EU Competition Policy and the Environment

- The role of environmental considerations under Article 101 TFEU

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Abstract

The role of private market actors and competition in combating environmental problems is a highly relevant topic for the coming decades. While environmental cooperation between market actors may promote environmental policy objectives, such cooperation may also raise concerns from a competition policy perspective. This thesis therefore aims to examine the role of environmental considerations in the assessment of anticompetitive cooperation between undertakings under Article 101 TFEU.

The conclusion of this thesis is that EU environmental policy and competition policy has become increasingly intertwined in the recent decades. Nevertheless, it remains uncertain whether environmental considerations may play a role under Article 101 TFEU. On one hand, the EU courts have yet not ruled on this matter. On the other hand, the Commission seems to have taken environmental considerations into account in the past, but has, in recent years, changed its approach and now rejects the relevance of other objectives than achieving efficiency (i.e. ‘consumer welfare’) under Article 101 TFEU.

The author has however argued that a systematic and teleological interpretation of the EU Treaties and Article 101 TFEU provides that environmental considerations must, in deed, be integrated into the assessment under Article 101 TFEU. Such an interpretation is motivated, in particular, because the integration principle in Article 11 TFEU requires that ‘environmental requirements’ must be integrated into other EU policy areas. As to the legal meaning of the integration principle, the CJEU has confirmed that the principle may affect the interpretation of EU law, even outside the field of environmental policy.

The integration principle does, however, not provide clear guidance on how to integrate environmental considerations into other EU policy areas. Therefore, the author has proposed ‘The Integration Model’ as a model for integrating such considerations into the assessment under Article 101 TFEU. The model is based on a number of considerations, including an interpretation of the integration principle and the observations that environmental degradation may be described as an efficiency problem and that environmental resources may be economically valued. In short, this model means that where an agreement restricts competition, within the meaning of Article 101.1 TFEU, but promotes environmental objectives, as defined in the EU Treaties, the environmental benefits generated by that agreement, after being transformed into economic terms, must be taken into account in the assessment under Article 101.3 TFEU.
<table>
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<tr>
<th>Abbreviation</th>
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<tr>
<td>EAP</td>
<td>Environment Action Programme</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
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1 Introduction

"We have to recognise that every breath of air we take, every mouthful of food we take, comes from the natural world. And if we damage the natural world, we damage ourselves. We are one coherent ecosystem. It’s not just a question of beauty, or interest, or wonder – the essential ingredient of human life is a healthy planet. We are in danger of wrecking that."

- Sir David Attenborough

1.1 Background Topic

At the time of writing, environmental concerns and climate change are hot topics on the EU agenda. According to the Paris agreement, the EU has undertaken, together with the rest of the Member States of the UN, to reduce emissions of green house gas in order to hold the increase of the global average temperature by 2100 to well below 2°C above pre-industrial levels.1 However, recent research shows that emissions have increased since the adoption of the agreement and that a development in line with current trends would result in a global average temperature well above the target.2 Thus, increased efforts for emission reductions will be necessary in the coming decades if the target is to be met.

In the debate on environmental concerns, the free market, consumption patterns, and the competitive process are often highlighted as driving forces behind environmental degradation and climate change. Proposals for solutions to environmental problems therefore often involve attempts to steer these driving forces towards environmentally favourable outcomes. In recent decades, environmental considerations have consequently started to play an increasingly important role in the market place. From a political perspective, environmental policy has developed into a fundamental policy area within the EU. At the same time, EU environmental policy has also developed towards an increased use of market-based instruments, with the aim of creating economic incentives for market actors to act more environmentally-friendly. From a market perspective, environmental performance is also becoming an increasingly important competitive factor. For example, recent reports show that modern consumers seem to prefer environmentally friendly products.3

1 See Article 2.1(a) in ‘The Paris Agreement’ adopted by the Parties of the United Nations on 12 December 2015 (COP21 Paris).
2 See e.g. UN Annual Climate Change Report, 2018, p. 11.
3 See Nielsen, Sustainable Shoppers Buy the Change They Wish to See in the World, 2018, pp. 3-9. For example, the report found that global consumers are willing to open their wallets for products that are organic (41%), made with
As the threat of climate change is becoming more urgent, and as political institutions and consumers put more pressure on businesses to reduce their environmental impact, there may be a growing need for environmental cooperation between businesses. Such cooperation may, however, raise concerns from a competition policy perspective since cooperation between businesses may restrict competition. In this regard, environmental cooperation also entails a risk of stifling competition as a driving force of innovation and development towards ‘greener’ products and services. The importance of the competition policy in the context of combating environmental problems have also been emphasised in recent statements from the EU institutions. For example, the Commission stated in a recent press release that it had taken the preliminary view that an agreement between German car manufacturers had restricted competition on emission cleaning technology and thereby denied consumers the opportunity to buy less polluting cars. Likewise, the Commissioner Vestager has stressed, in a recent speech, that businesses may need to work together to create sustainable markets and that competition policy should support them in doing this, while at the same time safeguarding competition and consumers.

In sum, environmental considerations have become increasingly relevant in the context of EU competition policy. As the issue of climate change is likely to become more urgent in the coming decades, this development can be expected to continue in the near future. As a consequence, there may also be an increased risk of conflicts between environmental objectives and competition objectives arising in the interface between EU competition policy and EU environmental policy.

1.2 Purpose

The purpose of this thesis is to examine the role of environmental considerations in the legal assessment under Article 101 TFEU. By doing so the thesis seeks to achieve two underlying aims. Firstly, as there may be an increased need for environmental cooperation in the future, this thesis seeks to illuminate the legal possibilities and preconditions for such cooperation from a competition law perspective. Secondly, as there may be an increased risk of conflicts between environmental objectives and competition objectives in the future, the thesis seeks to discuss the question of how to resolve such conflicts in the context of competition law. Article 101 TFEU prohibits anticompetitive cooperation.

sustainable materials (38%) or deliver on socially responsible claims (30%). According to the report almost half (46 %) of global consumers also said they would be willing to forgo brand name to buy environmentally friendly products.

4 See Press release IP/19/2008.

5 See Commissioner Vestager speech at GCLC Conference on Sustainability and Competition Policy, 2019.
between undertakings and due to its potential applicability to environmental cooperation, this provision has been chosen as the subject of this thesis. More specifically, Article 101 TFEU contains two separate provisions, Article 101.1 TFEU, which contains a prohibition rule, and Article 101.3 TFEU, which contains an exemption rule. The purpose of this thesis is to examine the role of environmental considerations under both these rules respectively.

1.3 Delimitations

For this purpose, the author will necessarily have to examine broad and complex questions regarding the objective of EU competition policy and the role environmental objectives within the EU Treaties. While the thesis will involve a discussion on those questions it should be noted that the aim of that discussion is to answer the more limited question of what role environmental considerations may play under Article 101 TFEU. Nevertheless, the author may refer to legal sources concerning other areas of EU competition law when discussing the objective of EU competition law since the different EU competition rules seek to achieve the same objective on different levels.6

Furthermore, it should be emphasised that this thesis is limited to the examination of the role of environmental considerations under Article 101 TFEU exclusively. Thus, the thesis does not seek to examine the role of environmental considerations in other areas of EU competition law, such as under Article 102 TFEU or ‘the EU Merger Regulation’.7 However, the author has not excluded these other areas of EU competition policy from the examination because a lack of relevance of environmental considerations in those areas. Rather, due to the limited scope of a thesis, the author has sought to ensure the depth and manageability of this work by limiting its scope to only one area of EU competition policy. Potentially, the findings in this thesis may be applied by analogy to other areas of EU competition law.

As this thesis will discuss Article 101 TFEU exclusively, it also follows that the examination will exclude questions regarding national competition law. Furthermore, as the purpose is to discuss the role of environmental considerations under Article 101 TFEU, the examination will not examine the role of other public policy objectives, such as the promotion of employment or protection of human health, under that provision. Nevertheless, case law or other legal sources regarding national competition legislation

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6 See Case 6-72 Continental Can, para. 25.
7 Council Regulation No 139/2004 on the control of concentrations between undertakings.
and the role of other public policy concerns under Article 101 TFEU may be referred to where they contribute to the purpose of this thesis. As to the different public policy objectives, it should however be noted that different policy objectives may play different roles in the EU Treaties and that analogies require caution.

Lastly, this thesis will not include a discussion on the concept of ‘the relevant market’. Even though this concept is of particular significance for competition law analysis, it appears to be of limited relevance for the question of the role of environmental considerations under Article 101 TFEU.

1.4 Methodology

The examination in this thesis will be based on the legal dogmatic method. The aim of that method is to analyse relevant legal sources, such as statutes, case law and legal literature, in order to determine what constitutes the current state of law and how certain legal issues should be solved. Furthermore, as the purpose of this thesis is to examine EU law, legal interpretative methods relevant in this particular field of law will be used. In this regard, the EU courts have used a variety of different interpretative methods when interpreting EU law. Beside traditional literal interpretation, the CJEU has also used systematic and teleological interpretation to interpret EU law. As to systematic interpretation, this method means that EU law must be interpreted in a way that guarantees that there is no conflict between individual provisions and the general scheme of which they are a part. As to teleological interpretation, this method means that EU rules must be interpreted and applied in the light of their objectives. As these two interpretative methods aim to achieve coherence in the EU Treaties and the purposiveness of individual provisions, those methods can contribute to the purpose of this thesis of examining the role of environmental considerations under Article 101 TFEU.

While the aim of this thesis is to determine the current state of law (de lege lata), this thesis will also involve a discussion on what the law has been and what the law ought to be (de lege ferenda). In this regard, it should be noted that while traditional legal dogmatic scholars reject the relevance of teleological arguments and discussions on what the law

8 See (in Swedish) Kleineman, Rättsdogmatisk metod, in Korling & Zamboni (eds.), p. 21
9 See (in Swedish) Bergström and Hettne, Introduktion till EU-rätten, p. 390.
10 See Lenaerts and Gutiérrez-Fons, To Say What the Law of the EU Is, p. 17-23 (systematic interpretation) and 31-34 (teleological interpretation).
11 See Ibid. p. 17.
12 See Ibid. p. 32 ff. where they also describe two other modes of teleological interpretation: ‘functional interpretation’ and ‘consequentialist interpretation’.
has been or ought to be in the legal dogmatic method, other scholars have a broader view on that method, which allows such elements to be included.\textsuperscript{13} To be precise, this thesis is thus based on the legal dogmatic method in a broad sense. Furthermore, as to discussions on what the law ought to be, such discussions must take into account the motives and characteristics of the legal areas examined. Additionally, it is important, from a methodological perspective, not to mix de lege lata reasoning with de lege ferenda reasoning, as they seek to answer two different questions.\textsuperscript{14} The de lege ferenda reasoning in this thesis will therefore be based on the motives and characteristics of EU competition law and the author will seek to be clear when presenting such reasoning.

Due to the choice of legal fields examined in this thesis, economic considerations will play an important role, beside legal reasoning. EU competition law regulates the internal market and the competitive process and this field of law is thus intrinsically connected to economics and economic theories.\textsuperscript{15} Similarly, EU environmental law has been increasingly influenced by economic theories in the recent decades, exemplified by the increased use of market-based instruments.\textsuperscript{16} In addition to legal methods, the author will therefore take an economic perspective on the questions of this thesis. For example, the author will examine different competition theories relevant for the understanding of EU competition policy. Furthermore, an economic perspective will be taken on environmental protection, with the aim of establishing a common economic frame of reference for the discussion of the questions in this thesis. However, it must be emphasised that, as a lawyer, the author does not aim to present economic analyses concerning the questions in this thesis nor to provide any comprehensive presentation of different economic theories. Instead, the author will merely use the economic perspective to understand the legal fields examined, the connection between them and to discuss the legal questions of this thesis.

1.5 Sources

As the purpose of this thesis is to examine the role of environmental concerns under Article 101 TFEU, the author will primarily use different sources of EU law. As to the authority of the different legal sources used and the hierarchy between them, a basic distinction can be made between primary law, constituted by the EU Treaties, and

\begin{itemize}
  \item \textsuperscript{13} See (in Swedish) Kleineman, Rättsdogmatisk metod, in Korling & Zamboni (eds.), p. 36 f.
  \item \textsuperscript{14} Ibid. p. 36.
  \item \textsuperscript{15} See Whish and Bailey, Competition Law, p. 1 f.
  \item \textsuperscript{16} See Kingston, Greening EU Competition Law and Policy, p. 41 ff. concerning the increased use of market-based instruments.
\end{itemize}
secondary law, including legislative acts based on the Treaties, such as regulations, directives and decisions. As primary law constitutes the ultimate source of EU law, secondary law must be interpreted in the light of primary law. Furthermore, the CJEU has an central role as the final interpreter of the EU law and the case law of the CJEU is thus important for the understanding EU law. The author will therefore, in first hand, seek answers to the questions of this thesis in primary law, of which Article 101 TFEU forms a part, and the case law of the CJEU. To a limited extent, secondary law will also be consulted for additional guidance on the interpretation of Article 101 TFEU and for the purpose of understanding EU competition policy and environmental policy.

Beside the EU courts, the Commission plays an important role in EU competition policy. As the primary enforcer of the EU competition law, the Commission has powers to investigate infringements of the competition rules and to adopt antitrust decisions and impose sanctions in order to bring infringements to an end. Decisions adopted by the Commission are binding in their entirety on the parties to whom they are addressed (Article 288 TFEU) but they may be appealed to the CJEU (Article 263 TFEU). In practice, the CJEU does not, however, always exercise full judicial review of these decisions. Rather, in the context of Article 101.3 TFEU, the CJEU has emphasised that the Commission enjoys a margin of appreciation when granting exemptions under that provision. Similarly, where decisions under Article 101.1 TFEU involve complex economic facts, the CJEU has held that its review will be limited to the possibility of the Commission having committed a manifest error in its assessment. Consequently, decisions from the Commission play an important role in the development of EU competition policy, and such decisions have therefore been used to answer the questions of this thesis.

Another important source of EU competition law is the Communications and Notices (often called ‘guidelines’) adopted by the Commission. These instruments are often referred to as ‘soft law’ and are based on Article 288 TFEU, which provides that the EU institutions shall adopt non-legally binding recommendations and opinions. As these instruments do not have legally binding force they are not binding on the EU courts nor

17 See (in Swedish) Bergström and Hettne, Introduktion till EU-rätten, pp. 20 f. (primary law) and 31-35 (secondary law).
18 See Article 19.1 TEU and (in Swedish) Bergström and Hettne, Introduktion till EU-rätten, p. 47 f.
19 See Council Regulation No 1/2003, e.g. Articles 7, 17 and 23.
20 See also Council Regulation No 1/2003, Article 31.
21 See e.g. Case 26/76 Metro SB-Grossmärkte v Commission, para. 45 and 50.
22 See e.g. in Case 42/84 Remia and Others v Commission, para. 34.
on national courts and competition authorities. Nevertheless, ‘soft law’ may have significant importance in practice. For example, the CJEU has held that the Commission is required not to deviate from its guidelines in individual cases without legitimate reason and, in practice, national competition authorities often consult and cite the guidelines from the Commission. Due to their practical importance, the author has also consulted the Commission’s guidelines in this thesis, where they complement other sources or otherwise can provide answers to the question of this thesis. Nevertheless, it must be emphasised that these documents may not fully reflect the position of the CJEU.

In addition to the legal sources mentioned above, the author has consulted legal literature and, to a limited extent, other sources relevant for the examination of the questions of this thesis. In particular, legal literature has been consulted for analyses of the different sources of EU law and for the discussion on what the law ought to be. The author will also refer to literature to direct the reader to complementary or further detailed discussions on certain questions discussed in this thesis.

1.6 Disposition

This thesis consists of eight sections. The three first sections will provide a background to the two policy fields relevant for the question examined in this thesis. Section (2) will introduce the field of EU environmental policy and its development as a policy area in the recent decades. Section (3) provide a background to the field of EU competition policy by examining three different competition theories and their role in EU competition policy, as well as the objective of EU competition policy. Section (4) will present an intermediate summary of the previous two sections and conclusions, which will form the foundation for the discussion in the following sections.

In Section (5) the author will discuss, from a general point of view, the question of what role environmental considerations play under Article 101 TFEU. The discussion will involve an economic perspective on environmental protection as well as a legal discussion on whether environmental considerations may be taken into account in the assessment under that provision. Sections (6) and (7), will provide a further detailed discussion on the role of environmental considerations under the specific legal requirements of Article 101.1 and 101.3 TFEU respectively. Lastly, Section (8) will summarise the conclusions of the former sections and provide some final remarks.

2 Background to EU Environmental Policy

2.1 Introduction

The following sections will introduce the reader to EU environmental policy and the development of this policy area within the EU. The aim is to establish a foundation for the further discussion on how EU environmental policy affects EU competition law and, in particular, the interpretation and application of Article 101 TFEU in the context of environmental cooperation. The purpose is thus not to provide a comprehensive presentation of EU environmental policy but rather to introduce certain aspects of this policy area relevant for the further discussion. The following sections will provide a historical overview of the role of environmental policy in the EU (Section 2.2), a presentation of EU environmental policy at present (Section 2.3) and, lastly, a description of the shift in EU environmental policy towards an increased use of market-based instruments and voluntary environmental agreements (Section 2.4).

2.2 A Historical Overview of the Role of Environmental Policy in the EU

In the last three decades, environmental policy has gradually evolved into a prominent policy area within the EU. From having a rather subtle role in the earlier Treaties, environmental protection, as policy objective, is now one of the fundamental objectives of the Union enshrined in Article 3 TEU.

While the 1957 Treaty of Rome (the EEC Treaty) did not contain any express reference to environmental objectives, environmental protection was for the first time formalised as an explicit objective of the Union by Single European Act (SEA). At that time, environmental policy remained a policy area subordinate to the primary objective of establishing an internal market within the EU. Nonetheless, by amendment of Article 130r of the EEC Treaty, Article 25 of the SEA introduced a specific legal basis for the adoption of environmental action at EU level and set out a number of ‘environmental principles’. One of these principles, the precursor to the integration principle, currently enshrined in Article 11 TFEU, required that:

“environmental protection should be a component of the Community’s other policies [emphasis added]”.

24 See Kingston, The Role of Environmental Protection in EC Competition Law and Policy, p. 7.
In the revisions of the Treaties following the SEA, the importance of environmental policy within the EU was further emphasised. By the 1992 Maastricht Treaty, a reference to environmental protection was for the first time inserted into Article 2, defining the fundamental objectives of the Union. Additionally, the status of environmental policy was strengthened, in relation to other policy areas, as Article 130r now stated that:

“environmental protection requirements must be integrated into the definition and implementation of other Community policies’ [emphasis added]”.

By the 1997 Treaty of Amsterdam, the importance of environmental policy was further promoted. After the amendment, Article 2 EC did not only refer to environmental protection but also specified that the common market should promote ‘sustainable development’ and ‘a high level of protection and improvement of the quality the environment’. In addition, the integration principle was moved to Article 3, in the forefront of the Treaty, and amended to clarify that integration of environmental requirements in other policy areas should have promotion of ‘sustainable development’ as its primary aim.

After the Treaty of Amsterdam, environmental policy has remained a fundamental policy area of the EU. Neither the 2001 Treaty of Nice nor the 2007 Lisbon Treaty brought substantial change in the field of EU environmental policy. The amount of legislation and case law at EU level concerning environmental protection has, however, steadily increased even after the Treaty of Amsterdam. In sum, a historical overview thus provides a picture of environmental policy as a policy area which over time has become increasingly important in the EU Treaties, both as an isolated policy area but also as a policy area in relation to other EU policies.

2.3 An Overview of EU Environmental Policy at Present

2.3.1 The Fundamental Status of Environmental Objectives in the EU Treaties

As shown in the previous section, environmental policy has gradually developed into one of the most important policy areas in the EU. Today, the central role of environmental objectives is emphasised in all of the constitutional acts of the EU. For example, the preamble to the TEU states that the Member States of the Union are:

25 See Kingston, The Role of Environmental Protection in EC Competition Law and Policy, p. 10.
“[d]etermined to promote economic and social progress for their peoples, taking into account the principle of sustainable development […] and a high level of protection and improvement of the quality of the environment […]”.

Likewise, Article 3 TEU, which defines the aims of the Union, states that:

“The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth […], aiming at […] a high level of protection and improvement of the quality of the environment.”.

Thus, environmental objectives belong to the fundamental objectives of the Union and play an important role in the establishment of the internal market. Furthermore, the idea that environmental objectives should not only be pursued on the side of other policy objectives, but rather should permeate EU policy as a whole, is also evident from the TFEU. As showed in the previous section, the integration principle has evolved over time, and now constitutes a prominent principle, enshrined in Article 11 TFEU, stating that:

“[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development. [emphasis added]”.

The integration principle has also been transformed into a fundamental right of the citizens of the EU, enshrined in Article 37 of the EU Charter, which states 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.”.

In sum, it thus clear from the constitutional acts of the EU that environmental objectives have a fundamental status and that the EU shall aim to achieve ‘a high level of environmental protection’. In this regard, the CJEU has also, in several cases, held that protection of the environment constitutes one of the essential objectives of the Union.26 Furthermore, the concept or principle of ‘sustainable development’, appearing in all the citations above, seems to be intended as a guiding star of Union policy. Even if environmental objectives are clearly emphasised in the Treaties, important questions are, however, how to define such objectives more concretely and to what extent such

26 See e.g. Case C-487/06 P, British Aggregates Association v Commission, para. 91 and the case law referred to there: Case C-320/03 Commission v Austria, para. 72, Case C-240/83 ADBHU, para. 13, Case C-302/86 Commission v Denmark, p. 8, Case C-213/96 Outokumpu, para. 32 and Case C-176/03 Commission v Council (Environmental Crime), para. 41.
objectives give rise to enforceable legal standards and principles. These questions will be further discussed in the following sections.

2.3.2 The Objectives of EU Environmental Policy

As mentioned in the previous section, the EU Treaties and, in particular, Articles 3 TEU and 11 TFEU, establish that environmental objectives have a fundamental status in the EU. However, these provisions only refer to ‘protection and improvement of the environment’ and ‘environmental protection’ and do not clarify what this means more specifically. To understand what the environmental objectives of the Union are, guidance must thus be sought in other Treaty provisions.

According to Article 191.1 TFEU, EU environmental policy shall contribute to the pursuit of four specific objectives. Firstly, environmental policy should aim to preserve, protect and improve the quality of the environment. In this regard, the Treaties do not contain any definition of ‘the environment’. Thus, the EU institutions seems to be have been left with quite the room for discretion to define this notion. ‘The environment’ has also been quite broadly defined by the EU institutions, including aspects such as conservation of biological diversity, protection against pollution, and even cultural environment.

Secondly, Article 191.1 TFEU provides that EU environmental policy shall contribute to protection of human health. As with the first objective, the second objective appears to be rather broadly defined. In this regard, it should however be noted that the EU Treaties also contain separate provisions concerning protection of working environment and public health, which to a certain extent probably limits the scope of the objective of protecting human health under EU environmental policy. Furthermore, there is probably a considerable overlap between the objective of protecting human health and the first objective to protect the quality of the environment. Nevertheless, the second objective underscores the connection between the external environment (e.g. access to drinkable water and breathable air) and the possibility of humans to maintain a good health.

Thirdly, EU environmental policy shall contribute to prudent and rational utilization of natural resources. What is meant by this is not further specified in the Treaties. As to ‘natural resources’, this notion appears to have been interpreted quite broadly, by the

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29 See Langlet and Mahmoudi, EU Environmental law and policy, p. 34 f.
30 See Article 153 TFEU.
31 See Article 168 TFEU.
32 See Langlet and Mahmoudi, EU Environmental law and policy, p. 35.
academia as well as by the EU institutions, and includes both living and non-living resources, as well as energy. As to ‘rational utilisation’, this notion seems to refer to ‘sustainable use of natural resources’, requiring that the rights of future generations are not compromised for the meeting of the needs of the current generation.33

Fourthly, and lastly, EU environmental policy shall promote measures at international level to deal with regional or worldwide environmental problems and, in particular, to combat climate change. This objective clearly underlines the international dimension of many environmental problems and the need for international cooperation to solve those problems. Furthermore, the fourth objective distinguishes climate change as a particularly important environmental problem.

In sum, Article 191.1 TFEU thus shows that the EU has taken a broad approach to environmental policy. As the objectives are broadly defined, and their outer limits rather vague, they leave quite a room for discretion to the EU institutions to adopt different measures in the environmental field.34 Beside the objectives, there are however other Treaty provisions limiting the competence of the EU in the environmental field. These provisions will be discussed in the next section.

2.3.3 EU Competence in the Field of Environmental Policy

There are important constitutional limits to EU competence in the environmental field. According to the principle of conferral, enshrined in Article 5.2 TEU, ‘the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein’. As to the competence conferred on the EU in the environmental field, Article 4.2e) TFEU provides that competence in this field is shared between the EU and the Member States. Thus, according to Article 5.3 TEU, EU competence in the environmental field is subject to the principle of subsidiarity. This principle means that, where competence is shared, the EU can act in that field only if, and in so far as, the objectives of a proposed action cannot be sufficiently achieved by the Member States themselves, but rather can be better achieved at Union level. Thus, the principle of subsidiarity sets the limits to EU competence in the environmental field.

In practice the principle of subsidiarity has not, however, constituted a considerable limitation to EU action in the environmental field. It is evident that a substantial amount of environmental legislation has been passed on EU level in recent decades and that this

33 See Langlet and Mahmoudi, EU Environmental law and policy, p. 35.
34 See Ibid. p. 36.
legislation normally fulfil the requirements of the subsidiarity principle.\textsuperscript{35} Furthermore, many environmental problems are of transboundary character and national environmental action involve a risk of having negative effects on the internal market and competition by creating national trade barriers. For those reasons, EU environmental measures are regularly motivated.\textsuperscript{36} Nevertheless, it is important not to forget that EU competence in the environmental field is not absolute, but subject to the principle of subsidiarity.

2.3.4 Central Principles and Concepts in EU Environmental Policy

2.3.4.1 The Integration principle

As mentioned above, the integration principle has evolved into a prominent EU principle, enshrined in Article 11 TFEU. The position of this principle in the forefront of the TFEU indicates the fundamental significance of this principle, which requires that ‘environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities’. The importance of the principle has also been confirmed by the EU courts, which in numerous cases have relied on this principle for interpretation of primary as well as secondary EU law and to annul EU legislative acts.\textsuperscript{37} However, the principle is still surrounded by ambiguity as to its exact legal definition and effects. In the following, the author will therefore attempt to clarify four aspects of the integration principle; (1) the contexts in which the principle is applicable, (2) its addressees, (3) the content of the ‘environmental protection requirements’ and (4) the mandatory nature of the principle.

Firstly, as to the contexts in which the principle is applicable, it is clear from the wording of Article 11 TFEU that the principle applies to a very broad range of EU measures (‘policies and activities’), both in the phase of adopting such measures and in the phase of implementing such measures (‘definition and implementation’). Jans has even claimed that the integration principle broadens the objective of the different EU competences laid down in the Treaties and limits the role of the principle of conferral in the field of EU environmental policy.\textsuperscript{38} More importantly, case law from the CJEU shows that the Court has relied on the integration principle to interpret EU law, even outside the field of

\textsuperscript{35} See Jans and Vedder, European Environmental Law, p. 14.
\textsuperscript{36} See Langlet and Mahmoudi, EU Environmental law and policy, p. 48.
\textsuperscript{37} See Kingston, Greening EU Competition Law and Policy, p. 108 f. for a short overview of how the principle has been used by the EU courts in different legal contexts.
\textsuperscript{38} See Jans, Stop the Integration Principle?!, p. 1541 f. Also see case C-176/03, \textit{Commission v Council (Environmental Crime)}, paras. 41-42 where the CJEU noted that the integration principle emphasises the fundamental nature of environmental objectives within the EU and its extension across the range of EU policies and activities.
environmental policy. Of particular relevance for the purpose of this thesis, the CJEU has used the integration principle to interpret Treaty provisions and secondary legislation which aims to ensure that competition is not distorted within the internal market. This was the case in the judgments British Aggregates v Commission, PreussenElektra and Concordia Bus, which will be discussed briefly below.

