

## Should competition authorities integrate environmental protection into competition policy?

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### 1) INTRODUCTION

Competition law has been described by Portwood as one weapon in the armoury against the destruction of the environment<sup>1</sup>. The present paper will assess the theoretical justifications and practicability of this assertion primarily in relation to the European Union and its competition authority, the European Commission.

My central argument will be that the Commission should integrate environmental protection considerations into its policy not only because it is constitutionally bound to do so, but principally because the recent shift in EC competition policy towards effects-based analysis necessarily requires the quantification of environmental benefits in applying the core competition law provisions of Articles 81 and 82. This quantification is demonstrably difficult unless the Commission adopts a more scientific 'economic' approach to assessing the effect on non-priced scarcities as well as priced scarcities in its assessments<sup>2</sup>. However, I will argue that this dilution of analysis can only inhibit the robust and consistent application of competition law, especially given the pronounced emphasis in the Commission guidelines on pure 'traditional' efficiencies<sup>3</sup>, as well as the recent decentralising effect of Regulation 1/2003.

Nonetheless, the Commission ought to integrate environmental considerations into its decision to institute proceedings so as to fulfil its constitutional duty without creating conflict with the effects-based approach. A more communicative Commission should be developed using the 'multicriteria methods' stipulated by Aslaksen and Myhr<sup>4</sup> to ensure that the most fundamental environmental concerns are remedied outside the realm of competition law, where it is arguably more effectively achieved.

My work will be divided into four sections. In Section One, I will evaluate the constitutional duty to integrate sustainable development into competition policy. In Section Two, I will assess the validity of the theoretical arguments claiming an inherent

<sup>1</sup> T Portwood, *Competition Law and the Environment*, London: Cameron May, 1994.

<sup>2</sup> J A H Maks, *The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment*, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 16.

<sup>3</sup> The concept of 'traditional' efficiencies is delineated by Maks, *The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment*, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 5.

<sup>4</sup> I Aslaksen and I Myhr, *The Worth of a Wildflower: Precautionary Perspectives on the Environmental Risk of GMOs*, *Ecological Economics*, Vol 60(3), 2007.

complementarity between the goals of competition law and environmental protection. In Section Three, I will explore the arguments for integrating environmental considerations into each of the three stages of competition law enforcement, i.e. at the level of exemption or justification under Article 81 and 82, at the level of designing sanctions and during the exercise of the Commission's prosecutorial discretion. In Section Four, I will outline institutional improvements to encourage greater integration between the various directorates to ensure effective integration of environmental considerations into competition policy.

## 2) THE INTEGRATION PRINCIPLE

### (A) THE CONSTITUTIONAL NATURE OF THE DUTY TO INTEGRATE

Article 6 EC states that 'environmental protection requirements must be integrated into the...implementation of the Community policies and activities [...], with a view to promoting sustainable development'. In Article 3(1)(g) EC, one of the Community policies described includes 'a system ensuring that competition in the internal market is not distorted', i.e. competition policy. Given this express stipulation and the use of the imperative verb in Article 6 EC it is argued that the Commission and the European Courts alike should integrate the goal of 'sustainable development' into their activities and decisions on competition law.

Basaran argues that Article 6 EC does not create a constitutional duty, and that it merely 'constitutes a general political declaration whose parameters and scope are not clear enough'<sup>5</sup>. She argues that because the integration principle was not inserted under the title for competition policy before the Amsterdam Treaty, Article 6 EC only has declaratory status. However, despite the absence of clear designation a duty does apply because of the explicit recognition by the Commission itself in the XXIII Competition Report of the direct applicability of Article 6 EC to competition policy<sup>6</sup>. The duty to 'integrate' is not a matter for institutional discretion as Basaran posits.

Furthermore, in the case of *Albany*<sup>7</sup>, the European Court of Justice cited the Commission's tasks in applying competition law as including the goal of Article 2 EC of 'a high level of employment and social protection'.<sup>8</sup> In that decision, the Court accepted a restriction of competition as 'inherent in collective agreements between organisations representing employers and workers', and that the 'social policy objectives' of Article 2 EC

<sup>5</sup>H R. Basaran, How Should Article 81 EC Address Agreements That Yield Environmental Benefits, *European Competition Law Review*, 27 (9) 2006, page 481.

<sup>6</sup>Commission, XXIII Competition Report (1993), paragraph 162, cited in H B Vedder, Voluntary Agreements and Competition Law, *Nota di Lavoro* 79 2000 available at SSRN:

<http://ssrn.com/abstract=253333> or DOI: 10.2139/ssrn.253333, at his own footnote 53.

<sup>7</sup>*Albany International*, 1999, Case C67/96 ECR I-5751.

