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# The Interplay between Competition Law and Environmental Law

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In this study, the discussion focuses on the relationship between the competition law and the environmental law in the European Union. The aim of my thesis was to show the areas where the EU competition and environmental laws meet each other and the potential conflicts between them. I did not consider any national legislation, my focus was on the context of the European Union.

In contrast to Competition Law, Environmental Policy was not introduced in the Treaty of Rome. At that time the most important aim was to create an economic integration among Member States. In the 1970s numerous disasters threatened Europe, so there was a need for environmental protection by law. Many firms started to use measures for protecting our environment and the two laws (competition and environmental law) came into conflict more often and the main question I wanted to answer is how the environmental concern should be contradicted with different articles from the Treaty of the Functioning the European Union (TFEU), such as,

*"How environmental protecting actions such as environmental agreements can restrict competition?"*

In order to answer this question I looked at the following articles: Article 101 TFEU, Article 102 TFEU, Article 106 TFEU and Article 107 TFEU, furthermore, I analysed them with case-by-case method.
I approached from two main aspects on how the environmental protection can restrict the common market within the Union. Measures to protect the environment can be taken by undertakings and Member States. On the one side, undertakings can restrict competition by concluding environmental agreement or abusing a dominant market position for environmental reasons. These practices fall within the Article 101 and 102 from the TFEU. On the other side, Member States may restrict competition by granting exclusive rights or by granting state aids, which relates to Article 106 and 107 from the TFEU.
According to the Treaties, the European Union at the same time shall protect the environment and ensure the free and fair competition on the market. Especially, Article 11 of the Treaty on the Functioning the European Union, which refers to the environmental integration principle, providing that the environmental considerations must be integrated into the definition and implementation of the Union policies and activities in order to promote sustainable development. The aim of the integration is to find a balance between competition and environmental protection in order to reach the goal of sustainable development. In order to attain a sustainable way of development it is not enough to let the polluters pay for their damages, but a pressure is needed by the competition law to decrease the number of environmental harms.

First, I have looked at Article 101 of the TFEU, which aims to prevent anti-competitive practices by undertakings. This is where companies get together agree on something that harms competition. For environmental protecting reasons undertakings conclude environmental agreements in order to achieve pollution abatement.

Article 101(1) TFEU explains which agreements shall be prohibited within the market. In order to be relevant, four conditions must be fulfilled:

- between the undertakings an agreement must exist;
- the agreement objective is to restrict competition;
- the impact on competition must be appreciable;
- and the agreement must have a significant effect on trade between member states.

The EU law distinguishes between horizontal and vertical agreements both, horizontal and vertical restraints are included in Article 101(1) TFEU. Horizontal cooperation includes information exchange; joint purchasing agreements; research and development agreements and the most common vertical cooperation includes exclusive distribution, franchising and resale price restrictions. Vertical agreements are less harmful than horizontal agreements because they tend to increase consumer welfare by facilitating the distribution of goods. For this reason, most competition problems derive from horizontal agreements.
The Commission's 2001 Horizontal Guidelines distinguishes four types of environmental agreements:

- those which "*do not fall*" under Article 101(1) TFEU;
- those which "*almost always fall*" under this provision;
- those agreements which "*may fall*" under the Article;
- and there are some "*borderline*" cases where the restrictions are inherent or ancillary.

"*Do not fall*" happened in the *ACEA* case where the Commission found that the agreement between automobile manufacturers, that aimed to reduce the amount of CO2 released from their cars did not infringed Article 101(1) TFEU because the agreement constituted efficiencies[1], which the parties could not have been obtained without the agreement.

Those agreements will "*almost always fall*" under Article 101 TFEU if the agreement's objective does not concern environmental intention or serves as a tool to engage in a disguised cartel by fixing prices, limiting output, etc. An example of such a disguised cartel was the *IAZ* case, where the Belgian Association agreed with Belgian manufacturers and sole importers of washing machines to use conformity label for certain environmental requirements. The Commission found that, the real objective of the agreement was to hinder parallel imports by establishing entry barriers within the Community, as the labels were only obtainable to Belgian manufacturers and that it was capable of affecting trade between Member States.

Environmental agreements will "*always fall*" under the Article 101 TFEU when they restrict the parties' ability to produce their products, for example by fixing prices. This was the case in *VOTOB*, where the Commission was against a Dutch association of companies in the chemicals storage business. The Commission found that a waste management agreement by the six undertakings falls under Article 101(1) TFEU, even where the expressed objective is

[1] Under efficiency I mean, if the agreement generates a new product on the market.

environmentally friendly because VOTOB members charged to their customers increased prices, which were uniform and fixed and this had a "knock-on effect[2] on the market" for undertakings.
And finally, there are some "borderline" cases, where a restriction was necessary in order to fulfil the environmental task. The ECJ have accepted restrictive practices in several cases (*Albany*, *Wouters*) under Article 101(1) TFEU because they had beneficial objectives.

Paragraph 3 from Article 101 TFEU sets out criteria which are excluded from the first paragraph. Only the Commission can decide whether an agreement could gain from Article 101(3) TFEU. This paragraph provides four conditions, which must be satisfied in order to get benefits: efficiency gains; fair share to consumer; indispensability of the restrictions and no elimination of competition.
In the *DSD* case the Commission granted an exception because all the four conditions have been applied and found the restriction was necessary to achieve the environmental benefits. *DSD* is a private undertaking and operates in Germany a countrywide system for the collection and recovery of sales packaging. In 2001 *DSD* signed exclusive recycling agreement with local collectors. These exclusive agreements restricted competition in the meaning of Article 101(1) TFEU. However, in the end, the Commission found that the exclusive agreement was necessary to obtain the environmental objectives. The first condition (efficiency gains) applied because the agreement improved the production of goods and promoted technical progress. The second condition (fair share to consumers) also applied because the volume of packaging has been reduced and it reduced the costs. Third condition (indispensability of the restrictions) applied because the restriction was necessary to achieve the efficiency. Further also the fourth condition (no elimination of competition) has been applied because it did not eliminate the competition.

