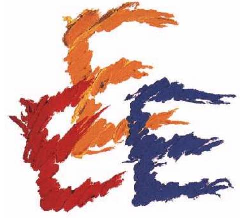

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The Application of Competition Law and Policy to Environmental Agreements in an Oligopolistic Market

Patricia M. Bailey

NOTA DI LAVORO 73.2000

Corso Magenta, 63, 20123 Milano, tel. +39/02/52036934 – fax +39/02/52036946
E-mail: letter@feem.it
C.F. 97080600154

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1. Introduction

The use of environmental agreements in the European Community as a complementary instrument of environmental policy increased rapidly during the 1990s and the future possibilities and permutations of this instrument make it likely that the number of agreements will grow in the years to come. However, as more environmental agreements have been executed, they have increasingly begun to impact other areas of community policy, including the integration of the internal market, social policy and competition policy.

This paper looks at the implications of competition policy on environmental agreements and in particular, on agreements in an oligopolistic market. The paper first reviews the general forms of environmental agreements and presents three hypothetical agreements one could find in an oligopolistic market. The paper then discusses competition law in the Community, in particular, decisions regarding oligopolies, and how this law would apply to the three hypotheticals. Lastly, the paper draws conclusions as to how the European Commission is likely to treat environmental agreements in an oligopolistic market, from a competition policy perspective.

2. General Aspects of Environmental Agreements

An environmental agreement can take many forms, ranging from an agreement executed between a single firm and a public authority to an agreement among many companies, trade associations, NGOs and the government. For purposes of this paper, we will only look at environmental agreements executed in an oligopolistic market, i.e., a market that is dominated by a small number of firms that are independent of one another. It is also important to note that environmental agreements may be binding or non-binding and that either type can fall within the ambit of the competition rules.

For purposes of illustration in this paper, it is useful to consider three hypothetical environmental agreements that could occur in an oligopolistic market. The first agreement is that of the "classic" binding environmental agreement, individually executed among all or most of the firms in an oligopolistic market and the public authorities. The second situation involves a non-binding declaration (or "gentlemen's agreement") among firms in an oligopolistic market, which declaration is made to the government, usually amid much publicity. The third hypothetical environmental agreement involves the execution of an agreement between the public authorities and a trade association acting on behalf of its member companies, which are in an oligopolistic market. These

three hypotheticals permit us to consider the ways in which competition law and policy may be applied.

This paper first presents a brief history of competition policy and then provides preliminary considerations for all environmental agreements. The paper then analyzes competition law and policy light of our three hypotheticals.

3. An Overview of Competition Law and Policy

In order to understand the treatment of oligopolies in the European Union, it is helpful to first understand the general theory of competition policy applied in the Community. While a discussion of competition theory is beyond the scope of this paper, it is important to briefly note the differences between the "traditional" and "Chicago" schools of competition theory and policy. Both of these schools of thought are based on a model of "perfect competition". In this ideal, all products are homogeneous; resources such as capital and labour can easily move from one area to another; and firms always maximize profits. For purposes of this paper, three other assumptions of this model are particularly interesting: that there are numerous buyers and sellers; that consumers have all necessary information about products in the market and that they act rationally thereon; and that there are no barriers to entering the market. This ideal system operates at maximum efficiency and with the best possible allocation of resources. (One can compare the situation of perfect competition with that of monopoly, in which there is only one provider of goods or services, or with that of oligopoly, in which there are a limited number of suppliers.)

The "traditional" school of thought, on which the American Sherman Antitrust Act and the competition articles of the Treaty are based, is that in the real world, the economy cannot achieve the model of perfect competition on its own. This failure is due to the fact that competitors in the market can decide to co-operate in order to divide the market amongst them (and as a consequence thereof, gain power and raise prices for the consumer). Thus, the government must intervene, particularly to assure a level playing field for SMEs. Traditional American anti-trust law was based

on this view and following the Second World War, competition law in Europe followed suit. In particular, German competition law is designed to break down powerful cartels that could lead to a concentration in a few firms of not only economic control, but also political power. European competition law is enforced by the Commission, subject to review by the European Court of Justice ("ECJ"). The Commission follows the traditional antitrust school of thought; it has however, been criticized as intervening excessively (Steiner, 1998).