<sup>8</sup>H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 127.

would be 'seriously undermined' if the agreements were subject to Article 85(1) (now Article 81(1)) EC. This constitutes concrete enforcement by the Court of the policy-oriented Treaty Articles. Moreover, Article 2 EC states that 'the Community shall have as its task...to promote...the quality of the environment'. Given the prioritisation in *Albany* of Article 2 EC's imperatives, its subsection on environmental considerations should *a fortiori* have an equal 'constitutional nature'<sup>9</sup>.

Nonetheless, I would agree with Basaran that Article 6 EC does not explicitly delineate how the Commission ought to integrate environmental considerations into competition policy. Therefore I would argue that the legislative Community institutions intended for the Commission to have discretion as to how it can include environmental considerations but not whether it should.

#### (B) THE REASONING BEHIND THE INTEGRATION PRINCIPLE

The reasoning behind the integration principle provides compelling insight as to why environmental protection and competition policy should be linked in practice. Firstly, 'the possibility of improving competitiveness by means of cleaner technologies, energy efficiency [and] internalization of environmental externalities'<sup>10</sup> was described as a motivating factor in the European Commission's White Paper on Growth, Competitiveness and Employment. This statement explicitly recognises a directly proportional relationship between efficiencies and environmental protection as posited by ecological modernisation theory<sup>11</sup>.

Furthermore, the integration principle resulted from the proliferation of sustainable development theory at the international level. The concept has been defined as a development 'that meets the needs of the present without compromising the ability of future generations to meet their own needs'<sup>12</sup>. In simple terms, it requires economic and social development which is in accordance with environmental protection considerations<sup>13</sup>. It has been entered into 'constitutions, many domestic laws and international agreements'<sup>14</sup>.

The ubiquitous affirmation of the theory is, however, a weak argument for its specific incorporation into competition policy. Indeed, the concept of sustainable development has been criticised as having definitional problems. 'Sustainable' implies continuous or ongoing

<sup>9</sup>H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 131.

<sup>10</sup>Liberatore, 1997, page 109.

<sup>11</sup>See Section 2(B) for an evaluation of EMT.

<sup>12</sup>Stockholm Declaration on the Human Environment, as cited by M W Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, Review of European Community and International Environmental Law, 15(2) 2006, page 175.

<sup>13</sup>H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 14.

<sup>14</sup>For instance, the Stockholm Declaration, above at footnote 12, as well as the Rio Declaration on Environment and Development, UN Doc. A/CONF 151/6/R.ev.1, 1992. Quote taken from M W Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, Review of European Community and International Environmental Law, 15(2) 2006, page 175.

activity, whereas 'development' implies a conservative steady state<sup>15</sup>. The scope of the concept has also evolved. For instance, the social sphere was only fully recognised at the 2002 Johannesburg Summit on Sustainable Development<sup>16</sup>. Given its broad and uncertain meaning, one could argue that competition authorities cannot effectively address environmental concerns without more specific guidance.

Behind the international ratifications, institutional actors have been motivated by growing concern about the environmental impact of rapidly developing liberal economies, and more specifically, of the integration of the European economy<sup>17</sup>. With growing attention on the depletion of environmental resources<sup>18</sup> and the 'strong inter-linkages between economy, ecology and social development', sustainable development is a clearly prioritised policy goal which should be directly integrated into the process of fostering a competitive economy<sup>19</sup>.

### 3) ASSESSING THE COMPLEMENTARITY OF THE GOALS OF COMPETITION LAW AND ENVIRONMENTAL PROTECTION

#### (A) THE GOAL OF COMPETITION LAW

The main goal of competition law remains controversial<sup>20</sup>. However, one of the shared premises among legal and economic theorists is that competition law should intervene when there is market failure, which is defined as a situation where the state of the market is such that companies can only maximise profit through raising price and limiting production<sup>21</sup>, i.e. when there is an inefficient use of scarce resources. Much debate has been generated about the correct focus of competition authorities for enhancing competitiveness most effectively. For instance, Schumpeter argues that encouraging 'competition in the provision of new commodities and technologies' or dynamic efficiency is what contributes to economic development<sup>22</sup>. This perspective focuses on economic efficiency of business practices.

An alternative model is the 'economic freedom' paradigm, which requires competition authorities to foster pluralism in the markets. Consequently, efficient use of resources is an indirect result of that model<sup>23</sup>.

<sup>15</sup> Available at <http://www.jsdnp.org/jm/glossary.html>.

<sup>16</sup> MW Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, *Review of European Community and International Environmental Law*, 15(2) 2006, page 175.

<sup>17</sup> Liberatore, 1997, page 109.

<sup>18</sup> Available at <http://news.bbc.co.uk/1/hi/business/5305950.stm>.