As to the first case, *British Aggregates v Commission* shows that the integration principle has been used for interpretation of the Treaty provision on State aid (currently 107 TFEU), which aims to prevent distortions of the competition in the internal market. In its judgment, the CJEU held that the Commission must take environmental requirements into account, in accordance with the integration principle, when assessing a State measure.39 Furthermore, the CJEU also noted, obiter dicta, that environmental protection requirements must be integrated into the Community policies referred to in Article 3 EC (current Article 3 TEU), and that this includes the ‘competition policy’ of the EU.40

As to the second case, *PreussenElektra* shows that the integration principle has been used for interpretation of the free movement provisions in the Treaty. The case concerned German legislation, which required private electricity supply undertakings to purchase electricity produced from renewable energy sources at certain minimum prices, and the application of the Treaty provision prohibiting measures having equivalent effect to quantitative import restrictions (current Article 34 TFEU). In its judgment, the CJEU expressly referred to the integration principle as it found that the legislation at issue was not incompatible with the Treaty.41

As to the last case, *Concordia Bus* shows that the integration principle has been used for interpretation of secondary legislation in the field of competition policy. The case concerned the interpretation of Directive 92/50/EEC on the coordination of procedures for the award of public service contracts. In its judgment, the CJEU interpreted the directive, in the light of the integration principle, as allowing contracting authorities to use environmental criteria in public procurement, despite the fact that the directive did not expressly permit the use of such criteria.42

39 See Case C-487/06 P, *British Aggregates v Commission*, para. 73 and 90. See also similarly Case C-279/08 P, *European Commission v Kingdom of the Netherlands*, para. 75.
40 See Case C-487/06 P, *British Aggregates v Commission*, para. 73.
41 See Case C-379/98 *PreussenElektra*, para. 76 and 81.
42 See Case C-513/99 *Concordia Bus Finland*, para. 57.
In sum, it appears that the CJEU has used the integration principle to interpret various EU rules aiming to protect competition in the internal market. However, it must be noted that the CJEU has not yet used the integration principle for interpretation of the EU competition rules in the Treaties; Article 101 and 102 TFEU.

Secondly, as to the addressee of the integration principle, it is obvious from the wording of Article 11 TFEU that the principle is addressed to the EU institutions. Furthermore, Krämer has held that the integration principle is only addressed to the EU institutions.43 As mentioned above, case law however shows that the principle has been used as a tool for interpretation of various EU legislative acts. In the view of the author, the integration principle must thus also be addressed to the Member States of the Union, at least, when they interpret and apply EU law.44

Thirdly, as to the as to content of ‘environmental protection requirements’, referred to by the integration principle, there are different opinions in the literature on the meaning of this notion. According to Scotford, the requirements referred to in Article 11 TFEU are generally understood as including the environmental objectives and principles mentioned in Article 191.1-2 TFEU and, possibly, also the ‘factors’ to be taken into account in EU environmental policy, listed in Article 191.3 TFEU.45 Langlet and Mahomudi have expressed a similar view and adds that it is important, when defining what should be integrated into other policy areas, that EU environmental policy should aim at ‘a high level of protection’ according to Article 3 TEU.46 However, Scotford has also noted that the environmental focus of the integration principle may be diluted by the principle’s qualifying objective to promote ‘sustainable development’, since this objective, besides environmental considerations, also include economic and social considerations.47 According to Nowag, the reference to ‘sustainable development’ does however not restrict the obligation to integrate environmental protection requirements, but rather emphasises the attainment of sustainable development via the integration.48

43 See Krämer, EC Environmental Law, p. 11.
45 See Section 2.3.2 above.
46 These principles are discussed further in Sections 2.3.4.4-7 below.
48 See Langlet and Mahmoudi EU Environmental law and policy, p. 60.
49 See Scotford, Environmental Principles and the Evolution of Environmental Law, p. 88 f.
50 See Nowag, Environmental Integration in Competition and Free-Movement Laws, p. 26 where he argues that the reference to ‘sustainable development’ does not restrict the previous part of the obligation but rather emphasises the attainment of sustainable development via the integration. See also Section 2.3.4.2 below regarding the concept of sustainable development.
Fourthly, and lastly, as to the mandatory nature of the integration principle, it seems obvious from the wording of Article 11 TFEU (‘must be integrated’) that integration of environmental requirements into other policy areas is a mandatory requirement. Moreover, such an interpretation seems to be supported by the case law of the CJEU as the Court has held that the integration principle requires that ‘all Community measures must satisfy the requirements of environmental protection’. However, even if Article 11 TFEU gives rise to a mandatory requirement, the question still remains as to what extent such environmental requirements must be integrated into other policy areas. In this regard, Wasmeier has held that the integration principle implies a rule of interpretation that is relevant for EU law as a whole and for the conception of the internal market. In his view, this rule gives preference to an interpretation which ensures the fulfilment of environmental protection requirements. However, in the case of a conflict between environmental objectives and other EU policy objectives, these objectives must be reconciled and, in this reconciliation, an interpretation must be found that does not neglect, overrule or give undue weight to any of these objectives of equal value.

2.3.4.2 The Concept of Sustainable Development

As mentioned above, the concept of ‘sustainable development’ seems to be intended as a guiding star of Union policy. However, the legal relevance of this concept has been debated and it can be questioned whether this concept only amounts to constitutional ‘fluff’ or whether it gives rise to an enforceable legal standard, capable of guiding the interpretation of the EU Treaties. In the following, some short comments will be made on the origin and meaning of this concept.

The concept of ‘sustainable development’ originates from the international arena and was a core concept in the 1987 Brundtland Commission report ‘Our common future’. In that report the concept was defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.

51 See similarly Vedder, Competition Law and Environmental Protection in Europe, p. 168 and Opinion of Advocate General Jacobs in Case C-379/98, PreussenElektra, para. 231.
53 See in Wasmeier, The Integration of Environmental Protection as a General Rule For Interpreting Community Law, p. 176. Compare Jans, Stop the Integration Principle?!, p. 1543 where he claims that the manner in which conflicts between environmental protection and other EU objectives should be resolved cannot be inferred from the integration principle as such.
55 See Ibid. Chapter 2, Section IV, para. 1.
the report, it is evident that the concept includes both economic, social and ecological aspects of development.56

Even if there is no express definition of the concept of ‘sustainable development’ in the EU Treaties, it is apparent from Article 3 TEU that this concept is based on economic as well as social and environmental aspects. The environmental aspect of this concept is also further emphasised in Article 11 TFEU. Moreover, various policy documents from the EU institutions indicates that the concept should be understood in accordance with the concept defined in the 1987 Brundtland Commission report.57 Guidance on the meaning of this concept may also be found in the Sustainable Development Strategy, adopted by the Council, which identifies key challenges of sustainable development.58 At present, many legal scholars, however doubt that the ‘sustainable development’ concept amounts to an enforceable legal standard in EU law. For example, Krämer has held that the concept does not have any meaningful content.59 Similarly, Langlet and Mahmoudi has held that there is inflation in the use of ‘sustainable development’ in EU policies, and that it is difficult to give the concept a clear content in every specific situation.60 Moreover, as pointed out by Kingston, the idea of balancing economic, social and ecological aspects, inherent in the sustainable development concept, naturally makes the concept ambiguous and difficult to use for practical guidance.61 Nevertheless, case law from the CJEU indicates that the concept in fact may be used for the interpretation of EU law. For example, the CJEU has referred to the concept when interpreting the Habitats Directive.62 However, the judgment does not provide any guidance on the actual content of the concept. At the moment, the concept of sustainable development is thus still characterized by remarkable ambiguity.

57 See e.g. Commission, Draft Declaration on Guiding Principles for Sustainable Development, 2005. See also Note of the Council, ‘Renewed EU Sustainable Development Strategy, para. 1.
59 Krämer, Sustainable Development in EC Law, Bugge and Voigt (eds.), Sustainable Development in International and National Law, p. 393.
60 Langlet and Mahmoudi, EU Environmental law and policy, pp. 42-46.
61 Kingston, Integrating Environmental Protection and EU Competition Law, p. 785 f.
62 See Case C-43/10 Nomarchiaki Aftodioikisi Aitolokarnanias and Others, para. 137-139.
2.3.4.3 The Concept of a High Level of Environmental Protection

Another central concept in EU environmental policy is the concept of ‘a high level of environmental protection’. As mentioned above, this concept appears in both Article 3 TEU and Article 37 of Charter. Furthermore, Article 191.2 TFEU states that:

“Union policy on the environment shall aim at a high level of protection […]”.

As to the legal content of this concept, it seems apparent that it involves a requirement that environmental protection within the EU must satisfy a certain qualitative level. In this regard, the Treaties does not contain any definition of what constitutes a ‘high level’ of protection. Nevertheless, the CJEU has confirmed that this concept gives rise to an enforceable legal standard. For example, the concept has been used by the Court to interpret secondary legislation in the environmental field and in order to annul EU legislative acts. In fact, the CJEU has even used this concept, read in conjunction with the integration principle, in order to annul legislative acts outside of the environmental field. As to the degree of environmental protection required, the Court has, however, not yet given any clear answers. According to Langlet and Mahmoudi, it does seem reasonably to use the level that environmentally more ambitious Member States apply in their legislation, as well as scientific knowledge available, as the basis when defining ‘a high level of environmental protection’.

2.3.4.4 The Precautionary Principle

Another environmental principle, enshrined in Article 191.2 TFEU, is the precautionary principle. This principle establishes a risk management strategy, meaning that potential environmental risks must be assessed and that the fact that a risk has not yet been fully demonstrated is not sufficient to ignore that risk. Furthermore, the EU courts have confirmed that this principle gives rise to an enforceable legal standard. For example, the CJEU has used the precautionary principle to interpret EU environmental legislation.

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63 See Section 2.3.1 above.
64 See Case C-277/02 EU-Wood-Trading, para. 47.
65 See e.g. Case C-341/95 Bettati, para. 47.
66 See Case T-229/04 Sweden v Commission, para. 262 concerning the annulment of a directive based on the legal basis for agricultural policy.
67 In Case C-341/95 Bettati, para. 47 the CJEU held that the level of protection required ‘does not necessarily need to be the highest that is technically possible’.
68 Langlet and Mahmoudi, EU Environmental law and policy, p. 50 f.
69 See Communication on the precautionary principle, Annex III, Sections 3, 5.1 and 5.1.2, Case T-13/99 Pfizer Animal Health, para. 146 and Case C-127/02 Waddenzee, para. 44.
70 See Case C-127/02 Waddenzee, para. 44 concerning the interpretation of The Habitats Directive.
Moreover, the EU courts have even relied on this principle, read in conjunction with the integration principle, to annul legislative acts outside of the environmental field.  

2.3.4.5 The Prevention Principle

A second environmental principle, enshrined in Article 191.2 TFEU, is the prevention principle. According to this principle, preventive action should be taken in order to avoid environmental damage. The principle can be contrasted with the precautionary principle as it does not address potential risks, but rather risks that are known and likely to realise as a result of a certain activity or omission. As to the legal relevance of the prevention principle, it is clear that numerous EU legislative acts refer to this principle. The legal implications of the principle are, however, still uncertain.

2.3.4.6 The Proximity Principle

A third environmental principle, mentioned in Article 191.2 TFEU, is the proximity principle. According to this principle, environmental damage should be rectified at the source (i.e. as soon as possible). As to its legal meaning, Krämer has held that it is not perfectly clear what is meant by ‘rectification’ and that EU institutions seems to have a broad discretion as to what measures they wish to adopt in this regard. Nevertheless, the CJEU has referred to the proximity principle as a tool interpretation of the Treaties, particularly in connection to waste regulation. For example, in Walloon Waste, the CJEU referred to the principle as it justified certain national restrictions placed on the free movement of waste under current Article 34 TFEU.

2.3.4.7 The Polluter Pays Principle

A fourth, and the last, environmental principle, codified in Article 191.2 TFEU, is the polluter pays principle. According to this principle, costs of environmental damage should be borne by the polluter that caused the damage. Besides an environmental perspective, this principle also involves a market perspective and contributes to preventing distortions of competition, which could occur if only some market actors

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71 See Case T-229/04, Sweden v Commission, para. 262 concerning the annulment of a directive based on the legal basis for agricultural policy.
72 See van Calster and Reins, EU Environmental Law, p. 34.
73 See further Commission, Study on the precautionary principle in EU environmental policies, p. 82 ff. for an overview of legislative acts referring to the prevention principle.
74 See Langlet and Mahmoudi, EU and Environmental Policy, p. 54.
75 See Krämer, EU environmental law, p. 24 ff.
76 See Case C-2/90 Commission v Belgium (Walloon Waste), para. 34.
77 See Jans and Vedder, European Environmental Law, p. 43.
where required to bear the costs of their pollution.\textsuperscript{78} As to the legal relevance of the principle, it is clear that there several EU legislative acts are based on the principle.\textsuperscript{79} However, Krämer has claimed that the EU and the Member States often have ignored the aim of the principle by granting subsidies to market actors, with the purpose of ensuring compliance with environmental requirements.\textsuperscript{80} Nevertheless, the CJEU has confirmed that the principle gives rise to an enforceable legal standard which can be used for interpretation of EU environmental legislation.\textsuperscript{81}

\section*{2.4 EU Environmental Policy and the Shift Towards Market-Based Instruments and Voluntary Environmental Agreements}

\subsection*{2.4.1 Introduction}

As discussed in the previous section, environmental objectives play a fundamental role at a constitutional level of the EU. However, to achieve its environmental objectives, the EU primarily relies on the adoption of environmental legislation, such as directives and regulations. As to EU environmental legislation, it appears that, since the beginning of the 1990s, there has been a shift in the regulatory approach adopted by the EU which entails implications for EU competition policy. The following two sections will present the essentials of this shift.

\subsection*{2.4.2 Regulatory Approaches in EU Environmental Policy: Direct Regulation, Market-Based Instruments and Voluntary Environmental Agreements}

Broadly speaking, a division can be made between three different regulatory mechanisms adopted in EU environmental policy. These are: (1) direct regulation, (2) market-based instruments (‘MBIs’) and (3) voluntary environmental agreements (‘VEAs’). As to VEAs, this type of regulatory mechanism may be subsumed under the category of market-based instruments.\textsuperscript{82} Due to the purely voluntary character of VEAs, and the particular relevance of such instruments for the questions of this thesis, this category will, however, be discussed as a separate category. In the following, the characteristics of each of the three regulatory mechanisms will be presented.

\textsuperscript{78} See Jans and Vedder, European Environmental Law, p. 50.
\textsuperscript{79} See further Commission, Study on the precautionary principle in EU environmental policies, p. 86 f. for an overview of legislative acts referring to the polluter pays principle.
\textsuperscript{80} See Krämer, EU environmental law, p. 27.
\textsuperscript{81} See e.g. Case C-188/07 Commune de Mesquer, para. 72.
\textsuperscript{82} See Langlet and Mahmoudi, EU and Environmental Policy, p. 153 and Kingston, Greening EU Competition Law and Policy, p. 75.
Direct regulation is the most common technique of regulation and is characterised by a ‘command’ prescribed by the state and backed by the threat of a negative sanction. In the context of environmental policy, direct regulation often involves a prescription of environmental quality standards that the addressees must comply with.\(^{83}\) For example, such standards may prescribe maximum permitted levels of pollution or environmental interference.\(^{84}\) An example in the EU context is the Water Framework Directive, which prohibits certain deteriorations of the quality of water bodies.\(^{85}\)

In contrast to direct regulation, *market-based instruments* do not, in a strict sense, impose a certain behaviour on its addressees. Instead, MBIs seek to utilize the market and the competitive process to incentivize the addressees to act in a certain way. In the context of environmental policy, MBIs usually, through market mechanisms, seek to steer the addresses towards action which results in more environmentally-favourable outcomes. For example, certain MBIs aims to implement an economic solution to the economic problem that many environmental resources constitute ‘public goods’, and that consumption of such goods give rise to ‘negative externalities’ (i.e. costs borne not only by the consumers) and therefore may be overexploited.\(^{86}\) The economic solution, in this regard, is to ‘internalise’ environmental costs so that the addressees take such costs into account in their decision making.\(^{87}\) Of course, such internalisation may be achieved in different ways and MBIs may thus take various forms. For example, MBIs used at EU level include environmental taxes and subsidies,\(^{88}\) tradable emission permits,\(^{89}\) eco-labelling,\(^{90}\) and eco-management and audit.\(^{91}\) The most prominent and important example of the use of MBIs in EU environmental policy is probably the EU Emission Trade System, which establishes a system for trade of greenhouse gas emission permits.\(^{92}\)

Lastly, as to *voluntary environmental agreements*, such agreements may take various forms and that there is no universally accepted definition of this type of instrument. For the purpose of this thesis, VEAs will however be defined in accordance with the definition used by the Commission. Accordingly, VEAs will be defined as:

\(^{83}\) See Kingston, *Greening EU Competition Law and Policy*, p. 43.

\(^{84}\) See Kingston, *The Role of Environmental Protection in EC Competition Law and Policy*, p. 39.


\(^{86}\) See Kingston, *The Role of Environmental Protection in EC Competition Law and Policy*, p. 39. See also Section 5.2.1 below where the concepts of ‘public goods’ and ‘negative externalities’ are further explained.


\(^{88}\) See further Kingston, *Greening EU Competition Law and Policy*, p. 56-60.

\(^{89}\) See further Ibid. pp. 60-75.

\(^{90}\) See further Ibid. pp. 90-93.

\(^{91}\) See further Ibid. pp. 87-90.

\(^{92}\) See Directive 2003/87/EC, Articles 4 and 12.
“[agreements] by which stakeholders undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives set out in Article 174 EC [current Article 191 TFEU]”.

Furthermore, according to the Commission, environmental agreements may be divided into two subcategories. The first category is *self-regulatory agreements* which are entered into on the sole initiative of private parties, and which do not involve any legislative act. The Commission may however ‘acknowledge’ such agreements by adoption of secondary legislative acts. In contrast to self-regulatory agreements, the second category, *co-regulatory agreements*, involve a more legislative approach. While such agreements also are concluded by private parties, they are concluded in the framework of a legislative act and with the legislator establishing the essential aspects of the agreement. At EU level, the Commission may take initiatives to conclusion of such agreements.

As to the specifics of VEAs, it should be self-evident that the content and form of such agreements may vary widely, since such agreements are only defined as agreements between private parties with the aim to achieve environmental objectives. Such agreements may thus be concluded between a limited number of parties or on a sector-wide basis. Furthermore, VEAs may pursue different environmental objectives and they may do so in a variety of ways. As to their aim, VEAs may concern energy efficiency, emission targets, waste reduction or recycling targets, collection of data for environmental purposes or reduction of the use of environmentally harmful substances or materials. As to their content, VEAs may, for example, set out standards on the environmental performance of products, inputs as well as outputs, or production processes. VEAs, as a regulatory mechanism, thus provide private parties a great amount of flexibility and choice as to how to respond to environmental challenges.

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93 See Commission, Communication on Environmental Agreements at Community Level, 2002, p. 4. See also similarly the, now replaced, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001/C 3/02), para. 179.
94 See Communication on Environmental Agreements at Community Level, p. 7 f. See also, as an example of such an ‘acknowledgement’, Commission, Recommendation on the reduction of CO2 emissions from passenger cars, OJ 1999 L 40/49.
95 See Communication on Environmental Agreements at Community Level, p. 8 f.
97 See the now replaced, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, para. 180.
98 For a further discussion on the merits and demerits of market-based instruments (including voluntary environmental agreements) and direct regulation respectively, see Kingston, The Role of Environmental Protection in EC Competition Law and Policy, pp. 33-38 and 42-45.
2.4.3 The Shift Towards Market-Based Instruments and Voluntary Environmental Agreements in EU Environmental Policy

As discussed in the previous section, different regulatory mechanisms may be used to achieve environmental policy objectives. In the EU, direct regulation is still the most common regulatory approach adopted in environmental policy. Nevertheless, it is evident that there has been an increased reliance on market-based instruments, including voluntary environmental agreements, in EU environmental policy since the 1990s.99 According to Langlet and Mahmoudi, the shift towards MBIs is the result of an increased focus on the role of market actors in the pursuit of sustainable development, but also of the recognition of the impact that environmental policy may have on competition in a globalised economy.100

In recent decades, various statements from the EU institutions have shown that MBIs and VEA{s are considered as an increasingly important part of EU environmental policy. A starting point for the ambitions to increase the use of such instruments appeared already in the beginning of the 1990s, as the *Fifth EAP* stated that:

“Previous action programmes have relied almost exclusively on legislative measures [i.e. direct regulation].101 […] In order to bring about substantial changes in current trends and practices and to involve all sectors of society, in a spirit of shared responsibility, a *broader mix of 'instruments'* needs to be developed and applied. Environmental policy will rest on four main sets of instruments: regulatory instruments, *market-based instruments* (including economic and fiscal instruments and *voluntary agreements*), horizontal supporting instruments (research, information, education etc.) and financial support mechanisms. [emphasis added]”.102

This ambition to use MBIs and VEA{s has also been confirmed in the *Sixth EAP*, adopted in 2002, and in the *Seventh EAP*, adopted in 2013 and still in force.

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100 See Langlet and Mahmoudi, EU and Environmental Policy, p. 153.
102 See Ibid. in the introduction to Chapter 7 “Broadening the Range of Instruments”. See also similarly, in the revised version of the Fifth EAP, European Parliament and Council Decision No 2179/98/EC, Article 3.
103 See Decision No 1600/2002/EC laying down the Sixth Community Environment Action Programme, Article 3.
104 See Decision No 1386/2013/EU on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’, para. 33 in the preamble, which states that EU environmental policy instruments should include market-based instruments and ‘voluntary tools and measures to complement legislative frameworks and to engage stakeholders at different levels’, which reasonably must be understood as including voluntary environmental agreements.
Furthermore, as to the use of VEAs specifically, the Commission has commented on the use of such instruments in several policy documents. For example, in 2002, the Commission adopted a Communication on Environmental agreements, in which it stated that it encourages the use of voluntary environmental agreements at Community level and that it is preferable not to make a legislative proposal where such agreements already exist and can be useful to achieve the objectives set out in the Treaty. Furthermore, the Commission’s former Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements contained a special chapter on environmental agreements. These guidelines stated that:

“[T]he Commission takes a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the Treaty [current Articles 2 TEU and 191 TFEU] as well as in Community environmental action plans, provided such agreements are compatible with competition rules.”

The chapter on environmental agreements was, however, removed when the Commission adopted the current Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements. According to the Commission, the removal was motivated by the fact that the former chapter mainly focused on environmental standards and that such agreements were more appropriately dealt with in a general chapter on standardisation agreements. Nonetheless, the Commission also stated in a Memo, regarding the adoption of the new guidelines, that the removal of the chapter did not imply a downgrading for the assessment of environmental agreements.

More recently, the current Commissioner Vestager has also commented on the matter of environmental cooperation between businesses. In a recent speech, she stated that:

“Tackling climate change is an important part of living more sustainably. But it’s only one part of building a more sustainable way of life. And as this conference reminds us, businesses have a vital role, in helping to create markets that are sustainable in many different ways. And competition policy should

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105 See Communication on ‘Environmental Agreements at Community Level’, p. 7 and 13.
107 Ibid. para. 192.
109 MEMO/10/676, under question 12.
support them in doing that. […] We don’t need new competition rules to make this possible. But it’s important that companies know about the opportunities which they already have, to work together for sustainability. […] And our review of the rules and guidelines on horizontal cooperation could be another opportunity to explain how companies can put together sustainability agreements without harming competition.”

In sum, various statements from the EU institutions thus show that MBIs and VEAs play an increasingly important role in EU environmental policy. Accordingly, private businesses are encouraged, more than ever before, to work towards more environmentally friendly ways of doing business and to take responsibility for the achievement of EU environmental objectives. As a consequence, EU environmental policy has been further intertwined with the market and the competitive process. Naturally, this development may give rise to conflicts between EU environmental objectives and EU competition objectives. For example, MBIs, such as environmental subsidies and taxes, may cause market distortions. Furthermore, as to VEAs, it is evident that such agreements will be subject to scrutiny under the EU competition rules. Where such agreements raise anti-competitive concerns, they may thus be prohibited. Since environmental objectives have a fundamental status within the Treaties, and since the EU institutions encourage the use of VEAs, it could, however, be questioned whether such agreements should enjoy some sort of ‘special treatment’ in EU competition analysis. In this regard, a crucial question is how to resolve conflicts between environmental objectives, pursued by an agreement, and competition objectives, threatened by the agreement. In order to answer this question, the objective of EU competition policy must however be explored first. The objective of EU competition policy will be examined in the next section.

3 Background to EU Competition Policy

3.1 Introduction

To answer the question of what role environmental consideration may play under Article 101 TFEU, one will inevitably need to discuss what competition law is and what objectives it should promote. The aim of the following sections is therefore to introduce a selection of competition law theories which are relevant in the context of EU competition policy (Sections 3.2-3.4) and to discuss the objective of EU competition
policy itself (Section 3.5). In this regard, it should be emphasised that the following sections will discuss the objective of EU competition policy ‘as a whole’, including Articles 101 and 102 TFEU as well as the Merger Regulation. Doing so is appropriate since the CJEU has confirmed that the different EU competition rules seek to achieve the same objective on different levels. Nevertheless, as Article 101 TFEU is the subject of this thesis, the author will primarily focus legal sources concerning that provision and where references are made to other competition rules, the reader should bear in mind that those rules operate on other levels than Article 101 TFEU.

3.2 Ordoliberalism

3.2.1 The Central Characteristics of Ordoliberalism

Ordoliberalism was developed in Germany at the University of Freiburg in the 1930s. In essence, Ordoliberalism is not a pure competition theory but rather a broad theory of what role the economy should play in society. As to the fundamental ideas of Ordoliberalism, this theory promotes individual economic freedom and competition as means of achieving societal welfare. However, Ordoliberals also argued that economic freedom and free markets cannot be unrestrained but must be governed by the State so that these institutions are not misused and destroyed. The State should therefore establish an ‘Economic Constitution’ to safeguard the existence of those institutions. According to Ordoliberals, the forming of such a constitution must also, inevitably, rest on political choices. As to its content, Ordoliberals argue that the constitution should prevent distortions of the market, ensure fair distribution of resources in society and hinder unwarranted government intervention in the market.