The second viewpoint was first introduced by the "Chicago School" of economists. This perspective holds that normally, the market is perfectly competitive and that only minimal intervention is needed. According to the Chicago School, even monopolies or oligopolies may be acceptable, as long as there are no barriers to entry for other competitors (Steiner, 1998). The Chicago School was very popular in the United States in the 1980s. However, since the mid-1990s, the U.S. Department of Justice, which is responsible for enforcing antitrust laws, has begun to swing back in the opposite direction, becoming very interventionist in several high-profile cases. In contrast, the Commission's application of competition law has always been proactive, as it has the ancillary goals of integrating the internal market and promoting "European champions". When analysing EU competition law and policy, one must always bear in mind these ancillary goals, plus the duty of the Commission to respect other areas, such as the protection of the environment and social policy.

The articles of the Treaty that specifically apply to competition issues are Articles 81 (former Article 85) that addresses anti-competitive agreements, decisions and concerted practices, and Article 82 (former Article 86) that defines the abuse of a dominant position. Although these two articles apply to private undertakings, the case of GB-INNO v. ATAB made it clear that public authorities cannot promote measures that would violate these articles. Moreover, Article 86 (former Article 90) states that a Member State cannot legislate any measure that would contravene the rules of the Treaty, even if that measure would only apply to public undertakings or those undertakings

granted special or exclusive rights by the Member State. Lastly, one should recall that public authorities are also subject to the rules on State aid (Articles 87-89, former 92-94), which rules may come into play where an environmental agreement requires the public authorities to provide subsidies to the participants.

4. The Application of Competition Law and Policy

The generally accepted description of an oligopolistic market is a market with only a few sellers, but numerous buyers. Accordingly, if an environmental agreement were to be executed among all or nearly all of the sellers in such a market, the competition rules would easily come into play. As will be discussed below, although competition policy has traditionally been concerned with price fixing, another important impediment to competition is an effort to block entry into the market with the use of a particular technology or process. On can see how such conduct could arise, as during the negotiation of an environmental agreement, the parties often discuss particular technologies for ameliorating the environment (Ziegler, 1996). Moreover, the mere fact of major competitors in a market meeting together on a regular basis has often piqued the interest of the competition authorities, which are concerned about a pattern of concerted practice, as discussed below.

Yet, an important caveat to the following should be added: competition law, in all its severity, is merely that: competition law. The decision of whether to enforce this competition *law* is then a matter of competition *policy*.

4.1 Preliminary Considerations.

Before beginning any analysis of how EU competition rules could apply to an environmental agreement, it is important to analyse the agreement in light of several preliminary issues. The first issue is the determination of the "relevant market" for the product; this is considered to be the market in which the products are substantially interchangeable. The products are either identical or viewed by consumers as similar because of their price, characteristics or utilisation (Steiner, 1998). In its recent "Draft Guidelines on the Applicability of Article 81 to horizontal co-operation"

(hereinafter the "Draft Guidelines"), the Commission clarified this definition with respect to environmental agreements: "When the pollutant is not itself a product, the relevant market encompasses that of the product into which the pollutant is incorporated" (para. 174).

The second issue is the *de minimis* principle, which is based on the rational notion that in fact, any agreement between two parties can naturally abridge the activities of another party in the relevant market; the question is to what extent. The *de minimis* principle was elucidated in Völk v. Établissements Vervaecke Sprl, in which the ECJ held that in order for the competition rules to apply, competition in the market must be affected to a "noticeable" extent. Generally speaking, factors such as the size of each party and the market share it holds determine the application of the *de minimis* principle. However, as these criteria are rather vague, in 1997, the Commission issued a Notice on Agreements of Minor Importance, which provides that in general, the competition rules will not be applied to an agreement between firms that do not represent more than 5% of the total market for their goods and/or services (for horizontal agreements) and 10% of the total market (for vertical agreements). Moreover, agreements between SMEs will be considered *de minimis*. One should note however, that agreements that provide for resale price maintenance or price fixing will always be covered by the competition rules, regardless of the market percentage the firms hold. The Draft Guidelines point out that there are always those agreements that do not have true environmental objectives, but are actually a "disguised cartel"; thus, these agreements' "environmental purpose" would not be sufficient to obtain an exemption pursuant to Article 81(3), below. The Draft Guidelines apply the *de minimis* concept specifically to environmental agreements in stating that agreements for products or processes that do not "appreciably affect product and product diversity in the relevant market" would not be subject to the competition rules (para. 178). The Commission then noted that this concept could also apply to agreements for the phasing out or banning of harmful products.