<sup>19</sup> MW Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, *Review of European Community and International Environmental Law*, 15(2) 2006, page 176.

<sup>20</sup> MW Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, *Review of European Community and International Environmental Law*, 15(2) 2006, page 173.

<sup>21</sup> G Monti, *EC Competition Law*, *Law in Context Series*, Cambridge University Press, 2007, page 55.

<sup>22</sup> P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 53.

<sup>23</sup> G Monti, *EC Competition Law*, *Law in Context Series*, Cambridge University Press, 2007, page 23.

(B) THE GOAL OF ENVIRONMENTAL PROTECTION

Ecological Modernisation (EM) theory posits that continuous economic growth and environmental protection are compatible. 'Once society reaches a certain per capita income...further growth produces improvement in environmental quality'<sup>24</sup>. More specifically, EM theory 'views environmental degradation as an indicator of poor and inefficient resource use'<sup>25</sup>. Therefore, one can discern a presumptive complementarity with the core goal of competition law.

However, a central axiom is that the 'market can offer real policy solutions'<sup>26</sup> to environmental problems 'through the use of appropriate pricing mechanisms for both production inputs and outputs'<sup>27</sup>. An example of such a mechanism would be the Polluter Pays Principle (PPP)<sup>28</sup>. According to this principle 'the polluter should bear the expenses of [pollution prevention]'<sup>29</sup>. This entails the internalisation of the externality of environmental pollution, meaning that the costs of pollution are passed on to the cost of goods and services. The implementation of PPP is achieved through state issued regulations. Arguably, this is incompatible with the 'economic freedom' conception of competition policy. It could result in less financially strong businesses leaving the market because they cannot pay the price of their pollution, thereby resulting in a more concentrated market structure.

Furthermore, a consumer total welfare analysis would quickly reveal an incompatibility with competition law because consumers are paying an increased price for a product with new pretensions to sustainability, thus decreasing utility to those who did not set out to buy an eco-friendly product.

A specific example of the conflict between competitiveness and environmental protection in the application of PPP is given by Bennett. He details how environmental liability insurance ensures adherence to PPP through the accurate linking between the premium paid and the risk posed by the buyer. However, in soft commercial marine reinsurance markets, i.e. where prices are pushed down due to fierce competition between insurers, the effective differentiation between premiums and risk is acutely distorted<sup>30</sup>, meaning that bad risks do not pay a premium commensurate with the risk they pose to the environment.

<sup>24</sup>D Wilkinson, *Environment and Law*, Routledge Introduction to Environment Series, Routledge Publishing, 2002, page 177.

<sup>25</sup>R Hollander & G Curran, *The Greening of the Grey: National Competition Policy and the Environment*, *Australian Journal of Public Administration* 60(3) 2001, page 44.

<sup>26</sup>R Hollander & G Curran, *The Greening of the Grey: National Competition Policy and the Environment*, *Australian Journal of Public Administration* 60(3) 2001, page 43.

<sup>27</sup>R Hollander & G Curran, *The Greening of the Grey: National Competition Policy and the Environment*, *Australian Journal of Public Administration* 60(3) 2001, page 42.

<sup>28</sup>Toke and Strachan in their article 'Ecological Modernisation and Wind Power in the UK', *European Environment*, Vol 16, Issue 3, page 156, explain how the third principle of EM theory is the 'polluter pays' principle.

<sup>29</sup>D Wilkinson, *Environment and Law*, Routledge Introduction to Environment Series, Routledge Publishing, 2002, page 120.

<sup>30</sup>P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 57.

To counteract this, an International Group Agreement was signed by the International Group of Protection and Indemnity Clubs whereby the member insurance companies agreed not to engage in price competition on premium rates. This anti-competitive agreement ‘increases the Club’s power over their customers, making it difficult for individual shipowners to play off Clubs against one another and obtain premiums incommensurate with the risk they pose’<sup>31</sup>. Hence, indirectly, this agreement contributes to higher standards of environmental protection as the higher premiums demanded for bad risks should deter environmentally harmful activities.

From this analysis, we can see that it is blind optimism to assert an inherent complementarity between the goals of competition law and environmental protection. Their reciprocity is contingent upon what we choose as the most effective means of achieving competitiveness. We can already discern scenarios where competition policy ought to be restrained so as to better effect environmental protection. This paper will now progress to analyse how environmental considerations could be most effectively integrated into the implementation of EC competition policy.