Even if Ordoliberalism is a broad economic theory, competition policy plays a central role in that theory. As to the Ordoliberal conception of competition policy, Ordoliberals believed that competition policy should enforce competition by creating and maintaining the conditions under which competition could thrive. In this regard, they distinguished between two concepts of competition; ‘performance competition’, meaning competition based solely on the merits to provide better products or services for consumers, and ‘impediment competition’ (or non-performance competition), based on conduct intended

111 See Case 6-72 Continental Can, para. 25.
112 See Kingston, Greening EU Competition Law and Policy, p. 11.
113 See Werner, Freedom and the Strong State, p. 636-638.
114 See Gerber, Constitutionalizing the Economy, p. 25 f.
115 See Gerber, Constitutionalizing the Economy, p. 49.
116 See Ibid. p. 50.
to impede the performance of a competitor. While the former type of practice was consistent with the competitive model, Ordoliberals argued that the latter type was inconsistent with it. In sum, Ordoliberals thus view the aim of competition policy as protecting the individual economic freedom to compete in the market and the competitive process as such and that, by doing so, the interest of consumers is safeguarded and their wellbeing guaranteed.  

3.2.2 The Role of Public Policy Objectives in Ordoliberalism

As to the role of public policy objectives, such as environmental protection, Ordoliberals argued that all governmental decisions that might affect the economy must be based in the economic constitution. Furthermore, Ordoliberals embraced an ‘integrated policy perspective’, meaning that each decision must be understood as part of ‘the greater whole’ of the economic constitution. Kingston has therefore argued that Ordoliberalism refuses a strict separation of environmental and pure economic efficiency grounds, and that the role of environmental protection in Ordoliberal competition policy thus will ultimately depend on whether environmental protection is considered as fundamental to the economic constitution of a certain community.

3.2.3 Ordoliberal Influence on EU Competition Policy

There are different views on the role that Ordoliberalism has played in EU competition policy. Generally, it has been held that Ordoliberalism has had a significant influence on the economic policy of the EU historically but that this influence has diminished over time. According to Monti, the structure of Article 101 TFEU, and the role of Article 101.3 TFEU, seems to be consistent with Ordoliberal thoughts on performance competition and distributional fairness. Furthermore, he claims that the EU courts have interpreted the notion of ‘restriction of competition’ in Article 101 TFEU as meaning ‘restricting the freedom of action of other market participants’, in line with the Ordoliberal view on the role of competition law as protecting economic freedom and hindering ‘impediment competition’. In contrast, Akman has however held that there

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117 See Ibid. p. 53.
119 See Gerber, Competition Law and International Trade, p. 43.
120 See Kingston, Greening EU Competition Law and Policy, p. 17-19.
121 See Ibid. pp. 14-17 and the references made there.
122 See Monti, Article 81 EC and Public Policy, p. 1060 f.
123 See Ibid. p. 1060-1062. See also Case T-112/99, Métropole Télévision (M6) and Others v Commission, para. 76.
is little quantitative and qualitative support in the case law of the EU courts that protection of economic freedom has ever been a guiding objective of EU competition law.124

3.3 The Harvard School

3.3.1 The Central Characteristics of the Harvard School

The Harvard School was developed in the US in the 1930s and was further advanced in the subsequent decades. Harvard competition theory focuses on the characteristics of markets and encourage the use of ‘Structure- Conduct-Performance’ analysis, based on the idea that there are casual links between market structure, market conduct and market performance.125 In the view of Harvard scholars, market concentration facilitates anticompetitive conduct and, principally, they therefore oppose concentration, even if it leads to lower costs and prices to the benefit of consumers. This presumption of illegality has also been highlighted as both the gift and the curse of the Harvard school theory since it, on one hand, provides a certain and foreseeable competition framework while, on the other hand, may lead to discrimination of large firms and prohibition of conduct that would benefit consumers.126

Another idea at the core of the Harvard School is the rejection of ‘perfect competition’ as an attainable state. Instead, Harvard scholars argue that competition policy should aim to achieve ‘workable competition’, in a sense that beneficial outcomes for the society can be expected.127 In other words, the Harvard School theory places competition policy in a broader context and sees it as an instrument to achieve multiple goals.128

3.3.2 The Role of Public Policy Objectives in the Harvard School

Similar to Ordoliberalists, Harvard scholars view competition policy as an integral part of a general economic policy and as an instrument to achieve multiple societally defined goals.129 Kingston has therefore argued that non-economic objectives, such as environmental protection, potentially could play a role within a competition policy based on the Harvard School approach.130

124 See Akman, The role of 'freedom' in EU competition law, p. 183.
125 See Kingston, Greening EU Competition Law and Policy, p. 20.
126 See Piraino, Reconciling the Harvard and Chicago Schools, p. 349 f.
127 See Budzinski, Monoculture versus diversity in competition economics, p. 298 f.
128 See Vedder, Competition Law and Environmental Protection in Europe, p. 30.
129 See Budzinski, Monoculture versus diversity in competition economics, p. 299.
130 See Kingston, Greening EU Competition Law and Policy, p. 22 f.
3.3.3 Harvard School Influence on EU Competition Policy

It has been argued by academics that the Harvard School has had a considerable influence on EU competition policy. As an example of such influence, the CJEU has held, in *Metro (I)*, that current Articles 3 TEU and 101 TFEU implies the existence on the market of ‘workable competition’, defined as a degree of competition necessary to ensure the attainment of the objectives of the Treaty. Furthermore, in the context of EU merger control, the emphasis on market shares and market concentration indexes seems to be in line with the Harvard presumption of illegality. However, in stark contrast to the Harvard School approach, it is also clear that EU competition policy does not principally oppose market concentration, but rather adopts an effects-based approach to decide whether market concentration is harmful to competition. For example, the Commission has stated, in its *Horizontal Merger Guidelines*, that efficiencies brought about by a merger may counteract the effects on competition, and the potential harm to consumers, that the merger might otherwise have. Similarly, the CJEU has also held that dominant firms, by proving that their conduct leads to benefits for consumers, may provide justification for conduct that would otherwise be prohibited according to Article 102 TFEU.

3.4 The Chicago School

3.4.1 The Central Characteristics of the Chicago School

The Chicago School theory was developed in the US at the University of Chicago. Instead of focusing on market structures, Chicago scholars emphasise the role of neo-classical microeconomics in competition analysis. In particular, price theory and the presumption that economic actors are rational and self-interest-maximising play a central role in the Chicago School theory. A central feature of the Chicago School was thus that it strongly opposed earlier interventionist-friendly competition theories. In particular, Chicago scholars rejected the Structure-Conduct-Performance analysis, relied on by Harvard scholars, and argued that the forces of competition select the market structures and that market concentration can be the result of efficiency. Therefore, Chicago scholars

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131 See Kingston, Greening EU Competition Law and Policy, p. 21 f. and the references made therein.
132 See Case C-26/76 *Metro v Commission*, para. 20.
134 See Ibid, para. 76.
135 See Case C-209/10 *Post Danmark*, para. 40-42.
136 See Kingston, Greening EU Competition Law and Policy, p. 23 and the references made therein.
also encouraged minimal State intervention in the market and preferred an order where the market, by itself, was allowed to correct problems of concentration.137

As to the goal of competition policy, Chicago scholars argue that achieving efficiency should be the sole goal of that policy. More specifically, they hold the concept of ‘consumer welfare’ as the guiding objective. This concept is understood as a total welfare standard, encompassing both consumer and producer surplus, focusing on the net effect of the surplus, rather than the distribution of surplus between consumers and producers. As to the distributional aspect, Chicago scholars however argue that an increase in producer surplus will eventually benefit consumers and that competition policy, by contributing to the maximisation of the total surplus, thus also will safeguard the interests of consumers.138

### 3.4.2 The Role of Public Policy Objectives in the Chicago School

As Chicago scholars view promotion of efficiency as the exclusive goal of competition policy, they also argue that competition policy should be free from non-economic and ethical considerations. Thus, if the legislator wishes to pursue non-economic objectives, such as redistribution of wealth or environmental protection, it should do so outside of the confines of competition policy.139 Nevertheless, Kingston has argued that environmental factors possibly can be taken into account under the Chicago School theory if those factors can be viewed as forming part of the objective of achieving efficiency.140

### 3.4.3 Chicago School Influence on EU Competition Policy

As the Chicago school was developed in the 1970s, this theory naturally did not influence EU competition policy in its initial phase. Nevertheless, academics claim that Chicago school influence on EU competition policy has increased in recent years.141 For example, as mentioned above, efficiencies may justify restrictions on competition in the assessment under the EU merger regulation and under Article 102 TFEU, which seems to be in line with the Chicago School approach.142 Furthermore, the Commission’s *Guidelines on the Application of Article 101.3 TFEU* indicates that Commission has adopted a narrow efficiency objective, similar to that of the Chicago School. In the guidelines, the Commission states that ‘consumer welfare’, and efficient allocation of resources, is the

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137 See Budzinski, Monoculture versus diversity in competition economics, pp. 299-301.
138 See Ibid. p. 6.
139 See Vedder, Competition Law and Environmental Protection in Europe, p. 37 f.
140 See Kingston, Greening EU Competition Law and Policy, p. 34.
141 See Ibid. p. 27 and the references made therein.
142 See Section 3.3.3 above.
ultimate objective of Article 101. Moreover, the guidelines states that goals pursued by other Treaty provisions can be taken into account only to the extent that they can be subsumed under the criteria of Article 101.3 TFEU. At the same time, the guidelines also states that only efficiency gains are relevant under those criteria. In fact, the guidelines thus suggest that non-economic factors are irrelevant to Article 101.3 TFEU, in line with the purely efficiency-based Chicago school competition policy.

However, it is doubtful that the objective of EU competition policy corresponds to the Chicagoan ‘consumer welfare’ concept. Firstly, it is evident that EU competition policy has not adopted the Chicagoan total welfare standard, including both consumer and producer surplus. Rather, EU competition policy seems to focus on consumer welfare, in a narrow and strict sense, and highlights the importance of direct distribution of efficiencies to consumers. For example, according to Article 101.3 TFEU, efficiency gains may only justify restriction on competition where consumers receive a ‘fair share’ of those efficiencies. Secondly, case law from the EU courts, as well as decisions from the Commission, indicate that various objectives, different from the one of achieving economic efficiency, has been taken into account in the application of the competition rules. Thus, even if Chicago school influence has increased in recent years, EU competition policy is not based on a pure Chicago School competition theory.

3.5 The Objective of EU Competition Policy

3.5.1 Some Initial Remarks

As shown above, EU competition policy seems to be influenced, to a greater or lesser extent, by Ordoliberalism, the Harvard School and the Chicago School. Rather than being based solely on any one of these three theories, EU competition theory must probably be described as a mix of these three theories. In this regard, Whish and Bailey has held that, historically, there has not been one single unifying objective underpinning EU competition policy. According to them, EU competition policy must rather be seen as an

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143 See Guidelines on the application of Article 81(3) of the Treaty, para. 13.
144 See Ibid. para. 42.
145 See e.g. Ibid. para. 50.
146 See Kingston, Greening EU Competition Law and Policy, p. 28.
147 See also e.g. Guidelines on the application of Article 81(3) of the Treaty, para. 83-85.
148 See e.g. Case C-26/76 Metro v Commission, para. 20, mentioned above in Section 3.3.3, where the CJEU held that Article 101 TFEU implies the existence of workable competition necessary for the achievement of ‘the objectives of the Treaty’ and, in particular, for ‘the creation of a single market’. See also Sections 3.5.3.2-3 below for more examples.
149 See similarly Kingston, Greening EU Competition Law and Policy, p. 10.
expression of current values, views and insights which may shift over periods of times.\textsuperscript{150} Furthermore, Budzinski has argued that, while the existing pluralism of competition theories might be characterised by significant incompatibilities, as to their view on competition and the objective of competition policy, pluralism does not necessarily imply an incapacity of competition economics. Instead, he argues that this pluralism might reflect a healthy scientific approach to the complex reality of the competitive process and the continuous adaption of competition economics to new scientific findings.\textsuperscript{151} Thus, the three competition theories discussed above may only provide limited guidance regarding the objective of EU competition policy. Instead, EU competition policy must probably be viewed as a unique, complex and dynamic institution which serves the particular interests of the society of which it forms a part.

While the objective of EU competition policy may have shifted over time, it should also be emphasised that different EU institutions, such as the CJEU and the Commission, might have conflicting views on the objective of EU competition policy.\textsuperscript{152} This makes the picture of EU competition policy even more complicated. Nevertheless, as pointed out by Townley, competition policy cannot be made rational until it is decided what objective it should achieve and whether it has one or multiple objectives.\textsuperscript{153} In the following sections, the author will therefore attempt to clarify the objective of EU competition policy, as understood by the EU courts and the Commission. Section 3.5.2 will present certain ‘core objectives’, which seems to be accepted by both the EU courts and the Commission. Thereafter, Section 3.5.3 will involve a discussion of the more controversial question of whether other Treaty objectives, such as environmental objectives, may play a role in EU competition policy.

\textbf{3.5.2 The Three Core Objectives of EU Competition Policy}

Even if there is no strict consensus in the literature, it seems to be generally accepted that EU competition policy, historically, has had three, fairly intertwined, core objectives; to protect \textit{economic freedom} (i.e. competition as a process), to achieve \textit{efficiency} (as an outcome of competition) and to promote \textit{market integration}.\textsuperscript{154} In the following, these three core objectives will be discussed separately as well as the hierarchy between them.

\begin{itemize}
  \item \textsuperscript{150} See Whish and Bailey, Competition Law, p. 20.
  \item \textsuperscript{151} See Budzinski, Monoculture versus diversity in competition economics, p. 313-318.
  \item \textsuperscript{152} See e.g. Witt, Public Policy Goals Under EU Competition Law, p. 469 f.
  \item \textsuperscript{153} See Townley, Is anything more Important than Consumer Welfare?, p. 345.
  \item \textsuperscript{154} See e.g. Monti, Article 81 EC and Public Policy, p. 1064 and Odudu, The Boundaries of EC Competition Law, p. 22.
\end{itemize}
Firstly, achieving *market integration* seems to have been an objective of EU competition policy since the early days of the EU. Establishing an internal market has always been one of the main objectives of the Union\(^\text{155}\) and both Article 101 and 102 TFEU expressly refers to certain conduct as ‘incompatible with the internal market’. Already in 1966, the CJEU therefore clarified, in *Consten and Grundig*, that the EU Treaties aimed at abolishing trade barriers between the Member States and that Article 101 TFEU was designed to pursue this aim.\(^\text{156}\) Furthermore, recent case law from the CJEU, as well as recent guidelines from the Commission, also shows that market integration is still an important objective of EU competition policy. For example, the CJEU has stated, in *GlaxoSmithKline*, that certain agreements might frustrate the Treaty objective of achieving market integration, through the establishment of a single market, and thereby restrict competition within the meaning of Article 101 TFEU.\(^\text{157}\) Similarly, various guidelines from the Commission, concerning Articles 101 and 102 TFEU, refer to the objective of achieving an integrated internal market.\(^\text{158}\) Thus, it seems clear that market integration is a core objective of EU competition policy.

Secondly, protecting *economic freedom* and the competitive process as such appears to be an important objective of EU competition policy according to case law from the EU courts and the guidelines from the Commission. For example, the General Court has held, in *Métropole Télévision*, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition in Article 101 TFEU.\(^\text{159}\) Similarly, the CJEU has held, in more recent cases, that Articles 101 and 102 TFEU aim to protect, not only consumers and competitors, but also the structure of the market and competition as such.\(^\text{160}\) Likewise, the Commission has also stated, in its *Guidelines on the Application of Article 101.3 TFEU*, that the ultimate objective of Article 101 TFEU is to protect the competitive process itself.\(^\text{161}\) In this regard, Witt has however argued that the Commission, in recent years, seems to have adopted a more narrow view on the objective of EU competition policy, rejecting the relevance of protection of individual economic

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\(^{155}\) See current Article 2.3 TEU. Compare Article 2 of the Treaty of Rome (EEC Treaty).

\(^{156}\) Joined Cases 56 and 58-64 *Consten and Grundig*, para. 340.

\(^{157}\) See Joined Cases C-501/06 P etc. *GlaxoSmithKline Services Unlimited v Commission*, para. 59-61.


\(^{159}\) See Case T-112/99, *Métropole Télévision (M6) and Others v Commission*, para. 76.

\(^{160}\) See e.g. Case C-52/09 *Konkurrensverket v TeliaSonera*, para. 24 (concerning Article 102 TFEU) and Case C-8/08 *T-Mobile Netherlands*, para. 38 (concerning Article 101 TFEU).

\(^{161}\) See Guidelines on the application of Article 81(3) of the Treaty, para. 105.
freedom. Nevertheless, the EU courts may still consider protection of economic freedom as one of the core objectives of EU competition policy.

Thirdly, and lastly, it is evident from case law from the EU courts and the guidelines from the Commission that achieving efficiency is a core objective of EU competition policy. For example, CJEU has accepted that anti-competitive conduct, caught by Article 102 TFEU, may be justified by efficiency gains that benefit consumers. Furthermore, the Commission’s guidelines concerning Articles 101 and 102 TFEU emphasises that the objective of those provisions is to ensure efficient allocation of resources and that consumers benefit from efficiency as a result of effective competition. Likewise, the Commission’s guidelines on merger control state that effective competition brings efficiency benefits to consumers, such as low prices and high quality products, and that the Commission aims to prevents mergers that would be likely to deprive customers of such benefits. However, it is important to note that the CJEU as well as the Commission emphasises a distributive aspect when referring to efficiency, namely that competition policy aims to achieve efficiency for the benefit of consumers (also referred to as ‘consumer welfare’). Witt has also held that it is uncertain whether the CJEU has fully embraced the economic approach, based on efficiency, adopted by the Commission. Nevertheless, it seems clear that achieving efficiency must be considered as one of the core objectives of EU competition policy.

Furthermore, as ‘efficiency’ (i.e. ‘consumer welfare’) may be considered as a somewhat unprecise concept, a few remarks will be made on the specific content of this concept. In this regard, neo-classical economics defines consumer welfare in terms of economic efficiency including of three dimensions of efficiency: (1) allocative efficiency, (2) productive efficiency and (3) dynamic efficiency. As to allocative efficiency, this concept refers to resources being allocated in accordance with consumer preferences, so that consumers can obtain the products that they desire at a price that they are willing to pay. As to productive efficiency, this concept refers to the minimising of production costs of products. Lastly, as to dynamic efficiency, this concept targets the aspect of innovation.
leading to new products and markets, thereby complementing the static perspective of allocative and productive efficiency. In the context of EU competition policy, all of these three dimensions appear to be relevant. Thus, the efficiency objective of EU competition policy seems to correspond to the neo-classical concept of consumer welfare. In sum, it has been established above that EU competition policy aims to achieve three core objectives. However, another important question is whether there is a hierarchy between these objectives. However, it is not crystal clear where the Commission and the CJEU stands in this question. As to the Commission, the guidelines contains somewhat contradictory statements in this regard. Nonetheless, it seems like the Commission considers that market integration and protection of competition as such constitute subgoals to an ultimate objective to promote efficiency. As to the CJEU, it seems less evident from the case law that the Court holds efficiency as the ultimate objective of EU competition policy. On one hand, as mentioned above, the Court has clearly emphasised that the objective of the competition rules is to protect the structure of the market and competition as such. On the other hand, as also mentioned above, the Court has allowed efficiency gains to justify restrictions on competition. Furthermore, Monti has argued that the CJEU has pursued the objective of market integration in ways that have yielded inefficient outcomes and hampered competition. It thus seems that, the CJEU considers that the objectives of achieving market integration and protecting competition as such constitute independent objectives on the side of the objective to achieve efficiency.

3.5.3 The Relevance of Other Treaty Objectives in EU Competition Policy

3.5.3.1 Introduction

So far, it has been established that EU competition policy seems to pursue three core objectives. However, there are numerous cases from the EU courts and decisions from the Commission indicating that other Treaty objectives have been taken into account in the application of EU competition rules. These cases and decisions suggest that EU

See Kingston, Greening EU Competition Law and Policy, p. 171 f.
See e.g. Guidelines on the application of Article 81(3) of the Treaty, para. 13 (allocative efficiency), 64 (productive efficiency) and 102 (dynamic efficiency).
See Ibid. para. 13 and 105. Note that even though the Commission refers to protection of the competitive process as such as the ultimate aim of Article 101 TFEU in para. 105, it also states that competition is protected in order to ensure long-term efficiency. See also Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty, para. 5 where the Commission states that it will direct its enforcement to ensuring that that consumers benefit from the efficiency and productivity which result from effective competition. Compare however Commission, Guidelines on Vertical Restraints, para. 7 where it is less clear that market integration and protection of competition as such are not independent objectives of EU competition policy.
See Monti, Article 81 EC and Public Policy, p. 1065.
competition policy has not been exclusively guided by the three core objectives, but rather, in line with ordoliberal and Harvard school thoughts, has been viewed as an integral part of the EU Treaties ‘as a whole’. However, as to the role of different Treaty objectives in EU competition policy, there seems to be a discrepancy between the approaches adopted by the Commission and the CJEU. In the following, the views of the CJEU and the Commission will therefore be discussed separately.

3.5.3.2 The Approach of the EU Courts

As to conflicts between the core objectives of EU competition policy and other Treaty objectives, the EU courts seem to have used two different methods to resolve such conflicts when applying the competition rules. These methods are; (1) ‘integration’ (or ‘balancing’) and (2) exclusion. In this regard, ‘integration’ means that the Court takes the other EU policy objective into account and resolves the conflict under the EU competition framework. In contrast, ‘exclusion’ means that a certain conduct, due to its intrinsic connection to the achievement of another EU policy objective, completely escapes the EU competition framework.172 In the following, a few examples of integration and exclusion from the case law of the EU courts will be presented.

Firstly, as to the method of integration, it is apparent from the earlier case law of the CJEU that the Court has considered that EU competition policy must be viewed in the light of the broader objectives of the Treaties. For example, the CJEU adopted such an approach in Continental Can, where it stressed that the Treaty allows certain restraints on competition ‘because of the need to harmonize the various objectives of the Treaty’. However, the Court also clarified that the ‘restraints’ allowed are limited by the requirements of the Articles setting out the fundamental objectives of the Union (at the time this was Article 2 and 3 EEC).173 As mentioned above, the CJEU has also held, in Metro (I), that Article 101 TFEU aims to achieve ‘workable competition’, defined as a degree of competition necessary for ‘the attainment of the objectives of the Treaty’.174 Furthermore, the Court stated that:

“[t]he powers conferred upon the Commission under Article 85(3) [current Article 101.3 TFEU] show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of

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172 Compare Townley, Is anything more Important than Consumer Welfare?, pp. 353-361, where he discusses ‘exclusion’ and ‘balancing’.
173 See Case 67/72 Continental Can, para. 24. Currently Article 3 TEU sets out the fundamental objectives of the EU.
174 See Case C-26/76 Metro v Commission, para. 20. See also Section 3.3.3 above.
a different nature and that to this end certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market. [emphasis added]”. 175

The CJEU then went on to discuss the role of employment objectives under the competition rules and reached the conclusion that ‘stabilizing the provision of employment’ comes within the framework of objectives to which reference may be had under current Article 101.3 TFEU. 176 In reaching this conclusion, the Court did however not expressly refer to any of the Treaty provisions concerning employment. 177 However, the Court also emphasised the fact that stabilizing the provision of employment would lead to improvement of the general conditions of production, especially when market conditions are unfavourable. 178 Thus, it seems like the Court tried to connect its reasoning to the core competition objective to achieve efficiency.

Furthermore, the CJEU has confirmed the relevance of employment considerations under Article 101.3 TFEU in its judgment in Remia. In that case, the Court referred to its findings in Metro (I) and stated that ‘the provision of employment’ comes within the framework of the objectives to which reference may be had pursuant to Article 101.3 TFEU. 179 However, the Court also emphasised that ‘economic justification’ is required for an exemption under Article 101.3 TFEU to be granted. 180

Moreover, the CJEU has in several cases defined the function of the EU competition rules, in fairly broad terms, as ‘to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union’. 181 In this regard, it seems like the Court, by using the notion ‘well-being of the European Union’, refers to Article 3 TEU, which states that the aim of the Union is to promote ‘the well-being of its peoples’. These cases thus indicate that CJEU views the objective of EU competition policy as not only to pursue the core

175 Ibid. para. 21. See also Case 75/84 Metro SB-Großmärkte v Commission, para. 65 which confirms this statement.
176 See Case C-26/76 Metro v Commission, para. 43.
177 See e.g. current Articles 3.3 TEU and 9 TFEU concerning employment.
178 See Case C-26/76 Metro v Commission, para. 43.
179 See Case 42/84 Remia and Others v Commission, para. 42.
180 See Ibid. para. 45.
181 See e.g. Case 136/79 National Panasonic v Commission, para. 20, Joined Cases 46/87 and 227/88 Hoechst, para. 25, Case 374/87 Orkem v Commission, para. 19, Case 85/87 Dow Benelux NV v Commission, para. 36, Case T-65/99 Strintzis Lines Shipping SA v Commission, para. 40, Case C-94/00 Roquette Frères SA, para. 42 and Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB, para. 22. Also compare Article 3.1 TEU which states that the Union’s aim is to promote the well-being of its peoples.
competition objectives discussed above, but rather to promote societally desirable outcomes, in a broader sense, in line with the fundamental objectives of the EU Treaties. Furthermore, while the cases above indicate that various Treaty objectives may be taken into account in EU competition policy, or even that the objective of EU competition policy must be defined in accordance with such objectives, there are also examples of exclusion in the case law of the CJEU. For example, the Court has held that collective agreements, due to their intrinsic connection to social policy objectives, are excluded from the scope of Article 101 TFEU. In Albany, the CJEU stated that:

“[i]t is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty [current Article 101.1 TFEU] when seeking jointly to adopt measures to improve conditions of work and employment. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty [emphasis added].”

The approach taken by the Court in Albany has also been confirmed in several subsequent cases. This case law clearly shows that the CJEU, by excluding collective agreements from full scrutiny under the competition law framework, has allowed Treaty objectives connected to social policy and employment to trump the core competition objectives.

In sum, it thus appears from the case law that the CJEU has taken EU policy objectives, different than those discussed above, into account when applying Article 101 TFEU. As particularly evident from Metro (I) and Albany, the Court’s approach seems to be based on a theological interpretation of the competition rules, meaning that those rules must be interpreted in the light of the objectives of the EU Treaties as a whole. Moreover,
Metro (I), and the cases where the CJEU held that the function of the competition rules is to “ensure the well-being of the European Union”, even seem to indicate that the Court does not only recognize that different objectives pursued by the Treaty may conflict with the core competition objectives, but also defines the objective of EU competition policy in accordance with the objectives of the Treaties. Nevertheless, it is not perfectly clear what this means in practice. As pointed out by Akman, values such as ‘the well-being of the European Union’ represent vague standards that may render competition enforcement less legitimate. Furthermore, it can be questioned why the Court, in Albany, opted for ‘exclusion’ of collective agreements from the scope of EU competition law, while, in cases such as Metro (I), it seems to have opted for ‘integration’ of employment considerations into EU competition law. For the purpose of this thesis, it is however sufficient to conclude that the CJEU seems to take the approach that various Treaty objectives must be taken into account when applying the competition rules. As to the role of environmental objectives in EU competition policy, the CJEU has, however, not yet expressed its view.