The third preliminary consideration for an environmental agreement is the involvement of public authorities. For those environmental agreements to which the government is a party, liability under the competition rules may be found, despite the wording of Articles 81 and 82 that these articles apply to "undertakings". While new Article 86(1) makes it clear that the competition rules would apply to "public undertakings", i.e., undertakings granted special privileges by the government to provide services in the general public interest, the application of the competition rules to public authorities themselves is not so clear. However, the ECJ has in general held that, "Member States may not enact measures enabling private undertakings to escape from the constraints imposed by [the competition and State aid rules] of the Treaty" (GB-INNO v. ATAB). Accordingly, it would be difficult to prove that an agreement was exempt from the competition rules simply because a public authority was a party.

Thus, having established how an environmental agreement could fall within the general ambit of the competition rules, we shall now proceed with the application of these rules to our three hypotheticals.

4.2 Application of Article 81(1).

Article 81(1) (former Article 85(1)) provides the well-known interdiction of:

1) "all agreements between undertakings and concerted practices;
2) which may affect trade between Member States; and
3) which have as their object or effect the prevention, restriction or distortion of competition within the common market".

Articles 81(1)(a) to (e) provide specific examples; with regard to environmental agreements, Article 81(1)(b) is particularly interesting (it forbids any agreements that "limit or control production, markets, technical development or investment") because environmental agreements often address production methods and/or the use of technologies, and/or provide investment for new technologies.

4.2.1 Need for an Agreement between Undertakings

The Traditional, Binding Contract. The first requirement of Article 81(1) that there must be an "agreement" between "undertakings", has been interpreted by the ECJ in the broadest terms. Generally speaking, as long as a firm participating in an environmental agreement is involved in some type of economic or commercial activity, it will be considered an "undertaking" (Bosman v. Commission). Interestingly, the ECJ has held that this activity does not have to be for profit (Fédération Française des Sociétés d'Assurance v. Ministère de l'Agriculture et de la Pêche), thus bringing any NGOs who participate in an environmental agreement into the ambit of Article 81.

A Non-binding, Unilateral Declaration ("Gentlemens' Agreement"). Unilateral commitments or declarations may be described as programmes created by the firms themselves. These declarations may be monitored by the firms themselves or sometimes by third parties, in order to gain credibility. A well-known example is the Responsible Care; firms which participate must follow the standardized procedures and controls and can then publicize their participation. The monitoring of the firms and the results thereof are made public (Börkey & Glachant, 1997). One could describe the Agreement with the European Automobile Industry (ACEA) as a gentlemens' agreement, given that the obligations of the parties are of an almost voluntary nature (Commission, 1998). On a national level, unilateral declarations are often found in Germany, where public authorities are not permitted to be a party to environmental contracts; the declarations (also called "self-commitments") are often completed following formal discussions with the public authorities and are then published jointly with the authorities (Jeder, 2000).

In its Draft Guidelines, the Commission provides some interesting insight into how it is likely to treat environmental agreements of a horizontal nature. In explaining its method of analysis, the Commission divided environmental agreements into three types: 1) those agreements that would probably not fall under Article 81(1); 2) those that would probably always fall under Article 81(1) and 3) those agreements in a grey area which depend on the circumstances. According to the Commission, gentlemens' agreements and unilateral declarations would probably fall into the first

category, as “no precise individual obligation is placed upon the parties or …they are loosely committed to contributing to the attainment of a sector-wide environmental target” (para. 177). An important aspect of this category is that the participants are given *discretion* as to the means of achieving the objectives of the environmental agreement.

An Agreement Between Public Authorities and a Trade Association acting on behalf of its Members. It is clear that agreements signed by trade associations on behalf of their members would be subject to competition law. Yet, even non-binding recommendations of a trade association may be sufficient to fall under the ambit of the competition rules (NV IAZ International Belgium v. Commission). In addition, a “code of conduct” promulgated by the Trade Association to its members may be sufficient (Re the Application of the Publishers’ Association). While recommendations and codes of conduct form the basis of many environmental agreements, this type of agreement can probably be characterised as a unilateral declaration and thus, not subject to the competition rules. However, binding agreements signed by trade associations on behalf of their members are another matter; their analysis would likely depend upon the terms of the membership agreements with the trade association regarding whether the trade association is authorised to sign on behalf of its members.

