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Voluntary Agreements and Competition Law

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What are, and what should be the boundaries to VA's imposed by competition law?

Introduction

Voluntary agreements cannot only be looked at from a purely environmental point of view. Even when they are also referred to as environmental agreements because of their environmental objectives, they may very well have some effects on competition. This brings these agreements in the realm of competition law. For the purpose of this paper voluntary agreements will be defined as those horizontal agreements, *i.e.* agreements between enterprises that operate on the same level of the economic process, that have a primarily environmental objective while also restricting competition. Many voluntary agreements may also have some vertical aspects or even be completely vertical of nature, However, these agreements are outside the scope of this paper.

In this paper I will explore the relation between competition law and environmental protection with the help of three assumptions:

1) Environmental protection and competition are not mutually exclusive or opposed but may be mutually reinforcing if the polluter-pays-principle is applied in full
2) Effective implementation of the polluter-pays-principle depends on competition with regard to the environmental costs incurred as a result of the polluter-pays principle
3) Voluntary agreements generally provide a more efficient and effective way to implement the polluter-pays-principle and thus protect the environment.

The first assumption follows from the idea that environmental pollution is not inherent in the choice of an economic order based on competition.[1] Environmental pollution appears much more to be caused by the faulty internalization of environmental costs. This assumption suggests that once environmental costs are internalized, the competitive process will take the environment into account. This will not only prevent undue use of the environment, moreover, a new aspect on which competition is possible is created. For instance, the incentive to compete on the environmental qualities of a product may very well be passed on to other industries or result in the creation of a new industry.[2]

As for the second assumption, making the polluter pay is one thing, changing his ways quite another. To achieve this ultimate objective, there needs to be some competition as regards the environmental costs. This necessity of some competitive pressure becomes particularly acute when environmental costs are not incurred by the final consumers but by economic actors on an intermediate or production level. Voluntary agreements generally seek to implement the polluter pays principle on a *supra*-consumer level of the economic process therefore

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[1] I will use the term environmental pollution hereafter to encompass all environmental problems eventhough these may in themselves not entail pollution. Clear-cutting of forests, for example, cannot be called pollution *stricto sensu* but presents an environmental problem nonetheless.

[2] *Cf.* T. Portwood, *Competition Law & the Environment* (London: Cameron May 1994), p. 95; R. Jacobs, EEC Competition Law and the Protection of the Environment, *LIEI* (1993) 1, p. 44.

necessitating some effective competition to prevent that environmental costs are simply passed on to lower levels without any substantial change in environmental pollution.

Voluntary agreements, and this relates to the third assumption, aim at internalizing environmental costs on this intermediate- or production level because of the increased *efficiency* and *effectiveness*. This bifurcation of advantages distinguishes, on the one hand, the lower costs of environmental protection through voluntary agreements and, on the other hand, the more effective environmental protection resulting from the use of voluntary agreements. The following reasons for this may be given. The economic actors on production level will be better acquainted with the particularities of their various production processes. In general, they can be said to be better equipped than the public authorities to ensure that a certain level of environmental protection is reached. Implementation of the polluter pays principle will generally increase the costs of a certain activity thereby increasing the probability of the actors illegally deferring these costs.[3] The costs of preventing this circumvention will increase substantially with the number of actors subjected to these increased costs. The costs of ensuring that all consumers will not circumvent environmental costs are likely to be many times higher than those incurred when checking an obviously smaller group of producers. This provides some evidence of the lower economic costs associated with the use of voluntary agreements compared to 'traditional' instruments of environmental protection. Moreover, enterprises will act as economically rational actors and thus pursue profit-maximization. The fact that these enterprises voluntarily enter into agreements should, in itself already constitute evidence of the greater efficiency. Similarly, the fact that governments, who of all actors should seek the highest level of environmental protection at minimal costs, encourage such agreements provides evidence that these agreements are an effective means of protecting the environment.

Indications that voluntary agreements are likely to lead to more effective environmental protection can furthermore be found when the resulting lower costs to attain a certain level of environmental protection are taken into account. Put differently, it could be said that more environmental protection might be had for the same costs. This effect may very well become even more important when it is taken into account that, as was briefly mentioned in explanation of the first assumption, competition with regard to the environment lead to an incentive to better protect the environment. The incentive to be as environmentally friendly as possible, together with the lower costs resulting from increased efficiency, will ensure that companies provide optimal environmental protection. Use of these dynamic aspects of competition is, in my opinion, the only feasible way to achieve sustainable development.

Having thus briefly explored the, somewhat economic, background to the problem, it is now time to turn to the more legal aspects of the matter. Voluntary agreements are primarily interesting from the perspective of the so-called cartel prohibition. Although voluntary agreements may very well involve other interesting interfaces with competition law, this paper will be concerned solely with the cartel law aspects.[4] The European Community's provision on cartels can be found in Article 81 EC. The relevant Dutch provisions are to be found in Articles 6 and 17 of the Dutch Competition act.[5]

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3 *E.g* by dumping waste illegally to avoid having to pay waste taxes.

4 One very interesting question concerns member state influence on voluntary agreements and the so-called useful effect-rule (Articles 3(1)g, 10 and 81 EC).

5 Hereafter abbreviated by Competition Act: CA, The full text can be found on the Authority's website: www.nma-org.nl.

The starting point will be to see whether voluntary agreements actually fall within the scope of the European Community's and the Netherlands' competition laws and what the resulting boundaries to voluntary agreements are. I have chosen these two specific systems of competition law for three reasons. Firstly, the European cartel-provision has been applied myriad times and can thus be said to have been relatively well explained. Moreover, it has also been applied rather extensively to agreements involving various environmental aspects. Secondly, Dutch competition law has been modeled on European competition law and policy. The leading principles are therefore identical to those of the European provision, this makes it possible to treat two different systems of competition law in relatively limited space. Thirdly, despite the fact that European law functioned as role model, some deviation from the existing European policy may perhaps already be seen.