3.5.3.3 The Approach of the Commission

From the decision practice of the Commission it seems like the Commission, in the past, has taken various Treaty objectives into account when applying Article 101 TFEU. For instance, the Commission has taken objectives related to employment into account under Article 101.3 TFEU. As an example, the Commission has referred to employment considerations, in Synthetic Fibres, where it found that an agreement between producers of synthetic fibres could be justified under Article 101.3 TFEU. The agreement in that case was aimed at reducing the production capacity of the producers and the Commission found that the arrangement would result in efficiency gains. In addition, the Commission also stated that the coordination of plant closures would make it easier to cushion social effects of the restructuring, by making suitable arrangements for the retraining and redeployment of workers, and that the agreement therefore contributed to ‘improving production and promoting technical and economic progress’. A few years later, the Commission also reached a similar conclusion, in Stichting Baksteen, concerning a restructuring agreement between brick producers. However, even if the Commission referred to employment considerations in these decisions, it seems like those

186 Akman, The concept of abuse in EU competition law, p. 326 f.
187 See Commission decision, Synthetic Fibres, 84/380/EC, para. 34-36.
188 See Ibid. para. 37-38
189 See Commission decision, Stichting Baksteen, 94/296/EC, para. 26-28
considerations were only taken into account as an additional factor to the pure efficiency gains. It is thus doubtful whether the Commission, in absence of the pure efficiency gains, would have considered the employment considerations as sufficient for an exemption under Article 101.3 TFEU.

Another decision in which the Commission has taken non-efficiency factors into account is *Ford Volkswagen*. This case concerned an agreement between car manufacturers to set up a joint venture for the development and production of a multi-purpose vehicle in Portugal. In its decision, the Commission found that the agreement would generate efficiency gains. In addition, the Commission noted that the agreement would result in the largest single foreign investment in Portugal and the creation of a substantial amount of jobs and that it therefore would contribute to ‘the promotion of the harmonious development of the Community and the reduction of regional disparities which is one of the basic aims of the Treaty’. However, in its decision the Commission emphasized that these additional factors would not be enough to make an exemption possible unless the conditions of Article 101.3 TFEU were fulfilled, but that they constituted an element which it had taken into account.

Beside social policy objectives, the Commission has also, in numerous decisions, taken environmental factors into account when granting exemptions under Article 101.3 TFEU. For example, in *Exxon/Shell*, the Commission held that a joint venture agreement would result in the reduction in the use of raw materials and of plastic waste and the avoidance of environmental risks, involved in the transport of ethylene, and that this would be perceived as beneficial by many consumers ‘at a time when the limitation of natural resources and threats to the environment are of increasing public concern’. Similarly, in *Philips-Osram*, the Commission held that another joint venture agreement would lead to less air pollution, and thereby, ‘direct and indirect benefits for consumers from reduced negative externalities’. Thus, these two decisions indicate that environmental benefits may be taken into account when granting an exemption under Article 101.3 TFEU. However, in these decisions, the environmental benefits were taken into account in addition to other efficiency gains. Since the Commission did not clarify the weight and

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190 See Monti, Article 81 EC and Public Policy, p. 1071.
192 See Ibid. para. 36.
relevance attributed to the environmental benefits in its assessment, it is thus difficult to understand whether those benefits were taken into account only as an additional factor.  

Nevertheless, there are decisions from the Commission in which environmental policy objectives seems to have played a prominent role for the justification of agreements under Article 101.3 TFEU. For example, the Commission explicitly referred to environmental policy objectives in its decision in *DSD*. This decision concerned DSD (Duales System Deutschland), which operated a countrywide system for collection and recovery of sales packaging and had entered into an agreement with its collectors containing an exclusivity clause, meaning that DSD would only buy collection services from one appointed collector in certain designated areas. In its decision, the Commission found that the exclusivity clause constituted a restriction on competition under article 101.1 TFEU. Nonetheless, the Commission also found that the agreement sought to give effect to ‘national and Community environmental policy with regard to the prevention, recycling and recovery of waste packaging’, which provided a high level of environmental protection. Furthermore, the Commission found that the agreement in question would give *direct practical effect to environmental objectives*. In addition, it also found that the agreement would produce other efficiency gains. In conclusion, the agreement was therefore granted an exemption under Article 101.3 TFEU.  

Similarly, in *CECED*, the Commission referred to the environmental principle that environmental damage should be rectified at the source, and the Community objective of a rational utilisation of natural resources, as it exempted an agreement under Article 101.3 TFEU. This case concerned an agreement between manufacturers of washing machines, according to which the parties committed to cease to produce and import certain categories of washing machines with the object of improving energy efficiency. In its decision, the Commission found that, in addition to ‘individual economic benefits’, the agreement would also generate ‘*collective environmental benefits*’, in the form of the

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195 See Monti, Article 81 EC and Public Policy, p. 1073 f. and Vedder, Competition Law and Environmental Protection in Europe, p. 163.  
197 Ibid. para. 143.  
198 See Ibid. para. 144.  
199 See Ibid. para. 145.  
200 See Ibid. para. 146.  
201 Also called the proximity principle. See Section 2.3.4.6 above.  
reduction of emissions, leading to savings in environmental damage. The Commission therefore granted an exemption under Article 101.3 TFEU.

In the wake of the CECED decision, the Commission has also, at several occasions, expressed that environmental objectives played an important role in that decision. For example, in a press release following the decision, Commissioner Monti declared, upon approval by the Commission, that:

“environmental concerns are in no way contradictory with competition policy. This decision [CECED] clearly illustrates this principle, enshrined in the Treaty, provided that restrictions of competition are proportionate and necessary to achieving the environmental objectives aimed at, to the benefit of current and future generations [emphasis added]”.

Similar statements have also been made in other communication from the Commission. Furthermore, in its Communication on Environmental Agreements the Commission stated, concerning the interpretation of Article 101.3 TFEU, that:

“in particular the protection of the environment might be considered as an element which contributes to improving the production or distribution of goods and to promoting technical and economic progress ”.

In sum, various decisions and other communication from the Commission thus indicates that the Commission, in the past, has taken various Treaty objectives, and in particular environmental objectives, into account when applying Article 101 TFEU. Nonetheless, it remains uncertain to what extent such objectives have been decisive for the assessment of the Commission in individual decisions. In all cases discussed above, non-efficiency considerations, such as environmental protection or employment considerations, were taken into account in addition to efficiency gains. Moreover, in most cases, the Commission does not clarify the weight attributed to the non-efficiency considerations. At the very least, environmental factors have been taken into account as an additional factor by the Commission. Potentially, such factors even ‘tipped the scale’ in favour of an exemption under Article 101.3 TFEU. In the case of DSD and CECED, those decisions

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203 Ibid. para. 47-57.
204 See Ibid. para. 67.
205 Press release IP/00/148.
207 Communication on Environmental Agreements at Community Level, p. 15. See also Commission, XXV Report on Competition Policy, 1996, p. 85 for a similar statement.
even indicate that environmental policy objectives played a *particularly important role* in the assessment of the Commission. In this regard, Monti has even argued that these decisions suggest that environmental protection was close to becoming a *core factor* in the eyes of the Commission. 208 Furthermore, legal scholars have argued that the environmental benefits in DSD may be seen as the primary justification for the exemption in that case. 209 Thus, it may be argued that the Commission, in the past, considered that environmental objectives were relevant when applying the EU competition rules.

Despite the decisions discussed above, it does however seem like the Commission, since the beginning of the 2000s, has favoured a more narrow approach to the objective of EU competition policy, holding efficiency (i.e. ‘consumer welfare’) and market integration as the exclusive objectives of EU competition policy. 210 This is particularly evident from the guidelines adopted by the Commission in the two recent decades. As mentioned above, these Guidelines primarily refer to the core objectives of EU competition policy. As to the relevance of other Treaty objectives, the Commission states, in its *Guidelines on the application of Article 101.3 TFEU*, that:

“[g]oals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81.3 [current 101.3 TFEU]”. 211

Prima facie, this statement seems to imply that various Treaty objectives might be relevant under EU competition policy. Nevertheless, according to the Guidelines, only objective economic efficiencies are relevant under the first criterion in Article 101.3 TFEU. 212 Thus, it seems that the current view of the Commission is that other Treaty objectives may only be taken into account where economic efficiencies promote such objectives.

Furthermore, in the current *Guidelines on horizontal cooperation*, the Commission seems to reject its own reasoning in CECED. More specifically, the guidelines contain an example of how to assess environmental standard agreements under Article 101.3 TFEU. The example is clearly based on the facts in the CECED case. In the example, the

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208 See Monti, Article 81 EC and Public Policy, p. 1075.
209 See Donal, Disintegration, p. 379 and Vedder, Competition Law and Environmental Protection in Europe, p. 168. See also Case T-289/01 DSD, para. 38 where the Court of First Instance seems to make the same interpretation of the DSD decision.
211 See Guidelines on the application of Article 81(3) of the Treaty, para. 42.
212 See Ibid. para. 50 and 59.
Commission does not, however, mention anything about environmental protection but refers solely to efficiency gains as relevant for the assessment.213

In conclusion, it thus seems like the Commission currently takes a narrow view on the role of other Treaty objectives, such as environmental protection, in EU competition policy. According to this narrow view, other Treaty objectives may not be taken into account unless those objectives are promoted by efficiency gains. Moreover, this narrow view appears to be in conflict with the view taken by the Commission in many of its earlier decisions and it is questionable whether this view is compatible with the case law of the CJEU, discussed in the previous section. As pointed out by Kingston and Witt, it therefore seems like the Commission, singlehandedly, has steered the interpretation of EU competition law towards a narrow efficiency-based approach.214

4 Intermediate Summary and Conclusions

Taken together, the sections above depict EU environmental policy and EU competition policy as two policy areas that have become increasingly intertwined in recent decades. In short, this development can be ascribed to three distinct, yet interlinked, elements.

Firstly, the status of environmental objectives in the EU Treaties has evolved over the last decades and environmental protection now constitute one of the fundamental objectives of the EU.215 Besides the fact that EU environmental policy now constitutes a important isolated policy area, it also appears that the Treaties require that environmental objectives must be taken into account in other EU policy areas. In fact, Article 3 TEU sets out that the EU shall establish an internal market which shall aim to achieve ‘a high level of environmental protection’. Furthermore, the integration principle, enshrined in Article 11 TFEU, requires that environmental requirements must be integrated into other policy areas. As apparent from the case law of the CJEU, this principle has the effect that environmental policy considerations may ‘spill over’ to other EU policy areas, such as policy on the internal market and competition policy.216

Secondly, there has been a shift in EU environmental policy towards an increased use of market-based instruments and encouragement of voluntary environmental agreements.

215 See Section 2.2 above.
216 See Section 2.3.4.1 above.
As a consequence, EU environmental policy has been further integrated into the market and the competitive process. In the context of voluntary environmental agreements, it is also evident that such agreements will be subject to scrutiny under the EU competition rules. In this regard, the EU institutions have also recognized that the development of EU environmental policy involves a risk of conflicts between the environmental policy objectives of competition policy objectives that needs to be resolved.217

Thirdly, and lastly, an overview of EU competition policy portrays a somewhat cluttered picture as to the objective pursued. It appears that EU competition policy has evolved in a dynamic manner over the years and today constitutes a unique institution influenced by several competition theories.218 Furthermore, there seems to be a potential discrepancy between the views of the EU courts and the Commission as to the role of other Treaty objectives in EU competition policy. In the past, the Commission seems to have taken various Treaty objectives, such as environmental protection, into account when applying Article 101 TFEU. However, since the beginning of the 2000s, the Commission seems to have taken a more narrow view on the objective of EU competition policy, as only to promote efficiency, thereby neglecting the relevance of other Treaty objectives under the competition rules.219 In contrast, the EU courts appear to have taken various Treaty objectives into account when applying Article 101 TFEU, and defines the objective of competition policy in rather broad terms.220 However, the CJEU has not yet ruled on the question of whether environmental objectives may play a role in competition policy.

In sum, as environmental and competition policy is becoming more intertwined one important question is how to handle conflicts between environmental and competition policy objectives when applying the competition rules. In the view of the author, the risk of such conflicts seems to be particularly high in the case of voluntary environmental agreements and other forms of environmental cooperation between businesses that, on the one hand, may entail restrictions on competition but, on the other hand, can promote environmental objectives. In the following, the author will therefore propose a model for integration of environmental considerations in Article 101 TFEU, which prohibits anti-competitive cooperation, and discuss how to assess environmental cooperation under the legal conditions of that provision.

217 See Section 2.4.3 above. See also Section 3.5.3.2 concerning antitrust decisions from the Commission where environmental considerations has been taken into account in the assessment under Article 101 TFEU.
218 See Sections 3.2.3, 3.3.3, 3.4.3 and 3.5.1 above.
219 See Section 3.5.3.3 above.
220 See Section 3.5.3.2 above.
5 The Role of Environmental Considerations in Article 101 TFEU – Integration or Exclusion?

5.1 Introduction

In the following sections, the author will propose a model for integration of environmental considerations into Article 101 TFEU. Firstly, an economic perspective will be taken on environmental protection, for the purpose of establishing a common economic frame of reference as the basis for the integration model (Section 5.2). Thereafter, the author will then discuss, from a legal perspective, whether the EU Treaties requires that environmental considerations must be integrated into Article 101 TFEU (Section 5.3). and propose a model for how to balance environmental objectives against the core competition objectives under that provision (Section 5.4). Lastly, the author will argue against exclusion of voluntary environmental agreement from the scope of Article 101.1 TFEU as a method of resolving conflicts between environmental objectives and competition objectives in the context of that provision (Section 5.5).

5.2 Environmental Protection from an Economic Perspective – Establishing a Common Economic Frame of Reference for the Integration Model

5.2.1 Environmental Degradation as an Efficiency Problem

From an economic perspective, environmental degradation can be described as an efficiency problem. In the following, a series of concepts, developed in economic theory, will be used to describe this.

Economists have introduced different tools for identifying socially optimal choices in terms of allocation of resources. One of these tools is the concept of Pareto efficiency, which describes a state of allocation of resources, in which it is impossible to achieve reallocation to the benefit of one actor without a harmful effect on another actor. In the light of the Pareto concept, societal choices should thus only be made if they result in a ‘Pareto improvement’, meaning that a reallocation of resources makes one party better off without making another party worse off. Accordingly, the Pareto concept emphasises preservation of the ‘status quo’ of each party as a limitation for reallocation, even if the reallocation would increase the total amount of resources. Due to this limitation, the Preto concept has been further developed into the concept of Kaldor-Hicks efficiency, which addresses this limitation. The Kaldor-Hicks concept builds on the Pareto concept,

\[ \text{See Cooter, Law and Economics, p. 14.} \]
but instead of requiring that a reallocation of resources must not make any party worse off, the concept promotes allocative improvements meaning that only one party is better off, if that party could, through theoretical compensation, restore the status quo of other parties being worse off.222

As will be explained below, the Pareto and Kaldor Hicks concepts may be used in order to describe environmental degradation as an efficiency problem. However, to explain this, three additional economic concepts, developed on the basis of those efficiency concepts, will first be described. These are the concepts of (1) ‘public goods’, (2) ‘negative externalities’ and (3) ‘market failures’.

Firstly, as to the concept of public goods, this concept can be described as having two characteristics. Firstly, such goods are characterized by ‘non-rivalrous consumption’, in the sense that benefits, gained from such goods by one consumer, does not come at the expense of another consumer. Secondly, such goods are characterized by ‘non-excludability’, in the sense that individual consumers cannot be excluded from the benefits of such goods. Due to the character of public goods, they may often give rise to, so called, ‘free riding problems’, meaning that, while certain actors contribute to the maintenance of such goods, other market actors benefit from those goods at no cost.223

Secondly, as to the concept of negative externalities (i.e. external costs), this concept can be described as ‘spill over effects’ resulting from a market transaction, meaning that the parties of a transaction does not bear all of the costs of the transaction. Such effects may often occur when a transaction involves public goods. Thus, while the parties to a transaction, typically, bear all the costs and gain all the benefits of the transaction, and thus has the best information regarding the desirability of the transaction, this is not the case in the presence of negative externalities. The Government may therefore often try to adopt regulations to achieve ‘internalisation’ of negative externalities, in the sense that market actors take the external costs into account in their decision-making.224

Thirdly, and lastly, as to the concept of market failures, this concept describes different situations where the market fails to deliver socially optimal choices (e.g. efficiency as defined by the Pareto or Kaldor Hicks concepts). In other words, when markets fail, consumers are not able to fully achieve their welfare objectives through the market

222 See Ibid. p. 42.
224 See Ibid. p. 39 f.
process. In this regard, public goods and negative externalities are typical sources of such failure since they lead to situations where market actors do not fully bear the costs of their decisions and thus may make decisions which are irrational from a societal perspective.225 Applying the concepts described above in an environmental context shows that environmental degradation, in many cases, may be the result of market failures. Naturally, many environmental resources, such as the atmosphere, water resources or air resources, are characterized by non-excludability, similar to public goods, resulting from an absence of property rights or their effective enforcement. At the same time, environmental resources are, however, ‘rivalrous’, in the sense that the use of one consumer diminishes the amount or quality of the good available to others. Hence, the characteristics of environmental resources can give rise to problems of free riding and overuse.226 For example, market actors may lack economic incentives not to release pollutants into the air without contributing to the maintenance of clean air. Moreover, due to the non-excludability of air resources, polluting the air will give rise to negative externalities, since breathable air is a resource used by everyone on this earth and, thus, costs of pollution will be borne by the society ‘as a whole’. Furthermore, it could be argued that it is unlikely that the benefits gained by the polluter would be able to compensate for the costs borne by the society. Consequently, pollution, and other types of environmentally harmful action, can lead to results that are likely to be inefficient227 from societal perspective.228

In sum, environmental degradation may thus be described as the result of market failure and as an efficiency problem. As apparent from previous sections, this perspective on environmental degradation has also been taken in EU environmental policy. For example, the polluter pays principle in EU environmental policy clearly reflects the problem of negative externalities in the environmental context, emphasizing that environmental costs should be borne by the polluter and not by the society.229 Similarly, the increased use of market-based instruments reflects an ambition achieve internalisation of environmental costs and, thereby, a more efficient use of environmental resources.230

225 Ibid. p. 38 ff. See also Janssen and Kloosterhuis, Defining non-economic activities in competition law, p. 133.
226 See Dean and McMullen, Toward a theory of sustainable entrepreneurship, pp. 59-61.
227 In contrast to efficiency as defined by the Pareto and Kaldor-Hicks concepts.
228 See Ibid. p. 55 f.
229 See Section 2.3.4.4 above on the polluter pays principle.
230 See Section 2.4.3 above.
5.2.2 Economic Valuation of Environmental Resources

As explained above, environmental degradation can be described as an efficiency problem. However, a particular issue of adopting an economic perspective on the environment is, the problem of valuing environmental resources. In this section, the author will briefly discuss this matter.

Fundamentally, economists have described the environment as an asset which provides various services to the society, such as basic living conditions for human beings and inputs to production in the economy. For example, the environment provides breathable air and temperature appropriate for human life, as well as suitable land and uncontaminated water required for farming and forest industry. Nevertheless, many environmental services lack a market and therefore perceptible market prices. Moreover, due to the character of environmental resources, such resources are intrinsically difficult to value. As such resources are often characterised by non-excludability, free rider problems may result in people understating their willingness to pay for such resources. Furthermore, uncertainties regarding the irreversibility of future environmental damages, as well as the necessity for discounting the value of such future damages, create further difficulties when valuing environmental resources. As pointed out by the Nobel Prize-winning psychologist Kahneman, humans also have a tendency of underestimating the probability of occurrence of unusual events, which likely render us unable of reasonably valuing the costs of environmental disaster.

Thus, valuing environmental resources and environmental services is a complex task. Nevertheless, environmental economists have developed different techniques of valuing environmental services and human preferences for environmental resources. Environmental valuation is, however, still an evolving and quite debated field and various valuation techniques has been developed. As a lawyer, the author will refrain from discussing the usefulness, accuracy and reliability of these different techniques. For the purpose of this thesis, it is sufficient to note that techniques for environmental valuation exist. To provide a short introduction to environmental valuation, the author will,

231 See Kingston, Greening EU Competition Law and Policy, p. 176.
232 See Ibid. p. 177.
233 See Kingston, Greening EU Competition Law and Policy, p. 184 f. where she also provides a further discussion on the difficulty of valuing environmental resources.
234 Kahneman, Tanka, snabbt och långsamt, p. 372.
235 See Kingston, Greening EU Competition Law and Policy, pp. 176-186 for a more thorough discussion on environmental valuation.
however, introduce three main approaches of environmental valuation; (1) direct market valuation, (2) revealed preference valuation and (3) stated preference valuation.

Firstly, as to direct market valuation, such valuation is based on data from actual markets. On the basis of such data, direct market valuation can show the price of environmental services or provide a basis for estimates of restoration costs for systems providing such services. Secondly, as to revealed preference valuation, such valuation uses observations of the behaviour of individuals (e.g. changes in demand) in markets, or other contexts, related to environmental services. Based on such observations, revealed preference valuation can provide estimates of the value of environmental services. Thirdly, and lastly, stated preference valuation is based on surveys where individuals are asked to value environmental services. By the use of such surveys, stated preference valuation generates artificial prices for environmental services. As to the usefulness of the three valuation techniques, it can be noted that the appropriateness of each technique will, naturally, ultimately depend on the context in which they are to be applied and on the environmental services at hand.236

5.3 Must Environmental Considerations Be Integrated Into Article 101 TFEU?

5.3.1 A Legal Argument Based on a Systematic and Teleological Interpretation of the EU Treaties

As to the question of whether environmental considerations must be integrated into Article 101 TFEU, the case law of the CJEU does not provide any definite answers. Furthermore, while the Commission seems to have answered this question affirmatory in the past, it seems to have shifted its approach to this question since the beginning of the 2000s.237 In the view of the author, a systematic and teleological interpretation of the EU Treaties however indicates that environmental considerations must be integrated into Article 101 TFEU. In this regard, it is also clear that systematic and teleological interpretation constitute important interpretative methods used by the CJEU.238

As a first argument, a systematic and teleological interpretation of Article 101 TFEU seems called for when that provision is viewed in the bigger context of the EU Treaties. Firstly, it seems apparent from the wording of Article 101 TFEU that this provision must

236 See Ibid. p. 182 f.
237 See Section 3.5.3.3 above.
238 See Lenaerts and Gutiérrez-Fons, To Say What the Law of the EU Is, pp. 17-23 (systematic interpretation) and pp. 31-37 (teleological interpretation). See also Section 3.5.3.2 above for examples of cases where these interpretative methods have been used for interpretation of the EU competition rules.
be viewed as a part of the EU objective of achieving an internal market, since this provision expressly refers to certain conduct as ´incompatible with the internal market´. As mentioned above, this also seems to be in line with the view of the Commission and the EU Courts, which both recognize market integration as an objective of EU competition policy. Secondly, according to Article 3 TEU, the internal market shall aim at ´a high level of environmental protection´ and work for ´the sustainable development of Europe´. As mentioned above, the concept of ´sustainable development´ involves an ecological dimension. Thus, it appears that Article 101 TFEU should contribute to the establishment of the internal market and, thereby, also aim at a high level of environmental protection and a sustainable development. In this regard, it is also apparent that the CJEU considers that the competition rules must be interpreted in the light of Article 3 TEU. Moreover the case law of the CJEU also indicates that both the concept of ´a high level of environmental protection´ and, possibly, also the concept of ´sustainable development´, constitute a legal standard that can be used for interpretation of EU law. However, these standards are still rather vague and does not provide any clear legal guidance. Nevertheless, in the view of the author, a systematic and teleological interpretation of Article 101 TFEU, in the light of Article 3 TEU, clearly suggests that environmental considerations must be integrated into that provision.

As a second argument, the so called “policy linking clauses” in the TFEU also indicate that environmental considerations must be integrated into Article 101 TFEU. Firstly, Article 7 TFEU states that ´the Union shall ensure consistency between its policies and activities, taking all of its objectives into account´, thus suggesting that consistency must be ensured between environmental policy objectives and competition objectives. Secondly, and more importantly, Article 11 TFEU, codifying the integration principle, states that environmental requirements must be integrated into other EU policy areas. As discussed above, case law also shows that the CJEU has used this principle interpretation of Treaty provisions related to the internal market, such as Article 107 TFEU (State aid), and Article 34 TFEU (free movement of goods). As mentioned above, the CJEU has, however, not yet used the integration principle for interpretation of Article 101 TFEU.

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239 See Section 3.5.2 above.
240 See Section 2.3.4.2 above.
241 See Case 6-72 Continental Can, para. 22-24 and Section 3.5.3.2 above.
242 See Sections 2.3.4.2-3 above.
244 See Section 2.3.4.1 above.
Nevertheless, in the view of the author, nothing indicates that Article 101 TFEU should be immune to the requirements of the integration principle. 245 Thirdly, integration of environmental considerations into Article 101 TFEU seems to be in line with the view on EU competition policy taken by the CJEU. As mentioned above the Court has, in several cases, taken Treaty objectives, such as employment objectives, into account when applying Article 101 TFEU and has also defined the function of the EU competition rules, in broad terms, as to ensure ‘the well-being of the European Union’. 246 Lastly, integration of environmental considerations into Article 101 TFEU also seems to be in line with the approach adopted by the Commission prior to the beginning of the 2000s. 247

In sum, when interpreting Article 101 TFEU in the light of Articles 3 TEU and 11 TFEU, it is thus clear that environmental considerations must be integrated into that provision, insofar as the wording of that provision is sufficiently open-textured.

5.3.2 Addressing Some of the Concerns Regarding Integration of Environmental Considerations into Article 101 TFEU

Even if the interpretation suggested above supports integration of environmental considerations into Article 101 TFEU, arguments can also be raised in opposition against such an interpretation. In the following, some of these arguments will be addressed.

As a first remark, there is a constitutional aspect that needs to be highlighted in the context of integrating environmental considerations into Article 101 TFEU. As clear from Article 7 TFEU, consistency between EU policies shall be ensured “in accordance with the principle of conferral”. As discussed above, the principle of conferral means that the EU shall act only within the limits of its competences and as to EU competence in the field of environmental policy, this is competence is, in principle, shared with the Member States and, thus, subject to the limitations of the principle of subsidiarity. 248 It could therefore be questioned whether integration of environmental considerations into Article 101 TFEU could result in a breach of the principle of conferral (i.e. the Union acting outside of its competencies). However, in the view of the author, this does not seem to be

246 See Section 3.5.3.2 above.
247 See Section 3.5.3.3 above.
248 See Section 2.3.3 above.
the case. *Firstly*, as mentioned above, the transboundary character of environmental problems regularly motivates environmental action at EU level.249 *Secondly*, the integration principle seems to provide the competence necessary to integrate environmental considerations into various EU policy areas. Furthermore, integration, in the sense discussed here, does not mean that Article 101 TFEU could be used as a vehicle to prohibit environmentally harmful conduct. Such an interpretation lacks support in the wording of Article 101 TFEU and would thus be in breach with the principle of conferral. Instead, as will be further explained below, the model of integration, proposed by the author, means that, on the basis of an interpretation of Article 101 TFEU, in the light of Article 3 TEU and Article 11 TFEU, environmental benefits generated by an anticompetitive agreement will be taken into account in the assessment under Article 101.3 TFEU.251 As mentioned above, the CJEU has also used the integration principle in similar way to justify State measures under Articles 34 and 107 TFEU.252

There is, however, an *important constitutional difference*, between Article 101 TFEU and provisions such as Articles 34 and 107 TFEU. While Article 34 and 107 TFEU concern measures taken by Member States, Article 101 TFEU concerns measures taken by market actors. As a matter of fact, integration would thus mean that the task of protecting competition, entrusted to the EU by the Member States, would be compromised, to a greater or lesser extent, in favour of environmental objectives pursued, not by a Member State, but by private actors. In this regard, Odudu has argued that balancing a range of Treaty goals within a single Treaty provision is specifically and exclusively designed for Member States, and not for private actors, since state action has a democratic legitimacy and a political accountability that private action lacks.253 However, as pointed out by Townley, private actors, while pursuing their self-interest, may very well, at the same time, promote the general public interest.254 In the view of the author, taking environmental considerations into account under Article 101 TFEU would therefore not

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249 See Section 2.3.3 above.
250 Article 101 TFEU prohibits ‘agreements between undertakings with the object or effect of restricting competition’.
251 See further Section 5.4 below.
252 See Section 2.3.4.1 above.
253 Odudu, The Boundaries of EC Competition Law, p. 165. See also similarly Loozen, Strict Competition Enforcement is the Way Forward, pp. 7-10.
254 Townley, Is anything more Important than Consumer Welfare?, pp. 364-368. Compare Loozen, Strict Competition Enforcement is the Way Forward, pp. 8-10 where she makes a distinction between ‘protection of competition’ as a public interest and ‘sustainability’ as a general interest. See however also Kingston, Greening EU Competition Law and Policy, p. 239 where she argues that the development in EU environmental policy, towards privatisation of environmental policy-making, has blurred the distinction between the public and private sectors in the area of environmental protection.
mean that private actors would be free to restrict competition in order to pursue their arbitrary goals. Instead, it would mean that EU institutions would be able to acknowledge when private actors are acting in line with the objectives of the Union, as defined by the Member States.  