#### 4) IMPLEMENTATION OF THE INTEGRATION PRINCIPLE AT THE EC LEVEL

##### (A) THE APPLICATION OF ARTICLE 81

Changes in EC competition policy have reoriented the enforcement focus away from the goal of the economic freedom model towards enhancing economic efficiencies for consumer benefit<sup>32</sup>. Article 81(1) EC is designed to identify activities having as their object or effect the prevention, restriction or distortion of competition, and Article 81(3) EC creates a justification or exception for such activities where they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Paragraph 24 of the Notice on Guidelines on the Application of Article 81(3) EC stipulates that ‘the prohibition of Article 81(1) only applies where, on the basis of proper market analysis, it can be concluded that the agreement has likely anti-competitive effects on the market’<sup>33</sup>. As Boute argues, ‘despite the non-binding force of these Guidelines, it can be considered as an ‘authoritative interpretation of the law’<sup>34</sup>. From this we can deduce that “the basic methodology of Article 81(1) is the effects-based approach’<sup>35</sup>.

<sup>31</sup>P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 62.

<sup>32</sup>G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 46.

<sup>33</sup>Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty Official Journal C 101 , 27/04/2004 P. 0097 - 0118

<sup>34</sup>A Boute, *Environmental Protection and EC Anti-Trust Law: The Commission’s Approach for Packaging Waste Management Systems*, *Review of European Community & International Environmental Law* 15 (2), 2006, page 148.

<sup>35</sup>H R Basaran, *How Should Article 81 EC Address Agreements That Yield Environmental Benefits*, *European Competition Law Review*, 27 (9) 2006, page 479.

Furthermore, in order to rely on the Article 81(3) EC exemption 'it must be shown that the agreement generates efficiencies... and that the pro-competitive effects outweigh the anticompetitive effects'<sup>36</sup>. Hence, on the face of the legislation and Commission communications, the analysis conducted by both the Commission and the Community Courts in respect of Article 81 EC necessitates the 'economization'<sup>37</sup> of the benefits to be derived from environmentally-oriented activities.

The Community's purported policy of pursuing economic efficiency through the application of Article 81 EC as a means for enhancing competitiveness is justified because it 'provides a realistic benchmark by which to measure the presence of competition'<sup>38</sup>. Economic analysis precisely determines the effect on both market and consumer welfare by quantifying 'competitive price levels, cost reduction and higher quality products and services'<sup>39</sup>.

However, arguably this approach follows an unjustifiably narrow conception of economics. Madsen outlines two conceptions of economics. Firstly, the 'traditional' approach, which assesses how market activity affects priced scarcities such as reduced prices or cost savings. The alternative is the 'scientific' definition which assesses the efficient use of non-priced scarcities e.g. reduced waste packaging. Robbins argues that 'economics is entirely neutral between ends'<sup>40</sup>, which implies that both scarcities could be easily integrated into economic analysis.

Nevertheless, Madsen highlights the operation of the Dutch competition law system prior to its reform in 1998. It stipulated that 'every competition restricting agreement or action was allowed unless it harmed the general interest'. Through the 'general interest' proviso, it followed a 'scientific' conception of economics in allowing anti-competitive behaviour which propagated efficient use of non-priced as well as priced scarcities. However, in practice, this reduced the levels of innovation and 'the Netherlands built a solid reputation as a cartel country'<sup>41</sup>, decreasing the efficacy of competition policy.

<sup>36</sup>Alexander Schaub, quoted G Monti, *EC Competition Law*, Law in Context Series, Cambridge University Press, 2007, page 48.

<sup>37</sup>H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 7.

<sup>38</sup>G Monti, *EC Competition Law*, Law in Context Series, Cambridge University Press, 2007, page 22.

<sup>39</sup>J A H Madsen, The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 7.

<sup>40</sup>J A H Madsen, The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 5.

<sup>41</sup>J A H Madsen, The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at: <http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF>, page 8.

Alternatively, environmental benefits could be economized within the ‘traditional’ conception of economics enshrined in Article 81(3) EC. Indeed, environmental amelioration has been classed as an economic benefit in the Commission’s Guidelines on the Applicability of Article 81(1) to Horizontal Agreements<sup>42</sup> where this leads to reduced environmental pressure. However, this arguably creates an insuperable barrier for many environmental agreements which do not generate economic efficiencies that can be proven in a cost benefit analysis. ‘How does one evaluate economically, for instance, the economic gains of protecting biodiversity or a landscape’<sup>43</sup>?

Furthermore, it has been argued that cost-benefit analysis without qualitative assessment of the restriction is necessarily one-dimensional when dealing with the unique value of nature<sup>44</sup>. Thus, Vedder argues for a combined quantitative and qualitative test for assessing restrictions of competition which allows non-economized environmental benefits to be ‘recognised as autonomous advantages capable of justifying an exemption’<sup>45</sup>. Such a radical approach would generate perplexing inconsistency and inefficacy in the application of competition law much like the situation that developed in the Netherlands. Vedder later admits that this mechanism would entail ‘a shift of perspective from competition as an end in itself to competition as a means to achieve sustainable growth’<sup>46</sup>. This approach entails a clear *detournement de pouvoir* by the Commission should it issue decisions based on purely non-competition considerations because this would clearly flout the explicit legal objective of Article 81 EC<sup>47</sup> and bypass the oversight of the Council and Parliament.