After the boundaries to voluntary agreements have thus been charted and explored, it will be seen whether these boundaries are right. Thus the second part of this paper is concerned with the question of what the competition law boundaries to voluntary approaches *should* be.

Voluntary agreements and Article 81 EC; what are the boundaries?

Article 81 EC, insofar as relevant for this paper, reads:[6]

> 1) The following shall be prohibited as incompatible with the common market: all 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 with in the common market […]
> 3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
> - any agreement or category of agreements between undertakings;
> - any decision or category of decisions by associations of undertakings;
> - any concerted practice or category of concerted practices,
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
> a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The Commission has applied article 81, in particular the third paragraph, most extensively. Notably with regard to the role of extra-competitive concerns, the Court has so far provided little guidance in its case law regarding Article 81. The account below will therefore concentrate on the Commission's policy.

Article 81, first paragraph

We will assume that voluntary agreements are concluded by "undertakings" . This encompasses those situations where the agreement is concluded either by solely by enterprises and the situation where the agreement is concluded by businesses and government authorities. A first interesting question would be to ask whether the fact that voluntary agreements first and foremost seek to regulate environmental behavior and not competition, removes these

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6 I have omitted the second paragraph and list of prohibited examples of cartel agreements in the first paragraph.

agreements from the scope of Article 81 (1). At first sight, the answer appears relatively clear. Article 81, first paragraph, prohibits agreements, which have as an object *or* effect the restriction of competition. This means that the parties to an agreements need not necessarily have had the objective to restrict competition.[7] Mere restrictive *effects* suffice to bring an agreement within the scope of Article 81 (1). With regard to this point it must be remarked that it is difficult and will become nearly impossible to distinguish between environmental and competition objectives. This will become all the more so when environmental costs are internalized. The objective of the polluter pays principle is to integrate environmental considerations into the 'competition equation' thereby blurring, if not completely removing the distinction between (economic) competition and environmental concerns. In this respect the use of the term 'non-economic' or 'non-competitive' concerns to describe, *inter alia*, environmental concerns appears not entirely correct.

The apparent vigor of this effect-based reasoning has recently been relaxed by the Court with regard to certain agreements in the field of social negotiations. In three cases, which have been decided on the same day and the wording of which is almost identical, the Court decided that:[8]

> It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However the social objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85 (now, after the Treaty of Amsterdam Article 81, HV) (1) of the Treaty 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.

The result of this 'Albany-reasoning' is that a category of agreements, which restrict competition, nonetheless fall outside the scope of the cartel prohibition. The implications of this ruling for voluntary agreements will be explored in greater detail in the second part of this paper. For now, suffice it to say that it is possible to extend the Court's reasoning to voluntary agreements.[9]

The designation "voluntary" indicates that these agreements have been voluntarily entered into by the parties. However, some form of government pressure may have played a role in bringing these agreements about. In this context it is interesting to briefly explore the influence of government involvement on voluntary agreements in relation to the applicability of competition law to these agreements. The notion of a restriction of competition presupposes the free choice by economic actors. In an extreme situation, government influence could be so pervasive that a free choice could no longer considered possible. This could, in an extreme situation, result in a so-called "*Zwangskartell*" which, in theory would

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7 The Court has confirmed this: European Court of Justice, case 56/65, *LTM/MBU*, ECR [1966], 235.

8 Judgements of 21 September 1999 in cases C-67/96, *Albany International*; C-115/97, C-116/97, C-117/97, *Brentjens* and C-291/97, *Drijvende Bokken*, n.y.r.

9 *Cf*. K.J.M. Mortelmans, 'Milieubeleid en mededingingsrecht: onvermijdelijke confrontatie en gewenste integratie', *NTER* 2000/1, E.M.H. Loozen, CAO's bedrijfspensioenfondsen en het EG-mededingingsrecht, *NTER* 1999/11, p. 274.

not be subjected to the competition laws.[10] However, the judgment of the Court in, *inter alia*, the BNIC/Clair case clearly indicates its reticence in acknowledging such pleas.[11]

The first paragraph of Article 81 sees to the "prevention, restriction or distortion of competition". This element of the provision has functioned as the seed from which a tree of 'rule of reason'-literature has sprouted.[12] Discussion with regard to the rule of reason in Article 81 centers on the question of whether Article 81 (1) knows such a rule in the first place. With regard to the rule's contents, the evidence, in the form of decisions and judgments, for the existence of a European rule of reason suggests that it is strictly limited to a purely economic appraisal. Primarily extra-economic benefits, such as enhanced environmental protection, are most likely not to be included in this rule of reason. This brings us back to the remark made earlier, that environmental benefits acquire an economic or competitive aspect through the polluter-pays-principle. The 'economization' of the environment could result in environmental benefits playing in role in a rule of reason.

The Commission's Draft Guidelines on Horizontal Agreements provide us with a hint as regards the application by the Commission of Article 81 (1) to voluntary agreements.[13] The chapter on "environmental agreements" distinguishes between agreements that do not (A), those that may (B) and those that almost always (C) come under article 81 (1). Whether this reasoning is the result of a rule of reason-approach still needs to be seen. As for the agreements that are likely not to fall under Article 81 (1) the Commission appears to distinguish between, firstly, agreements that can be said not to restrict competition and, secondly, agreements that may profit from a sort of rule of reason.

Ad A. The Commission gives two examples of the first category (i.e. agreements that can be said not to restrict competition in the first place). Firstly, the Commission indicates that when an agreement entails only generally formulated obligations and parties are thus left considerable discretion as to the means to fulfill these obligations, this agreement will not restrict competition.[14] According to the Commission the chance of the agreement not restricting competition increases with the amount of discretion left to the parties. It appears that this is probably the reasoning behind the informal Commission decision allowing the ACEA agreement.[15] This agreement only provided for an average objective and left parties free to aim for less or more stringent objectives, provided only that the average objective was met. Moreover, the parties were left free in their choice of means to attain the objectives. It can indeed be said that this agreement is likely not to restrict competition. However, one can also doubt the environmental effectiveness of the agreement.[16] With regard to the chance that an agreement restricts competition, the Commission seems to primarily base itself on the fact that no individual objectives are set for the parties. However, some exchange of information

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10 In such a situation the government involvement would itself be judged under the useful effect rule. See, for example the case 40-48, 50, 54-56, 111, 114/73, *Sugar*, ECR [1975], 1663.

11 European Court of Justice, case 123/83, *BNIC/Clair*, ECR [1985], 391.

12 A recent book, with excellent references to other literature was written by A. Gayk, *Restriktionen des tatbestandes des Art. 85 Abs. 1 EWG Vertrag : Anwendungsfälle einer Rule of Reason in der Entscheidungspraxis des Gerichtshofes der Europäischen Gemeinschaften* (Darmstadt: Dissertations druck 1991)

13 Draft Guidelines on Horizontal Agreements OJ [2000] C 118/3 from p. 37 on. Hereafter referred to as Draft Guidelines.

14 Paragraph 172 of the Draft Guidelines, *supra* note 13.

15 Unfortunately, the Commission restricted itself to issuing a press release in this case: IP/98/865 of 6-10-1998.

16 As many environmental organizations have done, *cf.* the paper presented by Dr. Chistian Hey of the EEB for the VAVA workshop Feb. 24, 25 Brussels.

as to these objectives and some concerted action with regard to the level of these individual objectives would appear to be necessary to ensure that the average goal is indeed attained. The competition problems inherent in this last aspect are not touched upon by the Commission.

Secondly, the Commission applies some sort of appreciability criterion with regard to the setting of products' environmental performance requirements.[17] In general, it has been argued that agreements concerning environmental quality standards do not appreciably restrict competition.[18] Apart from the environmental characteristics of a product many other aspects remain on which competition is possible. Perhaps this remark by the Commission is to be welcomed mostly because of the express acknowledgement of a qualitative concept of appreciability that speaks from it.

The second category that may be distinguished in the commission's approach involves something that could be deemed an application of a rule of reason. According to the Commission, agreements that give rise to "genuine market creation" will generally not restrict competition. The Commission appears to be weighing the restrictions of competition with the fact that an entirely new market is created. This may be so where a new activity is carried out (recycling agreements) but the same reasoning could probably be applied wherever markets are liberalized. In general it can be said that the market for waste collection (irrespective of whether this waste is recycled or not) was a non-competitive market. The advent of private enterprises on this market may not have exactly created a market but certainly made it more 'market-like'. I will return to this rule of reason-approach in the second half of this paper.

Ad B. With regard to this category (agreements that may fall under Article 81 (1)) the Commission reverts to a quantitative notion of appreciability. The Commission's appreciation of such agreements hinges primarily on the parties' market shares and secondly on whether the regulation of the environmental quality appreciably restricts competition with regard to quality in general. This last aspect suggests the use of a qualitative notion of appreciability. However, the decisive criterion appears to be one of quantitative appreciability. This approach was used in the CECED case where the Commission appears to have been particularly concerned with the fact that its members make up over 90 % of the European market.[19] Moreover, the agreement concerned the phasing-out of certain environmentally unfriendly products, thus reducing consumer choice whilst increasing prices.

Ad C. The Commission is succinct and severe with regard to environmental agreements that do "not truly concern environmental objectives" and qualifies these as "disguised cartels". According to the Commission, examples of such environmental cartels are agreements that involve price fixing or output limitation. This category obviously refers to the infamous VOTOB case.[20] With regard to the appreciability criteria used by the Commission, the VOTOB case at least is an example of what I would call '*per se* appreciability'. The Commission appears extremely stringent once a 'hard-core' restriction of competition is involved. For example, in the VOTOB case, the relative amount of the price fixed was

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17 Paragraph 173 of the Draft Guidelines, *supra* note 13.

18 *Cf*. H.G. Sevenster, *De geoorloofdheid van milieubeleidsafspraken in Europees perspectief*, in M.V.C. Aalders, R.J.J. van Acht (red.) *Afspraken in het milieurecht* (Zwolle: W.E.J. Tjeenk Willink 1992) and H.H.B. Vedder, *Competition Law and the Use of Environmental Agreements*, in: K. Deketelaere, E.W. Orts, *Comparative Environmental Law* (Kluwer law International, forthcoming in 2000).

19 Commission decision 00/475 in case *CECED*, [2000] OJ L 187/47.

20 Commission, XXIInd Competition Report (1992), paragraph 177-186.

considered irrelevant in determining the appreciability.[21] Apart from the appreciability issues involved, the Commission indicated in the context of the VOTOB case and on later occasions that such hard core restriction would be extremely difficult to justify. This approach may be contrasted with the later CECED case.[22] The restriction in this case was at least equally hard core (restriction of outputs to the detriment of the consumers) yet the proportionality criterion was satisfied rather easily.

This concludes the exploration of the boundaries imposed by Article 81 (1) on voluntary agreements. With regard to Dutch policy following from the Competition Act the situation appears to be identical. The provision containing the prohibition is an almost exact copy of Article 81 (1) and the resulting policy is accordingly based on existing European policy.[23] For example, the Dutch Competition authority, in its decisions in the Stibat case, appeared to closely follow the Commission's reasoning in the VOTOB case.[24]

Article 81, third paragraph

The conclusion that an agreement falls under the prohibition is only one step in the process of applying Article 81. The third paragraph of Article 81 allows the Commission to exempt an agreement from the prohibition.[25] To qualify for such an exemption, an agreement must cumulatively satisfy two so-called positive conditions (A-B) as well as two negative conditions (C-D).

Ad A. The first positive condition is fulfilled when an agreement contributes to improving the production or distribution of goods or to promoting technical or economical progress. The advantages thus listed indicate the primarily economic policy character of this provision. However, the primarily economic wording of this provision hasn't kept the Commission from taking environmental considerations into account. In approximately 20 decisions the Commission has interpreted the first positive condition so that environmental benefits could be qualified as "technical or economical progress".[26] The Commission has confirmed this

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21 The VOTOB-case concerned the fixing of an environmental surcharge that consisted of less than 5 % of the costs.

22 *Infra* note 26, the example in the Draft Guidelines refers to this case.

23 It is an almost exact copy in that, for example, Article 6 CA refers to the Dutch market instead of the common market.

24 Casenumber 51, Stibat, to be found on the Authority's website, *supra* note 5.

25 This system, whereby the Commission has an exemption monopoly, is under discussion at the moment; Commission White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty.

26 Commission decision 68/319/EEC, IV/26045 *ACEC/Berliet*, [1968] OJ L 201/7; Commission decision 76/248/EEC, IV/26.940/a *United Reprocessors*, [1976] OJ L 51/7; Commission decision 82/371/EEC, IV29.995 *Navewa Anseau*, [1982] OJ L 167/39; Commission decision 83/669/EEC, IV/29.955 *Carbon Gas Technologie*, [1983] OJ L 376/17; Commission decision 88/541/EEC, IV/32.368 *BBC Brown Boveri*, [1988] OJ L 301/68; Commission decision 91/38/EEC, IV/32.363 *KSB/Goulds/Lowara/ITT*, [1991] OJ L 19/25; Commission decision 91/301/EEC, IV/33.016 *Ansac*, [1991] OJ L 152/54; Commission decision 92/96/EEC, IV/33.100 *Assurpol*, [1992] OJ L 37/16; Commission decision 93/49/EEC, IV/33.814 *Ford Volkswagen JV*, [1993] OJ L 20/14; Notice pursuant to Article 19 (3), IV/34.781 *EEIG EFCC* (European Fuel Cycle Consortium), [1993] OJ C 351/6; Commission decision 94/322/EC, IV/33.640 *Exxon Shell JV*, [1994] OJ L 144/20; Commission decision 94/986/EC, IV/34.252 *Philips Osram JV*, [1994] OJ L 378/37; Notice pursuant to Article 19 (3), IV/34.415 *IFCO*, [1997] OJ C 48/4; Notice pursuant to Article 19 (3), IV/34.493 *DSD*, [1997] OJ C 100/4; Notice pursuant to Article 19 (3), IV/F1/36.172 *ZVEI/Arge Bat*, [1998] OJ C 172/13; Notice pursuant to Article 19 (3), IV/F2/35.742 *EUCAR*, [1997] OJ C 185/12; Commission decision 00/475, IV.F1/36.718 *CECED*, [2000] OJ L 187/47; Notice pursuant to Article 19(3), IV/C-3/36.494 *EACEM*, [1998] OJ C

interpretation in several of its Competition Reports.[27] While environmental benefits have thus been taken into account, it must be said that, in these decisions, the environmental benefits were always entirely accessory to the economic benefits. They were, so to say, listed as *obiter dicta*.[28] The Court has to this day seen it possible to refrain from giving a clear indication of the role of extra-competitive considerations in the first condition.[29]

In its recent Draft Guidelines the Commission appears to, as I would like to call it, 'economize' the environmental benefits. Within the appreciation of whether or not an agreement leads to benefits within the meaning of article 81, the Commission considers that environmental benefits may entail economic benefits which, either at aggregate social level or at consumer level outweigh the negative effects on competition.[30] This would seem to entail a complex calculation of some rather intangible benefits and costs the precise details of which are left open in the Commission paper. The Dutch competition authority added an extra dimension to this calculation of the environmental benefits when it considered that environmental benefits could certainly be considered to confer economic benefits because, as a general rule, preventing environmental problems is cheaper than curing them afterwards.[31]

The Commission indicates that when the environmental benefits entail a reasonably direct economic advantage for consumers, it will not be necessary to establish that the agreement's benefits outweigh the costs. This reasoning is the result of the 'economization' of the environmental benefits. In the example based on the CECED-case the Commission shows what it means by this reasoning.[32] As was mentioned above, a restrictive agreement within the meaning of Article 81 (1) was deemed to exist. However, the Commission exempted it because the initial price increase associated with the purchase of more expensive environmentally friendly equipment would quickly be recouped by the lower running costs of these more advanced machines. It appears that, in weighing the economic benefits and costs, the Commission is in fact applying a second proportionality criterion (*infra*, ad. C).

Ad B. The second positive condition for an exemption is satisfied when the agreement "allows consumers a fair share of the resulting benefit". The examples above show that, in economizing the benefits, the Commission combines the first and second condition. To a certain extent this merging of the conditions can be said to be inherent where environmental benefits are concerned as these almost always necessarily entail a general benefit that surpasses the parties' interests. Generally, it can be said that the Commission and Court have interpreted the notion "consumers" widely as not limited to final consumers.[33] The Commission appears to consider this condition fulfilled whenever some competition remains on the market. The market forces are then considered sufficient to ensure that the benefits are

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12/2, Notice pusuant to Article 19(3), 34.950, *Eco-Emballages*, [2000] OJ C 227/6.

27 Commission, XXVth. Competition Report (1995), paragraph 85; XXVIIIth. Competition Report (1998), paragraph 129.

28 *Cf*. L. Gyselen, *The Emerging Interface Between Competition Policy and Environmental Policy in the EC*, in: J. Cameron, P. Demaret (eds.) *Trade & the Environment* (London: Cameron and May 1994), p. 256.

29 With regard to case C-360/92 P, *Publishers Association*, ECR [1995], II-23, Goyder carefully argues that the court may have considered extra-competitive, cultural, considerations as included; D.G. Goyder, *EC Competition Law* (Oxford: Oxford University Press 1998),p. 139

30 Paragraph 180 Draft Guidelines, *supra* note 13.

31 Decision in case number 51, Stibat, paragraph 63, *supra* note 23.

32 Paragraph 7.5 Draft Guidelines, *supra* note 13 and paragraphs 52 and 56 of the CECED decision, *supra* note 26.

33 *Cf*. Goyder, *supra* note 28, p. 141.

(partly) passed on to consumers.[34] To the extent that the intensity or degree of remaining competition is considered to be indirectly decisive for the fulfillment of this condition, a relation with the final (negative) condition can be said to exist. I will return to this point when examining this condition (Ad. D).

Ad C. The first negative condition is designed to ascertain that the agreements do not impose "restrictions which are not indispensable to the attainment of these objectives". In short, it can be called a proportionality criterion.[35] The precise content of this notion in Community law remains somewhat obscure. However, the Commission has provided us with a general idea of the test that it will apply with regard to voluntary agreements. What is striking is recurring 'economization' of the environmental benefits. The Commission indicates that the indispensability of a restriction will increase when the "economic efficiency of an environmental agreement" is "more objectively" demonstrated.[36] This may be contrasted with earlier statements by the Commission where it indicated that it would weigh the restrictions of competition against the *environmental* objectives.[37] In the context of the VOTOB-case the Commission has indicated that it will apply a very strict proportionality criterion where 'hard-core' restrictions are concerned.[38] The CECED case shows an application of the proportionality criterion that is somewhat more lenient than the VOTOB case. In the words of the Commission's Draft Guidelines: "Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits." In the CECED case these benefits consisted in the phasing out of energy-inefficient machines. However, when the Commission itself comes to the conclusion that the higher purchasing costs will be quickly recouped by the lower running costs, one may wonder whether such an agreement was necessary to ensure the success of the agreement in the first place.[39]

Ad D. According to this condition, the agreement may not provide the parties the possibility of eliminating competition in respect of a substantial part of the products in question. This condition can be considered to indicate the outer limits of allowable restrictions of competition. It seems that the Commission very often views this last condition as one not to stand in the way of an exemption once the three preceding conditions have been satisfied. As mentioned above, the remaining competition is often considered an efficient instrument to ensure that the consumers are allowed a fair share of the benefit. This reasoning may be difficult to reconcile with the Commission's reasoning in the Draft Guidelines. In the Draft Guidelines the Commission seems to consider the condition fulfilled where competition is possible with regard to other aspects of a products' quality.[40] It must be noted that, whenever the existence of competition with regard to other than environmental aspects is considered sufficient to fulfill the final criterion, the danger that the environmental costs are simply passed on to consumers becomes more acute.[41] The enterprises could, for instance, keep on competing on other than environmental aspects of product quality while the costs associated with the improvement of environmental aspects are passed on to consumers. In determining whether sufficient competition remains, the Commission takes future competition, as a result

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34 Cf. Goyder, *supra* note 28, p. 141.

35 *Cf.* Goyder, *supra* note 28, p. 142.

36 Paragraph 182 Draft Guidelines, *supra* note 13.

37 Commission XXVIIIth Competition Report (1998), paragraph 129.

38 Commission XXIInd Competition Report (1992), paragraph 77, XXVth Competition Report (1995), paragraph 85.

39 For example, a coordinated publicity campaign concentrating on these lower running costs and thus encouraging consumers to buy more efficient machines, may be equally effective.

40 This becomes apparent from the example used in paragraph 7.5 Draft Guidelines, *supra* note 13.

41 See also the second assumption.

of the development of the market, into account. In this respect the Commission is willing to allow a serious restriction of competition when this is necessary to 'get a system started' even when this system is currently the largest but active on a 'developing market'.[42]

All in all, environmental considerations have played and continue to play a role in policy with regard to Article 81. At first sight, this role appears quite satisfactory. However, the example of the VOTOB-case may be used to show the limits of this approach.[43] VOTOB is the Dutch association of independent tank storage companies. Its members offer storage facilities to the chemical industry. To be ahead of legislation, VOTOB concluded a covenant with the Dutch authorities to reduce emissions. While initially it looked like the costs for their plans were going to be partly subsidized by the Dutch government under a general investment scheme, this scheme was withdrawn altogether some six months after signing the covenant. VOTOB decided nonetheless to continue the implementation of its covenant obligations and collect the extra environmental costs from the real polluters: the chemical industry. To this end, a scheme was conceived that consisted of a uniform fixed environmental surcharge that was only to compensate the loss of the subsidy. Furthermore, the environmental charge was to be listed separately on the invoice. VOTOB considered these measures necessary firstly because the market for tank storage facilities is a "buyers market"[44] and secondly because, from an environmental point of view, the VOTOB members would be considerably ahead of their German and Belgian competitors but would also face extra costs. In general, the market for tank storage allows only limited profit margins. Moreover, VOTOB's activities are non-value added. In these circumstances, the VOTOB members wanted to prevent a competition with regard to the costs for environmental protection that would lead to less effective protection of the environment.

The Commission was of the opinion that the scheme amounted to price fixing despite the fact that the surcharge was considered inappreciable by VOTOB.[45] Where VOTOB considered the separate invoicing necessary to implement the polluter pays principle, the Commission was of the opinion that the fixed and uniform surcharge was in obvious contradiction with the polluter pays principle. VOTOB argued that the separate invoicing should make the chemical companies aware of the environmental costs of their activities. The Commission contended that the parties had made significantly different investments to meet their obligations. The uniform character of the surcharge meant that the real environmental costs remained hidden.

The Commission tried to make competition work for the environment when it considered the role of the polluter pays principle in the scheme. Unfortunately, the result of the Commission's attempts was that VOTOB was left standing in the cold, having invested in pollution abatement techniques but facing a potential financing deficit at the same time.

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42 *E.g* the VALPAK case, XXVIIIth Competition Report (1998), paragraph 133, 134. However, in the IFCO case the Commission refused a restriction of competition that was also considered necessary for a system to acquire the minimal market share, *supra* note 25.

43 Unfortunately, this case was decided without a formal decision. Some attention is devoted to this case in the Commission's XXIInd. Competition Report (1992), paragraph 177-186. For an account of the VOTOB case see F.O.W. Vogelaar, *Towards an Improved Integration of EC Environmental Policy and EC Competition Policy: an Interim Report*, in: B. E. Hawk (ed.) Fordham Corporate Law Institute, p. 549 *et seq*.

44 This denotes a market where the buyers (industrial giants in the chemical industry) have considerable power.

45 The environmental charge amounted to approximately 5% of the total costs.

Voluntary agreements and the Dutch Competition Act: what are the boundaries?

As far as the prohibition is concerned, policy with regard to cartels under the Competition Act is identical to that under Article 81 EC. With regard to the possibility of an exemption, some deviation may perhaps be seen. In one of the first cases to come to it, the Stibat-case, the Dutch Competition authority faced an agreement similar to the VOTOB-agreement.[46] The fate of Stibat was, as may have been expected, comparable to that of VOTOB. The Stibat-decision primarily indicates an uneasy and subordinate role for environmental considerations. The Dutch Competition authority's reasoning with regard to the benefits flowing from the scheme shows the economization also to be found in the Commission's Draft Guidelines.[47] The next case concerned an agreement by the Dutch Association of Flower auctions to restrict the number of allowed types of packaging on, *inter alia*, environmental grounds.[48] In this case, the innovation on the part of the authority consists of the fact that environmental grounds are primarily taken into account in determining the benefits flowing from the agreement. Cost savings on the long term were taken into account only as secondary grounds for an exemption.[49]

A recent case involving environmental considerations is the case concerning the Dutch Association of Manufacturers of Plastic Pipes (FKS).[50] The agreement concerned a collective system to collect, sort and recycle plastic pipe waste. The association devised this system to prevent the a legal producer responsibility for this waste from being enacted. The bulk of plastic pipe waste is generated when buildings are constructed or demolished. The nature of this waste makes it very difficult if not impossible to identify the producer. Sorting the plastic waste according to the producer would only create extra costs, so it was decided to divide the generated waste according to fixed shares. These shares are based on (historical) market shares. Furthermore, a fixed price that would be charged to demolition and building contractors was agreed. Contractors that would use the scheme would be charged nothing (zero price) or a negative price (the contractors received a bonus to encourage collection when special containers are used) Lastly, the ways in which the secondary raw materials could be used, were limited. All in all, there were some 'hard core' restrictions of competition.[51]

The competition authority considered that the primarily environmental benefits (savings on primary raw materials and less waste for incineration) justified the restriction of competition. This decision can be called innovative because at least one 'hard core' restriction was nevertheless considered proportionate to ensure that the environmental objectives were reached. The fact that the recycling of plastic waste is unprofitable at the moment together with the fact that the collective solution would be the most efficient, led the authority to consider that these severe restrictions of competition were necessary for the scheme to work. If the fixed price for the waste would have been abandoned, this would have resulted in the members trying to defer their obligations by simply charging a higher price. While the distribution of the waste according to the market shares may not be completely in accordance with the actual producer responsibility, it is much more effective.

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46 Casenumber 51, Stibat, to be found on the Authority's website, *supra* note 5.

47 *Ibid*. paragraph 63.

48 Casenumber 492, Vereniging van Bloemenveilingen in Nederland.

49 *Ibid*, paragraph 71.

50 Decision of 23 July 1999 in case no. 12; Vereniging van Fabrikanten van Kunststofleidingsystemen (Association of Manufacturers of Plastic Pipes). Hereafter referred to as the FKS-decision.

51 The Commission has indicated that it considers such restrictions so severe that they will be very difficult to justify under EC competition law; Commission, XXVth. Competition Report (1995), paragraph 85.

On the basis of these three decisions, it may be argued that Dutch competition law is evolving into a more 'ecologically sound' competition policy than the European policy. This is not to say that environmental protection requirements were the sole ground for issuing the exemption.[52] This remark brings us to the second part of this paper. How environmentally friendly should competition law and policy become and what form should this take?

What should the boundaries to voluntary agreements be?

For an answer to this question, I will have to return briefly to the assumptions. The three assumptions together prescribe that it is necessary to maintain a certain level of competition in general but equally with regard to the environmental aspects of competition. Only then is it likely that environmental protection profits from the advantages of competition in a manner similar to the way other aspects have profited from competition. The high standards of product quality in general that we at least partly attribute to competition should also be achieved with regard to environmental protection.

In coming to this conclusion it needs to be taken into account that the internalization of environmental costs is still far from complete. Most environmentally friendly products are actually more expensive than their polluting counterparts thus creating an obvious incentive to free ride for the parties to an agreement. To counter this, and thus keep the costs of protecting the environment to a minimum level, some check on the parties is often considered necessary. The interface between competition law and voluntary agreements should take into account these two notions. On the one hand the necessity to maintain competition contrasted with the necessity to allow certain restrictions.

A pivotal role is thus played by two principles of Community environmental law: the polluter pays principle and the integration principle. Because the first of these two has already received adequate attention, I will now concentrate on the integration principle. Currently to be found in Article 6 EC, it prescribes that environmental protection requirements must be integrated in the Community's other policies. With regard to the Community's competition policy, the applicability of this provision has been expressly recognized by the Commission.[53] The extent of this integration appears to be limited in two respects. Firstly, a lower limit to integration follows from the precise content of what is meant by the 'integration'. Secondly, an upper limit is inherent in the objective of the principle namely environmental protection. As for the first (lower) limit, the confines of this chapter do not allow for a thorough investigation into what integration entails.[54] It can certainly be said that integration encompasses the "taking into account' of environmental concerns. In my opinion the upper limit is the more decisive of the two limits to what integration entails. Ultimately, this upper limit is defined by the environmental objective of the integration principle.

'Excessive integration' in the sense that no account at all is taken of the competition considerations with regard to voluntary agreements will deteriorate the effectiveness of the polluter pays principle in that the positive effects of competition with regard to environmental protection are made impossible. When the integration- and polluter-pays principle are thus taken together the result, as regards competition law, should be that ultimately the

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52 *Cf*. the decision of 23 February 2000 in case no. 228; VEBIDAK, paragraph 47.

53 Commission, XXIIIrd Competition Report (1993), paragraph 162.

54 *I.e*. taking the environment into account, weighing environmental with other concerns or even a preference for environmental protection?

environmental effectiveness should determine the (competition law) boundaries to voluntary agreements.

This short sketch of the dynamics of the integration of environmental concerns and competition policy has made it clear that it is necessary to maintain a certain degree of competition with regard to environmental agreements. Despite the fact that the Courts' Albany-reasoning could possibly be extended to voluntary agreements, this approach is not advocated. A complete exception for voluntary agreements from the cartel prohibition eliminates the possibility for competition to play a positive role in ensuring optimal environmental protection. I will nevertheless venture into the details of the extension of the Albany-reasoning to voluntary agreements in some detail.

In the Albany case the Court faced the problem of reconciling, on the one hand, a restrictive agreement with a social objective with, on the other hand, the Community's competition laws. With regard to these, as I will call them, social agreements the Court appears to attach considerable weight to the fact that the conclusion of such agreements is encouraged by the Community on the basis of an express Treaty provision.[55] With regard to voluntary agreements a similar reasoning may be upheld as the EC Treaty also provides for a Community policy in this field. The provision that allows the Community institutions to encourage the conclusion of voluntary agreements is not to be found in the Treaty but in secondary legislation.[56] The legal background to voluntary agreements is in many respects comparable to that of social agreements. Moreover, certain restrictions of competition can be said to be inherent in many voluntary agreements. Furthermore, the environmental objectives of these agreements are seriously hampered when Article 81 is applied unmitigated. The VOTOB case may serve as an example in this respect. While the Albany-reasoning could thus be applied to voluntary agreements as well,[57] this approach is not advocated.

The preferred approach to voluntary agreements would entail the normal application of Article 81 to voluntary agreements. When such agreements aim at, or result in the restriction of competition, an exemption ex. Article 81 (3) should be the only way to legalize these agreements. With regard to the applicability of Article 81 (1) to voluntary agreements, the currently applied appreciability criterion should in my opinion be changed. The *per se* appreciability that speaks from the Commission's current approach *vis a vis* price fixing[58] is in my opinion no longer justified. When it is accepted that agreements that regulate the environmental aspects of a products' quality do not *per se* appreciably restrict competition, the same reasoning should be applied to agreements that envisage the fixing of a minor percentage of a product's price. This may occur when removal fees or environmental surcharges are concerned. However, even when such price-fixing agreements are deemed *per se* appreciably restrictions of competition, they should be exemptible under Article 81 (3).

In this respect, the Commission's approach in the VOTOB case may be contrasted with the Commission's comfort letter in the Stibat case. From a competition law perspective, the VOTOB and Stibat cases are nearly identical. Both concerned a countrywide agreement

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55 Paragraphs 54-58 of the judgment, *supra* note 10.

56 Communication on Environmental Agreements, Council Resolution and Fifth Environmental Action Programme.

57 However, the Court's judgement in joined cases C-180-184/98, Pavlov, n.y.r. appears to deny the possibility of extending the Albany reasoning to voluntary agreements.

58 *Cf.* the Commission Notice on agreements of minor importance (de minimis notice), paragraph 11; [1997] OJ C 372.

between parties active on a European market.[59] Moreover the restrictions of competition in the Stibat case were identical to those in the VOTOB case. Apparently, Stibat received a comfort-letter because the Stibat agreement would not appreciably influence intra-community trade. This result appears very difficult to reconcile with the Commission's hash and succinct verdict in the VOTOB case. Could it be that the Commission is not entirely certain what to do with large number of voluntary agreements that entail price-fixing in the form of an environmental surcharge or removal fee?[60]

With regard to the exemption clause (Article 81 (3) EC) two remarks may be made. Firstly, environmental benefits should be recognized as autonomous advantages capable of justifying an exemption. Secondly, the proportionality criterion should function as a pivotal condition without making certain types of agreements nearly impossible to justify.

With regard to the first remark, the greatest concern should focus on the 'economization' of the environmental advantages. It may be observed that this economization, when it is seen as an extra requirement, is easily overcome by most voluntary agreements. As I have mentioned above, most voluntary agreements will entail an economic benefit for otherwise economically rational entrepreneurs would not have agreed them. One may argue that concentrating on the economic aspects alone allows for a more exact determination of whether or not an exemption is called for. In this respect I consider that the economization only *appears* to provide a unambiguous criterion. I have already suggested that the economization of environmental benefits would seem to entail a rather complex calculation. For example, how are the costs to society of a restriction of competition going to be calculated and how does one quantify environmental benefits?

Finally, when the economization entails weighing the economic benefits of environmental protection with the costs of restricted competition, the result is in fact the introduction of an extra proportionality criterion. The Commission's Draft guidelines clearly suggest the existence of a link between the demonstration of the economic benefits and the proportionality test.[61] In my opinion, this 'mingling' only leads to a more obscure test under Article 81 (3) and should for that reason alone be avoided.

Many of these difficulties could be avoided when environmental benefits would be recognized as legitimate independent reasons for an exemption. The easiest way to do so would be to simply classify these benefits as 'technical or economical progress' within the meaning of Article 81 (3).[62] In my opinion this would not unreasonably stretch its meaning as an improvement in a products' environmental quality can certainly be called technical progress.[63] Moreover, the internalization of the environmental costs together with the fact that the environment is protected should ensure that true economic benefits exist.

With regard to the proportionality test, the Commission is certainly right when they would like to prevent 'environmentally disguised' cartels. The proportionality criterion could very

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59 VOTOB was active on the market for tank storage whereas Stibat concerns the market for batteries and accumulators. Both markets are 'Europe-wide' in that VOTOB catered to the needs of many European chemical companies and the Dutch market for batteries is supplied by European manufacturers.

60 Or are the reasons more mundane? Could it be that the Commission has simply decided the refer the Stibat case to the national competition authority because it seemed 'practical'?

61 *Cf.* paragraph 182 Draft guidelines, *supra* note 13.

62 This is not to say that these environmental benefits couldn't coincide with economic benefits.

63 *Cf.* the Commission in its XXVth and XXVIIIth. Competition Reports (1995 and 1998) paragraphs 83-85 (1995 Report) and 192 (1998 Report)

well serve as the instrument to distinguish between true voluntary agreements and those agreements that serve only as a pretext for a cartel. The extremely severe proportionality criterion applied to hard core (price-fixing) restrictions seems in more than one respect unjustified. Many agreements not entailing the fixing of (a percentage of the) price can nonetheless be considered extremely restrictive of competition whereas not all price fixing agreements are equally restrictive of competition.[64]

Ultimately, the proportionality test should center on the environmental effectiveness and efficiency of the agreement. What I mean by this is that the decisive criterion should be whether the restrictions are environmentally effective. This is not to say that competition considerations should be excluded from the application of the exemption clause as this is impossible and contrary to the text of Article 81 (3). In the end, as I have shown above, the environmental effectiveness and efficiency depend on the presence of a workable degree of competition. Competition policy *vis a vis* voluntary agreements should therefore concentrate, through the proportionality criterion, on ensuring the effectiveness and efficiency of voluntary agreements and not so much maintaining a minimum degree of competition.

With regard to the case of agreements involving environmental surcharges or removal fees the reasoning could be as follows. These agreements try to internalize the environmental costs. Ultimately, the consumers are responsible for the production and concomitant environmental pollution. In that respect, nothing is wrong with making the consumers pay for the environmental impact of their consumption. Moreover, the fact that a removal fee is passed on to consumers completely and listed separately on the bill makes the consumer not only aware of the environmental costs but also of the fact that there is a recycling system. It is very likely that having to pay for the future recycling of their products will work better to create this awareness than any campaign. Yet another reason to acknowledge the necessity or proportionality of certain agreements with regard to a removal fee exists where the recycling scheme involves producer responsibility for the so-called 'historic' and 'orphaned waste'.[65] These notions refer to, respectively, the waste that was already present on the market before the producer responsibility was enacted and that portion of the historical waste for which no current producer can be held responsible. Producer responsibility will in such cases almost invariably lead to collective systems with a removal fee which is to be passed on and billed separately. This can be explained because cooperation will lead to important economies of scale in these cases. Moreover, because such systems involve a degree of solidarity between the producers as they take the collective responsibility irrespective of their own position on the market and even take the responsibility for the 'orphaned waste' for which no one can actually be held responsible. To keep such a system going, parties will require a system of checks and balances to prevent anyone from free-riding. The certainty that other parties will also charge the consumer the same removal fee is just such a check.

While the proportionality criterion has indeed proven to be a stumbling block for some agreements involving removal fees, this is not necessary. Indeed such agreements could, in my opinion, be considered necessary for a certain duration. As soon as all historical waste has been recycled, producers will face an incentive to enact their own system when this is cheaper.

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64 *E.g.* agreements to phase out certain products.

65 This has happened in the (draft) directives on end-of-life-verhicles and waste of electronic and electrical equipment and the Dutch removal orders.

The final criterion, that of residual competition, should not lead to any problem as the environmental matters regulated in a voluntary agreement will always remain only one small aspect of everything on which competition is possible. In the end, the main change is a shift of perspective from competition as an end in itself to competition as a means to achieve sustainable growth.

Perhaps the Dutch Competition authority's decision in the FKS case indicates 'the way ahead'. Restrictions of competition, even though they might very well be considered hard-core, were allowed on primarily environmental grounds. However, this decision is not perfect when an *integration* of environmental concerns and competition and sustainable growth is the ultimate objective. In allowing the restriction on the ways of using the secondary raw materials, the Competition authority deprived the parties of the incentive to undertake research into other, more effective or efficient, ways of using recycled plastics. The use of these materials in unduly low-tech applications, which appears to have been the rationale behind this restriction, could have been prevented with less restrictive means that will allow a competition *for* the environment.