This also seems to be in line with the recent encouragement of the use voluntary environmental agreements in various environmental policy documents from the EU, even if those documents obviously lack constitutional relevance.  

Furthermore, as mentioned above, the CJEU has stated that the EU Treaties do not aim to protect competition unconditionally, but allow certain restraints on competition because of the need to balance the various objectives of the EU. Consequently, it does not seem like integration would raise constitutional problems.

As a second remark, from a competition policy inside perspective, legitimate concerns about legal certainty and accountability have been raised in relation to flexible competition enforcement (also called ‘Hipster Antitrust’). For example, Odudu has argued that balancing different Treaty objectives within Article 101 TFEU essentially constitutes a political act and that competition authorities are ill-placed to carry out such balancing. Instead, he advocates a unitary goal (efficiency), which would be more justiciable and enhance legal certainty, transparency and accountability. Similarly, Akman has held that vague values and standards, such as “the well being of the Union” and “the public interest”, referred to by the CJEU in its case law, render competition law enforcement less legitimate. Likewise, Loozen has held that the thought of competition agencies and courts balancing competition and non-competition interests does not sit well with their duty to objectively apply the law. Instead, she argues that, to be legitimate, competition enforcement must be confined to an economic standard that accommodates both negative and positive welfare effects in an objective manner.

As to the need for legal certainty and accountability, the author does not dispute that competition law must be based on clear and foreseeable legal standards. Nevertheless, the author argues that the desire for keeping competition policy ‘pure and simple’ does not

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256 See Section 2.4.3 above concerning the encouragement of voluntary environmental agreements in EU environmental policy. See also Kingston, Greening EU Competition Law and Policy, p. 239 where she argues that one of the key features of modern EU environmental policy is the privatisation of environmental policy-making by the enrolment of private actors in situations where State-led action has proven to be ineffective.  
257 See Section 3.5.3.2 above.  
258 See e.g. Dorsey, Rybnicek, and Wright, Hipster Antitrust Meets Public Choice Economics, for an American perspective and criticism of ‘Hipster antitrust’.  
261 Loozen, Strict Competition Enforcement is the Way Forward, p. 1.  
262 Ibid. p. 9.
trump the fact that competition policy must be viewed in the bigger context of the EU Treaties, which require that environmental considerations must be integrated into Article 101 TFEU.263 Furthermore, it may be argued that caution should be observed when striving for a narrow objective of EU competition policy. As argued by Budzinski, there can be no ultimate competition theory and, therefore, it is important to stay open for alternative and new competition theories, especially due to the evolutionary character of market competition and the creativity of market actors.264 Moreover, as argued by Nowag, even if the analysis under EU competition rules would be strictly confined to ‘competition concerns’ (i.e. efficiency), the competition analysis still involves complex ‘value judgements’. Therefore, he argues that the claim that taking environmental considerations into account under these rules would introduce value judgments, that would render competition policy less justiciable, could be questioned.265 Nevertheless, the concerns expressed by the legal scholars mentioned above underlines the importance that integration of environmental considerations into Article 101 TFEU must comply with legitimate expectations on legal certainty and accountability. When proposing a model for integration in the next section, the author will therefore address these aspects.

5.4 How to Balance Environmental Considerations Against the Core Objectives of EU Competition Policy – Proposing ‘The Integration Model’

As argued above, a systematic and teleological interpretation of Article 101 TFEU provides that environmental considerations must be integrated into that provision. Nevertheless, an important question remains unanswered: ‘what does such an integration mean to the practical assessment under Article 101 TFEU, and how should environmental objectives be balanced against the core competition objectives in that assessment?’ In the following, this question will be discussed.

As mentioned above, legal scholars has argued that the integration principle implies a rule of interpretation which, in principle, gives preference to an interpretation which ensures the fulfilment of environmental protection requirements, understood in the light of the objectives and principles set out in Article 191 TFEU.266 Insofar as the wording of Article 101 TFEU is sufficiently open-textured, and an interpretation in line with both the core competition objectives and environmental protection requirements is possible, such an

263 See similarly Townley, Is anything more Important than Consumer Welfare?, p. 361.
264 Budzinski, Monoculture versus diversity in competition economics, p. 318.
266 See Section 2.3.4.1 above.
interpretation must thus be made.267 This approach also seems to be in line with the current approach taken by the Commission.268

A more complicated question is, however, how to interpret Article 101 TFEU, in the light of the integration principle, when there is a conflict between environmental objectives and the core competition objectives. Naturally, these objectives must in some way be balanced against each other. In this regard, Odudu has argued that the EU Treaties does not establish a clear hierarchy between the different objectives set out in the Treaties.269 Nevertheless, it is clear that environmental objectives have a fundamental status in the EU Treaties.270 However, the integration principle does not provide any definite guidance as to what extent environmental objectives should trump other EU policy objectives. A reasonable starting point should thus be that environmental objectives do not generally outplay other policy objectives. Rather, as argued by Wasmeier, the integration principle implies that, in the case of a conflict between environmental objectives and other EU policy objectives, these objectives must be reconciled by finding an interpretation that does not neglect, overrule or give undue weight to any of these objectives of equal value.271 In this regard, it seems like environmental objectives and competition objectives are of equal value, as the internal market shall aim at a high level of environmental protection.272 Thus, in the view of the author, a model must be found that allows balancing of the core competition objectives and environmental objectives in an objective and fair manner under Article 101 TFEU.273 In the following, the author will propose such a model (hereafter ‘The Integration Model’), taking into account various aspects, such as the structure of Article 101 TFEU, the need to ensure purposiveness and legal certainty of the model and the need to address certain complications of integration of environmental considerations into EU competition policy as it currently stands.

As to the structure of Article 101 TFEU, this provision provides for a two-step assessment. Firstly, Article 101.1 TFEU provides that certain anticompetitive conduct is prohibited. Secondly, Article 101.3 TFEU provides that certain prohibited conduct may be justified under certain circumstances. In other words, Article 101.3 TFEU involves

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267 See Kingston, Greening EU Competition Law and Policy, p. 116 f. for a similar interpretation.
268 See Guidelines on the application of Article 81(3) of the Treaty, p. 42 stating that 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.
269 Odudu, The Boundaries of EC Competition Law, p. 168.
270 See Section 2.3.1 above.
271 See section 2.3.4 above.
272 See Article 3 TEU.
273 Compare Monti, Article 81 EC and Public Policy, p. 1069 f. where he argues that, prima facie, other EU policy goals should have less weight than the ‘core objectives’ of Article 101 TFEU.
balancing of anticompetitive concerns against benefits generated by anticompetitive conduct.\textsuperscript{274} Logically, balancing of the core competition objectives against environmental objectives is thus most appropriately dealt with under Article 101.3 TFEU, which already provides for a balancing operation.\textsuperscript{275} In essence, this would mean that environmental benefits generated by an anticompetitive arrangement, prohibited under Article 101.1 TFEU, would be taken into account under Article 101.3 TFEU, as capable of justifying certain restrictions on competition.\textsuperscript{276}

Furthermore, as to need of ensuring purposiveness of ‘The Integration Model’, it is important to recognize the potential of competition from an environmental perspective. As pointed out by Vedder, competition is the best instrument to achieve dynamic and allocative efficiency and thus, by promoting innovation and efficient use of environmental resources, competition can contribute to achieving environmental objectives.\textsuperscript{277} Consequently, restrictions on competition might be detrimental to the environment, for example by limiting innovation related to environmentally beneficial products or production processes or by hindering improvements related to efficient use of environmental resources. Thus, allowing short-term environmental benefits, generated by an agreement, to trump the long-term losses of innovation and improved efficiency, could produce results that would be counterproductive to environmental objectives. Hence, when balancing environmental objectives and the core competition objectives, under Article 101.3 TFEU, it must be taken into account that competition also promotes environmental objectives.

Moreover, as to the need of ensuring legal certainty, it will be necessary to guarantee that the prerequisites for balancing of environmental objectives against the core competition objectives are clear. As discussed above, the environmental objectives and principles in Article 191 TFEU are still rather vague as to their content.\textsuperscript{278} A restrictive interpretation is therefore called for when environmental objectives are taken into account under Article 101.3 TFEU. As an example, a restrictive interpretation might include objectives, such as combatting air and water pollution and reducing emissions contributing to climate change, which clearly falls within the objectives of ‘protecting the quality of the

\textsuperscript{274} See Guidelines on the application of Article 81(3) of the Treaty, p. 11.

\textsuperscript{275} See however Whish and Bailey, Competition Law, p. 142-145 for a discussion regarding the question whether EU courts have adopted a ‘rule of reason’ under Article 101.1 TFEU. See also Section 5.5 below for further discussion on whether agreements promoting environmental objectives may be excluded from the scope of Article 101.1 TFEU.

\textsuperscript{276} See Sections 7.2.2.5, 7.2.3.2-3, and 7.2.5-5 below for further explanations on how to apply ‘The Integration Model’ in the assessment under the legal conditions of Article 101.3 TFEU.

\textsuperscript{277} Vedder, Competition Law and Environmental Protection in Europe, p. 59.

\textsuperscript{278} See section 2.3.4 above.
environment’ and ‘protecting human health’ set out in Article 191.1 TFEU. Thus, where an agreement promotes such objectives, for example by contributing to reduced air pollution, ‘The Integration Model’ would require that this would be considered in the assessment under Article 101.3 TFEU.

However, to ensure legal certainty, The Integration Model must also make it possible to balance environmental objectives against the core competition objectives in an objective manner under Article 101.3 TFEU. As discussed above, environmental degradation can be described as an efficiency problem and environmental resources can be economically valued.279 Thus, the key to integrating environmental considerations into the assessment under Article 101.3 TFEU should be to transform environmental considerations into economic terms and thereby integrate them into the economic framework applied under Article 101.3 TFEU.280 Accordingly, ‘The Integration Model’ would require that where an agreement promotes environmental objectives, the economic value of the environmental benefits, or the value of avoided environmental harm generated by that agreement, must be included in the assessment under Article 101.3 TFEU.281

When it comes to the matter of integrating environmental considerations into the current economic framework applied under Article 101 TFEU, there are two significant complications of ‘The Integration Model’. Firstly, many environmental resources are characterized by ‘non-excludability’.282 Therefore, agreements which contribute to the maintenance of such resources will, intrinsically, often produce benefits which accrue to the society as a whole, and not only to certain groups in the society, such as a particular group of consumers. This is problematic in the context of Article 101.3 TFEU, since the efficiency objective, embraced by the Commission and the EU courts, involves a distributive aspect. For efficiencies to be able to justify a restriction on competition they must therefore benefit ‘consumers’. Secondly, economic valuation of environmental resources or services can be complex due to the absence of markets and perceptible market prices for such resources or services, and since such valuation often may involve a long-term perspective.283 As pointed out by Kingston, it could therefore be argued that

279 See Section 5.2 above.
280 Compare Vedder, Competition Law and Environmental Protection in Europe, 61 f. where he argues that the competition rules should be applied in the light of the objective of achieving internalisation. Compare also Kingston, Greening EU Competition Law and Policy, p. 163 ff. where she provides a thorough discussion on the matter of adopting an economic perspective to environmental considerations under EU competition policy.
281 See Section 7.2.2.5 below for a further detailed discussion on how to transform environmental benefits into economic terms and how to take them into account under Article 101.3 TFEU
282 See Section 5.2.1 above.
283 See Section 5.2.2 above.
using such techniques would render competition policy too uncertain or even unmanageable. In the following, the author will address these two complications.

As to the first complication, the author proposes that, in the specific case of assessing environmental benefits, generated by an anticompetitive agreement, the narrow efficiency objective (i.e. ‘consumer welfare’), adopted by the EU courts and the Commission, must, in the light of the integration principle, be broadened, so that environmental objectives can be given due weight in the balancing operation under Article 101.3 TFEU. In essence, this would mean that environmental benefits would be viewed from a societal perspective, in terms of their contribution to ‘total welfare’, rather than to ‘consumer welfare’. In other words, this would mean a degradation of the interest of consumers, as this could lead to situations where anticompetitive agreements would be justified on the basis of environmental benefits, which consumers neither has demanded nor fully receive. Nevertheless, such an interpretation seems to be required to give the integration principle full effect in EU competition policy. As will further explained below, the wording of Article 101.3 TFEU also appears to be enough open-textured for such an interpretation. Moreover, such an interpretation does not necessarily mean that the interest of consumers will be set aside. Instead, such an interpretation only means that environmental benefits, accruing to the society as a whole and to consumers as a part of it, alongside the anticompetitive effects and other potential consumer benefits generated by an agreement, can be taken into account in the balancing operation under Article 101.3 TFEU.

As to the second complication, it has been mentioned above that valuation of environmental resources and services is a complex task. Nevertheless, this does not mean that the use of environmental valuation techniques automatically should be rejected. Rather, caution will be called for when evaluating the reliability and accuracy of such techniques. In the end, existing procedural requirements in EU competition law will set limitations on the acceptance of such techniques. Furthermore, uncertainty will of course be inherent in assessments of future long-term environmental benefits. In this regard, it should however be noted that competition policy always has and always will be concerned with complex assessments of future effects of market behaviour. Even if primary focus may have been confined to short- and medium-term effects, it is also apparent that neither the Commission nor the EU courts have refrained from considering long-term effects of

284 See Kingston, Greening EU Competition Law and Policy, p. 191.
285 See Kingston, Greening EU Competition Law and Policy, p. 173 f. for a similar interpretation.
286 See Sections 7.4.2.2-3 below.
market behaviour. Thus, the long-term dimension of environmental benefits does not mean that they cannot be taken into account. Rather, once again, this merely means that caution is called for when assessing such benefits under Article 101.3 TFEU.

In sum, the author thus proposes The Integration Model as a model for integrating environmental considerations into Article 101 TFEU. In essence, the model means that *where an agreement promotes environmental objectives, as defined in the EU Treaties, the environmental benefits generated by that agreement, after being transformed into economic terms, must be taken into account in the assessment under Article 101.3 TFEU.*

As to the question of how to use this model when assessing an agreement under the specific conditions of Article 101.3 TFEU, this will be discussed in further detail below.

5.5 **Rejecting Exclusion as an Alternative to Integration**

5.5.1 **Introduction**

In contrast to ‘The Integration Model’ proposed in the previous section, one may also consider ‘exclusion’ as an alternative method of resolving conflicts between EU environmental objectives and the core objectives of EU competition policy. In fact, the CJEU has in numerous cases found that certain agreements, due to their nature and purpose, fall outside the scope of Article 101.1 TFEU, even if they restrict competition. Some legal scholars have therefore questioned whether this case law may apply by analogy to private agreements that pursue environmental objectives, meaning that such agreements would be excluded from the scope of Article 101.1 TFEU. In the following, the author will comment on this matter.

5.5.2 **Case Law on Exclusion**

According to the case law of the CJEU, restrictive agreements and restrictive clauses may fall outside the scope of Article 101.1 TFEU where they are necessary for the achievement of certain ‘legitimate purposes’. The case law can be divided into different groups of cases representing different doctrines. In the following, the author will discuss three separate groups of cases; (1) cases on ‘commercial ancillarity’, (2) cases on collective agreements and (3) cases on ‘regulatory ancillarity’.

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287 See Kingston, Greening EU Competition Law and Policy, p. 191 f.
288 See Section 7 below.
289 See Whish and Bailey, Competition Law, p. 136 where the term ‘commercial ancillarity’ is used.
290 See Ibid. p. 138 where the term ‘regulatory ancillarity’ is used.
As to commercial ancillarity, the CJEU has in numerous cases held that restrictive clauses may not constitute a restriction on competition, as long as those clauses are necessary to achieve a legitimate commercial purpose. For example, in *Gøttrup-Klim*, the CJEU found that a clause, which prohibited members of a cooperative purchase association from joining other competing associations, did not necessarily constitute a restriction on competition, and that it even may have beneficial effects on competition, where that clause is limited to what is necessary to ensure the proper functioning of the association.

As another example, the Court found, in *Société Technique Minière*, that an exclusive license granted to a distributor may not restrict competition where that license seems really necessary for the penetration of a new area of an undertaking. Thus, certain commercially motivated restrictions of competition may escape the prohibition in Article 101.1 TFEU.

Furthermore, as to the cases on collective agreements, the CJEU has established that certain restrictions of competition are inherent in collective agreements and therefore do not infringe Article 101 TFEU. This was initially established in *Albany*, where the CJEU held that collective agreements, by virtue of their nature and purpose, fall outside the scope of Article 101 TFEU. According to the Court, the activities of the EU are to include not only a system ensuring that competition in the internal market is not distorted, but also a policy in the social sphere, aiming to promote ‘a high level of employment and of social protection’ and supporting close cooperation between Member States in the social field and, particularly, in matters relating to collective bargaining between employers and workers. Furthermore, the Court held that the social policy objectives pursued by collective agreements would be undermined if such agreements were subject to Article 101 TFEU. The CJEU therefore found that it follows from an interpretation of the Treaty as a whole that collective agreements fall outside the scope of Article 101 TFEU. This exemption for collective agreements has also been confirmed by the CJEU in a series of cases after the Albany judgment.

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291 See Whish and Bailey, Competition Law, p. 136 f.
292 See Case C-250/92 *Gøttrup-Klim*, para. 33-35.
293 See Case 56/65 *Société Technique Minière*, para. 250.
294 See Case C-67/96 *Albany*, para. 60.
295 See Ibid. para. 54. See also current Articles 9 and 153 TFEU as well as Article 3.3 TEU regarding the objectives of EU social policy.
296 See Case C-67/96 *Albany*, para. 59.
297 See Ibid. para. 60.
As to the third group of cases, the CJEU has developed a quite debated case law on regulatory ancillarity.\textsuperscript{299} This line of cases started with the \textit{Wouters} judgment. The case concerned the Dutch Bar Association which had been mandated by Dutch law to regulate the legal profession.\textsuperscript{300} To fulfil its task, the Bar adopted a rule which prohibited lawyers in the Netherlands from entering into partnership with non-lawyers. One of the questions before the CJEU was whether this rule infringed Article 101 TFEU. In that regard, the CJEU stated that:

“not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty [current Article 101.1 TFEU]. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure 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 […] It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.”\textsuperscript{301}

The CJEU then held that the rule adopted by the Bar reasonably could be considered as necessary in order to ensure the proper practice of the legal profession, as it was organised in the Netherlands.\textsuperscript{302} Therefore, the Court found that the rule fell outside the scope of Article 101.1 TFEU, despite the effects restrictive of competition inherent in the rule.\textsuperscript{303}

In subsequent cases, the CJEU has applied the Wouters doctrine to various rules regulating professions, such as professional sports, accounting and geologists. For example, in \textit{Meca-Medina}, the CJEU referred to Wouters as it found that anti-doping rules, adopted by the International Olympic Committee, fell outside the scope of Article 101.1 TFEU. According to the Court, the rules were excluded since they did not appear

\textsuperscript{299} See Whish and Bailey, Competition Law, p. 138-145.
\textsuperscript{300} Case C-309/99, \textit{Wouters}, para. 8.
\textsuperscript{301} Ibid. para. 97.
\textsuperscript{302} Ibid. para. 107.
\textsuperscript{303} Ibid. para. 110.
to go beyond what was necessary to ensure the ‘legitimate purpose’ of guaranteeing that sporting events could take place and function properly.\textsuperscript{304}

Furthermore, the CJEU has referred to the Wouters doctrine in its more recent judgments in CNG\textsuperscript{305}, OTOC\textsuperscript{306}, and API\textsuperscript{307}. As to the two first cases, these concerned professional associations which had been mandated by national legislation to adopt rules regulating geologists and chartered accountants respectively.\textsuperscript{308} In CNG, the Court held that the rules in that case, which established certain criteria for determining the remuneration of geologists, would escape the scope of Article 101.1 TFEU if those rules did not go beyond the ‘legitimate objective’ of providing guarantees to consumers of geologists’ services.\textsuperscript{309}

As the case was a reference for a preliminary ruling, the Court however referred the case back to the national court for an in depth analysis.\textsuperscript{310} Similarly, in OTOC, the Court held that the rules in that case, concerning the establishment of system of compulsory training for chartered accountants, pursued the ‘legitimate objective’ of guaranteeing the quality of the services offered by chartered accountants.\textsuperscript{311} Nevertheless, the Court also found that those rules eliminated competition on a substantial part of the relevant market and, thus, could not be considered to be necessary for the attainment of that objective.\textsuperscript{312} As to the third case, API, that case concerned a decision, made mandatory by national legislation, to fix certain minimum costs for road transport adopted by a professional organisation.\textsuperscript{313} In API, the Court referred to the Wouters doctrine and stated, \textit{obiter dicta}, that it could not be ruled out that ‘the protection of road safety’ might constitute a ‘legitimate objective’ under that doctrine.\textsuperscript{314} However, the Court concluded that there was no need to consider whether the Wouters doctrine was applicable in the specific case, since the rules in question could not be justified by any legitimate objective.\textsuperscript{315}

\begin{footnotes}
\textsuperscript{304} Case C-519/04 \textit{Mecca-Medina}, para. 42 and 54.
\textsuperscript{305} Case C-136/12 CNG, para. 53.
\textsuperscript{306} Case C-1/12 OTOC, para. 93.
\textsuperscript{307} Joined Cases C-184/13 etc. API, para. 47.
\textsuperscript{308} Case C-1/12 OTOC, para. 48-49 and 93-94 and Case C-136/12 CNG, para. 51-54.
\textsuperscript{309} Case C-136/12 CNG, para. 56.
\textsuperscript{310} Ibid. para. 57.
\textsuperscript{311} Case C-1/12 OTOC, para. 94.
\textsuperscript{312} Ibid. para. 95-100.
\textsuperscript{313} Joined Cases C-184/13 etc. API, para. 43.
\textsuperscript{314} Ibid. para. 51.
\textsuperscript{315} Ibid. para. 49.
\end{footnotes}
5.5.3 Applying the Case Law on Exclusion to Agreements Promoting Environmental Objectives

As apparent from the previous section, case law shows that restrictive agreements may escape the scope of Article 101.1 TFEU where they are necessary for the achievement of certain ‘legitimate purposes’. Since environmental objectives have a fundamental status in the EU Treaties, it could be questioned whether this case law may apply by analogy to agreements which pursue such objectives. In the following, the author will present some of views expressed by legal scholars and also express his own view on this matter.

Firstly, as to the case law on ‘commercial ancillarity’ and ‘collective agreements’, Kingston has argued that this case law might indeed be applied to agreements promoting environmental objectives. In her view, cases like Gøttrup-Klim and Albany shows that Article 101 TFEU may not be infringed where the restrictions caused by an agreement are inherent in that agreement, in the sense that in the absence of those restrictions, no agreement would likely have been reached. She also argues that Albany is an excellent illustration of how the CJEU has sought to achieve a compromise between two EU policy areas. According to Kingston, there is therefore a strong argument, on the basis of Gøttrup-Klim and Albany, that competitive restrictions in environmentally positive agreements should not infringe Article 101.1 TFEU if, without such restrictions, no agreement would otherwise be arrived at.316

In contrast to Kingston, Vedder has held that the Albany case must be read narrowly and that the reasoning in that case cannot be extended to agreements pursuing environmental objectives. In his view, it must be stressed that Albany concerned collective agreements, which is a type of agreement that enjoy a special position in the EU Treaties.317 Voluntary environmental agreements, even though encouraged by the EU institutions in various soft law documents, and other agreements that promote environmental objectives, lacks a similar position in the Treaties. Thus, in the view of Vedder, the Albany exception cannot apply by analogy to such agreements since they are not comparable to collective agreements.318 This view also seems to be in line with the Opinion of Advocate General Jacobs in Albany, as he justified an exception for collective agreements by referral to the

316 See Kingston, Greening EU Competition Law and Policy, p. 237.
317 See e.g. Article 153 TFEU, which provides that the Union shall support and complement the activities of the Member States in the field of representation and collective defence of the interests of workers and employers, and Article 156 TFEU, which provides that the Commission shall encourage cooperation between the Member States, particularly in matters relating to collective bargaining between employers and workers.
318 See Competition Law and Environmental Protection in Europe, p. 129-135 where he also questions the reasoning behind the Albany judgment itself.
special nature and status of collective agreements and, at the same time, stressed that the exception had to be construed narrowly.319

Secondly, as to the possibility of applying the doctrine on ‘regulatory ancillarity’ to environmental agreements, the scope of this doctrine does not appear to be clearly delimited in the case law. As a first remark, it is not clear whether this doctrine is limited to certain types of rules. In this regard, the judgments in Wouters, Meca-Medina, CNG and OTOC all concerned rules regulating professions (lawyers, professional sport, geologists and chartered accountants respectively). However, API did not concern such rules, but tariff rules. Thus, it seems that the CJEU might be open to apply the regulatory ancillarity doctrine, not only to rules regulating professions, but also to other types of regulatory rules. As a second remark, most cases on ‘regulatory ancillarity’, with the exception of Meca-Medina, seems to involve some sort of ‘public element’, in the sense that the rules in these cases where mandated or made mandatory by national legislation.320 Therefore, legal scholars have argued that the Wouters doctrine is limited to situations where such a ‘public element’ is present.321 Even if the Wouters doctrine may be applied to rules for environmental protection, the application would thus, according to this view, be limited to situations where those rules have been mandated or made mandatory by national legislation. In the context of voluntary environmental agreements, this could thus mean that the ‘regulatory ancillarity’ doctrine could only be applied, if at all, to co-regulatory environmental agreements, concluded in the framework of a legislative act, but not to self-regulatory environmental agreements, lacking such a ‘public element’.322

Nevertheless, some legal scholars have also questioned whether the ‘regulatory ancillarity’ doctrine may be applied to situations lacking a public element. For example, Whish and Bailey have questioned whether this doctrine may be applied to purely private regulatory systems, such as rules adopted by firms in a particular sector for the protection

320 As to the Meca-Medina case, see Whish and Bailey, Competition Law, p. 141 where they note that Meca-Medina concerned an organisation created by public international law and that this aspect may explain the willingness of the CJEU to apply the Wouters doctrine in that case. Also compare Janssen and Kloosterhuis, The Wouters case law, special for a different reason?, p. 336 where they argue, in footnote 21, that Meca-Medina, despite its reference to Wouters, seems to be more related to the case law on ‘commercial ancillarity’ than to the case law on ‘regulatory ancillarity’.
321 See e.g. Janssen and Kloosterhuis, The Wouters case law, special for a different reason?, p. 338 where they argue that, Wouters, CNG, OTOC and API, all concerned situations where the regulatory or supervisory tasks of the associations were assigned to them through public law. See similarly Loozen, Strict competition enforcement is the way forward - also to promote sustainable consumption, p. 14-19 where she argues that, in Wouters, the delegation of regulatory power, from the State to the Bar, was at the core of the reasoning behind the Court’s exclusion of the regulatory rules from the scope of Article 101 TFEU. See also Whish and Bailey, Competition Law, p. 141.
322 See Section 2.4.2 above concerning ‘co-regulatory agreements’ and ‘self-regulatory agreements’.
of the environment. Going even further, Kingston has argued that the case law on regulatory ancillarity is of obvious application to private regulatory systems set up for the purpose of protecting the environment, where such regulation would likely otherwise have been undertaken by the State. As the case law on ‘regulatory ancillarity’ does not explicitly clarify the limits to this doctrine it is however far from certain whether or not the doctrine may be applied to purely private regulatory systems.

