NATUR VÅRDS VERKET

An integrated product policy in the EU

– some EC legal conditions

Report 5338 • December 2003

An integrated product policy in the EU

– some EC legal conditions

Annika Nilsson
Henrik Norinder
Katarina Olsson

Department of Law
Lund University

ORDERS

Order by telephone: +46 (0)8-505 933 40
Order by telefax: +46 (0)8-505 933 99
E-mail: natur@cm.se
Address: CM Gruppen
Box 110 93
SE-161 11 Bromma
Internet: www.naturvardsverket.se/bokhandeln

The Swedish Environmental
Protection Agency

Telephone: +46 (0)8-698 10 00 (switchboard)
Internet: www.naturvardsverket.se
Address: Naturvårdsverket
SE-106 48 Stockholm, Sweden

ISBN 91-620-5338-8.pdf
ISSN 0282-7298

Digital Publication

Translation: Gothia Translations AB

Foreword

To further develop the Integrated Product Policy, IPP, it is useful to illustrate the potential of current instruments to bring about change. Legal instruments can create clear rules for market actors and, as such, are an important driving force for environmental work by companies. As far as possible, a starting-point ought to be a common regulatory framework within the EU.

This report investigates and discusses the scope within Community law for measures to implement an Integrated Product Policy. The report thus seeks to uncover the possibilities and obstacles set by primary and secondary legislation to regulate the environmental impact of products through legislation from a life cycle perspective. The analysis covers the following areas of Community policy: the Internal Market, public procurement, environmental policy and competition policy.

The report was compiled by Annika Nilsson, Katarina Olsson and Henrik Norinder at the Department of Law, Lund University, as a research report on behalf of the Swedish Environmental Protection Agency. The authors have sole responsibility for the content of the report and it can therefore not be taken as the view of the Swedish Environmental Protection Agency.

Stockholm, November 2003
The Swedish Environmental Protection Agency

Table of contents

1. Introduction

1.1 Background and aims

The Commission of the European Communities has presented a Green Paper on Integrated Product Policy.[1] This has been discussed within Community institutions and with stakeholders.[2] A discussion on such a policy is also underway in Sweden.[3]

This report, prepared on behalf of the Swedish Environmental Protection Agency, seeks to investigate and discuss the extent of the scope within Community law for measures to implement an Integrated Product Policy. What scope is there within the EC Treaty and secondary legislation, and what obstacles do they pose when it comes to setting up and further developing the instruments that systematically and through different handling levels allow the environmental impact of products "from the cradle to the grave" to be taken into account and minimised in a so-called Integrated Product Policy? The report also aims to bring out some areas and issues where Sweden can act within the EC to support the development of such a Community policy.

1.2 What is an Integrated Product Policy?

A fundamental question in this context is what is meant by an Integrated Product Policy. According to the Commission's Green Paper, an Integrated Product Policy seeks to minimise the environmental impact throughout the life cycle of products, from the mining of raw materials to production, distribution, use and waste management. The environmental aspects have to be integrated into all the stages of a product's life. Such a policy can naturally be formulated more or less ambitiously, but it is a far-reaching project if the ambition is to be implemented in full. It is a matter of integrating environmental considerations with regard to:[4]

- the management of natural resources such as raw material reserves, energy and other material, as well as biological resources
- mining of raw materials
- transport of material, components and finished products

---

1 COM(2001) 68 final.

2 See, for example, Council Conclusions of 7 June 2001, Press Release 9116/01 and European Parliament Resolution of 17 January 2002. A summary of the party discussions can be found at http://europa.eu.int/comm/environment/ipp/2001developments.htm. The Commission has further developed its standpoint in a Communication to the Council and the European Parliament on 18 June 2003, COM(2003) 302 final.

3 See, *inter alia*, Government Communication 1999/2000:114 A Strategy for an Environmentally Sound Product Policy, and the Swedish Environmental Protection Agency's Reports 5043 Producenters ansvar för varors miljöpåverkan, and 5296 Towards greener products.