Moreover, as the ECJ held in Vereeniging van Cementhandelaron v. Commission, agreements involving national trade associations may be subject to particular scrutiny because even though an agreement might only apply within a Member State, it could help to create an entry barrier to firms from other Member States which would have to become a member of the association in order to compete. An example would be the association created by the 1991 German packaging waste ordinance, Duales System Deutschland, and its companion “Green Dot” programme, of which firms from other Member States had to *de facto* become a member in order to compete on the German retail market.

3.2.1 Alternative of a Concerted Practice

It is important to note that even in the absence of any contract or unilateral declaration, a violation of Article 81(1) may be found under the guise of a "concerted practice". The case law of the ECJ in this area can be significant for environmental agreements in an oligopolistic market because the negotiation of the agreement requires regular meetings among competing firms, *regardless of whether the negotiation ever leads to a binding contract or a unilateral declaration.*

The concept of a concerted practice was defined in the seminal *"Dyestuffs"* case, Imperial Chemical Industries Ltd. v. Commission: "… a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition" (para. 64). In *Dyestuffs*, chemical producers were involved in a series of price increases over several weeks. The Commission had only circumstantial evidence with respect to meetings and prior tacit agreements. The producers argued that such a pattern of price changes was characteristic of an oligopolistic market, i.e., that each producer had acted independently and the competitors had reacted to the price leadership of the first producer that had changed prices. The ECJ sided with the Commission in holding that "although parallel behaviour may not by itself be identified with a concerted practice, it may however, amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market" (Imperial Chemical, para. 66).

Moreover, one cannot simply conclude that an absence of parallel pricing will preclude the application of the theory of concerted practice. For example, in an oligopolistic market, after periods of price warfare, there are periods of price stability, during which the firms compete using various other methods, among them volume discounts, rebating and customer competitions (Alese,

1999). If the market demonstrates parallel conduct regarding these methods, this too can be evidence of a concerted practice.

Other decisions in this area include Suiker Unie v. Commission, in which the Commission alleged that the concerted plan of action was decided upon during international meetings of sugar producers. The Court reaffirmed *Dyestuffs* and held that there is no need for an actual plan of conduct among the parties to prove concerted practice. Later decisions of the Court may be divided into two types, depending upon whether the Commission was able to produce evidence of meetings among the competing firms, during which market behaviour was discussed. It appears that once contact among the firms has been established, there is a supposition of collusion. Moreover, it seems irrelevant whether the firms ever intended to complete the plan of action, whether representatives of all firms were present at all meetings or just how much influence each firm possessed (Alese, 1999). The implications of this jurisprudence can be quite serious for the negotiations of an environmental agreement in an oligopolistic market, given that issues which could affect each firm's market share (conditions for the use of certain technologies or for their financing) would likely be discussed.

3.2.2 Effect on Trade between Member States

The second requirement is that for EU competition law to apply, trade between the Member States must be affected. The ECJ interprets this rule very broadly, even more so than the Article 28 (former Article 30) test, which requires a hindrance to Member State trade; Articles 81 and 82 only require an effect on such trade. Thus, even though the participants in an environmental agreement are residents of the same Member State, if the agreement could affect Member State trade, it would be subject to the EU competition rules. Moreover, within the context of proposed plans for international environmental agreements, even those firms that are outside the Community, but

whose conduct affects trade between Member States can be held liable for breaching EU competition law (Ahlström & OY v. Commission).

3.2.3 Object or Effect to Prevent, Restrict or Distort Competition

The third requirement of Article 81(1) is that the agreement has as its "object or effect the prevention, restriction or distortion of competition". While it is doubtful that an environmental agreement would ever have the specific objective of restraining competition, it is clear that the effect of an environmental agreement could be to prevent, restrict or distort the internal market. Because the greater the market share, the greater the effect, with all or nearly all members of an oligopolistic market signing an environmental agreement, the effect would be severe. Indeed, the XXVth Report on Competition Policy states that the Commission will be vigilant about environmental agreements that could cause a product to be squeezed out of a market. Thus, it appears that environmental agreements involving oligopolies would be subject to higher scrutiny.