In sum, there thus different views on how to interpret the case law on exclusion and whether this case law may be applied in the context of agreements promoting environmental objectives. Regardless of whether this case law can be extended to encompass such agreements, the author however principally rejects exclusion of such agreements from the scope of Article 101.1 TFEU for a number of reasons. Firstly, excluding agreements having the effect of restricting competition does not find support in the wording of Article 101.1 TFEU. Nevertheless, it is apparent that conflicts may arise between competition objectives and environmental objectives, in the context of assessing environmental cooperation under Article 101 TFEU, and that such conflicts must be resolved in the light of the integration principle. However, such conflicts may be resolved by taking environmental considerations into account under Article 101.3 TFEU. Secondly, the author therefore argues that there is no need to exclude agreements promoting environmental objectives from the scope of Article 101.1 TFEU to resolve such conflicts. Thirdly, case law on the rules of the internal market indicates that the CJEU opts for integration in preference to exclusion when it comes to resolving conflicts between environmental objectives and the core objectives of competition policy. Thus, it could be argued that a similar approach seems reasonable in the context of Article 101 TFEU. Fourthly, integration seems to be in line with the idea of the integration principle, since that principle implies that an interpretation must be found that does not give undue weight neither to the core objectives of competition policy nor to environmental objectives. In contrast, exclusion appears to give undue weight to environmental objectives since exclusion would mean that an agreement would escape full competition law analysis. Fifthly, and lastly, as argued above, restrictions on competition might, in the

323 See Whish and Bailey, Competition Law, p. 141.
324 See Kingston, Greening EU Competition Law and Policy, 238-240.
325 See Section 5.4 above.
326 See e.g. Case C-297/08 P Netherlands v Commission, para. 75 where the CJEU held that the need to take environmental objectives into account did not justify the exclusion of a measure from the scope of 107 TFEU, concerning state aid, as account of those objectives could usefully be taken under that provision.
327 See Section 2.3.4.1 above.
long-term, be detrimental to the environment. Thus, excluding agreements promoting environmental objectives from full competition law scrutiny could produce results, that are counterproductive from an environmental perspective. In the view of the author, ‘The Integration Model’ should thus be preferred to exclusion, as a means of resolving conflicts between environmental objectives and the core competition objectives, when assessing agreements promoting environmental objectives under Article 101 TFEU.

6 Article 101.1 TFEU and Environmental Considerations

6.1 Some Initial Remarks

In the following sections, the author will discuss how to assess agreements that promote environmental objectives under Article 101.1 TFEU. As to the content of Article 101.1 TFEU, this provision prohibits *anti-competitive cooperation*, defined as:

“agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”

As to the relevance of environmental objectives under this provision, it has been argued above that environmental considerations must be integrated into Article 101 TFEU. However, the author principally rejects exclusion of agreements from the scope of Article 101.1 TFEU as an appropriate method of resolving conflicts between environmental objectives and the core competition objectives under Article 101 TFEU. Instead, the author has proposed ‘The Integration Model’, meaning that environmental objectives promoted by an agreement must be taken into account under Article 101.3 TFEU. Thus, *prima facie*, the fact that an agreement promotes environmental objectives is not relevant in the assessment under Article 101.1 TFEU. In general, it may therefore be claimed that such agreements must be assessed as any other agreements under that provision. For the purpose of providing a complete overview of how to assess such agreements under Article 101 TFEU, some comments will, nevertheless, be made on the question how to assess such agreements under the criteria of Article 101.1 TFEU. In this regard, it must however be emphasized that environmental cooperation may take various

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328 See Section 5.4 above.
329 See Section 5.3 above.
330 See Section 5.5 above.
331 See Section 5.4 above.
forms and that the following sections does not aim to provide a complete presentation of all the aspects that may be relevant when assessing such cooperation.

6.2 Assessing Environmental Cooperation under Article 101.1 TFEU

6.2.1 Undertakings and Associations of Undertakings

The scope of Article 101.1 TFEU is limited to conduct carried out by certain subjects, namely (1) ‘undertakings’ and (2) ‘associations of undertakings’. These terms are not defined in the EU Treaties and the task of defining them has therefore fallen on the EU courts. As to the notion of undertakings, the CJEU has established, in Höfner, that every entity, regardless of its legal status and the way in which it is financed, which is engaged in an economic activity is an undertaking.\textsuperscript{332} Furthermore, the CJEU has also held, in MOTOE, that the classification of an activity as an economic activity must be carried out separately for each activity exercised by a given entity.\textsuperscript{333}

Furthermore, as to the notion of associations of undertakings, the CJEU has held that this notion covers entities consisting of undertakings, as defined above.\textsuperscript{334} However, such entities must not be engaged in economic activities themselves to fall within the scope of Article 101.1 TFEU.\textsuperscript{335} For example, trade associations and associations of trade associations may thus be classified as associations of undertakings.\textsuperscript{336}

In sum, it is thus clear that the CJEU has taken a quite broad and functional approach when defining the concepts of undertakings and associations of undertakings. In the context of environmental cooperation, it is thus clear that environmental action performed by many different types of entities may fall within the scope of Article 101 TFEU. The decisive element is not the legal status of the entity, but rather its connection to an economic activity. For example, offering goods and services on a given market constitute such an economic activity.\textsuperscript{337} Where trade associations or individual corporations pursue environmental objectives by regulating the characteristics of goods or services, these entities will thus fall within the scope of Article 101.1 TFEU. In contrast, it may however be noted that where a Member State is involved in environmental conduct, carried out by a private actor, the conduct of that entity may fall outside of the scope of Article 101.1 TFEU. For example, that might be the case where private parties have been

\textsuperscript{332} Case C-41/90 Höfner, para. 21.
\textsuperscript{333} Case C-49/07 MOTOE, para. 57.
\textsuperscript{334} See Case C-309/99 Wouters, para. 44-45.
\textsuperscript{335} See Joined Cases T-25/95 etc. Cimenteries and Others, para. 1320 and the cases referred to in therein.
\textsuperscript{336} See Whish and Bailey, Competition Law, p. 94.
\textsuperscript{337} See Joined Cases C-180/98 to C-184/98 Pavlov, para. 75.
mandated by a Member State to carry out a task in the environmental field. In this regard, it can be noted that the CJEU has stated, in Diego Calì & Figli, that the levying of a charge for anti-pollution surveillance, entrusted by a public authority to a body governed by private law, did not constitute an economic activity, within the meaning of Article 102 TFEU. As the judgment concerned the interpretation of the concept of ‘undertaking’, it may be applied by analogy to the same concept in Article 101 TFEU. Where an entity has been mandated by the State to carry out certain activities, other Treaty provisions, such as Article 106 TFEU, may, however, apply to that activity.

6.2.2 Agreements, Decisions and Concerted Practices

Besides, the fact that the scope of Article 101.1 TFEU is limited to certain subjects, that provision is also limited to certain forms of cooperation, namely; (1) ‘agreements’ between undertakings, (2) ‘decisions’ by associations of undertakings and (3) ‘concerted practices’. Firstly, as to the notion of ‘agreements’, the case law from the EU courts shows that the form of the agreement is unimportant and that this concept is centred on the existence of ‘concurrence of wills’ between two or more parties. Secondly, as to the notion of ‘decisions’, the constitution of an association, agreements entered into by trade associations and even non-binding recommendations may fall within this category. Thirdly, and lastly, as to the notion of ‘concerted practices’, this concept has been described by the CJEU as a form of cooperation between undertakings which, without having reached the stage of a proper agreement, knowingly substitutes practical cooperation between them for the risks of competition.

In sum, the scope of Article 101.1 TFEU thus covers a broad range of forms of cooperation. In the context of environmental cooperation, such cooperation may thus often fall within the scope of that provision. For example, if a trade association adopts a non-binding recommendation, encouraging its members to phase out a certain environmentally harmful product or substance, that decision may fall within the scope of Article 101.1 TFEU. Furthermore, the Commission has stated, in its Guidelines on Horizontal Cooperation Agreements, that exchange of information between competitors

338 See Case C-343/95 Diego Calì & Figli, para. 22-25.
339 See Whish and Bailey, Competition Law, p. 188 where they state that the term ‘undertaking’ has the same meaning in Article 101 as in Article 102 TFEU.
340 See Case T-41/96 Bayer v Commission, para. 69 and Joined Cases C-2/01 P and C-3/01 P Bundesverband der Arzneimittel-Importeure eV v Bayer AG, para. 97 where the CJEU did not reject this definition of agreements.
341 See Whish and Bailey, Competition Law, p. 116 and the case law referred to there.
342 See e.g. Case C-8/08 T-Mobile Netherlands, para. 26.
can amount to a concerted practice where it reduces strategic uncertainty on the market.\textsuperscript{343} If undertakings, with the objective of pursuing environmental objectives, decide to exchange information regarding environmental performance of their products, such an exchange may thus fall within the scope of Article 101.1 TFEU.

6.2.3 Object or Effect of Preventing, Restricting or Distorting Competition

Even though Article 101.1 TFEU applies to various forms of cooperation between various forms of entities, an important limitation is that Article 101.1 TFEU only applies to cooperation that is anticompetitive, in the sense that it has the ‘object’ or ‘effect’ of preventing, restricting or distorting competition. As apparent from the wording of that provision, object and effect are two alternative conditions. The CJEU has therefore established that there is no need to prove any actual effects of restrictions of competition if an object of restricting competition has been found.\textsuperscript{344}

As to the question of what constitutes anti-competitive objects or effects, this has been, and remains, a well-debated question which is closely connected to the question of what competition theories and objectives that are guiding EU competition policy.\textsuperscript{345} Nevertheless, Article 101.1 TFEU contains a non-exhaustive list of practices that, \textit{prima facie}, are considered as anticompetitive. For example, that list contains practices such as; price fixing, limiting production and technical development and applying dissimilar conditions to equivalent transactions with other trading parties. The case law of the EU courts and the guidelines of the Commission also provides further guidance as to what type of conduct that constitutes anticompetitive conduct.

As to \textit{anticompetitive effects}, the CJEU has established that it is necessary to carry out an extensive analysis of an agreement in the legal and factual market context in which the agreement operates.\textsuperscript{346} Furthermore, it is necessary to consider the situation that would be in absence of an agreement, in order to be able to compare the two situations and arrive at the conclusion whether the agreement generates anticompetitive effects.\textsuperscript{347} In the view of the Commission, negative anticompetitive effects are likely to occur where an agreement contributes to the creation, maintenance, strengthening or exploitation of

\textsuperscript{343} Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements’, para. 61.
\textsuperscript{344} See Case C-209/07 Beef Industry Development Society Ltd, para. 16.
\textsuperscript{345} See section 3 above concerning the question of what competition theories objectives that guide EU competition policy.
\textsuperscript{346} See Case 23/67 Brasserie, para. 415.
\textsuperscript{347} See Case 56/65 Société Technique Minière, para. 8, Case T-328/03 O2 (Germany) v Commission, para. 74 and Case C-382/12 P Mastercard, para. 161.
market power, defined as the ability of maintaining prices above competitive levels or maintaining output, in terms of quantity, quality, variety or innovation of products, below competitive levels. Anticompetitive effects may thus be generated in a variety of ways and the Commission has therefore adopted Guidelines on how to assess such effects in different contexts. For example, the Commission’s Guidelines on Horizontal Co-operation Agreements contains specific chapters on information exchange, R&D agreements, production agreements and standardisation agreements. Furthermore, the Commission’s Guidelines on Vertical Restraints contain guidance on how to assess anticompetitive effects in the context of vertical agreements, such as license agreements.

As to anticompetitive objects, the CJEU has stated that the essential criterion for the establishment of such an object is the finding that the coordination in question reveals, in itself, a sufficient degree of harm to competition. The CJEU has also found that regard must be had, inter alia, to the content of the provisions of an agreement, the objectives it seeks to attain and the economic and legal context of which it forms a part. Moreover, the EU courts have considered that certain practices generally have as their objects to restrict competition. For example, the CJEU has held that limiting output and exchanging information that reduces uncertainty about future market behaviour is conduct with the object of restricting competition.

In sum, it is thus clear that various forms of conduct may have the object or effect of restricting competition. Furthermore, it is also clear that environmental cooperation may pursue a variety of environmental objectives and may do so in a variety of ways. Such cooperation may be horizontal or vertical. It may involve small-scale cooperation or an industry-wide scheme. Environmental cooperation may also occur within various sectors. More specifically, such agreements may involve standard setting, regarding the environmental performance of products or production processes, or provide for the common attainment of an environmental target, such as emission reductions, improvement of energy-efficiency or recycling of certain materials. Moreover, such

348 See Guidelines on the application of Article 81(3) of the Treaty, para. 25.
349 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.
351 See Case C-67/13 P Groupement des cartes bancaires, para. 57.
352 See Joined Cases C-501, 513, 515 and 519/06 P GlaxoSmithKline Services Unlimited v Commission, para. 58.
353 See Case C-209/07 Beef Industry Development Society Ltd, para. 33-34 and 40.
354 See Case C-8/08 T-Mobile Netherlands, para. 43.
355 See Whish and Bailey, Competition Law, pp. 124-133 for a further discussion on different practices that have been considered as having an anticompetitive object and for references to relevant case law on this matter.
356 Compare, the now replaced, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, para. 180. See also Section 2.4.2 above concerning ‘voluntary environmental agreements’.
cooperation may include the establishment of a common eco-label, R&D projects with
the aim of developing environmental-friendly products or exchange of information
between undertakings with the aim of reducing environmental impact. Obviously, since
environmental cooperation may take many forms, such cooperation may also give rise to
many different types of anticompetitive concerns, such as *limiting output*, especially in
terms of variety or innovation of products, or *facilitating information exchange* that
reduces certainty about future market behaviour. Consequently, the assessment of
anticompetitive effects of environmental cooperation will depend much on the form of
the cooperation rather than on the environmental objectives pursued. This view has also
been expressed by the Commission, in its Guidelines on Horizontal Co-operation
Agreements, where it stated that:

“In general, depending on the competition issues ‘environmental agreements’
give rise to, they are to be assessed under the relevant chapter of these guidelines,
be it the chapter on R&D, production, commercialisation or standardisation
agreements.”357

When assessing environmental cooperation, it will thus be useful to consult the
Guidelines of the Commission. For example, as to *environmental standards*, the
Commission states in the Guidelines that standardisation agreements will normally not
restrict competition where participation in the standard-setting is unrestricted and the
procedure for adopting the standard is transparent, or where the standardisation agreement
does not contain any obligation to comply with the standard and provide access to the
standard on fair, reasonable and non-discriminatory terms.358 Furthermore, as to
*environmental R&D*, the Commission states that R&D agreements are only likely to give
rise to restrictive effects on competition where the parties have market power on the
existing markets or competition with respect to innovation is appreciably reduced.359

In addition to the guidelines currently in force, it can also be noted that the former
*Guidelines on horizontal cooperation agreements*360 contained a specific chapter on
‘environmental agreements’. When the new guidelines were adopted, this chapter was
removed with the motivation that the chapter had mainly focused on standard-setting in

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357 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to
horizontal co-operation agreements, footnote 14.
358 Ibid. para. 280.
359 Ibid. para. 133.
360 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, (2001/C
302).
the environment sector, and that such considerations were more appropriately dealt with in a general chapter on standardisation.\textsuperscript{361} However, in a Memo regarding the adoption of the new guidelines, the Commission also stated that the removal of the chapter on environmental agreements did not imply a downgrading for the assessment of environmental agreements.\textsuperscript{362} Thus, it may be argued that the removed Chapter can still offer guidance on how to assess environmental agreements under Article 101.1 TFEU.\textsuperscript{363}

As to the content of the removed chapter on environmental agreements, that chapter made a distinction between three types of environmental agreements: (1) agreements that almost always come under Article 101.1 TFEU (2) agreements that may fall under Article 101.1 TFEU and (3) agreements that do not fall under Article 101.1 TFEU. In the view of the Commission, \textit{the first category} included cooperation that did not truly concern environmental objectives, but rather served as a tool to engage in a disguised cartel or otherwise aimed at excluding actual or potential competitors.\textsuperscript{364} As to \textit{the second category}, the Commission stated that agreements may fall under Article 101.1 TFEU, where they cover a major share of an industry and appreciably restricts the parties’ ability to devise the characteristics of their products or the way in which they produce them.\textsuperscript{365} Furthermore, the Commission held that agreements belong to that category where they may phase out or significantly affect an important proportion of the parties’ sales, as regards their products or production processes, when the parties hold a significant proportion of the market. According to the Commission, the same would also apply to agreements whereby the parties allocate individual pollution quotas.\textsuperscript{366} As to \textit{the third category}, the Commission held that certain agreements would not fall under Article 101.1 TFEU, irrespective of the aggregated market share of the parties.\textsuperscript{367} For example, that could be the case where an agreement does not place any individual obligation on the parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target. As to the latter case, the Commission also held that the assessment would focus on the discretion left to the parties, regarding the means that are technically

\textsuperscript{361} See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), footnote 14.
\textsuperscript{362} Commission, MEMO/10/676, under question 12.
\textsuperscript{363} See similarly Nowag, Environmental Integration in Competition and Free-Movement Laws, p. 74. In this regard, it can also be noted that the current Commissioner Vestager has implied, in a recent speech, that the coming review of the guidelines on horizontal cooperation may result in further explanations on ‘how companies can put together sustainability agreements without harming competition’. See Vestager speech at GCLC Conference on Sustainability and Competition Policy, Brussels, 24 October 2019.
\textsuperscript{364} See Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, para. 188.
\textsuperscript{365} See ibid. para. 189.
\textsuperscript{366} See ibid. para. 190.
\textsuperscript{367} See ibid. para. 184.
and economically available in order to attain the environmental objective agreed upon.\textsuperscript{368} Moreover, the Commission stated that agreements may fall within the third category where they set the environmental performance of products or processes, while not appreciably affecting product and production diversity.\textsuperscript{369} Finally, the Commission also held that environmental agreements would not fall within Article 101.1 TFEU where they lead to genuine market creation, such as recycle agreements, provided that, and for as long as, the parties would not be capable of conducting the activities in isolation, whilst other alternatives or competitors do not exist.\textsuperscript{370} In addition to the Commission’s Guidelines, various decisions from the Commission and the EU courts may also provide guidance on how to assess agreements promoting environmental objectives under Article 101.1 TFEU. In this regard, it appears that agreements that pursue environmental objectives may, depending on the circumstances, be considered as having an anticompetitive object. For example, the Commission found, in CECEI, that an agreement between manufacturers of washing machines, which sought to promote energy efficiency by phasing out certain categories of washing machines, had the object of restricting competition.\textsuperscript{371} In this regard, it can also be noted that the CJEU has held, in Beef Industry Development Society Ltd, that an agreement may be regarded as having a restrictive object even if it does not have restriction of competition as its sole aim, but also pursues other ‘legitimate objectives’.\textsuperscript{372} Moreover, the decision practice of the Commission shows that joint venture agreements, which may contribute to rational utilization of natural resources, increased energy efficiency and reduced waste emissions, can cause anticompetitive concerns by foreclosing downstream markets or by facilitating coordination.\textsuperscript{373} Similarly, Commission decisions show that collective arrangements for recycling of packaging and other materials have raised concerns regarding market foreclosure.\textsuperscript{374}

\begin{itemize}
\item See Ibid. para. 185.
\item See Ibid. para. 186.
\item See Ibid. para. 187. See also Nowag, Environmental Integration in Competition and Free-Movement Laws, pp. 74-82 for a discussion of cases where the Commission seems to have found that agreements belonged to the category of ‘agreements that do not fall under Article 101.1 TFEU’.
\item Commission decision, CECEI, 2000/475/EC, para. 30-37.
\item Case C-209/07 Beef Industry Development Society Ltd, para. 21.
\item See e.g. Commission decision, Philips-Osram, 94/986/EC (joint venture agreements between two manufacturers of lead glass) and Commission decision, Exxon/Shell, 94/322/EC (joint venture agreement between two manufacturers of polyethylene). See also Commission decision, Carbon Gas Technologie, 83/669/EEC (joint venture between undertakings in the field of coal gasification).
\item See e.g. Commission decision, Eco-Emballages, 2001/663/EC (system of selective collection and recovery of household packaging waste), Commission decision ARA, ARGEV, ARO, 2004/208/EC, confirmed by Case T-419/03, Altstoff Recycling Austria v Commission (countrywide collection and recycling system for packaging) and Commission decision, DSD, 2001/837/EC, confirmed by Case T-289/01, DSD v Commission (countrywide system for the collection and recovery of sales packaging).
\end{itemize}
cooperation, and the circumstances of a particular case, guidance on how to assess agreements promoting environmental objectives under Article 101.1 TFEU can thus be sought in a variety of sources, such as guidelines and decisions of the Commission and case law of the EU courts.

6.2.4 An Appreciable Effect on Inter-State Trade and Competition

As to the last condition of Article 101.1 TFEU, anticompetitive cooperation is only prohibited as far as it ‘may affect trade between Member States’. As developed in the case law of the CJEU, this condition contains ‘a test of double appreciability’, meaning that in order for anticompetitive cooperation to be captured by Article 101.1 TFEU, it must have an appreciable (i.e. not insignificant) impact on both trade between Member States and on competition.375 Furthermore, the CJEU has held that an agreement which has as its object to restrict competition, by its nature and independently of any concrete effect, constitute an appreciable restriction on competition.376 In addition to the case law, the Commission has also adopted a Notice on Agreements of Minor Importance377 and Guidelines on the effect on trade concept378, which indicates the circumstances in which agreements do not fulfil the test of double appreciability. In these documents, the market shares of the parties to an agreement play an important role in the assessment.379 Nevertheless, the CJEU has established that market shares are not exclusively decisive for the assessment and that qualitative aspects of the restriction also must considered.380

In the context of agreements promoting environmental objectives, the assessment of whether such agreements fulfil the test of double appreciability will, of course, depend on the circumstances of the specific case. As mentioned in the previous section, such agreements may be concluded at different scales and may raise various types of anticompetitive concerns. Nevertheless, as pointed out by Vedder, a major driving force behind the conclusion of environmental agreements may be the achievement of economies of scale and such agreements may, thus, often involve a large percentage of the actors in a particular market.381 As an example, the agreement concerned in CECED, discussed above, involved manufacturers holding about 90% of the market for domestic

375 See e.g. Case C-226/11 Expedia, para. 16-17.
376 See e.g. Ibid. para. 37.
377 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice).
379 See Notice on agreements of minor importance, p. 3 and Guidelines on the effect on trade concept, p. 52.
380 See Whish and Bailey, Competition Law, p. 151 and their analysis of Joined Cases C-180/98 etc. Pavlov.
381 See Vedder, Competition Law and Environmental Protection in Europe, p. 141.
washing machines in the EEA. Consequently, from a quantitative perspective, environmental agreements may often have an appreciable effect on trade and competition.

7 Article 101.3 TFEU and Environmental Considerations – Application of ‘The Integration Model’

7.1 Introduction

In the following Sections, the author will discuss how to assess agreements that promote environmental objectives under Article 101.3 TFEU. As apparent from the previous section such agreements may raise various anticompetitive concerns and will, in such cases, be prohibited under Article 101. TFEU. Nevertheless, Article 101.3 TFEU provides that Article 101.1 TFEU may be declared inapplicable where certain conditions are met. Furthermore, as argued above, environmental consideration must be integrated into Article 101 TFEU, in accordance with the integration principle. In this regard, the author has also proposed ‘The Integration Model’ as a model for taking environmental objectives promoted by an agreement into account under Article 101.3 TFEU. In the following, the author will therefore introduce the exemption framework applied under Article 101.3 TFEU and explain how to use ‘The Integration Model’ when assessing environmental cooperation under the criteria of Article 101.3 TFEU. It must however be emphasized that environmental cooperation may take various forms and that the following sections therefore do not aim to provide a complete presentation of all the aspects that may be relevant when assessing such cooperation under Article 101.3 TFEU.

7.2 Assessing Environmental Cooperation Under Article 101.3 TFEU

7.2.1 Improving the Production or Distribution of Goods or Promoting Technical or Economic Progress

7.2.1.1 Background

As to the first requirement for exemption under Article 101.3 TFEU, an agreement must result in some sort of ‘benefit’ or ‘improvement’. More specifically, Article 101.3 TFEU only applies to agreements that generate certain forms of benefits, namely those that contribute to improvements of ‘production or distribution’ or promote ‘technical or economic progress’. The scope of the first requirement has been well debated in the legal

382 See Commission decision, CECED, 2000/475/EC, para. 7 f.
383 See Section 5.3 above.
384 See Section 5.4 above.
literature. While some legal scholars adopt a narrow view on the ‘benefits’ referred to in Article 101.3 TFEU, others have adopted a broader view. Furthermore, the Commission seems to have taken a broad view on the ‘benefits’ relevant under Article 101.3 TFEU in the past, but now seems to take a narrow view. At the same time, there seems to be a discrepancy between the narrow view taken by the Commission and the view taken by the EU courts. In the following, the author will therefore present the former approach of the Commission, the current approach of the Commission, the approach of the EU courts and, lastly, how to apply ‘The Integration Model’, proposed by the author above, in the context of the first requirement of Article 101.3 TFEU.

7.2.1.2 The Former Approach of the Commission

From numerous decisions and guiding documents, pre-dating 2004, it is apparent that the Commission has taken various forms of environmental benefits into account under the first criterion of Article 101.3 TFEU. For example, the Commission has referred to factors such as ‘the avoidance of environmental risks involved in the transport of ethylene’, ‘the reduction of environmentally harmful exhaust emissions’ and ‘the reduction of air pollution’, when assessing agreements under that provision. In its Communication on environmental agreements, from 2002, the Commission also stated that:

“in particular the protection of the environment might be considered as an element which contributes to improving the production or distribution of goods and to promoting technical and economic progress.”