<sup>42</sup>Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements OJ C 3, 6.1.2001, p. 2–30, paragraph 193.

<sup>43</sup>A Boute, Environmental Protection and EC Anti-Trust Law: The Commission’s Approach for Packaging Waste Management Systems, Review of European Community & International Environmental Law 15 (2), 2006, page 155.

<sup>44</sup>I Aslaksen and I Myhr, The Worth of a Wildflower: Precautionary Perspectives on the Environmental Risk of GMOs, Ecological Economics, Vol 60(3), 2007, section 3.

<sup>45</sup>H B Vedder, Voluntary Agreements and Competition Law, Nota di Lavoro 79 2000 available at SSRN: <http://ssrn.com/abstract=253333> or DOI: 10.2139/ssrn.253333, page 14.

<sup>46</sup>H B Vedder, Voluntary Agreements and Competition Law, Nota di Lavoro 79 2000 available at SSRN: <http://ssrn.com/abstract=253333> or DOI: 10.2139/ssrn.253333, page 16.

<sup>47</sup>This can be shown in paragraph 4 of the Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements OJ C 3, 6.1.2001, p. 2–30, which states that “The Commission has to ensure effective competition is maintained”. Therefore, the primary priority does not encompass public policy considerations.

Furthermore, this approach creates the risk of Type III errors in competition law enforcement. Decisions constituting Type III errors rely on speculative, unstable criteria which do not facilitate the transparent predictability of competition policy<sup>48</sup>. This inconsistency can be amply demonstrated by the furor generated by the *CECED* case<sup>49</sup>. Here, the Commission assessed a voluntary agreement designed to phase out less eco-friendly washing machines under Article 81(3) EC. The Notice Guidelines stipulate that such an agreement would qualify for exemption provided that individual economic benefits accruing to consumers can be found<sup>50</sup>. Failing that, an exemption may result from economized collective environmental benefits.

However, in *CECED*, the Commission outlined the collective environmental benefits as well as individual economic benefits accruing to consumers<sup>51</sup>. This superfluous inclusion of this 'collective line of reasoning'<sup>52</sup> seems to indicate that environmental considerations, such as reduced emissions and electricity consumption, will result in a fair share for consumers in themselves and are capable of constituting standalone justifications for environmental agreements. This analysis is inconsistent with a traditional economic approach oriented towards a narrow conception of consumer welfare. For instance, this attention to qualitative efficiencies opens up the possibility for agreements to be exempted that internalise external environmental costs which are passed on to consumers. Despite its emphasis on their economization, the Commission's reasoning has veered towards Vedder's ideal conception of an exemption based on purely environmental benefits. This creates an intrinsic uncertainty and unpredictability in competition law enforcement which can only hinder its effective application.

Another reason for disallowing the integration of environmental protection into the application of Article 81 EC is Regulation 1/2003 which entails the direct applicability of Article 81(3) EC<sup>53</sup>. This means that national courts will have the authority to declare an environmental agreement qualifying for the exception to Article 81(1). Given the uncertain weighting to environmental benefits in *CECED* and the other 'landmark case'<sup>54</sup> of *DSD*, a prominent risk has been created of the non-uniform balancing of consumer welfare and environmental considerations in national competition authority decisions across the Community space. Basaran corroborates this risk of diversity when she states that 'following the Modernisation Regulation, public policy considerations... were used as a pretext for the protection of national interests'<sup>55</sup>.

<sup>48</sup>H R Basaran, How Should Article 81 EC Address Agreements That Yield Environmental Benefits, *European Competition Law Review*, 27 (9) 2006, page 481.

<sup>49</sup>*CECED* 2000 OJ L187/47.

<sup>50</sup>Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements OJ C 3, 6.1.2001, p. 2–30, paragraphs 193 and 194.

<sup>51</sup>*CECED* 2000 OJ L187/47, at paragraphs 52–57.

<sup>52</sup>H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 172.

<sup>53</sup>Regulation 1/2003 On the Implementation of the Rules of Competition in Articles 81 and 82 of the Treaty (Modernisation Regulation) 2003 OJ L1/1, paragraph 4.

<sup>54</sup>H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 194.

<sup>55</sup>H R Basaran, How Should Article 81 EC Address Agreements That Yield Environmental Benefits, *European Competition Law Review*, 27 (9) 2006, page 481.