3.2.4 The Commission's View

With regard to environmental agreements, the Draft Guidelines state that such agreements will be subject to Article 81(1) "where they appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them, thereby granting them influence over each other's production or sales" (para. 181), or, as the Commission notes, where they restrict the output of third parties. The Commission provides two examples of agreements that would fall within this ambit. The first example is where the parties' combined market share is significant (as in an oligopoly) and the environmental agreement phases out or affects significantly the sales of the parties' products or production processes; this example is entirely consistent with traditional competition law. The second example is where the agreement permits the parties to allocate pollution quotas among themselves. The second example is quite likely with an environmental agreement, given the trend toward a mix of policy instruments, such as tradable

permits, financial incentives and environmental management systems. Lastly, the Draft Guidelines state that agreements in which participants holding a substantial share of the market appoint another firm to exclusively provide collection and recycling services for their products may restrict competition, presumably by creating barriers to trade. This phrase appears to be a veiled reference to the Duales System Deutschland packaging waste programme in Germany. Again, we see here an application to oligopolies, which can wield so much influence on their market.

4.2 Application of Article 81(3)

Although Article 81(2) states that an agreement that meets the specifications of Article 81(1) "shall be automatically void", Article 81(3) provides an exception to Article 81(1) where the agreement either contributes to the improvement of the production or distribution of goods, or promotes technical or economic progress. However, the agreement must result in consumers receiving a fair share of the benefit that results. Furthermore, the restriction on competition: 1) must be indispensable to the attainment of the objectives of the agreement; and 2) must not allow the firms to eliminate competition with regard to a substantial part of the products affected by the environmental agreement. Thus, in the event that an environmental agreement restrains competition, the question arises as to whether it could meet one of these exemptions.

A strict reading of Article 81(3) would find that there are no specific exemptions for environmental protection and thus, restrictive environmental agreements would be forbidden (Rehbinder, 1997). Fortunately for environmental agreements, national and EU competition authorities have tended to conclude otherwise. In its XXVth Report on Competition Policy, the Commission stated that it "weighs up the restrictions of competition arising out of an agreement, and applies the principle of proportionality in accordance with [Article 81(3)]. In particular, improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress" (para. 85). Accordingly, the Commission applies the proportionality principle and weighs the restrictions of competition that would ensue from the

agreement against the value of the environmental goals of the agreement (COWI, 1997; Steiner, 1998). This means that the Commission examines the restrictions of the environmental agreement to determine if they are truly necessary and compares this with whether consumers would in fact receive their fair share of the benefits arising from the achievement of the agreement's goals. An example of this policy is the Philips/Osram decision, in which the Commission permitted a joint venture because emissions reduction equipment would be installed at the joint venture's factory.

The Commission's Draft Guidelines refer to environmental amelioration as an "economic benefit" (per Article 81(3)) and state that in certain agreements, such an economic benefit could outweigh the agreement's negative effects on competition. The Commission states that "there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken" (para. 185). The difficulty in applying this principle is that with many environmental agreements, it is very difficult to determine the baseline because either little information is available or the participants do not wish to share such information with their competitors.

The Commission identifies the costs of an environmental agreement as not only a restriction of competition, but also the compliance costs for the participants and effects on third parties. For the benefits side of the agreement, the Commission applies a two-stage analysis. In the first stage, if the participants can demonstrate that individual consumers will benefit from the agreement within a reasonable period of time, this is sufficient. If the first test cannot be met, the participants must produce a cost-benefit analysis that demonstrates that consumers are likely to benefit. This cost-benefit analysis will generally be necessary for any terms of the agreement that cannot be prima facie demonstrated as indispensable; the analysis must show that any alternatives are more costly.

Of particular interest to oligopolies is the Commission's declaration that, "Whatever the environmental and economic gains and the necessity of the intended provisions, the agreement must not eliminate competition in terms of product or process differentiation, technological innovation or

market entry in the short or, where relevant, medium run" (para. 189). As an example, the Commission states that where an agreement grants exclusive collection and recycling rights to an undertaking, the agreement must provide for revisions in the event that another undertaking appears in the marketplace.

Historically, there have been numerous instances in which the Commission has accepted an agreement where the environmental benefits have outweighed the anti-competitive aspects (Portwood, 1994). However, it must be noted that in the majority of these cases, the applicable market was in "perfect competition", i.e., the fourth condition that competition is not eliminated, could be met. In general, if the parties to an agreement control more than 60% of the market, it will be difficult to obtain an exemption (Khalastchi and Ward, 1998). This is not to say that an exemption is impossible: in the United Reprocessors case, the Commission did provide an exemption, albeit for a limited duration, as the agreement was for a joint venture.

Another exception to this rule is the CECED decision in which the firms involved held 90.5% of the relevant market and had signed an environmental agreement for the phasing-out of less environmentally sensitive washing machines. The Commission concluded that although the agreement would fall under the provisions of Article 81(1), "the combined social benefits seem to be more than sevenfold greater than the increased purchase costs" of the washing machines to be produced under the agreement. Moreover, the Commission noted that the programme "appears to provide a fair return to individual consumers…" (CECED, paras. 11-12). Thus, despite the high concentration of economic power, the Commission approved the agreement.

Another interesting case was the Commission decision regarding VALPAK, an association of packaging waste recovery firms in the United Kingdom, which were set up in response to the 1994 directive on packaging and packaging waste. The Commission first declared that the membership agreements of VALPAK violated Article 81(1) because they required businesses who joined the scheme to use VALPAK for all of their packaging waste needs. However, the Commission

determined that the agreements could be exempted under Article 81(3), although the grounds of the exemption are not very clear. It seems that the Commission balanced the restrictions on competition against the environmental benefits of reduced packaging waste as well as the need for the VALPAK members to invest heavily in the United Kingdom packaging waste infrastructure. Thus, the Comission decided to grant an exemption; however, it reserved the right to review the matter after three years.

Notwithstanding the fact that an environmental agreement could arguably fall within an exception of Article 81(3), it must be notified to the Commission for its review and comment. Procedurally, the environmental agreement must be notified to the Competition Directorate of the Commission for its review before the agreement is implemented, as the Commission has the exclusive power to grant an exemption under Article 81(3) (Commission, 1996).

4.3 Application of Article 82

It is worth noting that Article 82 may also play a role in an environmental agreement in an oligopolistic market. Article 82 prohibits an undertaking from abusing its dominant position to the extent that it affects trade between the Member States (the fact of dominance is not enough; the dominant position must be abused for Article 82 to come into play). If an environmental agreement would permit the undertaking to abuse its position, then the agreement would be held invalid.

Of particular importance is the fact that Article 82 does not contain any exemptions, as does Article 81. Thus in principle, should the Commission decide that an undertaking or an environmental agreement is infringing Article 82, the fact that the activity is being conducted for an environmental purpose would not be a valid defence. Yet, the Commission has tended to permit firms to provide an explanation for the abusive behaviour; during the discussions with the firm, an informal exemption may be given, typically based on a balancing process (Portwood, 1994). Moreover, Article 82 might not be applied in the event that the Commission decides not to pursue a matter (Bongaerts, 1997).

Moreover, the Commission has made it clear (in SPA Monopole v. GDB) that when other competitors (particularly those from other Member States) are unable to enter a market due to an abuse of a dominant position, the fact that the abusive behaviour (requiring standardised refillable bottles and crates for mineral waters) benefits the environment will not be a sufficient defense (Khalastchi and Ward, 1998).

4.4 Intellectual property issues

Lastly, it is worth briefly mentioning that the use of intellectual property rights in the context of an environmental agreement could run afoul of the competition rules. Thus, while the mere fact of an intellectual property right does not violate Articles 81 or 82, an improper use of the right (to protect parallel imports or to prevent non-signatories to an environmental agreement to access the intellectual property) could constitute a violation of these articles (Steiner, 1998).

5. Conclusions

When negotiating environmental agreements, it is generally understood that as more firms that are involved, it becomes more difficult to negotiate and enforce the agreement, as transaction costs rise and the problem of free riders increases (Moffet and Bregha, 1999). It is thus ironic that the oligopolistic market, a situation more facilitative of negotiating an environmental agreement, is more likely to come under greater scrutiny from the Commission.

Yet, one must return to our initial discussion of competition theory: the concentration of economic power in the hands of one or only a few firms in the market is frowned upon. Collusive behaviour and/or an agreement, resulting in barriers to market entry via technologies or exclusivity, or even parallel pricing, is a particular concern of the competition authorities. And an "environmental agreement" can be a convenient method for hiding this anti-competitive behaviour (or, the conduct of the negotiating parties may simply lead in that direction). It is for these reasons that environmental agreements are (and should be) subject to a heightened scrutiny by the competition authorities. As the Commission has demonstrated, where the environmental purpose is justified, the agreement will stand. And thus, the Commission has created a methodology for balancing the need for protection/amelioration of the environment with the need to assure a competitive internal market.

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