Thus, it seems clear that the Commission, in the past, has considered environmental factors to be relevant under Article 101.3 TFEU. However, the role of such factors in the assessment is less evident from the decision practice of the Commission. In fact, no
exemption seems to have been granted on environmental factors alone and the Commission has not been crystal clear as to the weight attributed to those factors.\textsuperscript{395}

As to the ambiguity of the decision practice of the Commission, the well-debated decision by the Commission in \textit{CECED} can be used as an example. That decision concerned an agreement between manufacturers of household washing machines, according to which the parties committed to cease the production and import of certain categories of washing machines, with the aim of improving energy efficiency and to contribute to environmentally conscious use of washing machines.\textsuperscript{396} After establishing that the agreement fell within the scope of Article 101.1 TFEU, the Commission assessed the possibility of granting an exemption under Article 101.3 TFEU. In that regard, the Commission found that the agreement would result in ‘\textit{collective environmental benefits}’ in the form of savings in marginal damage from avoided carbon dioxide emissions, as a result of increased energy-efficiency of the washing machines sold in the European market.\textsuperscript{397} However, this factor was just one among other factors, such as savings on the consumers’ electricity bills, taken into account by the Commission, as it found that an exemption was justified.\textsuperscript{398} It is therefore uncertain in what capacity the environmental benefits were taken into account in that decision. On one hand, it could possibly be argued that those benefits were merely considered in addition to the other economic benefits generated by the agreement. On the other hand, it could be argued that those benefits played a decisive role in that decision.\textsuperscript{399} As pointed out by Vedder, it does however seem clear that the environmental benefits were only taken into account as ‘economic benefits’.\textsuperscript{400}

\textbf{7.2.1.3 The Current Approach of the Commission}

Even if the Commission has taken various environmental factors into account in the past, it is clear from the current Guidelines that the Commission currently takes a narrow view on the ‘benefits’ relevant under Article 101.3 TFEU. In its \textit{Guidelines on the Application of Article 101.3 TFEU}, the Commission states that the first requirement of Article 101.3 TFEU covers ‘\textit{objective economic efficiencies}’.\textsuperscript{401} Furthermore, the Commission states that such efficiencies may be divided into two categories; ‘cost efficiencies’ and

\textsuperscript{395} Vedder, Competition Law and Environmental Protection in Europe, pp. 163-170.
\textsuperscript{396} See Commission decision, CECED, 2000/475/EC, para. 18-24.
\textsuperscript{397} Ibid. para. 56.
\textsuperscript{398} See Ibid. para. 47-57 under the title ‘individual economic benefits’.
\textsuperscript{399} See e.g. Monti, Article 81 EC and Public Policy, p. 1075 and Donal, Disintegration, p. 370.
\textsuperscript{400} See Vedder, Competition Law and Environmental Protection in Europe, p. 167.
\textsuperscript{401} Guidelines on the application of Article 81(3) of the Treaty, para. 64.
‘qualitative efficiencies’ (i.e. ‘non-cost based efficiencies’). As to cost efficiencies, the Commission considers that such efficiencies may result from various sources, such as economies of scale and scope, better planning of production and synergies resulting from an integration of existing assets. As to qualitative efficiencies, the Commission considers that technical and technological advances and production of higher quality products or products with novel features may constitute such efficiencies.

Thus, where environmental agreements generate these types of efficiencies, they can, according to the current approach of the Commission, be taken into account under Article 101.3 TFEU. As an example, the Guidelines on horizontal cooperation states that standards on environmental aspects of a product may generate qualitative efficiencies by facilitating consumer choice or innovation. As mentioned above, the Guidelines on the Application of Article 101.3 TFEU also states that 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. However, it seems clear that the Commission does no longer consider ‘collective environmental benefits’, of the type referred to in CECED, relevant under Article 101.3 TFEU. In this regard, the Guidelines on Horizontal Cooperation contains an example of how to apply Article 101 TFEU to environmental standards. The example concerns an agreement between producers of washing machines to no longer manufacture products which do not comply with certain environmental criteria, and is clearly based on the facts in the CECED case. However, when explaining how to assess the agreement under Article 101.3 TFEU, the Commission refers only to cost efficiencies and qualitative efficiencies and does not, in contrast to its reasoning in CECED, mention any ‘collective environmental benefits’, in the form of reduced environmental impact. In sum, it thus seems like the Commission has overruled its past findings of environmental benefits as relevant under Article 101.3 TFEU.

7.2.1.4 The Approach of the EU Courts

According to well-established case law of the CJEU, the ‘benefits’, referred to in Article 101.3 TFEU does not include all the benefits which the parties obtain from an agreement but are confined to ‘appreciable objective advantages’ of such a character as to

402 Ibid. para. 57 and 59.
403 See Ibid. para. 64-68.
404 See Ibid. para. 69-71.
405 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, para. 308 and Section 3.5.3.3 above.
406 See Guidelines on the application of Article 81(3) of the Treaty, para. 42.
compensate for the disadvantages which that agreement entails for competition.\textsuperscript{407} Furthermore, it seems like the Court considers that an ‘economic justification’ is needed for an exemption under that provision.\textsuperscript{408} However, it is less evident that the CJEU considers that only cost efficiencies and qualitative efficiencies, as defined by the Commission,\textsuperscript{409} can constitute ‘appreciable objective advantages’. For example, the CJEU has in several cases considered that public policy interests, such as creation or protection of jobs, may constitute such advantages.\textsuperscript{410} Furthermore, the General Court has implied that ‘the dual objective of raising professional and ethical standards for the occupation of football players’ agent in order to protect players, who have a short career’, fulfilled the first requirement of Article 101.3 TFEU.\textsuperscript{411}

As to the question of whether environmental benefits may constitute ‘appreciable objective advantages’, it does not seem like the CJEU has yet ruled on this matter. As the Court has held that promotion of public policy interests, such as employment, may constitute such advantages, it does however seem like environmental benefits, promoting EU environmental objectives, also would be able to constitute such advantages, particularly if those benefits are transformed into economic terms. As noted by Witt, the CJEU has, however, not pronounced itself on the relevance of benefits, other than economic efficiency gains, in over twenty years, and it is thus uncertain whether the court would still adhere to its broad view on ‘appreciable objective advantages’ taken in the past.\textsuperscript{412}

7.2.1.5 Application of ‘The Integration Model’ – Environmental Efficiencies

As shown in the three previous sections, the jurisprudence provides a somewhat cluttered picture as to the role of environmental considerations under the first requirement of Article 101.3 TFEU. It is therefore uncertain whether environmental benefits may be able to justify an exemption under that provision. However, as argued above, the integration principle requires that, in so far as the wording of that provision is sufficiently open-textured environmental requirements must be integrated into Article 101 TFEU.\textsuperscript{413}

\textsuperscript{408} See e.g. Case 42/8 \textit{Remia and Others v Commission}, para. 45
\textsuperscript{409} See the previous section.
\textsuperscript{410} See Case 26/76, \textit{Metro v Commission}, para. 43, Joined Cases 209 to 215 and 218/78 \textit{Heintz van Landewyck SARL and Others v Commission}, para. 182 and Case 42/8 \textit{Remia and Others v Commission}, para. 42 in. See also Section 3.3.3.2 above.
\textsuperscript{411} See Case T-193/02 \textit{Laurent Piau v Commission}, para. 102 and 104.
\textsuperscript{412} See Witt, The European Court of Justice and the More Economic Approach to EU Competition Law, p. 213.
\textsuperscript{413} See Section 5.3 above.
Furthermore, the author has proposed ‘The Integration Model’ as a model for integration of environmental considerations into Article 101.3 TFEU. In the following, the author will describe how to apply this model in the context of the first requirement of that provision.

As mentioned above, environmental degradation can be described as an efficiency problem and environmental resources and services can be economically valued. In the view of the author, the wording of Article 101.3 TFEU and, in particular, the notion of ‘economic and technical progress’ therefore seems to be sufficiently open-textured to include environmental benefits, when such benefits have been transformed into economic terms. Consequently, the first requirement must, when read in the light of the integration principle, be interpreted as including ‘environmental benefits’ when those have been transformed into economic terms, such as the economic value of avoided environmental damage (hereafter ‘environmental efficiencies’).

As to the concept of ‘environmental benefits’, this concept must be interpreted in accordance with the integration principle. Consequently, such benefits would be defined in terms of contribution to the ‘environmental requirements’ referred to in Article 11 TFEU. As discussed above, those environmental requirements must, in turn, be defined in accordance with the environmental objectives and principles in Article 191 TFEU. Thus, benefits, such as an agreement’s contribution to air or water pollution abatement or to emissions reductions, promoting environmental objectives set out in Article 191 TFEU, would thus be classified as ‘environmental benefits’.

As stated above, the environmental benefits would also have to be calculated into economic terms in order to fulfil the first requirement of Article 101.3 TFEU. In this regard, the author proposes the term ‘environmental efficiencies’ for environmental benefits that has been transformed into economic terms. As to the transformation of environmental benefits into environmental efficiencies, different methods of environmental valuation may be used. In this regard, examples of the use of

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414 See Section 5.4 above.
415 See Section 5.1 above.
416 See similarly Kingston, Greening EU Competition Law and Policy, p. 274-276 where she argues that, insofar as environmental benefits can be substantiated and economically valued, they can constitute ‘technical and economic progress’. Compare however Vedder, Competition Law and Environmental Protection in Europe, p. 161-170 where he discusses the question of whether Article 101.3 TFEU could allow for an exemption on environmental grounds and whether environmental benefits should be economised under the first criterion of that provision. Also compare Monti, Article 81 EC and Public Policy, p. 1057 where he argues that the wording of the first requirement of Article 101.3 TFEU is sufficiently open textured to allow for factors like employment or industrial policy to be included.
417 See further Section 5.4 above.
418 See Section 5.2.2 above.
environmental valuation can also be found in the former decision practice of the Commission, as well as in guiding documents from national competition authorities regarding the application of Article 101.3 TFEU. For example, in CECED, the Commission estimated the economic value of avoided damage from emissions of carbon dioxide, sulphur dioxide and nitrous oxide resulting from the agreement in that case. Similarly, the Dutch competition authority calculated the economic value of environmental benefits in its informal analysis of the so-called ‘Chicken of Tomorrow’ case, concerning a sustainability arrangement between producers and retailers regarding the complete replacement of regularly-produced broiler chicken meat. The informal analysis was carried out according to Dutch competition rules, as well as Article 101 TFEU. In its analysis under 101.3 TFEU, the ACM took into account environmental effects, in the form of avoided emissions of ammonia and particulate matter, and calculated the economic value of these effects. CECED and Chicken of Tomorrow thus show the practical possibility of transforming ‘environmental benefits’ into ‘environmental efficiencies’.

Furthermore, as to the requirements of substantiation of environmental efficiencies, the current principles for substantiation in the Commission’s Guidelines on the application of Article 101.3 TFEU could, naturally, be used as a starting point. To exemplify this, all environmental efficiencies would have to be substantiated so that the nature, likelihood and magnitude of the environmental efficiency, as well as the link between the efficiency and the agreement, can be verified. Nevertheless, it should also be considered whether the special character of environmental resources motivates different requirements for the substantiation of environmental efficiencies. In this regard, the Commission already makes a differentiation between the substantiation of cost efficiencies and non-cost based efficiencies. While the value of the former efficiencies must be calculated or estimated as accurately as reasonably possible, such strict requirements are not upheld in the case of the latter, which only must be described and explained in detail. Consequently, some sort of relaxation of the substantiation requirement may thus also be appropriate in the case of environmental efficiencies, where such efficiencies are difficult to substantiate.
due to their nature. In this regard, it also seems like the Commission, in CECED and in its former *Guidelines on Horizontal Cooperation Agreements*, was satisfied that the conditions of Article 101.3 TFEU were fulfilled where environmental benefits were likely for consumers in general ‘under reasonable assumptions’. The exact meaning of that statement is however rather unclear. The author would therefore refrain from using that statement as a benchmark for how to substantiate environmental efficiencies. Instead, it seems appropriate to require that undertakings must substantiate their claims as far as possible, while also taking into account the specific nature of the environmental benefits involved and the current state of scientific knowledge, as factors which could relax the substantiation requirement. It can also be argued that the precautionary principle, read in conjunction with the integration principle, requires that certain environmental risks, not yet fully demonstrated scientifically, may not be ignored in the assessment of environmental benefits under Article 101.3 TFEU. Thus, where an undertaking has substantiated environmental efficiencies, resulting from the avoidance of a such not yet fully demonstrated risk, the substantiation may satisfy the substantiation requirement.

In sum, the author thus argues that ‘environmental benefits’, when transformed into ‘environmental efficiencies’, fulfil the first requirement of Article 101.3 TFEU. While this approach may be compatible with the former decision practice of the Commission, it clearly runs contrary to the current approach adopted by the Commission. Thus, the author essentially proposes a reform of the current approach adopted by the Commission, meaning that not only cost efficiencies and qualitative efficiencies, in the sense described above, but also environmental efficiencies, should be considered in the assessment. As to the case law of the CJEU, the Court has not yet ruled on the possibility of taking environmental benefits into account under Article 101.3 TFEU. It could therefore be argued that environmental efficiencies, since those would be formulated in objective economic terms, could fit within the concept of ‘appreciable objective advantages’ established by the Court.

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425 See Section 5.2.2 for examples of why environmental benefits may be difficult to substantiate.
427 See Section 7.2.2.3 above.
7.2.2 Consumers Getting a Fair Share of the Benefits

7.2.2.1 Environmental Efficiencies and The Current Jurisprudence

As to the second requirement of Article 101.3 TFEU, this requirement means that for certain ‘benefits’ to be able to justify an exemption, consumers must receive a fair share of those benefits. Accordingly, the second requirement underlines a distributive aspect of Article 101.3 TFEU. In this section, the author will discuss the current approach adopted by the EU courts and the Commission to the second requirement and whether environmental efficiencies may fulfil that requirement. Thereafter, in the two subsequent sections, it will be explained how to apply ‘The Integration Model’, in the context of the second requirement.

In essence, the EU courts and the Commission seem to have a common approach to the application of the second requirement of Article 101.3 TFEU. According to the case law of the CJEU, it is the beneficial nature of the effect on all consumers in the relevant market that must be assessed, and not the effect on each member of that category of consumers. Nevertheless, the EU Courts have also stated that the assessment may take into account advantages arising, not only in the relevant market where the restriction of competition occurs, but also in other markets. The CJEU has however also stressed that a fair share of the benefits must at least accrue to the consumers harmed by the restriction in question.

According to the Guidelines on the application of Article 101.3 TFEU, the Commission essentially shares the view of the CJEU, presented above. Furthermore, the Commission also states that the second requirement of Article 101.3 TFEU contains two concepts; the concept of ‘consumers’ and the concept of ‘fair share’. As to the concept of ‘consumers’, this concept encompasses all direct or indirect users of the products covered by an agreement, including producers, that use the products as an input, wholesalers, retailers and final consumers. As to the concept of ‘fair share’, this concept implies

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428 See Case C-238/05 Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbank), para. 70. See also similarly Guidelines on the application of Article 81(3) of the Treaty, para. 87, which refers to Case T-131/99 Shaw v Commission, para. 163.


430 See e.g. Case C-382/12 P Mastercard, para. 225. See also similarly Guidelines on the application of Article 81(3) of the Treaty, para. 43 and 85.

431 See footnotes 436-438 above where references to the guidelines have been made.

432 See Guidelines on the application of Article 81(3) of the Treaty, para. 84.
that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 101.1 TFEU.\textsuperscript{433} As to ‘fair share’, the Commission also states that this concept incorporates a ‘sliding scale’, meaning that the greater the restriction on competition, the greater must be the efficiencies and the pass-on to consumers.\textsuperscript{434} In that regard, the Commission also notes that were a certain period of time is required before efficiencies materialise, this means that the greater the time lag, the greater must the efficiencies be.

When it comes to the question of assessing ‘environmental efficiencies’\textsuperscript{435} under the second requirement, it is clear that such efficiencies may often not fulfil that requirement, as currently interpreted by the EU courts and the Commission. The reason for this is the characteristics of such efficiencies. In the following, the author will discuss two characteristics of environmental efficiencies which makes it unlikely that they will fulfil the second requirement as applied in the current jurisprudence.

*Firstly*, as discussed above, environmental resources might often be characterised by *non-excludability* and environmental efficiencies, contributing to the maintenance of such resources, may thus often accrue to the society ‘as a whole’, rather than specifically to the consumers affected by a restriction on competition.\textsuperscript{436} Therefore, environmental efficiencies may seldom fulfil the distributional requirement of Article 101.3 TFEU. Even if such efficiencies will benefit the harmed consumers indirectly, as a part of the society, the total societal value of those efficiencies will most likely be diluted in the assessment, since it must be considered that those efficiencies also accrue to other members of the society. As an example, an agreement contributing to abatement of air pollution will not only ensure clean air (and the economic value of such air) for a certain group of consumers but also for the society as a whole.

*Secondly*, another problem when assessing environmental efficiencies is that they may often take the shape of *saved costs*, due to avoidance of environmental damage. Such efficiencies may thus often materialize after a certain period of time or over a certain period of time. While such time lag may also exist in the case of qualitative efficiencies and cost efficiencies, it could be the case that the existence of such time lag is especially

\begin{itemize}
\item \textsuperscript{433} Ibid. para. 85.
\item \textsuperscript{434} Ibid. para. 90.
\item \textsuperscript{435} See Section 7.2.2.5 for an explanation of this concept.
\item \textsuperscript{436} See Section 5.1.1 above.
\end{itemize}
frequent in the case of environmental efficiencies. Thus, as the greater the time lag, the greater must the efficiencies be, environmental efficiencies may often not fulfil the second requirement of Article 101.3 TFEU, due to the time frame currently adopted in the assessment under that requirement.

In sum, it is therefore doubtful that environmental efficiencies would be able to pass the second requirement of Article 101.3 TFEU under the current approach of the EU courts and the Commission. In the following two sections, the author will however explain how to use ‘The Integration Model’ in the context of the two concepts of ‘consumers’ and ‘fair share’, in order to integrate environmental considerations into Article 101.3 TFEU, in line with the integration principle.

7.2.2.2 ‘The Integration Model’ and the Concept of ‘Consumers’

As mentioned in the previous section, environmental efficiencies are, generally, unlikely to accrue only to ‘consumers’, as defined by the EU courts and the Commission. Consequently, such efficiencies may often not fulfil the second criterion of Article 101.3 TFEU. Nevertheless, as argued above, the integration principle requires that, insofar as the wording of Article 101 TFEU is sufficiently open-textured, an interpretation in line with environmental objectives, as well as the core competition objectives must be made. In this regard, the current approach of the EU courts and the Commission to the second requirement seems to give insignificant weight to environmental objectives, since environmental efficiencies may seldom, or never, justify a restriction on competition under that approach. However, Article 101.3 TFEU refers to ‘consumers’, without further defining this concept. The wording of Article 101.3 TFEU thus appears to be sufficiently open-textured to interpret that provision as referring to a broader concept of consumers, than the concept established in the current jurisprudence. In order to give environmental objectives due weight under Article 101 TFEU, the notion of ‘consumers’ must therefore, be interpreted, in the light of the integration principle, as referring to consumers in a general sense, and not only the consumers suffering from the harm of the restriction on competition. In this regard, it could also be noted that the Commission, in the past,

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437 See e.g. Dressing and Meals, Lag Time in Water Quality Response to Best Management Practices, concerning time lag in the context of restoring the quality of water bodies.
438 See Section 5.3 above.
439 See 5.4 above. See also Kingston, Greening EU Competition Law and Policy, p. 277 for a similar interpretation.
seems to have been open to interpret the concept of ‘consumers’ broadly in the context of environmental benefits.440

The interpretation proposed thus means that, in the specific context of environmental efficiencies, the concept of ‘consumers’ would be interpreted as including all consumers of environmental resources, and the harmed consumers as a part of that group. In other words, environmental efficiencies would be assessed from a societal perspective (i.e. total welfare), rather from the narrow perspective of a particular group of consumers (i.e. consumer welfare), meaning that the efficiencies, in their entirety, would be taken into account in the assessment. Prima facie, this interpretation would, of course, lead to a downgrading of the interests of the consumers harmed by a restriction, to the benefit of the interests of consumers in a general sense. Nevertheless, it should be noted that the harmed group of consumers will be included in the broader group of consumers, and their interests will thus not be set aside completely. Moreover, as discussed in the previous section, the current jurisprudence does not focus on the interests of individual consumers of the harmed group, but rather on the group as a whole. The proposed interpretation thus means that, in the context of environmental efficiencies, the interests of one group (not the interests of individuals) will be substituted for the interests of a larger group. It must also be pointed out that, while the proposed interpretation of ‘consumers’ allows environmental efficiencies to be taken into account in the assessment, it is the interpretation of the concept ‘fair share’ that is decisive for the weight given to those efficiencies in the assessment. The interpretation of ‘fair share’ is thus crucial for the conclusion of whether or not such efficiencies outweigh the negative impact of a restriction on competition. How to deal with environmental efficiencies under the concept of ‘fair share’ is discussed in the section below.

7.2.2.3 ‘The Integration Model’ and the Concept of ‘Fair Share’

The concept of ‘fair share’, as currently defined by the EU courts and the Commission, is of course interlinked to the concept of ‘consumers’, defined in the narrow sense. As the

440 See e.g. Commission decision, CECED, 2000/475/EC, para. 56 where the Commission stated that the agreement in question generated environmental results for society that would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines. See also, the now replaced, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, para. 195-196 where the Commission stated that net benefits in terms of reduced environmental pressure for consumers in general may outweigh the negative effects on competition resulting from an agreement. Compare also Commission decision, DSD, 2001/837/EC, para. 148 where the Commission stated that consumers would benefit as a result of the improvement in environmental quality sought by the agreement in that case (a reduction in the volume of packaging). See also Vedder, Competition Law and Environmental Protection in Europe, pp. 171-171 for a further analysis of the statements made by the Commission in the guidelines and in DSD.
author has proposed in the previous section, the concept of ‘consumers’ must be broadened, in the context of environmental efficiencies, and it must therefore also be established what the concept of a ‘fair share’ would mean in that context. As mentioned above, the Commission has held that ‘fair share’ incorporates a sliding scale and implies that the pass-on of benefits must at least compensate consumers for the negative impact caused to them by a restriction. In the view of the author, the essence of that concept is thus to clarify that benefits must have a certain magnitude capable of compensating the negative effects of a restriction on competition, and to justify an exemption under Article 101.3 TFEU. In other words, that concept invokes a balancing operation.

As argued above, the integration principle implies that, in the case of a conflict between environmental objectives and other EU policy objectives, these objectives must be reconciled by finding an interpretation that does not neglect, overrule or give undue weight to any of these objectives. The concept of ‘fair share’ must thus, when interpreted in the light of the integration principle, provide a framework under which environmental objectives and competition objectives can be balanced in an objective and fair manner. As environmental objectives must be given due weight under that framework, this must also mean that environmental efficiencies, per se, must be capable of justifying certain restrictions on competition. However, as to the specific details of how to balance environmental efficiencies against competitive restrictions, the integration principle does not provide any guidance. In the following, the author will nevertheless propose some considerations relevant for that assessment.

As to the question of how to balance environmental efficiencies against competitive restrictions, the current Guidelines on the Applicability of Article 101.3 TFEU can, naturally, be taken as a starting point. While certain statements in those guidelines may be extended to assessments involving environmental efficiencies without adjustment, other statements may need to be adapted to the specific context of such efficiencies. For example, ‘fair share’ must incorporate a sliding scale even in the context of environmental efficiencies, meaning that the greater the restriction on competition is, the greater must be the environmental efficiencies be.

Furthermore, as to the economic value of future efficiency gains, the Commission has stated that the future value of efficiencies must be discounted to allow for an appropriate

441 Section 5.4 above.
442 Compare Guidelines on the application of Article 81(3) of the Treaty, para. 90.
comparison with a present loss to consumers. In the context of assessing whether future environmental efficiencies allows consumers to receive a fair share of those efficiencies, such efficiencies must thus, as a starting point, be discounted. In this regard, it could however be noted that, in order to give environmental objectives due weight in the assessment, it may be necessary to adapt the time frame of the assessment to comprehend the long-term dimension of environmental benefits. In other words, an assessment confined to short or medium-term benefits may exclude long-term environmental benefits, and it could therefore be argued that a long-term perspective should be taken in the case of such benefits. Nevertheless, it must also be considered that competition, by promotion of innovation and efficient use of resources, contributes to environmental objectives. Thus, allowing short-term environmental benefits generated by an agreement to trump the long-term losses of innovation and improved allocative efficiency could produce results that would be counterproductive to the environmental objectives pursued. In the view of the author, the assessment of whether environmental efficiencies provides consumers a fair share of those efficiencies should thus include long-term environmental benefits, as well as long-term losses of competition.

In addition to the considerations mentioned above, another issue that must be addressed is that assessing environmental efficiencies, under the concept of ‘fair share’, will involve balancing of positive and negative effects that relate, not only to one group, but to two different groups. Consequently, the question arises as how to balance negative anticompetitive effects, harming a particular group of consumers, against environmental efficiencies, benefitting the society as a whole. In this regard, it could be argued that the environmental efficiencies would at least have to compensate for the losses of the harmed group, in order to reach Kaldor-Hicks efficiency. Going even further, it could also be argued that the efficiencies would have to equal the losses of the harmed group multiplied by a certain factor, in order for an exemption to be justified. In that case, the interests of the harmed consumers would be somewhat elevated in the assessment.

In addition to the negative anticompetitive effects and the environmental efficiencies, it would also be necessary to take into account potential cost efficiencies and qualitative efficiencies, benefitting the harmed group of consumers, in the assessment. When using

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443 See Ibid. para. 88.
444 Compare Section 5.4 above.
445 See further Section 5.4 above.
446 See the previous section regarding the two different groups of ‘consumers’.
447 See Section 5.1.1 above concerning the concept of Kaldor-Hicks efficiency.
‘the sliding scale’ in this context, this scale would thus require that the greater the qualitative efficiencies and cost efficiencies are, the less great would the environmental efficiencies need to be. The relationship between the factors could thus be expressed in a simple formula as:

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\text{anticompetitive effects - qualitative efficiencies and cost efficiencies = environmental efficiencies required to satisfy the ‘fair share’ requirement.}
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In the end, the question, in the context of ‘fair share’, is thus; ‘\textit{when does environmental efficiencies, taken together with qualitative efficiencies and cost efficiencies generated by an agreement, outweigh the negative effects of the agreement?}’. While the answer to this question is dependent on the circumstances of the particular case, it seems possible to adopt guiding principles for the assessment. For the sake of foreseeability and legal certainty, it would be preferable to develop guidelines on how to balance environmental efficiencies against other efficiencies, as well as against the negative effects on competition. While the author has proposed some considerations above that may be taken into account when shaping such guidelines, the author is however not confident in suggesting how to shape such guidelines more specifically. Rather, the author proposes that the shaping of guidelines should be based on, not only legal reasoning, but also economic reasoning and science in the environmental field, to ensure that both environmental objectives and competition objectives, \textit{de facto}, will be given due weight in the assessment under Article 101.3 TFEU.448

\subsection*{7.2.3 Indispensability}

As to the third requirement of Article 101.3 TFEU, a restriction on competition must be indispensable for the attainment of the benefits, generated by an agreement, for an exemption to be justified. According to the Commission, the decisive factor for indispensability is whether the agreement, as a whole, and the individual restrictions, resulting from that agreement, make it possible to perform the activity in question more efficiently, than would likely have been the case in the absence of the agreement and those restrictions.449 Furthermore, the Commission has stated that the indispensability requirement implies a two-fold test.450 \textit{Firstly}, it must be established that the benefits are

\footnotesize{448 Compare Kingston, Greening EU Competition Law and Policy, p. 280 where she argues that the concept of ‘fair share’ is a particularly subjective one and not one which lends itself to an overly scientific, economics-based approach and that genuine environmental benefits ceteris paribus will fulfil this criterion if the concept of ‘consumers’ is broadened to include consumers in a general sense.