Hence, it is clear that the integration of environmental considerations can only distort the clear conception of economics denoted in Article 81(1) and (3) EC. The posture adopted by the Commission in *CECED* is in clear conflict with the legislation and guidelines on the role of public policy in competition decisions. This conflict can only morph into Community-wide inconsistency due to the risk of manipulation by national competition authorities to propound national environmental policies.

(B) THE APPLICATION OF ARTICLE 82

Vedder posits that environmental considerations could be integrated as a basis for arguing that there is no abuse of a dominant position under Article 82 EC and hence that this kind of behaviour is objectively justified<sup>56</sup>.

In the case of *DSD*, an agreement between a dominant firm DSD and other waste disposal companies which facilitated the collection and recovery of sales packaging was condemned abusive of its dominant position under Article 82<sup>57</sup>. It was formed to fulfil obligations derived from the environmental regulation, the German Packaging Ordinance. The Commission found that the high price charged by DSD for its own recycling services constituted an exploitative abuse and that an exclusionary abuse had been committed in preventing viable competitors from entering the market.

However, Vedder plausibly argues that this monopolistic situation is almost always an inevitable result of state regulations enforcing producer responsibility<sup>58</sup>. The ordinance in *DSD* required the exemption system to cover at least one Bundesland creating an entry barrier of considerable sunk costs. Vedder argues that the emergence of a new competitor would be inefficient because of the multiplication of investment needed for the infrastructure.

Nonetheless, the Commission's consistent refusal to allow environmental protection for objective justification can be substantiated. As Vedder explains, the doctrine of objective justification is based on 'contractual freedom...and the need to protect competition'. Public policy does not form any part of this doctrine because Article 82 EC arguably covers more flagrant anti-competitive behaviour than that covered by Article 81 EC. To incorporate environmental considerations at this level of anti-competitive risk would seriously threaten the efficacious application of competition policy.

<sup>56</sup>H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 202.

<sup>57</sup>*DSD* 2001 OJ L166/1.

<sup>58</sup>H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 221.

Furthermore, in the cases of *Hilti Ag*<sup>59</sup> and *Tetra Pak*<sup>60</sup>, it was decided that restrictive measures did not qualify for objective justification despite being geared towards the public interest<sup>61</sup>, because there were less restrictive measures in place to achieve this goal. In *Tetra Pak*, the Court referred to 'adequate technical solutions...and a legal framework' intended to specifically solve the public interest concern in the facts. This constitutes an explicit recognition by the Commission of the superior effectiveness of other regulatory regimes to solve public policy concerns.

Finally, the Commission discussion paper even suggests that there is an efficiency defence embedded in Article 82 EC which is modelled on Article 81(3)<sup>62</sup>. As expounded above, pure efficiency analysis would guarantee a consistent and formulaic approach across the board for the competition law provisions which would be as equally muddled by the integration of environmental non-economic benefits under Article 82 as under Article 81.

#### (C) INTEGRATION AT THE LEVEL OF SANCTIONS

Environmental concerns could be integrated through altering the punishment meted out to anti-competitive businesses so as to also propound environmental goals. However, the contradictoriness of environmental and competition goals makes the choice of dual purpose sanctions deeply problematic. This conflict can be shown in the case of DSD.

After finding that DSD's payment system and exclusive control of the essential facility of the 'Green Dot' constituted an abuse of a dominant position under Article 82, the Commission then outlined its remedy. One part of the punishment was to require DSD to grant partial licenses to use the 'Green Dot' trade mark to competing exemption systems, in order to enhance competition and open up the collection and recycling market. This enhanced the likelihood of the emergence of multiple systems using their own distinguishing symbols, e.g. green, red and pink dots.

Vedder puts forward a double-edged critique of this pro-competitive sanction. Firstly, it will hinder the environmental goal. Due to the recycling decision being made by the consumer, 'the emergence of multiple systems is likely to confuse the consumer and lead to 'recycling fatigue'<sup>63</sup>.

<sup>59</sup>Hilti AG v Commission, T-30/89, 1991 ECR II-1439.

<sup>60</sup>Tetra Pak v Commission, T-83/91, 1994 ECR II-755.

<sup>61</sup>G Monti, EC Competition Law, Law in Context Series, Cambridge University Press, 2007, page 211.

<sup>62</sup>G Monti, EC Competition Law, Law in Context Series, Cambridge University Press, 2007, page 208.

<sup>63</sup>H Vedder, Competition Law and Environmental Protection in Europe – Towards Sustainability? Groenigen-Europa Law Publishing, 2003, page 217.

Secondly, DSD opposed the obligation to license as imposing a duty to finance the cost of recycling and collection in advance, while not knowing what proportion of packaging would be used under their subcontractor's capacity. The Commission responded to this by instituting a quota system for the market players. If the quotas were not met by either DSD or its competitors, mutual compensation would take place. Vedder justifiably criticises this arrangement as hindering the working efficiency of the waste management system, which, in any case, was envisaged by the original pro-environmental legislation to take place in an arguably more efficient monopolistic market. This case provides an example of how 'doubling up' these two policy objectives when devising punishment is prohibitively difficult.

Finally, I would concur with Monti in that the integration of environmental considerations at this late stage would constitute a misuse of Commission powers. The aim of competition law sanctions is to maintain competitive markets and 'to deter firms from acting unlawfully'<sup>64</sup>, but not to sustain an activist industrial policy within the realm of competition policy.

#### (D) THE PROPER LOCUS OF THE INTEGRATION PRINCIPLE

It is submitted that the Commission should fulfil its constitutional duty under Article 6 EC at the preliminary stage of assessing whether or not to take legal action under EC competition law as this is the most legally satisfactory and environmentally effective option.

Integrating public policy considerations towards the beginning of the enforcement process has already been instituted by the Community Courts. In the decisions of *Wouters*<sup>65</sup> and *Brentjens*<sup>66</sup>, the Court applied the 'European rule of reason'<sup>67</sup>, which stated that EC provisions prohibiting restrictions on the free movement of services did not apply to these activities, where particular national interests were being pursued. This approach was mirrored in relation to environmental protection in the case of *Preussen Elektra*<sup>68</sup> where the ECJ exempted a German law from competition law which reserved a percentage of the German energy market for renewable energy because this law forwarded a legitimate social goal<sup>69</sup>.

<sup>64</sup>G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 243.

<sup>65</sup>*Wouters and Others v Algemene Raad van de Nederlandse Order van Advocaten* C-309/99 2002 ECR I-1577.

<sup>66</sup>*Brentjens' Handelsonderneming BV*, C-115-17/97 1000 ECR I-6025.

<sup>67</sup>G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 112.

<sup>68</sup>*Preussen Elektra v Commission*, 2001, Case C-379/98 ECR I-2099.

<sup>69</sup>MW Gehring, *Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law*, *Review of European Community and International Environmental Law*, 15(2) 2006, page 183.

However, it is submitted that the decision of non-action because of environmental concerns should be taken by the Commission during its initial investigatory procedure. Both *Brentjens* and *Wouters* represent examples of a Community Court responding to the Commission's poor exercise of prosecutorial discretion. 'It has...invented its own approach to reconcile conflicting interests, excluding the application of Article 81 when more powerful interests have to be attained'<sup>70</sup>. This flagrant balancing of EC policies need not occur at the level of the Community Court, but could be achieved more cost-effectively and legitimately by the policy directorates of the Commission. As Bailey argues, 'Competition law is merely that: competition law. The decision of whether to enforce this competition law is a matter for competition policy'<sup>71</sup>. Once anti-competitive behaviour is prosecuted under the competition law provisions, the competition policy domain and its associated objectives are chosen, i.e. competitiveness and economic efficiency. For these to be attained most efficiently and consistently during enforcement, Court judgements should not need to devote time to balancing extraneous policy priorities when only a relatively cursory investigation can be effected.

This evaluation could be better achieved by the Commission during the exercise of prosecutorial discretion through the inclusion of more scientific analysis, substantial consultation with national authorities and greater cross-Commission dialogue on environmental cases so as to decide whether (or not) to bring an action under competition policy.

##### 5) "COMMISSION INTEGRATION" FOR THE INTEGRATION PRINCIPLE: A NEW APPROACH

In order to operationalise the integration principle in competition policy in a legally consistent manner which does not hinder the effective enforcement of competition law, the Commission must join up its policy directorates to form a prosecutorial panel so as to make more fitting choices of pro-public policy and potential anti-competitive activities for prosecution.

Bennett explains how the structure of the Commission prevents this consensual approach. Collaboration between directorates is inhibited by their different working practices and the lack of formalised procedure for inter-directorate consultation<sup>72</sup>. Barker's description of a 'sectoral fragmentation of responsibility'<sup>73</sup> is particularly evident in relation to competition policy, where the DG IV decides by itself whether or not to grant an exemption on environmental grounds<sup>74</sup>. This dislocation creates a risk that the pro-environmental benefits of anti-competitive agreements are not properly assessed.

<sup>70</sup>G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 119.

<sup>71</sup>P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 5.

<sup>72</sup>P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 62.

<sup>73</sup>The Politics of Sustainable Development: Theory, Policy and Practice within the European Union, Edited by S Baker, M Kousis, D Richardson, S Young, Taylor & Francis Publishing, 1997, page 95.

<sup>74</sup>P Bennett, *Anti-Trust? European Competition Law and Mutual Environmental Insurance*, *Economic Geography*, Vol 76 (1) 2000, page 62.

As Liberatore posits, ‘defining how to ‘better’ pursue environmental quality is a complex process where political and economic interests, scientific evidence and societal perceptions interact’<sup>75</sup>. In relation to activities with environmental ramifications, a combined investigatory panel with representatives from DG IV and DG XI could take the prosecutorial decision on the basis of combined dialogue. Each DG could develop ‘red lines’ to determine which policy interest should gain priority in which circumstances. An example would be the Commission’s stance in *SpA Monopole Vs GDB*<sup>76</sup>, where it held that environmental benefits could not excuse an abuse of a dominant position that excluded new market entrants<sup>77</sup>.

Aslaksen and Myhr outline how dialogue between DG IV and DG XI could suffer because of their competing disciplines. They explain how this clash could be resolved by the use of multi-criteria methods<sup>78</sup>, an evaluation methodology that considers different objectives by the attribution of a weight to each measurable objective.

Nonetheless, the evaluation of the environmental risk of these agreements or practices should not be carried out by Commission officials alone, as such an approach could fall prey to the criticism of *dirigisme*, where Commissioners assume they ‘know more about how to make the business work than the businessmen involved’<sup>79</sup>. ‘Scientific experts can provide the best available risk assessment’<sup>80</sup>, and including representatives from national authorities will help determine the exact environmental and market effect of the activities through ‘providing knowledge of local conditions and resources’.

<sup>75</sup>Liberatore, 1997, page 112.

<sup>76</sup>XXII Report on Competition Policy, 1993, paragraph 240.

<sup>77</sup>P M Bailey, The Application of Competition Law and Policy to Environmental Agreements in an Oligopolistic Market, (2000). FEEM Working Paper No. 73.2000. Available at SSRN: <http://ssrn.com/abstract=248118>, page 15.

<sup>78</sup>I Aslaksen and I Myhr, The Worth of a Wildflower: Precautionary Perspectives on the Environmental Risk of GMOs, Ecological Economics, Vol 60(3), 2007, in the section entitled ‘Fitness of purpose; the need for extended peer-review’.

<sup>79</sup>G Monti, EC Competition Law, Law in Context Series, Cambridge University Press, 2007, page 116.

<sup>80</sup>I Aslaksen and I Myhr, The Worth of a Wildflower: Precautionary Perspectives on the Environmental Risk of GMOs, Ecological Economics, Vol 60(3), 2007, section 4.2.

6) CONCLUSION

In sum, the Commission is bound by a constitutional duty to integrate environmental considerations into competition policy because of the express language of the EC Treaty. The Commission's explicit recognition of the binding nature of the integration principle corroborates this observation.

The Commission's methodology for weighing environmental considerations with competition policy risks inconsistency and inefficacy since these balancing policy priorities often do not complement each other. This theoretical conflict is demonstrated at the level of setting sanctions. Furthermore, the effects-based analysis necessary for both Article 81 and 82 constitutes a veritable barrier for weighing in environmental considerations. However, as Monti argues, the Commission's narrow focus on efficiency is beneficial for ensuring uniform application of competition law and consequent legal certainty across the EU territory<sup>81</sup>. Hence, at the level of applying competition law, 'it might be a proper choice for competition policy to concentrate on its traditional core business and not to bungle around with environmental externalities'<sup>82</sup>.

I submit that weighing in environmental considerations into the early decision-making stages of the enforcement process prevents the awkward economization of environmental benefits before the Courts. In order to effect this change, root and branch reform is required. Relevant directorates should be able to weigh their scientific and economic analysis together to come to a well considered decision for relevant action. This is the only way the respective policy concerns can be effectively addressed and constitutes a viable option for Vedder's *modus vivendi* for the integration principle<sup>83</sup>.

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<sup>81</sup>G Monti, *EC Competition Law, Law in Context Series*, Cambridge University Press, 2007, page 119.

<sup>82</sup>J A H Moks, *The "New" Horizontal Agreements Approach in the EU: an "Economic" Assessment*, Paper presented at the Workshop on "Reform of EC Competition Policy" Jointly organised by EIPA and HWWA, 10-11 Dec 2001, Maastricht, available at:

<http://www.fdewb.unimaas.nl/eurecom/ThenewhorizontalEUapproach3.PDF> page 16.

<sup>83</sup>H Vedder, *Competition Law and Environmental Protection in Europe – Towards Sustainability?* Groenigen-Europa Law Publishing, 2003, page 4.