4 The description is intended to illustrate the complexity of the problem. It makes no claim to be scientific.

- product design (content of hazardous substances, energy consumption, etc.)
- production
- waste management

It is also about

- the effect on human health
- the effect on biological diversity
- the effect on air, water and land

with regard to

- short-term and dramatic effects
- long-term effects
- cumulative effects and synergy effects
- other diffuse and indirect effects

A successful policy must also take into account

- the intended function of the products
- technical options/alternatives to produce these functions
- economic aspects
- the possibility of comparing different alternatives and placing them in order of environmental performance with regard to all the relevant components above

In our opinion, an ambitious life cycle policy should seek to minimise the harmful effects of products on human health and the environment in the short and the long term. Big and close up risks obviously have to be counteracted, but so do long-term and diffuse risks too that do not necessarily have any clear outcomes in the relatively near future. It is also about remedying conditions that may indirectly lead to problems, and working strategically to minimise environmental risks by consistently substituting substances, products and techniques that have a negative impact on the environment with those that are less harmful.

Even if an ambitious environmental product policy objective is advocated, it is still advisable to take care when developing such a system. As far as we understand, experience of life cycle analyses shows that the result can vary greatly depending on the parameters, and the calculation and investigative methods used in the analysis. A "full" investigation of the collective environmental impact of a product is hardly possible. Some thought should therefore be given to the conditions to include in the system, and how different kinds of environmental impact are to be investigated or calculated. It is obviously important, as far as possible, to avoid steering the development from the public side in a direction that later turns out to be less suitable. The threats to the environment are such, however, that it is not justifiable to wait until "complete certainty" is reached before taking action. It can therefore be a wise policy to start with issues for which there is a fair degree of certainty that clear positive results can be achieved, as well as issues of

strategic importance to the implementation of a systematic life cycle perspective on the environmental impact of products. The system can be gradually extended and further developed.

A policy can be implemented (more or less effectively) using different kinds of measures. The Community recommends that the Integrated Product Policy be implemented largely through voluntary measures. In our opinion, this is an unfortunate restriction. Voluntariness is clearly preferable in all situations where acceptable results can be achieved in this way. It is a bit naïve, however, to assume that consumer influence and goodwill efforts by companies will automatically increase pressure on the supply and use of more environmentally friendly products. Environmental considerations can be *one* driving force for companies to develop their products and for consumers to decide to buy certain products, but there are many other elements too, such as economy and function. Investigations have shown that legislative measures are more likely to provide effective incentives for product development. With soft instruments, there is likely to be some supply of environmentally friendly products, but the volumes of these in relation to traditional products can in no way be guaranteed.[5] Moreover, many "soft" instruments require a legal framework in order to function satisfactorily. To draw up an effective strategy for an Integrated Product Policy requires a combination of different instruments. We have also interpreted our investigatory assignment to mean that it is *scope and obstacles to legislative measures* that are to be studied and discussed.

1.3 Detailed focus and scope of the investigation

The problem described above is extensive and could form an excellent basis for a bigger research programme. The starting-point is for environmental requirements for products to be set in such a way as to minimise environmental impact "from the cradle to the grave". This means that a full study would include all the handling levels from extraction of raw material to final destruction. It must also be taken into account that EC policy consists of a great many policy areas that start out largely from different objectives and strategies. The policy for the Internal Market and freedom of movement, the competition policy, the transport policy, the agricultural policy, the policy for international trade and other policy areas all affect the scope for environmental requirements in different respects. Although Article 6 of the EC Treaty now prescribes that environmental considerations should be integrated into all policy areas, this obviously does not mean that the central objectives for which these other policy areas work cease to be important. There is clearly a risk of contradiction between environmental policy, in the wide sense of an Integrated Product Policy, and policy in other areas. There must be solutions to balancing the interests of different policy areas, but these would require extensive analyses and development work.

---

[5] Emtairah *et al.*: Av vem skapas marknaden för miljöanpassade produkter? Background report for the Swedish Environmental Protection Agency, July 2002. The OECD recently concluded in a report that voluntary environmental agreements are seldom effective: Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes, published in June 2003 (http://www.oecd.org/document/9/0,2340,en_2649_201185_2789257_1_1_1_1,00.html).

Space is limited in this report, and the issues therefore have to be restricted significantly in relation to the above description of the problem. We have nonetheless chosen quite a broad demarcation to allow us to concentrate on important structural issues within the scope of the investigation.

The report thus focuses on the legal conditions to bring about an Integrated Product Policy. Financial and voluntary instruments essentially fall outside the study, but even with regard to these instruments, it is often necessary (eco-tax) or at least appropriate (environmental management systems, eco-labelling) to create legal frameworks to shape and implement the measures. In other words, legal measures can consist of binding measures as well as frameworks for measures of a more or less voluntary nature. Legal regulations aimed at objectives other than environmental protection can also be formulated to promote or obstruct an environmental product policy. These aspects are also illustrated.

To produce an Integrated Product Policy, it is necessary to find effective and suitable solutions to (at least) two types of problem. Firstly, methods (technical and for instruments) must be developed to implement a "from the cradle to the grave perspective" for the whole handling chain. Secondly, it is necessary to develop Community policy in different areas so it at least does not prevent, and preferably supports, such a perspective. In this investigation, we have chosen to make the following demarcations for handling levels and policy areas:

The policy areas we have chosen to focus on are the Internal Market including public procurement, environmental policy and competition policy. These areas are of central interest to the Community. They are also of central importance to a general discussion on the scope for structuring and implementing an Integrated Product Policy. The Treaty provisions for the Internal Market specify the framework for the way product design requirements can be set within the Community. Community policy for public procurement, which is an instrument for the Internal Market, is of enormous importance to the implementation of an Integrated Product Policy. Environmental policy is decisive to the way a life cycle perspective can be applied to the authorisation procedure and other measures aimed at the production level. It can also be important to the way products are designed from an environmental point of view. Finally, competition policy is of interest as it affects the scope for cooperation between companies, something that is specified in the official documents as a central instrument for the implementation of a Community product policy. Agricultural policy is also of great importance when it comes to an integrated policy for the product "foodstuffs", but this product category demands special investigation and considerations that are too extensive for this limited assignment. We have therefore chosen to leave this policy area out of the study.

The levels of the production chain that we have chosen for discussion are product design, production and waste management, the latter being limited to issues concerned with waste from a life cycle perspective. The use of the final product is only touched on briefly, as this discussion would be largely the same as that for the production level. We have chosen not to discuss extraction of raw material, as this issue is currently in the main a national matter. We have also chosen not to discuss transport issues. The ever-increasing volume of vehicle transport through Europe is, and will be, an enormous problem from the point of view of the environment and space. Heavy taxes or charges

could counteract the problem, but, at the same time, would be incompatible with one of the basic pillars of the Community, namely the free movement of goods. The solution to the problem may lie in the Community making a concerted effort to coordinate Europe's railway systems, together with effective measures to increase the use of this means of transport. Although the issue is important to the environmental impact of products, an effective solution to the problem needs to be looked for in a different direction to that given in our investigatory assignment.

It should be pointed out that the report has been prepared by three authors, each one being responsible for his/her part of the report. Annika Nilsson has written sections 2.1 - 2.3 (Introduction, The Internal Market and Environmental policy), 3.1- 3.3 (Product design, Production and Waste) and 4.1 - 4.4 (Introduction, Product design, Production and Waste).[6] Henrik Norinder is the author of sections 2.4, 3.4 and 4.5 (Public procurement).[7] Katarina Olsson is the author of sections 2.5, 3.5 and 4.6 (Competition policy).[8]

1.4 Outline

The investigation thus discusses product design and product requirements, production, and composition of waste. The areas discussed are the Internal Market, environmental policy, public procurement and competition policy. We have reflected on how the report should be organised with regard to these different areas. Public procurement is basically an instrument for the Internal Market and, as such, it would be more thematically correct to discuss this issue under a subheading in the section that discusses this. We found it more appropriate, however, to present the report so that the rules that regulate environmental concerns more generally, i.e. environmental requirements for products and the external environment, are discussed before the more specific instrument of procurement.

We have also considered whether the study should have a more out-and-out "product perspective", i.e. with the product and the environmental impact from a life cycle perspective at the centre, or if it is more productive to first identify and discuss important obstacles to an Integrated Product Policy from a more selective/points-oriented perspective, i.e. by focusing on special problem areas related to handling levels and policy. We mean to say that overall the perspectives are parallel. For a holistic view on how to minimise the environmental impact of products from a life cycle perspective, it is necessary to systematically clear away the obstacles.

Chapter 2 describes fundamental Community policy in the areas discussed by the study, starting with the EC Treaty. We analyse and discuss the scope and obstacles, in the

---

[6] Annika Nilsson is an Associate Professor in public law at the Faculty of Law, Lund University, and practises environmental law.

[7] Henrik Norinder is a university lecturer at the Department of Business Law, Ekonomihögskolan (School of Economics), Lund University and works in public procurement, community law and competition law.

[8] Katarina Olsson is an Associate Professor in civil law at the Faculty of Law in Lund and works in company law and competition law.

different policy areas, to setting environmental requirements for products, and how different Community interests are balanced against each other within the policy areas.

Chapter 3 outlines the secondary legislation for environmental requirements for products, production and waste that has been adopted within the different policy areas, and analyses and discusses the scope and obstacles within current secondary legislation for taking account of the environmental impact of products at different handling levels.

In Chapter 4, we finally bring out a few areas/issues where we feel it could be appropriate to focus efforts to introduce/develop an Integrated Product Policy. These are areas that we see as being of special strategic importance, and where we think there may be a better basis than other areas for a response from the Community for legislative measures and/or where we feel that the measures are both important and relatively simple to take.

2 Scope for and obstacles to an Integrated Product Policy within a few EU policy areas

2.1 Introduction

This chapter discusses the scope within the Community's overall policy for the Internal Market, environmental policy, public procurement and competition policy for implementing an Integrated Product Policy, and the obstacles posed by the different policy areas.

In the discussion on environmental law in EU contexts, the focus is usually on the Community rules that exist, what they really mean and, maybe above all, the scope for adopting and applying deviating national legislation. In the current context, the perspective is thus different: to what extent can the provisions of the EC Treaty be used to set environmental requirements *within* the Community framework, particularly with regard to setting up an Integrated Product Policy, and to what extent does the regulation of the different policy areas counteract such a policy? This issue does not appear to have been discussed at any length in doctrines, official sources or rulings. The EC Treaty and other available material do give some guidance however.

The starting-point for the discussion in this chapter is found in Article 2 of the EC Treaty. It is the task of the Community to promote harmonious, balanced and sustainable development of economic activities, a high level of employment, sustainable and non-inflationary growth, a high degree of competitiveness, a high level of environmental protection and to improve the quality of the environment and raise the standard of living and quality of life. These and other, in part quite disparate, objectives should be achieved through the setting up of a Common Market and an Economic and Monetary Union, and by carrying out the common policy or activity referred to in Articles 3 and 4. Articles 5 (the principles of subsidiarity and proportionality) and 6 (environmental concerns should be integrated into all areas of policy) are of general importance to the discussion.

Our task in the following sections is thus to illustrate the extent to which an Integrated Product Policy is compatible with the objectives of the current policy area, and the competence of Community institutions according to the EC Treaty to take action towards an Integrated Product Policy within the areas concerned. The competence of the Member States is also touched on to some extent.

Some of the discussion that follows deals with issues that are in themselves quite obvious to someone with basic knowledge of Community law. There is nonetheless reason to bring them up in order to give a full picture of the legal position in this context where the aim is to illustrate more systematically the support within the Community for an Integrated Product Policy and what this support entails with regard to ambition level and tools to implement the policy.

2.2 The Internal Market

This section discusses the issue of the scope for and obstacles to implementing an Integrated Product Policy within Community policy using legislation to establish and develop the Internal Market. In other words, it is a question of Community competence to adopt secondary legislation with product-related environmental requirements in accordance with Article 95.

The Internal Market is not presented as a goal in itself in Article 2 of the EC Treaty, but as a means to reach other goals, some of which are not economic. Despite this, it is clear that the organisation of an Internal Market is a priority issue for the Community. According to Article 3 of the Treaty, one of the aims of Community activity should be to remove obstacles to the functioning of the Internal Market, such as bans on quantitative restrictions on imports and exports and measures with equivalent effect, and other obstacles to the free movement of goods, persons, services and capital. The policy should also harmonise the legislation of Member States to the extent required by the function of the Common Market. Even if the Internal Market is assigned as a means and not as a goal in itself, it is clearly a central ambition to implement this "means" to as great an extent as possible. (Maybe the implementation of the Internal Market will automatically lead to the idea of the other goals also being realized.)

The introduction of an Integrated Product Policy with harmonised legislation ought not in itself be incompatible with this ambition. If all the Member States have common legislation, then there are no obstacles to the free movement of goods in this regard. Another issue, however, is the extent to which the Community is competent to implement such measures. There is no doubt that the Community is competent to take measures that *seek to remove obstacles to the functioning of the Internal Market* or to harmonise the legislation of Member States *to the extent required for the functioning of the Common Market*. In this context, it is not the Internal Market that is the main aim, but limiting the environmental impact of products from a life cycle perspective.

The requirements for the setting up and functioning of the Internal Market are of course essentially a question of interpretation. Secondary legislation can be adopted for an Integrated Product Policy, as long as there is consensus within Community institutions, including the European Court of Justice, that such rules are needed. It is clear that there is currently hardly any consensus on far-reaching and sweeping Community legislation with environmental requirements for products. If anything, the public documents carry an air of scepticism about the legislation. In the White Paper "Completing the Internal Market", the Commission points out that harmonisation is needed in some regards, but that a strategy based on complete harmonisation would mean inflexible over-regulation that could obstruct innovation. A strategy is needed that brings together the best of the methods of mutual recognition and harmonisation. One area in which harmonisation may be needed is that of basic health and environmental protection measures. According to the Commission, when harmonisation is a suitable alternative it

ought, however, in the future be carried out more through European standards than through detailed regulation in directives.[9]

According to Article 28 of the EC Treaty, there is a general ban within the Community on qualitative import restrictions for goods and for measures with the same effect. The Court of Justice has stated many times that a product that can be placed on the market in one Member State can also be freely imported to and placed on the market in the other Member States. The Council has also stated and emphasised a principle of mutual recognition.[10] Starting from these principles, it is not considered necessary for the setting up and functioning of the Internal Market to adopt harmonisation measures for every conceivable issue. After all, goods can, in principle, move freely between Member States. There are a few situations, however, where harmonisation measures according to Article 95 may be needed to promote the Internal Market.

The fact that there is, in principle, free movement of goods does not mean that the national rules in different Member States have to be the same. Many countries do in fact have similar requirements for the functions of goods and for health and the environment, but the rules that have been developed are often not the same. Products from different Member States therefore often differ in technical design and standard. This means that economies of scale cannot be used to rationalise industrial and trade development, with resources being allocated to where they are of greatest economic use. This is considered to counteract economic growth and increased employment, which are important priority issues for the EU.[11] In such situations, technical harmonisation can contribute to improving the functioning of the Internal Market. This motivation can almost certainly also be used in some cases to harmonise environmental requirements for products. The main aim of an Integrated Product Policy is not, however, to bring about complete harmonisation and the economies of scale that follow, but rather to create conditions for the individual adaptation of every product and activity in order to limit environmental impact from a life cycle perspective.

Other situations in which harmonisation may be needed to bring about or improve the Internal Market are those where national measures that obstruct trade between Member States can be justified in accordance with Article 30 of the EC Treaty or in accordance with the "*rule of reason*".[12] The driving force behind harmonisation rules in the environmental field is often just a few Member States having or intending to introduce rules that can have a restrictive effect on trade. This is probably also a reason behind many measures for an Integrated Product Policy.[13] For a national measure to be permissible on these grounds, it has to start out with a real environmental protection aim and be appropriate, proportional and the least restrictive measure that can reasonably achieve the aim. There is not enough space here to get to the bottom of this discussion on the scope for national rules. Such a national legislative measure would probably be accepted if there were a serious problem for which there was no Community regulation. It

---

[9] White Paper from the Commission: Completing the Internal market COM (85) 310 final.

[10] See, for example, Council Resolution of 28 October 1999 on mutual recognition, 2000/C 141/05.

[11] COM(85) 310, Council Resolution of 7 December 1992 on making the Single Market work, 1992/C 334/01.

[12] Kapteyn p. 777, Jans p. 13.

[13] Schliessner p. 86.

is doubtful, however, whether a national measure aimed at limiting the long-term and diffuse environmental impact of a product would be accepted by the European Court of Justice if it had an injurious effect on trade or conflicted with other Community rules. The Court of Justice would probably not question the national ambition level of environmental protection.[14] It is likely, however, that the Court of Justice would consider a measure that seeks to limit environmental impact, and for which the effect of the measure cannot be safely assessed or where the effect that can be shown is small, not to be appropriate or proportional. Article 30 and the "rule of reason" are thus only of limited use as a basis for a national Integrated Product Policy that leads to restrictions on trade with other Member States.

In our opinion, Community competence to introduce an Integrated Product Policy in accordance with Article 95 is limited to measures that are needed for the setting up and functioning of the Internal Market. This would thus include those issues for which Member States already have similar rules that need to be coordinated, and issues for which the environmental benefit of a regulation is clear enough for a Member State to be entitled to reject a product in accordance with the "*rule of reason*". As mentioned before, it was stressed already in the Commission's White Paper from 1985 that some restraint should be observed with regard to legislative measures.

Arguments from 1985 may not be as important today as they once were. After all, environmental concerns carry a completely different weight today. Nowadays, environmental protection and improving environmental quality are important objectives for the Community. To what extent does this affect the scope of using harmonisation of Member State legislation as an active, strategic instrument of environmental policy?

The importance of environmental concerns according to Article 95, which forms the basis for most harmonisation provisions in the environmental field, has been clarified and gradually developed in the Treaty amendments of recent years. Commission proposals on health, safety and environment and consumer protection should start from a high level of protection. The European Parliament and the Council should also strive to achieve this objective. This provision does not state that the Commission should, even if it could, present the proposals on, for example, environment *that are needed to establish a high level of ambition* in the environmental field. It says only that when the Commission considers harmonisation measures *to be needed for the setting up and functioning of the Internal Market* the proposals should start from a high level of protection. In our opinion, a correct interpretation of Article 95 does not give scope for measures that *aim* for an ambitious, progressive environmental law at Community level. Community competence according to Article 95 is still limited to taking measures when the aim is to remove obstacles to the Internal Market.

This leads on to a few resulting questions. The question of whether there is scope, and if so how much, within *environmental policy* to decide on harmonisation of product requirements is discussed in the next section. Another important question is: "What does Article 6 of the EC Treaty mean in the context?" According to this, environmental considerations should be integrated into all areas of Community policy. The provision has

[14] See the Case on Danish Bottles, 302/86 Commission v. Denmark REG 1988 p. 4607, p. 4611 and fol. p. and the discussion in Nilsson 1997 p. 306 and fol. pp.

its origins in the Single European Act 1987 and got its current formulation and place through the Amsterdam Treaty of 1998. In addition to this, Article 5 is also important to the Community's competence to act. It prescribes principles of subsidiarity and proportionality that can restrict the scope for legislative measures at Community level. The most important question, however, may be how Community institutions interpret and use the different grounds of the Treaty in practice to support different kinds of environmental protection measures. Interpretation is not a mathematical calculation that starts with objective values, but a process that takes a number of different considerations into account. Political will should not be underestimated as an interpretation factor.

According to Article 5 para. 3 of the EC Treaty, Community competence is limited to prevent Community institutions taking measures that go beyond what is necessary to meet the objective of the Treaty. The role of the principles of subsidiarity and proportionality in Community law is not absolutely clear. The few decisions that the European Court of Justice has taken based on the Article do not give the impression that the Court would be keen to reject decisions by Community institutions on this basis.[15] According to Pagh, the importance of the principle of subsidiarity in limiting Community competence is quiet weak, almost curious.[16] It should be indisputable, however, that the principles have *some* importance to Community competence.