449 See Guidelines on the application of Article 81(3) of the Treaty, para. 74.

450 See Ibid. para. 73.
‘specific to the agreement’, in the sense that there are no other economically practicable and less restrictive means of achieving those benefits. Secondly, it must be established that the nature and intensity of each individual restriction is reasonably necessary to produce the benefits in question.

In the context of agreements promoting environmental objectives, it does not seem motivated to apply this criterion in any way different than to other agreements. As mentioned above, the purposiveness of integration of environmental considerations into Article 101 TFEU requires recognition of the importance of competition from an environmental perspective. Since the third criterion requires an assessment of the necessity of a restriction on competition, in relation to the environmental efficiencies, this requirement thus contributes to the purposiveness of the integration. Furthermore, this requirement will ensure that the core competition objectives will not be set aside when agreements involve competitive restrictions that are not necessary for the achievement of environmental objectives. Thereby, the indispensability requirement will guarantee, in accordance with the integration principle, that the competition objectives are given due weight in the assessment under Article 101 TFEU, in the event of conflicts between such objectives and environmental objectives. Lastly, the wording of Article 101.3 TFEU does not allow any exemptions for agreements that involve restrictions that are not indispensable for the achievement of environmental benefits. ‘Indispensability’ thus sets a limit to the consideration of environmental objectives under Article 101 TFEU.

Agreements promoting environmental objectives must therefore, like any other agreement, fulfil the indispensability requirement, as currently applied by the Commission. This means that there must be no other economically practicable and less restrictive means of achieving the environmental efficiencies than through the restrictions imposed by the agreement. Additionally, the nature and intensity of the restrictions must be reasonably necessary to produce the environmental efficiencies. As mentioned

451 See Ibid. para. 75.
452 See Ibid. para. 78.
453 See similarly Kingston, Greening EU Competition Law and Policy, p. 281 where she argues that the third criterion of Article 101.3 TFEU should apply to environmental agreements in the same way as to any other restrictive agreement.
454 See Section 5.4 above.
455 See similarly Vedder, Competition Law and Environmental Protection in Europe, p. 180 f. where he argues that the attainment of sustainable development require the presence of some competitive pressure and that the third criterion of Article 101.3 TFEU fulfils an essential role in this regard.
456 See Section 5.4 above.
457 See further Commission Notice ‘Guidelines on the application of Article 81(3) of the Treaty’ (2004/C 101/08), para. 73-82 for guidance on the application of the indispensability requirement. See also Kingston, Greening EU Competition Law and Policy, pp. 280-287 for a further discussion on how the Commission has applied the indispensability requirement to environmental agreements in its past decision practice.
above, environmental cooperation may take many forms and give rise to many different types of anticompetitive concerns. Such cooperation may therefore also give rise to various concerns under the indispensability requirement. As an example, it could probably be argued that environmental standards, in general, would have to comply with certain requirements to be indispensable for the achievement of its potential environmental benefits. For example, the participation in the setting of such standards must likely be unrestricted and the procedure for adopting such standards must be transparent. Furthermore, access to such standards must probably be provided on fair, reasonable and non-discriminatory terms. If those conditions are not met, it could be argued that environmental efficiencies, generated by the standards, could be achieved by less restrictive means and that the restrictions imposed by the standards are not indispensable for the achievement of the efficiencies.

7.2.4 No Elimination of Competition

As to the fourth requirement of Article 101.3 TFEU, an agreement can only be exempted under that provision if it does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. According to the Commission, this requirement underlines the fact that the ultimate aim of Article 101 TFEU is to protect the competitive process and that this aim therefore is given priority over potential benefits generated by a restrictive agreement. Furthermore, the Commission has also stated that the question whether competition is eliminated depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition. Consequently, the weaker the existing competition is, and the greater the restrictive effect of the agreement is, the higher the likelihood will be that the agreement results in elimination of competition.

In the context of agreements promoting environmental objectives, as with the indispensability requirement, it does not seem motivated to apply the fourth requirement in any way different than to other agreements. As mentioned above, the purposiveness of integration of environmental considerations into Article 101 TFEU requires recognition of the importance of competition from an environmental perspective. Similar to the

458 See Section 6.2.3 above. See also Section 2.4.2 above concerning ‘voluntary environmental agreements’.
459 Compare Section 6.2.3 above and Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), para. 280.
461 See Ibid. para. 107. See also Ibid. para. 105-116 for further guidance on the application of the fourth requirement.
462 See Section 5.4 above.
indispensability criterion, the fourth requirement will therefore contribute to the purposiveness of the integration by safeguarding the existence of residual competition in the market.643 Moreover, by safeguarding the existence of residual competition in the market, this requirement will also ensure that the core competition objectives will not be set aside when environmental cooperation is particularly harmful to competition. Thereby, the requirement will guarantee, in accordance with the integration principle, that the competition objectives are given due weight in the assessment under Article 101 TFEU, in the event of conflicts between such objectives and environmental objectives.644 Finally, the wording of Article 101.3 TFEU does not allow any exemptions for agreements that eliminate competition in respect of a substantial part of the products in question. The fourth requirement thus sets a limit to the consideration of environmental objectives under Article 101 TFEU.

Agreements promoting environmental objectives must thus fulfil the requirement of not eliminating competition, as currently applied by the Commission. The question of whether an exemption can be granted will therefore depend on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition. As mentioned above, environmental cooperation may take many forms and give rise to many different types of anticompetitive concerns. Furthermore, such cooperation may be conducted on different scales and within various sectors.645 The assessment of whether such cooperation eliminates competition will therefore ultimately depend on the circumstances of the specific case.646 As noted above, environmental agreements may however often involve a large percentage of the actors in a particular market.647 In general, such agreements may thus involve a particular risk of eliminating competition, from a quantitative perspective. Nevertheless, it may be the case that such cooperation only restricts competition on environmental factors, which normally only forms one of many potential parameters of competition, and that such cooperation therefore often are likely to satisfy the fourth requirement.648 In this regard, it can also be

643 See similarly Kingston, Greening EU Competition Law and Policy, p. 288 where she argues that the elimination of competition in respect of product innovation would, in the long term, run the risk of harming environmental protection by stifling the development of environmentally cleaner technology.
644 See Section 5.4 above.
645 See Section 6.2.3. See also Section 2.4.2 above concerning ‘voluntary environmental agreements’.
646 See Kingston, Greening EU Competition Law and Policy, pp. 287-292 for a discussion on how the Commission has assessed environmental agreements under the fourth requirement in its past decision practice.
647 See Section 6.2.4.
648 See Kingston, Greening EU Competition Law and Policy, p. 288 f. Also compare Commission decision CECED, 2000/475/EC, p. 64 where the Commission stated that major distributors of household washing machines agreed that ‘factors like price, brand image, and technical performance may have more weight in purchase decisions than energy efficiency’.
noted that the Commission has stated that, in the assessment under the fourth requirement, it is relevant to examine the agreement’s influence on the various parameters of competition, and, in particular, its influence on price competition and competition in respect of innovation and development of new products. Where environmental cooperation, such as environmental standard setting, restrict competition on innovation and development of new products in a substantial part of the market, such cooperation is thus not likely to fulfil the fourth requirement. As a last remark, it could also be noted that current trends indicate that environmental factors have become an increasingly important competitive factor in the market. As competition policy evolves, it is thus possible that restricting competition on environmental factors may be considered as particularly problematic under the fourth requirement of Article 101.3 TFEU.

8 Summary and Final Remarks

8.1 Summary

In this thesis, the author has examined the role of environmental considerations in the EU competition law analysis under Article 101.1 and 101.3 TFEU. Essentially, the underlying aim has been to illuminate the legal preconditions for environmental cooperation, from a EU competition law perspective, and to contribute to the discussion on how to resolve conflicts between competition objectives and environmental objectives in the context of Article 101 TFEU.

As a first remark, the development in the recent decades indicates that EU competition policy and EU environmental policy are becoming increasingly intertwined. In the view of the author, this development can be attributed to three distinct, yet interlinked, elements.

Firstly, the status of environmental objectives in the EU Treaties has evolved over the last decades and environmental protection now constitute one of the fundamental objectives of the EU. Besides the fact that EU environmental policy now constitutes an important policy area, it also seems that the Treaties require that environmental objectives must be taken into account in other EU policy areas. In this regard, Article 3 TEU sets

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470 See Nielsen, Sustainable Shoppers Buy the Change They Wish to See in the World report, pp. 3-9. For example, the report found that almost half (46 %) of global consumers also said they would be willing to forgo brand name in order to buy environmentally friendly products.
471 See Section 4 above.
472 See Section 2.3.1 above.
out that the EU shall establish an internal market which shall aim to achieve ‘a high level of environmental protection’. Furthermore, the integration principle, codified in Article 11 TFEU, requires that environmental requirements must be integrated into other EU policy areas. As apparent from the case law of the CJEU, the effect of this principle is that environmental policy considerations may ‘spill over’ to other policy areas, such as the policy on the internal market and competition policy.473

Secondly, there has also been a shift in EU environmental policy, from an almost exclusive reliance on direct regulation, towards an increased use of market-based instruments and encouragement of voluntary environmental agreements.474 The aim of this development has been to encourage and steer market actors to act in ways that result in more environmentally-favourable outcomes, rather than to force them, in a strict sense, not to harm the environment.475 As a consequence of this development, EU environmental policy has been further integrated into the market and the competitive process. In the context of voluntary environmental agreements, such agreements will also be subject to scrutiny under the EU competition rules. The development in EU environmental policy has thus resulted in an increased risk of conflicts between environmental policy objectives of competition policy objectives, which must to be resolved.

Thirdly, and lastly, a historical overview of EU competition policy portrays a somewhat cluttered picture as to the objective pursued. It does not appear as if EU competition policy is based exclusively on any of the established competition theories; Ordoliberalism, the Harvard School and the Chicago School.476 Rather, it seems like EU competition policy has evolved in a dynamic manner over the years and that it today constitutes a unique institution influenced by several competition theories and which pursues its own unique objectives.477 As to the objectives pursued, it seems like three core objectives can be defined; market integration, economic freedom and efficiency.478 Nevertheless, it also appears that other Treaty objectives may play a role in the application of competition law. In this regard, it does however seem to be a discrepancy between the views of the EU courts and the Commission. In the past, the Commission has taken various Treaty objectives, such as environmental protection, into account when applying the competition rules. However, since the beginning of the 2000s, the Commission has

473 See Section 2.3.4.1 above.
474 See Section 2.4.3 above.
475 See Section 2.4.2 above.
476 See Sections 3.2.3 (Ordoliberalism), 3.3.3 (the Harvard school) and 3.4.3 (the Chicago school).
477 See Section 3.5.1 above.
478 See Section 3.5.2 above.
taken a more narrow view on the objective of EU competition policy, as only to promote the core objectives of EU competition policy. In contrast, the EU courts have taken various Treaty objectives into account when applying the competition rules, and it seems like they still take a broad view on what objectives that are relevant when applying those rules. Nevertheless, the CJEU has not yet ruled on the question of whether environmental objectives may play a role in EU competition policy.

Consequently, it seems like, while competition policy and environmental policy has become increasingly intertwined, and the risk of conflicts between environmental objectives and competition objectives thus has increased, it is still rather uncertain how to handle such conflicts in the context of the EU competition rules. To address this uncertainty, the author has therefore examined whether environmental considerations must be integrated into Article 101 TFEU. In this regard, it has been concluded that the integration principle in fact does require such integration. Furthermore, the author has presented ‘The Integration Model’, as a model of how to integrate environmental considerations into Article 101 TFEU and how to balance environmental objectives against the core competition objectives in the assessment under that provision. This model is based on various considerations, including an interpretation of the integration principle and the observations that environmental degradation may be described as an efficiency problem and that environmental resources may be economically valued. In essence, the model means that where an agreement promotes environmental objectives, as defined in the EU Treaties, environmental benefits, generated by that agreement, after being transformed into economic terms, must be taken into account in the assessment under Article 101.3 TFEU. In addition to this model, the author has also discussed the alternative of excluding agreements that pursue environmental objectives from the scope of Article 101 TFEU. In that regard, certain cases from the EU courts suggest that agreements may fall outside the scope of Article 101.1 TFEU where the agreements pursue certain ‘legitimate purposes’. However, legal scholars have different views on how to interpret these cases and whether these cases may be applied by analogy to environmental agreements. In conclusion, the author has however principally rejected

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479 See Section 3.5.3.3 above.
480 See Section 3.5.3.2 above.
481 See Section 5.3 above.
482 See Section 5.4 above. See also Section 2.3.4.1, concerning the integration principle, and Section 5.2, for an economic perspective on environmental protection.
483 See Section 5.4 above.
484 See Section 5.5.2 above.
‘exclusion’ as a viable alternative to integration for a number of reasons, including the reasons that exclusion seems to be contrary to the wording of Article 101 TFEU and the idea of the integration principle.485

After having discussed the role of environmental considerations under Article 101 TFEU, at a general level, the author has also discussed how to assess agreements promoting environmental objectives under the specific criteria of Articles 101.1 and 101.3 TFEU. As to the requirements under Article 101.1 TFEU, which essentially prohibits anticompetitive cooperation, it has been established that those requirements, in principle, apply to environmental agreements in the same way as to any other agreements. In this regard, it has also been noted that environmental cooperation may take various forms and thus may raise various anticompetitive concerns. Nevertheless, the author has also highlighted certain aspects of the requirements of Article 101.1 TFEU that may be particularly relevant in the context of agreements promoting environmental objectives.486

As to Article 101.3 TFEU, this provision basically allows for an exemption from the prohibition of anticompetitive agreements under certain circumstances where an agreement generate certain ‘benefits’. When it comes to the question of whether the achievement of environmental objectives may constitute such ‘benefits’, the jurisprudence provides a somewhat cluttered picture. While the Commission have considered that environmental benefits can be taken into account under Article 101.3 TFEU in the past, the Commission currently considers that only certain objective economic efficiencies can justify an exemption under that provision.487 At the same time, the CJEU have accepted that promotion of public policy interests, such as employment, may justify an exemption. Thus, it could be argued that environmental benefits, promoting EU environmental objectives, also may be capable of justifying an exemption, particularly if those benefits are transformed into economic terms. As the CJEU has not yet ruled on the possibility of exempting agreements on environmental grounds, the jurisprudence however remains uncertain in this regard.488

As mentioned above, the author however argues that the integration principle requires that environmental objectives must be taken into account when applying Article 101 TFEU, and proposes ‘The Integration Model’ as a model for integration of

485 See Section 5.5.3 above.
486 See Section 6 above.
487 See Sections 7.2.2.2-3 above.
488 See Section 7.2.2.4 above.
environmental considerations into the assessment under Article 101.3 TFEU. In this thesis, explanations have also been provided as to how to use that model when assessing agreements promoting environmental objectives under the requirements of that provision. In sum, this model means that, insofar as the wording of Article 101.3 TFEU is sufficiently open-textured, the requirements must be interpreted in line with the core competition objectives as well as with environmental objectives. Moreover, those objectives must be balanced against each other in an objective and fair manner, and they must both be given due weight in the assessment under that provision.

As to the two first requirements of Article 101.3 TFEU, application of this model results in an interpretation that is somewhat different from the current interpretation of the Commission and the CJEU of those requirements. In the context of the first requirement, the model means that ‘environmental benefits’, when transformed into ‘environmental efficiencies’, must be considered as ‘promoting economical or technical progress’. Furthermore, in the context of the second requirement, the model means that the interpretation of ‘consumers receiving a fair share’ must be extended, in the particular context of environmental efficiencies, to encompass not only the consumers suffering from the harm of the restriction on competition, but also consumers in a general sense. In other words, environmental efficiencies would be assessed from a societal perspective (i.e. total welfare) rather than from the narrow perspective of a particular group of consumers (i.e. consumer welfare). This would mean that environmental efficiencies, which often may accrue to the society as a whole rather than to a particular group of consumers, would be taken into account, in their entirety, in the assessment under Article 101.3 TFEU.

As to the two last requirements of Article 101.3 TFEU, application of ‘The Integration Model’ would not result in an interpretation different than the current interpretation of the Commission and the CJEU of those requirements. Instead, the current interpretation of those requirements would ensure, in line with the model, that the core competition objectives are given due weight in the assessment by ensuring that restrictions on competition are ‘indispensable’ for the attainment of environmental efficiencies and that ‘competition is not eliminated’. Those requirements would thus be applied to agreements promoting environmental objectives as to any other type of agreements.

489 See Section 7 above.
490 See Section 5.4 above.
491 See Section 7.2.2.5 above.
492 See Sections 7.2.3.2-3 above.
493 See Sections 7.2.4-5 above.
8.2 Final Remarks

Finally, it should be noted that the author, during the writing of this thesis, has realized the grave complexity and uncertainty surrounding the questions examined in this thesis. As to the complexity of the questions, it can be noted that environmental policy as well as competition policy is concerned with the regulation of particularly diffuse and dynamic subjects, namely the environment respectively the market (i.e. the competitive process). As those subjects change, and as science concerning those subjects develops over time, it is thus only natural that environmental policy and competition policy must adopt new approaches to regulate those subjects. In this regard, EU competition policy seems to have been influenced by various competition theories over the years. Similarly, EU environmental policy has been through a shift in the regulatory approach adopted, from an almost exclusive reliance on direct regulation, towards an increased use of market-based instruments. While law involves requirements of legal certainty and legitimacy, it is thus particularly evident in the field of EU competition law and EU environmental law, that there is a need for continuous adoption of the law to the ‘changing reality’. In the view of the author, this makes the task of construing a stringent story of the legal development in these fields a difficult task. As the EU courts and the Commission also may have different views on how to advance the legal development, this task becomes even more difficult. In sum, there may thus be a particular need for clarification in the context of what role environmental considerations may play under the EU competition rules.

Furthermore, while the current approach of the Commission, *prima facie*, seems to provide clarity on the role of other Treaty objectives in EU competition law, this approach does not really make sense against the background of its former decision practice. In addition, it also seems somewhat contradictory by the Commission to encourage the use of voluntary environmental agreements while changing the decision practice in disfavour of the implementation of such agreements and revoking the specific guidance on how to enter such agreements in a way that is compatible with the competition rules.

In sum, the author would therefore encourage the EU institutions to address the question of the role of environmental considerations under Article 101 TFEU to provide some clarification in this regard. While the author has proposed ‘The Integration Model’, as a model for integration of environmental considerations in the assessment under Article 101.3 TFEU, this is simply one model for how to move forward. Various other
options remain possible in this context. To mention a few, one could consider the possibilities of the Commission to address environmental cooperation specifically in new Commission guidelines or to adopt a Group Exemption for certain environmental agreements. Furthermore, one could consider the possibilities of the CJEU to confirm, in its case law, that the integration principle does not apply in the context of the competition rules. Lastly, one could also consider the possibility of the Member States to rewrite Article 101 TFEU as to include public policy considerations, such as environmental protection. In the end, time will tell how this story will continue.
Bibliography

The European Union

Primary law
Consolidated version of the Treaty on European Union (TEU), OJ 2008 C 115/13
Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ 2012 C 326/47
Consolidated Versions of the Treaty on European Union and of the Treaty establishing the European Community (Treaty of Nice), OJ 2002 C 325/01
Single European Act (SEA), OJ 1987 L 169/1.
Treaty establishing the European Economic Community (Treaty of Rome)

Regulations
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 (Regulation 1/2003), OJ 2003 L 1/1

Directives


**Decisions**


**Resolutions**

Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development - A European Community programme of policy and action in relation to the environment and sustainable development, OJ 1993 C 138/01 (The Fifth Environmental Action Programme)
Communications, Notices and Recommendations from the Commission


Commission Recommendation of 5 February 1999 on the reduction of CO2 emissions from passenger cars, OJ 1999 L 40/49

Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ 2001/C 3/02


Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004/C 31/03

Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004/C 101/07

Guidelines on the application of Article 81(3) of the Treaty, OJ 2004/C 101/08


Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009/C 45/02

Guidelines on Vertical Restraints, OJ 2010/C 130/01

Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011/C 11/01

Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ 2014/C 291/01

**Other Publications from the Commission**

Commission, XXV Report on Competition Policy 1995, COM (96) 126 final


Commission, Competition Policy Newsletter, 2002, Number 1, ‘Commission confirms its policy in respect of horizontal agreements on energy efficiency of domestic appliances’, pp. 50-52


**Press Releases and Memos from the Commission**

Commission, Press release, *Commission approves an agreement to improve energy efficiency of washing machines*, IP/00/148, 11 February 2000

Commission, Press Release, *Commission approves agreements to reduce energy consumption of dishwashers and water heaters*, IP/01/1659, 26 November 2001

Commission, Memo, *Competition: Commission adopts revised competition rules on horizontal co-operation agreements*, MEMO/10/676, 14 December 2010

**Speeches**

Commissioner Vestager, *Competition and sustainability*, GCLC Conference on Sustainability and Competition Policy, Brussels, 24 October 2019

**Court of Justice of the European Union**

Joined cases 56 and 58-64 *Consten. and Grundig*, ECLI:EU:C:1966:41

Case 56/65 *Société Technique Minière*, ECLI:EU:C:1966:38

Case 23/67 *Brasserie*, ECLI:EU:C:1967:54

Case 6/72 *Continental Can*, ECLI:EU:C:1973:22

Case C-26/76 *Metro v Commission*, ECLI:EU:C:1977:167


Case C-240/83 *ADBHU*, ECLI:EU:C:1985:59

Case 75/84 *Metro SB-Großmärkte v Commission*, ECLI:EU:C:1986:399

Case 42/84 *Remia and Others v Commission*, ECLI:EU:C:1985:327

Case C-302/86 *Commission v Denmark*, ECLI:EU:C:1988:421


Case 85/87 *Dow Benelux NV v Commission*, ECLI:EU:C:1989:379

Case 374/87 *Orkem v Commission*, ECLI:EU:C:1989:387

Case C-62/88 *Greece v Council*, ECLI:EU:C:1990:153

Case C-2/90 *Commission v Belgium (Walloon Waste)*, ECLI:EU:C:1992:310

Case C-41/90 *Höfner*, ECLI:EU:C:1991:161

Case C-250/92 *Göttrup-Klim*, ECLI:EU:C:1994:413

Case C-341/95 *Bettati*, ECLI:EU:C:1998:353
Case C-343/95 *Diego Calì & Figli*, ECLI:EU:C:1997:160

Case C-67/96 *Albany*, ECLI:EU:C:1999:430

Case C-213/96 *Outokumpu*, ECLI:EU:C:1998:155

Joined cases C-115/97 to C-117/97 *Brentjens*, ECLI:EU:C:1999:434

Case C-219/97 *Drijvende Bokken*, ECLI:EU:C:1999:437

Joined cases C-180/98 to C-184/98 *Pavlov*, ECLI:EU:C:2000:428

Case C-379/98 *PreussenElektra*, ECLI:EU:C:2001:160

Case C-49/07 *MOTOE*, ECLI:EU:C:2002:98

Case C-309/99 *Wouters*, ECLI:EU:C:2002:98

Case C-513/99 *Concordia Bus Finland*, ECLI:EU:C:2002:495

Case C-94/00 *Roquette Frères SA*, ECLI:EU:C:2002:603

 Joined Cases C-2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV v Bayer AG* ECLI:EU:C:2004:2

Case C-127/02 *Waddenzee*, ECLI:EU:C:2004:482

Case C-277/02 *EU-Wood-Trading*, ECLI:EU:C:2004:810

Case C-176/03 *Commission v Council (Environmental Crime)*, ECLI:EU:C:2005:542

Case C-320/03 *Commission v Austria*, ECLI:EU:C:2005:684

Case C-519/04 P *Meca-Medina*, ECLI:EU:C:2006:492

Case C-238/05 *Asnef-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, ECLI:EU:C:2006:734

Case C-487/06 P *British Aggregates v Commission*, ECLI:EU:C:2008:757

 Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission*, ECLI:EU:C:2009:610

Case C-188/07 *Commune de Mesquer*, ECLI:EU:C:2008:359

Case C-209/07 *Beef Industry Development Society Ltd*, ECLI:EU:C:2008:643

Case C-8/08 *T-Mobile Netherlands*, ECLI:EU:C:2009:343
Case C-279/08 P European Commission v Kingdom of the Netherlands, ECLI:EU:C:2011:551

Case C-52/09 Konkurrensverket v TeliaSonera Sverige AB, ECLI:EU:C:2011:83

Case C-43/10 Nomarchiaki Aftodioikisi Aitolakarnanias and Others v Ypourgos Perivallontos, Chorotaxias kai Dimosion ergonand Others, ECLI:EU:C:2012:560

Case C-209/10 Post Danmark A/S v Konkurrencerådet, ECLI:EU:C:2012:172

Case C-226/11 Expedia, ECLI:EU:C:2012:795

Case C-1/12 OTOC, ECLI:EU:C:2013:127

Case C-136/12 CNG, ECLI:EU:C:2013:489

Case C-382/12 P Mastercard, ECLI:EU:C:2014:2201

Case C-67/13 P Groupement des cartes bancaires, ECLI:EU:C:2014:2204

Joined Cases C-184/13 etc. API, ECLI:EU:C:2014:2147

General court

Case T-86/95 Compagnie générale maritime and Others v Commission, ECLI:EU:T:2002:50

Case T-25/95 Cimenteries v Commission, ECLI:EU:T:2000:77


Case T-112/99, Métropole Télévision (M6) and Others v Commission, ECLI:EU:T:2001:215


Case T-168/01 GlaxoSmithKline Services Unlimited v Commission, ECLI:EU:T:2006:265

Case T-289/01 DSD, ECLI:EU:T:2007:155
Case T-193/02 Laurent Piau v Commission, ECLI:EU:T:2005:22
Case T-328/03 O2 (Germany) v Commission, ECLI:EU:T:2006:116
Case T-419/03, Alstoft Recycling Austria v Commission, ECLI:EU:T:2011:102

Advocate General Opinions

Opinion of Advocate General Jacobs in Case C-379/98, PreussenElektra,
ECLI:EU:C:2000:585
Opinion of Advocate General Jacobs in Case C-67/96, Albany, ECLI:EU:C:1999:28

Antitrust Decisions of the Commission

Commission decision, Continental/United/Lufthansa/Air Canada, COMP/AT.39595
Literature


Gerber, D, Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe, American Journal of Comparative Law, Vol. 42, Issue 1, 1994, pp. 25–84


Kahneman, D, Tänka, snabbt och långsamt (Original title: 'Thinking, Fast and Slow’), 1st edition, Volante, 2017


Kingston, S, The Role of Environmental Protection in EC Competition Law and Policy, Doctoral Thesis, Faculty of Law, Leiden University, 2009


Kloosterhuis, E, Defining non-economic activities in competition law, European Competition Journal, Volume 13, Issue 1, pp. 117-149


Krämer, L, EU environmental law, 7th edition, Sweet & Maxwell, 2012


Loozen, E, Strict Competition Enforcement is the Way Forward - Also to Promote Sustainable Consumption and Production, EUI Working Paper LAW 2018/16,
European University Institute Department of Law, 2018 (cit: Loozen, Strict Competition Enforcement is the Way Forward)


Scotford, E, Environmental Principles and the Evolution of Environmental Law, Hart Publishing, 2017


Other Sources


The Nielsen Company, ‘Sustainable Shoppers Buy the Change They Wish to See in the World’, 2018 (available at: https://www.nielsen.com)

UN, Paris Agreement, 12 December 2015 (Available at: https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf)