performances:: An Exploratory Note' (2013) 36 *World Competition* 409–424
- Peter E Herzog, 'Article 6 EC' in Hans Smit and Peter E Herzog (eds), *Smit & Herzog on the law of the European Union* (LexisNexis Bender, Newark, NJ 2008) 82.01-82.03
- Sebastian Heselhaus, 'Rechtfertigung unmittelbar diskriminierender Eingriffe in die Warenverkehrsfreiheit: Nationaler Umweltschutz in einem unvollkommenen Binnenmarkt' (2001) *Europäische Zeitschrift für Wirtschaftsrecht* 645–650

Martin Hession and Richard Macrory, 'Maastricht and the Environmental Policy of the Community: Legal Issues of a New Environment Policy' in David O'Keefe (ed), *Legal issues of the Maastricht Treaty* (Chancery Law, London 1994) 151–167

Richard Hession and Martin Macrory, 'The Legal Duty of Environmental Integration: commitment and obligation or enforceable right' in Timothy O'Riordan and Heather Voisey (eds), *The Transition to Sustainability: The politics of Agenda 21 in Europe* (Earthscan, London 1998) 100–112

Imelda Higgins and Marie Demetriou, 'Free Movement and the Environment: Seeing the Wood for the Trees' in Mark Hoskins and William Robinson (eds), *A true European: Essays for Judge David Edward* (Hart, Oxford 2003) 193–201

Doris Hildebrand and Andrea Schweinsberg, 'Refined Economic Approach in European State Aid Control: Will it Gain Momentum?' (2007) 30 *World Competition* 449–462

Katherine Holmes, 'The EC White Paper on Modernisation' (2000) 23 *World Competition* 51–80

Simon Holmes, 'Environmental Aid: A Case for Fundamental Reform (2)' (2006) 31 *European State Aid Law Quarterly* 735–741

Thomas Horsley, 'Case Comment on C-142/05; C- 265/06; C-110/05 (Anyone for Keck?)' (2009) 46 *Common Market Law Review* 2001–2019

Thomas Horsley, 'Unearthing Buried Treasure: Art.34 TFEU and the Exclusionary Rules' (2012) 37 *European Law Review* 734–757

Herbert Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (3rd edn Thomson/West, St. Paul, MN 2005)

Ulrich Immenga, 'Coherence: A Sacrifice of Decentralisation?' in Claus-Dieter Ehlermann and Isabella Atanasiu (eds), *Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart, Oxford 2001) 353–359

Ulrich Immenga and Ernst-Joachim Mestmäcker, 'Die Bedeutung der Wettbewerbsregeln in der Wirtschaftsverfassung der EG' in Ulrich Immenga and Ernst-Joachim Mestmäcker (eds), *Wettbewerbsrecht* (4th edn Beck, München 2007)

Interview with Michal Porter. Interview with Peter Day, accessed 21 January 2012 (London, 02 January 2011).

<http://www.bbc.co.uk/iplayer/episode/p00clns/Global_Business_Professor_Michael_Porter> (accessed 21 January 2012)

Francis Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford, Portland, 1999) 1–21

Reto Jacobs, 'EEC Competition Law and the Protection of the Environment' (1993) *Legal Issues of Economic Integration* 37–67

Jutta Jahns-Böhm, 'Article 6 EC' in Jürgen Schwarze (ed), *EU-Kommentar* (Nomos, Baden-Baden 2000) 272–282

Jutta Jahns-Böhm and Siegfried Breier, 'Die umweltrechtliche Querschnittsklausel des Art. 130 r II 2 EWGV: Eine Untersuchung am Beispiel der Güterkraftverkehrspolitik der Europäischen Gemeinschaft' (1992) *Europäische Zeitschrift für Wirtschaftsrecht* 49–55

Jan H Jans *European Environmental Law* (Kluwer Law International, The Hague 1995)

- Jan H Jans, 'Stop the Integration Principle?' (2010) 33 *Fordham International Law Journal* 1533–1547
- Jan H Jans and Ann-Katrin d von Heide *Europäisches Umweltrecht* (Europa Law Publishing, Groningen 2003)
- Jan H Jans and Joanne Scott, 'The Convention on the Future of Europe: An Environmental Perspective *Journal of Environmental Law*' (2003) 15 *Journal of Environmental Law* 323–339
- Jan H Jans and Hans H B Vedder *European Environmental Law* (3rd edn Europa Law Publishing, Groningen 2008)
- Angus Johnston, 'Free Allocation of Allowances under the EU Emissions Trading Scheme: Legal Issues' (2006) 6 *Climate Policy* 115–136
- Alison Jones *EU Competition Law: Text, Cases, and Materials* (4th edn OUP, Oxford 2011)
- Alison Jones and Brenda E Sufrin *EC Competition Law: Text, Cases, and Materials* (3rd edn OUP, Oxford 2008)
- Andrew Jordan and Camilla Adelle *Environmental Policy in the EU: Actors, Institutions and Processes* (3rd edn Routledge, London, New York 2013)
- Alina Kaczorowska *European Union law* (2nd edn Routledge, London, New York, NY 2010)
- Wolfgang Kahl, 'AEUV Art. 114 (ex-Art. 95 EGV) [Beschlüßfassung; einzelstaatliche Regelungen; Schutzklausel]' in Christian Calliess and Matthias Ruffert (eds), *EUV, AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta; Kommentar* (4th edn Beck, München 2011)
- Michael Katz and Carl Shapiro, 'Critical Loss: Let's Tell the Whole Story' (2003) 17 *Antitrust* 49–56
- James Kavanagh, Gunnar Niels and Simon Pilsbury, 'The Market Economy Investor: An Economic Role for Assessing State Aid' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar, Cheltenham, UK 2011) 90–104
- Nicholas Khan and Klaus-Dieter Brochardt, 'The Private Market Investor Principle: Reality Check or Distorting Mirror' in Francisco Santaolalla Gadea (ed), *EC state aid law: Liber Amicorum Francisco Santaolalla Gadea = Le droit des aides d'Etat dans la CE* (Kluwer Law International, Alphen aan den Rijn 2008) 109–123
- Philip Kienapfel and Miersch Gerald, 'Competition Issues in Waste Management Systems' (2006) *Competition Policy Newsletter* 52–56
- Francis Kieran, 'A Separation of Powers Approach to Non-efficiency Goals in EU Competition Law' (2013) 19 *European Public Law* 189–208
- Hyung-Ji Kim, 'Subsidy, Polluter Pays Principle and Financial Assistance among Countries' (2000) 34 *Journal of World Trade* 115–141.
- Thorsten Kingreen, 'Fundamental Freedoms' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn CH Beck, Oxford, Portland, München, Germany 2010) 515–549
- Suzanne Kingston, 'A "New Division of Responsibilities" in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC? A Warning Call' (2001) 22 *European Competition Law Review* 340–350
- Suzanne Kingston, 'The Role of Environmental Protection in EC Competition Law and Policy' (PhD Thesis, Leiden 2009)

- Suzanne Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) 16 *European Law Journal* 780–805
- Suzanne Kingston *Greening EU competition law and policy* (CUP, Cambridge 2012)
- Jens Koch, 'Die Einbeziehung nichtwettbewerblicher Erwägungen in die Freistellungsentscheidung nach Artikel 81 Abs. 3 EG' (2005) 169 *Zeitschrift für das Gesamte Handelsrecht und Wirtschaftsrecht* 625–647
- Dimitry Kochenov and Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 *European Law Review* 369–396
- Christian Koenig, Andreas Bartosch and Jens-Daniel Braun (eds) *EC Competition and Telecommunications Law* (2nd edn Kluwer Law International, The Hague 2009)
- Beate Kohler-Koch (ed) *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield, Lanham, Md. 2007)
- Assimakis P Komninos *Non-Competition Concerns: Resolution of Conflicts in the Integrated Article 81 EC* (2005) <<http://denning.law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2008-05.pdf>> accessed 14 Januar 2014
- Assimakis P Komninos, 'Resolution of Conflicts in an Integrated Article 81 EC' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2004: The Relationship between Competition Law and the (Liberal) Professions* (Hart, Oxford 2006) 451–472
- Valentine Korah *An Introductory Guide to EC Competition Law and Practice* (9th edn Hart, Oxford 2007)
- Markus Krajewski, 'Providing Legal Clarity and Securing Policy Space for Public Services through a Legal Framework for Services of General Economic Interest: Squaring the Circle?' (2008) 14 *European Public Law* 377–398
- Ludwig Krämer, 'Article 6 EC' in Hans von der Groeben and Jürgen Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (6th edn Nomos, Baden-Baden 2003)
- Ludwig Krämer, 'Regional ban of GMO—J.E.E.P.L. 2008, 5(1), 116-118: Admissibility under Art. 95 (5) EC?' *Journal for European Environmental & Planning Law*
- Ludwig Krämer, 'Die Integrierung umweltpolitischer Erfordernisse in die gemeinschaftliche Wettbewerbspolitik' in Hans-Werner Rengeling (ed), *Umweltschutz und andere Politiken der Europäischen Gemeinschaft: Erste Osnabrücker Gespräche zum Deutschen und Europäischen Umweltrecht am 26-27. November 1992; Referate und Diskussionsbeiträge* (Heymanns, Köln 1993) 47–83
- Ludwig Krämer, 'Thirty Years of EC Environmental Law: Perspectives and Prospectives' (2002) 2 *The Yearbook of European Environmental Law* 155–182
- Ludwig Krämer, 'Protection de l'environnement et libre circulation des marchandises: (2008) 45 *Common Market Law Review* pp. 602–605' (2008) 45 *Common Market Law Review* 302–605
- Ludwig Krämer *EU Environmental Law* (7th edn Sweet & Maxwell, London 2011)
- Ludwig Krämer, 'Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies' in Suzanne Kingston (ed), *European Perspectives on Environmental Law and Governance* (Taylor and Francis, Hoboken 2013) 81–101
- Sebastian Kreiner, 'Luxembourg Goes Astray: Finds Government Compulsion to Subsidise Competitors Allowable under Community Law' (2001) *The European Legal Forum* 312–318

- Christoph Krenn, 'A Missing Piece in the Horizontal Effect "Jigsaw": Horizontal Direct Effect and the Free Movement of Goods' (2012) 49 Cambridge Law Journal 177–215
- Mihail Krititikos, 'Traditional Risk Analysis and Release of GMOs into the European Union: Space for Non-Scientific Factors' (2009) 44 European Law Review 405–432
- Bartłomiej Kurcz and Dimitri Vallindas, 'Can General Measures be ... Selective?: Some Thoughts on the Interpretation of a State Aid Definition' (2008) 45 Common Market Law Review 159–182
- William M Lafferty, Adun Tuud and Olav M Larsen, 'Environmental Policy Integration: How will we recognize it when we see it?' (The case of green innovation policy in Norway) in Svend O Remøe (ed), *Governance of Innovation Systems* (OECD Publ, Paris 2006) 221–244
- Katja Langenbucher, 'Zur Zulässigkeit parlamentsersetzender Normgebungsverfahren im Europarecht' (2002) Zeitschrift für Europäisches Privatrecht 265–286
- K.P.E. Lasok, 'Recent Developments in the Rule of Reason in EC Antitrust Law' (2008) 7 Competition Law Journal 226–236
- K.P.E. Lasok, 'When is an Undertaking not an Undertaking?' (2004) 25 European Competition Law Review 383–385
- Saskia Lavrijssen, 'What Role for National Competition Authorities in Protecting Non-competition Interests after Lisbon?' (2010) 35 European Law Review 636–659
- Charles Leben and Joe Verhoeven (eds) *Le principe de précaution, aspects de droit international et communautaire* (Droit international et relations internationales, Éd. Panthéon-Assas; diff. LGDJ, Paris 2002)
- Markus A Lehmann *Negotiating Environmental Quality: Policy implementation in Germany and the United States* (Elgar, Cheltenham 2000)
- Stefan Leible and Thomas Streinz, 'EU-Arbeitsweisevertrag Art. 34 Verbot von Einfuhrbeschränkungen' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (Beck, München 2011 [45 Ergänzungslieferung])
- Jos Lemmink and Hans Kasper, 'Competitive Reactions to Product Quality Improvements in Industrial Markets' (1994) 28 European Journal of Marketing 50–68
- Andrea Lenschow (ed) *Environmental Policy Integration: Greening Sectoral Policies in Europe* (Earthscan Publications, London, Sterling, VA 2002a)
- Andrea Lenschow, 'Greening the European Union: An Introduction' in Andrea Lenschow (ed), *Environmental Policy Integration: Greening Sectoral Policies in Europe* (Earthscan Publications, London, Sterling, VA 2002b) 1–21
- Leo Tolstoy *The Diary of Leo Tolstoy* (translated from the Russian by C J Hogarth & A Sirnis) (Dutton, New York 1917)
- Jeremy Lever and John Pike, 'Cartel Agreements, Criminal Conspiracy and the Statutory "Cartel Offence"' (2005) European Competition Law Review 70-77(part 1); 164-172 (part 2)
- Ioannis Lianos, 'The Price/Non Price Exclusionary Abuses Dichotomy: A Critical Appraisal' (2009) Concurrences 34–39
- Ioannis Lianos, 'Competition Law in the European Union after the Treaty of Lisbon' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (CUP, Cambridge, UK 2012) 252–283
- Charles E Lindblom and Edward J Woodhouse *The Policy-making Process* (3rd edn Prentice Hall, Englewood Cliffs, N.J 1993)

- William Lindsay-Poulsen, 'Regional Autonomy, Geographic Selectivity and Fiscal Aid: between "The Rock" and a hard place' (2008) 29 *European Competition Law Review* 43–49
- Paul-John Loewenthal, 'The Defence of "Objective Justification" in the Application of Article 82 EC' (2005) 28 *World Competition* 455–477
- Ragnar E Löfstedt *Risk Management in Post-trust Societies* (Palgrave Macmillan, Basingstoke 2005)
- Caroline London, 'Concurrence et Environnement: une entente écologiquement rationnelle?' (2003) 29 *Revue trimestrielle de droit européen* 267–286
- Melanie Lorenz *Umweltschutz und wettbewerblich konzipierter Binnenmarkt im Gemeinschaftsrecht* (Lang, Frankfurt am Main 2004)
- Moritz Lorenz, 'Emission Trading - (2004) *European State Aid Law Quarterly: The State Aid Dimension*' (2004) 3 *European State Aid Law Quarterly* 399–405
- Frédéric Louis and Anne Vallery, 'Ferring Revisited: the Altmark Case and State Financing of Public Service Obligations' (2004) 27 *World Competition* 53–74
- Victoria Louri, 'Undertaking as a Jurisdictional Element for the Application of EC Competition Rules' (2002) 29 *Legal Issues of Economic Integration* 143–176
- Philip Lowe, 'DG Competition's Review of the Policy on Abuse of Dominance' in Barry E Hawk (ed), *International Antitrust Law & Policy: Annual proceedings of the Fordham Corporate Law Institute 2003* (Juris, Huntington, NY 2004) 163–173
- Thomas Lübbig, '§ 7 Rechtsgrundlagen' in Gerhard Wiedemann and Ursula Bumiller (eds), *Handbuch des Kartellrechts* (2nd edn Beck, München 2008)
- Markus Ludwigs and Andreas Lamping, 'Die kartellrechtliche Bedeutung des Buches als Wirtschafts- und Kulturgut nach europäischem Gemeinschaftsrecht: Sind Bücher anders?' (1999) *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung* 51–58
- Orla Lynskey, 'The Application of Article 86(2) EC to Measures Which do Not Fulfil the Altmark Criteria: Institutionalising Incoherence in the Legal Framework Governing State Compensation of Public Service Obligations' (2007) 30 *World Competition* 153–168
- Angus MacCulloch, 'Honesty, Morality and the Cartel Offence' (2007) 28 *European Competition Law Review* 355–363
- Miguel Maduro *We, the Court: The European Court of Justice and the European Economic Constitution* (Hart, Oxford 2002)
- Tobias Mähner *Der Europäische Gerichtshof als Gericht* (Duncker & Humblot, Berlin 2005)
- Jerónimo Maillo, 'Services of General Economic Interest and EC Competition Law' in Giuliano Amato, Claus-Dieter Ehlermann and Assimakis P Komninos (eds), *EC Competition Law: A Critical Assessment* (Hart, Oxford 2007) 591–625
- Gösta C Makowski *Kartellrechtliche Grenzen der Selbstregulierung* (Nomos, Baden-Baden 2007)
- Giuliano Marengo, 'Pour une interprétation traditionnelle de la notion de mesure d'effet équivalent à une restriction quantitative?' (1984) 20 *Cahiers de Droit Européen*
- Gracia Marin-Duran and Elisa Morgera, 'Commentary on Article 37 of the EU Charter of Fundamental Rights – Environmental Protection' ((Europa Working Paper No 2013/2) 2013) <<http://ssrn.com/abstract=2267402>> accessed 15 January 2014
- David Marquand *Parliament for Europe* (London Cape 1979)

Camilla A a M P Martina Herodes *Environmental Policy Integration at the EU Level: A Literature Review* (Berlin 2007)

Santiago Martínez Lage and Helmut Brokelmann, 'The Application of Article 85 and 86 EC to the Conduct of Undertakings that are Complying with National Legislation' in Marianne Dony, Aline d Walsche and Michel Waelbroeck (eds), *Mélanges en hommage à Michel Waelbroeck* (Bruylant, Bruxelles 1999) 1247–1295

Santiago Martínez Lage and Helmut Brokelmann, 'Article 81 (3) before National Courts: The CAMPSA Doctrine of the Spanish Supreme Court and Articles 84 and 85 EC Revisited' in Claus-Dieter Ehlermann and Isabella Atanasiu (eds), *Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart, Oxford 2001) 593–612

Manuel Martínez-López, 'Commission Approves an Agreement to Improve Energy Efficiency of Washing Machines' (2000) *Competition Policy Newsletter* 13

Manuel Martínez-López, 'Commission Confirms its Policy Line in respect of Horizontal Agreements on Energy Efficiency of Domestic Appliances' (2002) *Competition Policy Newsletter* 50–52

Brian McCracken, 'Towards the Application of Article 81(3) by National Courts (an Irish Perspective)' (2001) 2 *ERA-Forum* 15–17

John McGee, 'Predatory Price Cutting: The Standard Oil (N.J.) Case' (1958) 1 *Journal of Law and Economics* 137–169

John McGee, 'Efficiency and Economies of Size' in Harvey J Goldschmid, Harold M Mann and John F Weston (eds), *Industrial Concentration: The New Learning* (Little Brown, Boston 1974) 55–97

Donald McGillivray and Jane Holder, 'Locating EC Environmental Law' (2001) 20 *Yearbook of European Law* 139–171

Owen McIntyre, 'The Integration Challenge: Integrating Environmental Concerns into other EU Policies' in Suzanne Kingston (ed), *European Perspectives on Environmental Law and Governance* (Taylor and Francis, Hoboken 2013) 125–143

Michael Mehling, 'Article 6 EC' in Kay Hailbronner and Heinrich Wilms (eds), *Recht der Europäischen Union: Kommentar. Vol II* (Kohlhammer, Stuttgart 2005 [9th Ergänzungslieferung]) 2–26

Roderick Meiklejohn, 'The Economics of State Aid' in Directorate-Generale for Economic and Financial Affairs European Commission (ed), *European Economy 1999* (Brussels 1999) 25–31

Yves Mény, 'De La Démocratie en Europe: Old Concepts and New Challenges' (2003) 41 *Journal of Common Market Studies* 1–13

Massimo Merola and Gloria Crichlow, 'State Aid in the Framework of the EU Position after Kyoto: An Analysis of Allowances Granted under the CO2 Emission Allowance Trading Directive' (2004) 27 *World Competition* 25–51

Ernst-Joachim Mestmäcker, 'Versuch einer kartellpolitischen Wende in der EU: Zum Weißbuch der Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EGV a. F. (Art. 81 und 82 EGV n. F.)' (1999) *Europäische Zeitschrift für Wirtschaftsrecht* 523–529

Ernst-Joachim Mestmäcker, 'The EC Commission's Modernization of Competition Policy: a Challenge to the Community's Constitutional Order' (2000) 1 *European Business Organization Law Review* 401–444

Ernst-Joachim Mestmäcker, 'The Application of the Modernised Rules of EC Antitrust Policy: Constitutional Challenge or Administrative Convenience?' in Claus-Dieter Ehlermann and Isabella Atanasiu (eds), *Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Hart, Oxford 2001) 223–240

Ernst-Joachim Mestmäcker and Heike Schweitzer *Europäisches Wettbewerbsrecht* (2nd edn Beck, München 2004)

Felix Mezzanotte, 'Interpreting the Boundaries of Collective Dominance in Article 102 TFEU' (2010) 21 *European Business Law Review* 519–537

Claire Micheau, 'State Aid and Taxation in EU law' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar, Cheltenham, UK 2011) 193–218

Colin Miège, 'Contrôle d'une réglementation anti-dopage au regard des règles communautaires de concurrence' (2006) *La Semaine Juridique* 2225–2229

Lois A Mohr and Deborah J Webb, 'The effects of Corporate Social responsibility and Price on Consumer Responses' (2005) 39 *Journal of Consumer Affairs* 121–147

Lois A Mohr, Deborah J Webb and Katherine E Harris, 'Do Consumers Expect Companies to be Socially Responsible? : The Impact of Corporate Social Responsibility on Buying Behavior' (2001) 35 *Journal of Consumer Affairs* 45–72

Machiel R Mok, 'Naar 'modernisering' van het Europees kartelbeleid: Witboek Europese Commissie mei 1999' (1999) 47 *Toonaangevend tijdschrift voor Europees en economisch recht* 314–322

Monopolkommission *Cartel Policy Change in the European Union?: On the European Commission's White Paper of 28th April 1999* (Special Report by the German Monopolies Commission pursuant to Sec. 44 (1) of the Act Against Restraints of Competition (GWB)) (Nomos, Baden-Baden 2000)

Giorgio Monti, 'The Scope of Collective Dominance under Articles 82 EC' (2001) 28 *Common Market Law Review* 131–157

Giorgio Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review* 1057–1099

Giorgio Monti *EC Competition Law* (CUP, Cambridge 2008)

Serge Moresi, Steven C Salop and John Woodbury *Implementing the Hypothetical Monopolist SSNIP Test with Multi-Product Firms* ((2008).) <<http://ssrn.com/abstract=1087536>>

Kamiel Mortelmans, 'Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?' (1991) 28 *Common Market Law Review* 115–136

Kamiel Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?' (2001) 38 *Common Market Law Review* 613–649

Kamiel J M Mortelmans, 'The Functioning of the Internal Market: The Freedoms' in Paul J G Kapteyn and others (eds), *The law of the European Union and the European Communities: With reference to changes to be made by the Lisbon Treaty* (4th edn Kluwer Law International, Alphen aan den Rijn 2008) 575–784

Wernhard Möschel, 'Europäische Wettbewerbspolitik auf Abwegen' (1999) 79 *Wirtschaftsdienst* 504–512

Wernhard Möschel, 'Systemwechsel im Europäischen Wettbewerbsrecht?: Zum Weißbuch der EG-Kommission zu den Art. 81 ff. EG-Vertrag' (2000) 55 *Juristen Zeitung* 61–67

- Wernhard Möschel, 'Effizienter Wettbewerbsschutz in einer erweiterten Gemeinschaft durch Einbeziehung der nationalen Wettbewerbsbehörden und nationalen Gerichte?' (2001) 51 *Wirtschaft und Wettbewerb* 147–148
- Thomas Müller, 'Efficiency Control in State Aid and the Power of Member States to Define SGEIs' (2009) 34 *European State Aid Law Quarterly* 39–45
- Peter-Christian Müller-Graff, 'Die Freistellung vom Kartellverbot' (1992) 27 *Europarecht* 1–40
- Peter-Christian Müller-Graff, 'Protectionism or Reasonable National Regulation?: The Protection of Non-economic interests as Barriers to the Freemovement of Goods; A Comparison of EC Law and WTO Law' in Stefan Griller (ed), *The WTO and the Doha Round: At the Brink of Failure?* (1st edn Springer, Wien 2008) 147–167
- Vijaya Nagarajan, 'The Paradox of Australian Competition Policy: Contextualizing the Coexistence of Economic Efficiency and Public Benefit' (2013) 36 *World Competition* 133–163
- Bernhard Nagel, 'Ökostrom darf durch Mindestpreise gefördert werden: Anmerkung zur Entscheidung des EuGH in Sachen Preußen-Elektra AG/Schleswig' 2001 *Zeitschrift für Umweltrecht* 263–265
- Bernhard Nagel, 'Stromeinspeisung auf dem europarechtlichen Prüfstand: Generalanwalt Jacobs und der Umweltschutz' (2000) *Zeitschrift für Neues Energierecht* 100–111
- Hanns P Nehl, 'Changes in Legislation: Constitutional Reform and the Role of the Administrator' , *The Modernisation of European Competition Law: The Next Ten Years* (CELS Occasional Paper No. 4 2000) 10–42
- Martin Nettesheim, 'Article 6 EC' in Eberhard Grabitz and Meinhard Hilf (eds), *Das Recht der Europäischen Union: [Kommentar]* (Beck, München 2009 [40th Ergänzungslieferung])
- Martin Nettesheim, 'Article 11 TFEU' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (Beck, München 2011 [45 Ergänzungslieferung])
- Phedon Nicolaides, 'The Balancing Myth: The Economics of Article 81(1) & (3)' (2005) 32 *Legal Issues of Economic Integration* 123–145
- Phedon Nicolaides, 'State Aid, Advantage and Competitive Selection: What is a Normal Market Transaction' (2010) *European State Aid Law Quarterly* 65–78
- Gunnar Niels, Helen Jenkins and James Kavanagh *Economics for Competition Lawyers* (OUP, Oxford 2011)
- Paul Nihoul, 'Do Workers Constitute Undertakings for the Purpose of the Competition Rules' (2000) 25 *European Law Review* 408–414
- André Nollkaemper, 'Three Conceptions of the Integrations Principle in International Environmental Law' in Andrea Lenschow (ed), *Environmental Policy Integration: Greening Sectoral Policies in Europe* (Earthscan Publications, London, Sterling, VA 2002) 22–34
- Nicola Notaro, 'Comment on Case C-203/96, Chemische Afvalstoffen Dusseldorp , Nicola Notaro, Issue 6, pp.' (1999) 36 *Common Market Law Review* 1309–1323
- Nicola Notaro, 'European Community Waste Movements: the Copenhagen Waste Case' (2000a) 9 *European Energy and Environmental Law Review* 304–312
- Nicola Notaro, 'The new generation of case law on Trade and Environment' (2000b) 25 *European Law Review* 467–491

- Julian Nowag, 'Case C-113/07P Selex Sistemi Integrati SpA. v Commission [2009] ECR I-2207: Redefining the Boundaries between Undertaking and the Exercise of Public Authority' (2010) 31 *European Competition Law Review* 483–486
- Julian Nowag, 'Changing the Competition Regime without Altering the Treaty's Chapter on Competition?' in Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar, Cheltenham UK, Northampton MA 2012) 398–412
- Carsten Nowak, '§60 Grundrechtsdimensionen des Umweltschutzes' in F. S M Heselhaus and others (eds), *Handbuch der Europäischen Grundrechte* (Beck; Linde; Stampfli, Bern 2006) 1647–1680
- Daniel O'Brien and Abraham Wickelgren, 'A Critical Analysis of Critical Loss Analysis' (2003) 71 *Antitrust Law Journal* 161–184
- Robert O'Donoghue and Jorge A Padilla *Law and Economics of Article 102 TFEU* (2nd edn Hart, Oxford 2013)
- Okeoghene Odudu, 'Interpreting Article 81(1): object as subjective intention' (2001a) 26 *European Law Review* 60–75
- Okeoghene Odudu, 'Interpreting Article 81(1): demonstrating restrictive effect' (2001b) 26 *European Law Review* 261–274
- Okeoghene Odudu, 'Interpreting Article 81(1): the object requirement revisited' (2001c) 26 *European Law Review* 379–390
- Okeoghene Odudu, 'Article 81 (3), Discretion and Direct Effect' (2002) 23 *European Competition Law Review* 17–25
- Okeoghene Odudu, 'The Meaning of Undertaking Within 81 EC' (2004-2005) 7 *Cambridge Yearbook of European Legal Studies* 211–241
- Okeoghene Odudu *The Boundaries of EC Competition Law: The Scope of Article 81* (OUP, Oxford 2006)
- Okeoghene Odudu, 'Economic Activity as a Limit to Community Law' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart, Oxford, Portland 2009) 225–243
- Okeoghene Odudu, 'The Wider Concerns of Competition Law' (2010) *Oxford Journal of Legal Studies* 1–15
- Peter J Oliver, 'Some Further Reflections on the Scope of Articles 28–30 (ex 30–36) EC' (1999) 36 *Common Market Law Review* 783–806
- Peter J Oliver, 'Of Trailers and Jet Skis' (2010) 33 *Fordham International Law Journal* 1423–1471
- Peter J Oliver and Stefan Enchelmaier, 'Free Movement of Goods: Recent Developments in the Case Law' (2007) 44 *Common Market Law Review* 649–704
- Peter J Oliver and Stefan Enchelmaier *Oliver on Free Movement of Goods in the European Union* (5th edn Hart, Oxford 2010)
- Peter J Oliver and Wulf-Henning Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 407–441
- Rosemary O'Loughlin, 'EC Competition Rules and Free Movement Rules: an Examination of the Parallels and their furtherance by the ECJ Wouters Decision' (2003) 24 *European Competition Law Review* 62–69

- Federico Ortino *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Hart, Oxford, Portland 2004)
- Eirik Østerud *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: The Spectrum of Tests* (Kluwer Law International, Alphen aan den Rijn 2010)
- Daljord Øystein, Lars Sjørgard and Øyvind Thomassen, 'The SSNIP Test and Market Definition with the Aggregate Diversion Ratio: A Reply to Katz and Shapiro' (2008) 4 *Journal of Competition Law and Economics* 263–270
- Lorenzo F Pace *European Antitrust Law: Prohibitions, Merger Control and Procedures* (Elgar, Cheltenham 2007)
- Michael Paulweber, 'The End of a Success Story? The European Commission's White Paper on the Modernisation of the European Competition Law: A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and the American Antitrust Law' (2000) 23 *World Competition* 3–48
- David Pearce and Edward Barbier *Blueprint for a Sustainable Economy* (Earthscan, London 2000)
- Peter Pecho, 'Good-Bye Keck?: A Comment on the Remarkable Judgment in Commission v. Italy' (2009) 36 *Legal Issues of Economic Integration* 257–272
- Jan Peeters, 'The Rule of Reason Revisited: Prohibition on Restraints of Competition in the Sherman Act and the EEC-Treaty' (1989) 37 *American Journal of Comparative Law* 521–570
- Roger Perman *Natural Resource and Environmental Economics* (3rd edn Pearson Education, Harlow 2003)
- Ingolf Pernice, 'Rechtlicher Rahmen der europäischen Unternehmenskooperation im Umweltbereich unter besondere Berücksichtigung von Art. 85 EWGV' (1992) *Europäische Zeitschrift für Wirtschaftsrecht* 139–143
- Nicola Pesaresi and others, 'The New State Aid Rules for Services of General Economic Interest (SGEI): The Commission Decision and Framework of 20 December 2011' (2012a) *Competition Policy Newsletter*
- Nicola Pesaresi and others, 'The New State Aid Rules for Services of General Economic Interest (SGEI)' (2012b) *Competition Policy Newsletter*
- Nicola Pesaresi and others, 'The SGEI Communication' (2012c) *Competition Policy Newsletter*
- Pierre Pescatore, 'Some Critical Remarks on the "Single European Act"' (1987) 24 *Common Market Law Review* 1–18
- Denis Philippe, 'The Application of State Aid Provisions to National Rules Allocating Rights to Emit Pollutants' (2012) 3 *Journal of European Competition Law & Practice* 168–169
- Danny Pieters and Stefaan van den Bogaert *The Consequences of European Competition Law for National Health Policies* (Reeks gezondheidszorgverzekering en europa, Maklu Uit. Antwerpen 1997)
- Michael E Porter, 'Creating Shared Value' (2011) 89 *Harvard Business Review* 62–77
- Michael E Porter and Claas van der Linde, 'Toward a New Conception of the Environment-Competitiveness Relationship' (1995) 9 *The Journal of Economic Perspectives* 97–118
- Timothy Portwood *Competition Law & the Environment* (Cameron May, London 2000)
- Richard A Posner *Antitrust Law: An Economic Perspective* (Univ. of Chicago Press, Chicago 1976)

- Richard A Posner, 'The Chicago School of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 925–1033
- Richard A Posner *Antitrust Law* (2nd edn Univ. of Chicago Press, Chicago 2001)
- Luca Prete, 'Of Motorcycle Trailers and Personal Watercrafts: the Battle over Keck' (2008) 35 *Legal Issues of Economic Integration* 133–155;
- Tony Prosser *The Limits of Competition Law: Markets and Public Services* (OUP, Oxford 2005)
- Jens H Quellmalz, 'Die Justiziabilität des Art. 81 Abs. 3 EG und die nichtwettbewerblichen Ziele des EG-Vertrages' (2004) *Wettbewerb in Recht und Praxis* 461–470
- Conor Quigley *European State Aid Law: And policy* (2nd edn Hart, Oxford 2009)
- Conor Quigley, 'Direct Taxation and State Aid: Recent Developments Concerning the Notion of Selectivity' (2012) 40 *Intertax* 112–119
- Norbert Reich, "Nutzungsbeschränkungen" als "Verkaufsmodalitäten" oder "Marktzugangssperren"?: Kurzbesprechung der Schlussanträge des Generalanwalts Yves Bot vom 8.7.2008 in der Rechtssache C-110/05 (Kommission/Italien)' (2008) *Europäische Zeitschrift für Wirtschaftsrecht* 485–486
- Ortwin Renn *Risk Governance: Coping with Uncertainty in a Complex World* (Earthscan, London 2010)
- Brigitta Renner-Loquenz, 'State Aid in Feed-in Tariffs for Green Electricity' (2006) *Competition Policy Newsletter* 61–65
- Annalisa Renzulli, 'Services of General Economic Interest: The Post-Altmark Scenario' (2008) 14 *European Public Law* 399–432
- Alan Riley, 'The EU Reform Treaty & the Competition Protocol: Undermining EC Competition Law' (2007) 28 *European Competition Law Review* 703–707
- Lennart Ritter and W. D Braun *European Competition Law: A practitioner's guide* (3rd edn Kluwer Law International, The Hague 2005)
- Cesare Rizza, 'The Duty of National Competition Authorities to Disapply Anti-competitive Domestic Legislation and the Resulting Limitations on the Availability of the State Action Defence (Case C-198/01 CIF)' (2004) 25 *European Competition Law Review* 126–131
- Aidan Robertson, 'Article 81 EC the rule of reason revisited' (2007) 6 *Competition Law Journal* 318–330
- Malcolm Ross, 'A Healthy Approach to Services of General Economic Interest?: The BUPA Judgment of the Court of First Instance.' (2009) 34 *European State Aid Law Quarterly* 127–140
- Wulf-Henning Roth, 'Zur Berücksichtigung nichtwettbewerblicher Ziele im europäischen Kartellrecht: Eine Skizze' in Christoph Engel and Ernst-Joachim Mestmäcker (eds), *Recht und spontane Ordnung: Festschrift für Ernst-Joachim Mestmäcker zum achtzigsten Geburtstag* (Nomos, Baden-Baden 2006) 411–435
- Ekaterina Rousseva, 'The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it help to Modernise the Analysis under Article 82 EC?' (2006) 2 *Competition Law Review* 27–72
- Ekaterina Rousseva, 'Abuse of Dominant Position Defences: Objective Justification and Article 82 EC in the Era of Modernisation' in Giuliano Amato, Claus-Dieter Ehlermann and Assimakis P Komninos (eds), *EC Competition Law: A Critical Assessment* (Hart, Oxford 2007) 377–431
- Ekaterina Rousseva *Rethinking Exclusionary Abuses in EU Competition Law* (Hart, Oxford 2010)

- Luca Rubini *The Definition of Subsidy and State Aid: WTO and EC law in Comparative Perspective* (OUP, Oxford, New York 2009)
- Matthias Ruffert, 'Article 2 EC' in Christian Calliess and Matthias Ruffert (eds), *EUV - EGV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta [Kommentar]* (3rd edn Beck, München 2007)
- Nicolas de Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law' (2006) 12 *European Law Journal* 139–172
- Nicolas de Sadeleer and others *Environnement et marché intérieur* (3rd edn Éd. de l'Univ. de Bruxelles, Bruxelles 2010)
- Paul Samuelson, 'A Note on the Pure Theory of Consumers' Behaviour' (1938) 5 *Economica* 61–71
- Michael Sánchez Rydelski, 'Umweltschutzbeihilfen, EuZW' (2001) *Europäische Zeitschrift für Wirtschaftsrecht* 458–463
- Alberto Santa Maria *Competition and State aid: An analysis of the EC practice* (Kluwer Law International, Alphen aan den Rijn 2007)
- Wolf Sauter, 'Services of General Economic Interest and Universal Service in EU Law' (2008) 33 *European Law Review* 167–193
- Wolf Sauter, 'The Altmark Package Mark II: New Rules for State Aid and the Compensation of Services of General Interest' (2012) 33 *European Competition Law Review* 307–313
- Wolf Sauter and Hans Vedder, 'State Aid and Selectivity in the Context of Emissions Trading: An Examination of the ECJ'S 2011 NOx Case (C-279/08)' (15 February 2012) <<http://ssrn.com/abstract=2005755>> accessed 08 June 2012
- Alexander Schaub, 'Continued Focus on Reform: Recent Developments in EC Competition Policy' in Barry E Hawk (ed), *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute 2000* (Juris, Huntington, NY 2001) 31–52
- Mark Schechter, 'The Rule of Reason in European Competition Law' (1982) *Legal Issues of Economic Integration* 1
- Harm Schepel, 'Delegation of Regulatory Powers to Private Parties under EC Competition Law: Towards a Procedural Public Interest Test' (2002) 39 *Common Market Law Review* 31–51
- Harm Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: (2012) 18 *European Law Journal: On the Horizontal Application of the Free Movement Provisions in EU Law*' (2012) 18 *European Law Journal* 177–200
- Philipp Schepelmann *From Helsinki to Gothenburg: Evaluation of Environmental Integration in the European Union* (Study commissioned by the Federal Ministry of Agriculture and Forestry, Environment and Water Management) (Vienna 2000) <<http://seri.at/wp-content/uploads/2009/09/From-Helsinki-to-Gothenburg1.pdf>> accessed 31 October 2013
- Dieter Scheuing, 'Umweltschutz auf der Grundlage der Einheitliche Europäische Akte' (1989) *Europarecht* 152–192
- Dieter Scheuing, 'Regulierung und Marktfreiheit im Europäischen Umweltrecht' (2001) *Europarecht* 1–26
- Annette Schrauwen (ed) *The Rule of Reason: Rethinking Another Classic of European Legal Doctrine* (Europa Law Publishing, Groningen 2005)

- Helmuth Schröter, 'IV. Freistellung vom Kartellverbot (Artikel 81 Absatz 3)' in Hans von der Groeben and Jürgen Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (6th edn Nomos, Baden-Baden 2003a)
- Helmuth Schröter, 'Vorbemerkung zu den Artikeln 81 bis 89 EC' in Hans von der Groeben and Jürgen Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (6th edn Nomos, Baden-Baden 2003b)
- Tobias Schumacher, 'The Environmental Integration Clause in Article 6 of the EU Treaty: Prioritising Environmental Protection' (2001) 3 *Environmental Law Review* 29–43
- Carl Stephan Schweer and Bernhard Ludwig, 'Emissionshandel und EG-Beihilfenrecht: Der Schutz vor wettbewerbsverfälschenden nationalen Allokationsplänen' (2004) 7 *Recht der Energiewirtschaft* 153–158
- Heike Schweitzer *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81* (2007) <<http://cadmus.iue.it/dspace/bitstream/1814/7623/3/LAW-2007-30.pdf>>
- Heike Schweitzer, 'Standardisierung als Mittel zur Förderung und Beschränkung des Handels und des Wettbewerbs' (2012) 23 *Europäische Zeitschrift für Wirtschaftsrecht* 765–770
- Joanne Scott, 'On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO' in Josef H H Weiler (ed), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?* (OUP, Oxford 2001) 126–168
- Martin Seidel, 'Umweltrecht der Europäischen Gemeinschaft: Träger oder Hemmnis des Fortschritts?' (1989) *Deutsche Verwaltungsblatt* 441–448
- Anne T Seinen, 'State Aid Aspects of the EU Emission Trading Scheme: the Second Trading Period (2007) 3 EC Competition Policy Newsletter 100.' (2007) *Competition Policy Newsletter* 100–105
- Joëlle de Sépibus, 'The European Emission Trading Scheme Put to the Test of State Aid Rules' (01 September 2007) <<http://ssrn.com/abstract=1088716>> accessed 08 June 2012
- Sebastian Setter, 'Maastricht, Amsterdam and Nice: The Environmental Lobby and Greening the Treaties' (2001) 10 *European Energy and Environmental Law Review* 150–159
- Niamh N Shuibhne, 'Shirley McCarthy v. Secretary of State for the Home Department/Dereci and others v. Bundesministerium für Inneres' (2012) 49 *Common Market Law Review* 349–379
- Beate Sjøfjell, 'Quo Vadis, Europe?: The Significance of Sustainable Development as Objective, Principle and Rule of EU Law' in Cecilia Bailliet (ed), *Non-state Actors, Soft Law and Protective Regimes: From the Margins* (CUP, Cambridge 2012) 254–280
- Piet J Slot, 'Harmonisation' (1996) 21 *European Law Review* 378–387
- Jukka Snell, 'Non-Discriminatory Tax Obstacles in Community Law' (2007) 56 *International and Comparative Law Quarterly* 339–370
- Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *Common Market Law Review* 437–472
- Ulrich Soltész, 'Von PreussenElektra zu France Télécom – Die „Belastung des Staatshaushaltes“ als Beihilfekriterium' (2011) *Europäische Zeitschrift für Wirtschaftsrecht* 254–256
- Ulrich Soltész and Felix Schatz, 'State Aid for Environmental Protection: The Commission's new Guidelines and the new General Block Exemption Regulation' (2009) 6 *Journal for European Environmental & Planning Law* 141–170

- Eleanor Spaventa, 'Leaving Keck Behind?: The Free Movement of Foods after the Rulings in Commission v Italy and Mickelsson and Roos' (2009a) 34 *European Law Review* 914–932
- Eleanor Spaventa, 'The Outer Limit of the Treaty Free Movement Provisions: Some Reflections on the Significance of Keck, Remoteness and Deliège' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart, Oxford, Portland 2009b) 245–271
- Eleanor Spaventa and Michael Dougan (eds) *Social Welfare and EU Law* (Hart, Oxford 2005)
- Jacques Steenbergen, 'Proportionality in Competition Law and Policy' (2008) 35 *Legal Issues of Economic Integration* 259–268
- Torsten Stein, 'Die Querschnittsklauseln zwischen Maastricht und Karlsruhe' in Ole Due and Ulrich Everling (eds), *Festschrift für Ulrich Everling* (Nomos, Baden-Baden 1995) 1439–1453
- Anja V Steinbeck, 'Umweltvereinbarungen und europäisches Wettbewerbsrecht' (1998) 48 *Wirtschaft und Wettbewerb* 554–566
- Ernst Steindorff, 'Art. 85 and the Rule of Reason' (1984) 21 *Common Market Law Review* 639–646
- Stephen Weatherill, 'Anti-doping Revisited: the Demise of the Rule of "Purely Sporting Interest"?' (2006) 27 *European Competition Law Review* 645–657
- Candice Stevens, 'Interpreting the Polluter Pays Principle in the Trade and Environment Context' (1994) 27 *Cornell International Law Journal* 577–590
- George J Stigler, 'A Theory of Oligopoly' (1964) 72 *Journal of Political Economy* 44–61
- Joseph E Stiglitz *Economics of the Public Sector* (Norton, New York 2000)
- Joseph E Stiglitz and Carl E Walsh *Economics* (4th edn W.W. Norton, New York 2006)
- Marcin Stoczkiewicz, 'The Polluter Pays Principle and State Aid for Environmental Protection' (2009) 6 *Journal for European Environmental & Planning Law* 171–196
- Joshua M Stone, 'Restraints on Competition through the Alternation of the Environment at the Genetic Level' (2000) 8 *NYUEnvtlJ* (New York University Environmental Law Journal) 704–732
- Jules Stuyck, 'EC Competition Law After Modernisation: More Than Ever in the Interest of Consumers' (2005) 29 *Journal of Consumer Policy* 1–30
- Brenda E Sufrin, 'The Evolution of Article 81(3) of the EC Treaty' (2006) 55 *Antitrust Bulletin* 915–981
- Anna Szajkowska, 'The Impact of the Definition of the Precautionary Principle in EU Food Law' (2010) 47 *Common Market Law Review* 173–196
- Erika Szyszczak, 'Public Services in the New Economy' in Cosmo Graham and Smith Fiona (eds), *Competition, Regulation and the New Economy* (Hart, Oxford 2004) 185–206
- Erika Szyszczak, 'Competition and Sport: E.L. Rev. 2007, 32(1), 95-110' (2007) 32 *European Law Review* 95–110
- Lester G Telser, 'Why Should Manufacturers Want Fair Trade?' (1960) 3 *Journal of Law and Economics* 86–105
- Harrie Temmink, 'From Danish Bottles to Danish Beer,: The Dynamics of Free Movement of Goods and Environmental Protection a Case Law Analysis' (2000) 1 *The Yearbook of European Environmental Law* 61–102

John Temple Lang, 'Decentralised Application of Community Competition Law' in José Rivas and Margot Horspool (eds), *Modernisation and Decentralisation of EC Competition Law* (Kluwer Law International, The Hague 2000) 13–29

Patrick ten Brink and others *The Economics of Ecosystems and Biodiversity* (2009)
<<http://www.teebweb.org/ForPolicymakers/tabid/1019/language/en-US/Default.aspx>>
accessed 17 November 2009

Giuseppe Tesaurò, 'Modernisation and Decentralisation of EC Competition Law' in José Rivas and Margot Horspool (eds), *Modernisation and Decentralisation of EC Competition Law* (Kluwer Law International, The Hague 2000) 1–12

Christopher Townley, 'Is Anything more Important than Consumer Welfare (in Article 81 EC)?': Reflections of a Community Lawyer' (2007–2008) 10 *Cambridge Yearbook of European Legal Studies* 345–381

Christopher Townley, 'The Concept of an 'Undertaking': The Boundaries of the Corporation A Discussion of Agency, Employees and Subsidiaries' in Giuliano Amato, Claus-Dieter Ehlermann and Assimakis P Komninos (eds), *EC Competition Law: A Critical Assessment* (Hart, Oxford 2007) 3–23

Christopher Townley *Article 81 EC and Public Policy* (Hart, Oxford 2009)

Christopher Townley, 'The Goals of Chapter I of the UK's Competition Act 1998' (2010) 29 *Yearbook of European Law* 307–360

Christopher Townley, 'The Relevant Market: An Acceptable Limit to the Competition Analysis' (2011a) 32 *European Competition Law Review* 490–499

Christopher Townley, 'Which Goals Count in Article 101 TFEU? Public Policy and its Discontents: the OFT's Roundtable Discussion on article 101(3) of the Treaty on the Functioning of the European Union' (2011b) 32 *European Competition Law Review* 441–448

Christopher Townley, 'Is there (Still) Room for Non-Economic Arguments in Article 101 TFEU Cases?' in Caroline Heide-Jørgensen (ed), *Aims and Values in Competition Law* (Djoef Publishing, Copenhagen 2013) xxx

Takis Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford, Portland, 1999) 65–84

Carlos Urraca Caviedes, 'La Sélectivité Régionale' in Francisco Santaolalla Gadea (ed), *EC state aid law: Liber Amicorum Francisco Santaolalla Gadea = Le droit des aides d'Etat dans la CE* (Kluwer Law International, Alphen aan den Rijn 2008) 125–144

Geert van Calster, 'Greening the EC's State Aid and Tax Regimes' (2000) 21 *European Competition Law Review* 294–314

Geert van Calster, 'The Fee Movement of Waste after DaimlerChrysler' (2002) 27 *European Law Review* 610–617

Johan W van de Gronden, 'Rule of Reason and Convergence in Internal Market and Competition Law' in Annette Schrauwen (ed), *The Rule of Reason: Rethinking Another Classic of European Legal Doctrine* (Europa Law Publishing, Groningen 2005) 79–94

Ben van Houtte, 'A Standard of Reason in EEC Antitrust Law: Some Comments on the Application of Parts 1 and 3 of Article 85' (1982) *Northwestern Journal Of International Law & Business* 497–516