The second analysed article in my thesis was Article 102 of the TFEU which prevents the abuse of a dominant market position. Article 102 of the TFEU is to do with big companies, such as Microsoft or Apple, who have a dominant position on the market. So just because a company like Microsoft has good products and hold a dominant position on the market it's not prohibited per se, it is the abuse of such position that infringes the EU competition law. In contrast to Article 101 TFEU, 102 TFEU does not include any exemption clause.
There is 4 different ways when a company can abuse their dominant position on the market:

- by imposing unfair prices, for example a dominant undertaking raising a costlier environmental friendly product;
- by limiting production in the case of downstream market where a dominant undertaking holding an important technology to reduce emission but keeping it as a business secret to itself;
- by discriminating between trading parties, for example, a downstream market owns an essential facility and it refuses the access to a facility for the requestor and there is no other potential substitute for the facility may eliminate the market;

[2] When a price is fixed the competition on that price is excluded.

- and by making contracts with extra obligations: an example for this is called tying. In environmental concept, a good example of a tying practice would be an undertaking requiring its purchasers to buy not just the product itself, but that product which is necessary for recycling the product.

The *Spa Monopole* case was the oldest example, where the Commission constituted an abuse of a dominant position in the market within the meaning of Article 102 TFEU.
The German Mineral Water producers held a dominant position on the market and it had entered into agreements with almost every German supermarket chain and it refused to grant to all non-German water producers access to its pool standardised glass bottles. A complain was raised by the Belgian mineral water producer which wanted to use GDB bottles. The Commission held that GDB was abusing its dominant position since it did not grant to the foreign water producers the access and this made it unable for them to get in to the German market because such access was essential in order to be able to compete in the mineral water market.

Article 106 of the Treaty of the Functioning the European Union is addressed to Member States, which favours public undertaking and undertaking that Member States grant special or exclusive rights to. This article from the Treaty requires Member States to no maintain any measure contrary to the rules. Where a Member State may choose to grant special rights to undertaking for environmental reasons, it can enhance the State's ability to influence the undertaking and may put the undertaking in a stronger market position than it would have without the right. These rights must fulfil four essential conditions: must be granted by Member States; must be granted to one undertaking or to limited number of undertakings; must affect the ability of other undertakings; and be granted otherwise than according to objective, proportional and non-discriminatory criteria.
Paragraph 2 from Article 106 TFEU provides an exception clause. It means that it's possible for undertaking to perform the tasks entrusted to it under economically acceptable conditions.

This article also tends to be applied with 102 TFEU, because the favoured undertaking can abuse a dominant position on the market by using those rights. An example for this comparison is the *Sydhavnens* case. The Municipality of Copenhagen granted exclusive rights to three undertakings because it was faced with serious environmental problem. As a consequence, the exclusive right had the effect to exclude undertakings that wanted to enter the market, such as Sydhavnens. The relevant market is the processing of the building waste within the Municipality of Copenhagen, ranks among the largest in Europe. Sydhavnens claimed there was a restriction of competition by granting those rights, and could not exporting building waste.

The last article from the TFEU which I have analysed is Article 107. I intend to examine how competition law reacts when legislation grants state aids for environmental purposes. Paragraph one from Article 107 TFEU defines aid as "any aid granted by a Member State or through State resources which distorts competition by favouring certain undertakings, and has an effect on trade between Member States that are incompatible with the internal market".

However, some State aid may in certain circumstances be necessary for the economy. Paragraph 2 and 3 set out criteria on which aid could be considered acceptable.
The *PreuessenElektra* case is a leading case regarding to State Aid in the question of involvement of State resources under the Article 107(1) of the TFEU. The Regional Court asked the European Court of Justice (ECJ) for preliminary reference questions on the compatibility of EU state aid law with German national law. The question was whether the obligation by German legislation on private electricity undertakings, which required German electricity to be purchased from local renewable energy sources at inflated prices, constitutes State aid within Article (1). In the end, the ECJ held that it falls outside the scope of Article 107(1) TFEU because it did not involve any State resources.

The central purpose of my thesis was to show the interplay between environmental and competition law within the European Union and the studied cases helped me answer to my research questions. I was looking for evidences by using more than thirty cases, whether protecting the environment has likely anti-competitive effects on the relevant market. Since companies are willing to adopt more “greening” production, processes will jeopardize their competitive position in the market. Although, protecting our environment is not just a European Union problem, it does often transcend national borders, and we have to face with this issue at global level. When environmental legislation is compared to other laws relatively new and it is not always gives the space that it needs. Measures taken by undertakings and by Member States or using environmental agreements by companies in order to improve environmental protection can stand in conflict with the strict interpretation of competition rules. All the examined cases in my thesis showed how the European Commission tried to solve this conflict between the two fundamental laws for the European Union. In some cases although the Commission has considered that the agreements were restrictive of the competition, it decided not to prohibit them. Furthermore, we come to the conclusion that, these days many firms started to consider the protection of our environment. This is the reason why the two laws come into conflict more often and in the past years the European Union’s case-law developed a reconciliation of both interests: the firms’ competitiveness and on the other hand the interest of protecting the environment.