- Hubert van Vliet, 'State Resources and PreussenElektra: When is a State Aid not a State Aid' in Francisco Santaolalla Gadea (ed), *EC state aid law: Liber Amicorum Francisco Santaolalla Gadea = Le droit des aides d'Etat dans la CE* (Kluwer Law International, Alphen aan den Rijn 2008) 65–88
- Karen Vandekerckhove, 'The Polluter Pays Principle in the European Community' (1993) 13 *Yearbook of European Law* 201–262
- David Vaughan and Vaughan-Lee-Kennelly-Riches *EU Competition Law: General Principles* (OUP, Oxford 2006)
- Hans Vedder, 'Environmental Protection and Free Competition: A New Balance?' (2001) 28 *Legal Issues of Economic Integration* 105–116
- Hans Vedder *Competition Law and Environmental Protection in Europe: Towards Sustainability?* (Avosetta Series, Europa Law Publishing, Groningen 2003)
- Hans Vedder, 'An Assessment of Carbon Capture and Storage under EC Competition Law' (2008) 29 *European Competition Law Review* 586–599
- Hans Vedder, 'Of Jurisdiction and Justification: Why Competition is Good for 'Non- Economic' Goals, But May Need to be Restricted' (2009) 6 *Competition Law Review* 51–75
- James S Venit, 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' (2002) 40 *Common Market Law Review* 545–580
- Peter L Vesterdorf and Mogens U Nielsen *State aid law of the European Union* (Sweet & Maxwell; Thomson Reuters, London 2008)
- Claire Vial *Protection de l'environnement et libre circulation des marchandises* (Collection Droit de l'Union européenne, Bruylant, Bruxelles 2007)
- Tjarda van der Vijver, 'Objective Justification and Article 102 TFEU' (2012) 25 *World Competition* 55–76
- Sybe A de Vries *Tensions within the Internal Market: The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Europa Law Publishing, Groningen 2006)
- Denis Waelbroeck, 'The Assessment of Efficiencies under Article 102 and the Commission's Guidance Paper' in Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (OUP, Oxford 2010) 115–129
- Richard Wainwright, 'Public Undertakings under Article 90' in Barry E Hawk (ed), *International Antitrust Law & Policy: Annual proceedings of the Fordham Corporate Law Institute 1989* (Juris, Huntington, NY 1990) 239–270
- Richard Wainwright and André Bouquet, 'State Intervention and Action in EC Competition Law' in Barry E Hawk (ed), *International Antitrust Law & Policy: Annual proceedings of the Fordham Corporate Law Institute 2003* (Juris, Huntington, NY 2004) 539–579
- Mike Walker and Joao P de Azevedo, 'Dominance: Meaning and Measurement' (2002) 23 *European Competition Law Review* 363–367
- Gabriela von Wallenberg and Michael Schütte, 'Art. 107 Beihilfeverbot: Ausnahmen' in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (Beck, München 2011 [45 Ergänzungslieferung])
- Martin Wasmeier, 'The Integration of Environmental Protection as A General Rule for Interpreting Community Law' (2001) 38 *Common Market Law Review* 159–177

Stephen Weatherill, 'Beyond Preemption? Shared Competences and Constitutional Change in the European Community' in David O'Keefe (ed), *Legal issues of the Maastricht Treaty* (Chancery Law, London 1994) 13–33

Stephen Weatherill, 'After Keck: Some Thoughts On How To Clarify The Clarification' (1996) 33 *Common Market Law Review* 887–908

Stephen Weatherill, 'Fair Play Please!: Recent Developments in the Application of EC Law to Sport' (2003) 40 *Common Market Law Review* 51–93

Stephen Weatherill, 'Measures of consumer protection as impediments to exports of goods' (2009) 5 *European Review of Contract Law* 149–158

Stephen Weatherill, 'The Road to Ruin: "Restrictions on use" and the circular lifecycle of Article 34 TFEU' ((No 58/2012 September 2012) 2012) <<http://ssrn.com/abstract=215239>> accessed 27 February 2013

Anja M Weidemann *Die Bedeutung der Querschnittsklauseln für die Kompetenzen innerhalb der Europäischen Gemeinschaft: Eine Untersuchung aus deutscher Sicht* (Lang, Frankfurt am Main 2009)

Jürgen Weigt *Die Förderung der Stromerzeugung aus erneuerbaren Energien in der Europäischen Union: Probleme und Herausforderungen im Spannungsfeld zwischen Binnenmarkt und Umweltschutz* (Lang, Frankfurt am Main 2009)

Stefan Weishaar *Towards Auctioning: The Transformation of the European Greenhouse Gas Emissions Trading System* (Kluwer Law International, Alphen aan den Rijn 2009)

Wolfgang Weiß, 'Articel 81 EC' in Christian Calliess and Matthias Ruffert (eds), *EUV - EGV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta [Kommentar]* (3rd edn Beck, München 2007)

Pål Wennerås, 'Towards an ever greener Union?: Competence in the field of the environment and beyond' (2008) 45 *Common Market Law Review* 1645–1685

Rein Wesseling, 'The Commission White Paper on Modernisation of EC Antitrust Law: Unspoken Consequences and Incomplete Treatment of Alternative Options' (1999) 20 *European Competition Law Review* 420–433

Rein Wesseling, 'The Draft-Regulation Modernising the Competition Rules:: The Commission is Married to One Idea' (2001) 26 *European Law Review* 357–378

Rein Wesseling, 'The Rule of Reason and Competition Law: Various Rules, Various Reasons' in Annette Schrauwen (ed), *The Rule of Reason: Rethinking Another Classic of European Legal Doctrine* (Europa Law Publishing, Groningen 2005) 59–78

'What Standard after Keck?' (2012) Special Issue of the *European Journal of Consumer Law*

Richard Whish *Competition Law* (6th edn OUP, Oxford 2009)

Richard Whish and David Bailey *Competition Law* (7th edn OUP, Oxford 2012)

Richard Whish and Brenda E Sufrin, 'Community Competition Law: Notification and Exemption -Goodbye to All That' in David Hayton (ed), *Law's future(s): British legal developments in the 21st century* (Hart, Oxford 2000) 135–162

Bernd Wieberneit *Europarechtlicher Ordnungsrahmen für Umweltsubventionen: Grundlagen, Bestand und Perspektiven* (Duncker & Humblot, Berlin 1997)

David Wilkinson, 'Steps Towards Integrating the Environment into other EU Policy Sectors' in Timothy O'Riordan and Heather Voisey (eds), *The Transition to Sustainability: The politics of Agenda 21 in Europe* (Earthscan, London 1998) 113–129

Kenneth G Willis and Guy Garrod *Landscape Values: A Contingent Valuation Approach and Case Study of the Yorkshire Dales National Park* (Newcastle upon Tyne 1991)

Peter von Wilmsky, 'Waste Disposal in the Internal Market: The State of Play after the ECJ's ruling on the Walloon Import Ban' (1993) 30 *Common Market Law Review* 541–570

Wouter P J Wils, 'The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation 17' in Barry E Hawk (ed), *International Antitrust Law & Policy: Annual Proceedings of the Fordham Corporate Law Institute 2000* (Juris, Huntington, NY 2001) 313–363

Daniel Wilsher, 'Does Keck discrimination make any sense?: An assessment of the non-discrimination principle within the European Single Market' (2008) 33 *European Law Review* 3–22

Tim Wißmann, 'Decentralised Enforcement of EC Competition Law and the New Policy on Cartels: The Commission White Paper of 28th of April 1999' (2000) 23 *World Competition* 123–154

Lorna Woods *Free Movement of Goods and Services within the European Community* (Ashgate, Aldershot 2004)

Lorna Woods and Philippa Watson *Steiner & Woods EU law* (11th edn OUP, Oxford 2012)

World Commission on Environment and Development *Our Common Future* (OUP, Oxford 1987)

P.J. Wils Wouter, 'La Compatibilité des Procédures Communautaires en Matière de Concurrence avec la Convention Européenne des Droits de l'Homme: Wils, La Compatibilité des Procédures Communautaires en Matière de Concurrence avec la Convention Européenne des Droits de l'Homme, Cahiers de Droit Européen, 1996, 329' (1996) 32 *Cahiers de Droit Européen* 329–354

Joshua D Wright, 'The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond' (2007) 3 *Competition Policy International* 24–57

Katja Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288–305

Hans-Peter Zils *Die Wertigkeit des Umweltschutzes in Beziehung zu anderen Aufgaben der Europäischen Gemeinschaft: Untersuchungen zur Anwendung der Querschnittsklausel Art. 130r Abs. 2 Satz 2 EWGV im Gemeinschaftsrecht* (v. Decker, Heidelberg 1994)