According to the principle of subsidiarity, the Community shall only take measures if the objectives of the planned measure cannot be reached to a sufficient extent by the Member States and are therefore better achieved at Community level. Both of these aspects shall be met for the Community to be competent to act in, for example, the environmental field. The guidelines for deciding whether the conditions have been met should be to assess whether the issue has transnational aspects that cannot be regulated satisfactorily at national level, whether measures or the lack of them at national level would be incompatible with the requirements of the Treaty and whether a measure at Community level would involve clear efficiency benefits.[17] Issues concerning products are generally of a transnational nature as they can move across borders. The Community is thus competent to act in the area. Every individual measure has to be justifiable based on the criteria. When deciding how a product policy that takes account of life cycle aspects is to be implemented, every measure thus has to be motivated based on the principle of subsidiarity.

The third paragraph of Article 5 expresses a principle of proportionality. This is probably more important to Community competence than the principle of subsidiarity. Measures at Community level should be *necessary* to achieve the objective of the Treaty. This is interpreted to mean that Community measures should be formulated in a way that gives as much scope as possible for Member States to act nationally. National judicial systems should be respected. Legislation at Community level should only be used if it is necessary. Minimum common rules are preferable, directives are better than regulations, framework directives are better than detailed regulations, and recommendations and other

[15] See, *inter alia*, discussions in Craig & De Burca p. 132 and fol. pp., Kapteyn p. 135 and fol. pp., Jans p. 11 and fol. pp., Rasmussen p. 269 and fol. pp., Emiliou and Jans, p. 14.

[16] Pagh p. 99.

[17] Amsterdam Protocol on Subsidiarity and Proportionality, EUT 1997 C 340 p. 105.

non-binding measures should be used where possible.[18] This, in itself quite vague, provision clearly limits Community competence to take legislative measures.

Naturally, it must follow from Article 6 that environmental considerations carry greater weight than before in the different areas of Community policy. This can hardly mean, however, that environmental objectives should be *superior* to other objectives. Furthermore, the ambition to integrate environmental considerations cannot mean that Community competence has broadened so that harmonisation of legislation can now also take place under conditions other than those that are stated in Article 95 and which are compatible with Article 5. Jans has stated that Article 6 intends to ensure that environmental protection aspects are at least *taken into consideration* in other policy areas.[19] He points out that the policies in the different areas have more than one aim. An aim can (temporarily) be prioritised as long as the policy is not so one-sided as to counteract the other aims. This can also apply to environmental protection considerations. According to Jans, if an agricultural objective, for example, can be reached in different ways, a reasonable argument is, at the very least, to choose the one that does the minimum harm to the environment.[20]

The Commission lays down in a number of documents that the Internal Market should not only ensure good economic development but also secure a high level of health and safety, and environmental protection.[21] The Economic and Social Committee has stated that environmental protection and fulfilment of the Internal Market carry the same weight at Community level and that both principles ought to promote harmonious and well-balanced development of industry as well as sustainable growth in accordance with Article 2 of the EC Treaty.[22] Such general statements can naturally be interpreted to mean that the Community has a high profile on environmental issues, but the most important issue still remains to be answered: how to act when, despite everything, the objectives are not completely compatible and there is a choice of whether to satisfy the growth objective or the environmental objective.

In the so-called Cardiff Process, the Community drafts integration strategies for each area in order to implement the principle of integration of environmental concerns. With regard to the Internal Market, an updated strategy was adopted in November 2002 and it includes the following:[23] such a strategy has to be based on a balance between free movement and environmental protection. The strategy should be carried out with the help of the effective implementation of Community legislation and adequate framework regulation, notification of proposals for new legislation in Member States, the principle of mutual recognition, Articles 28-30 of the EC Treaty, standardisation, an Integrated Product Policy, a chemicals strategy, public procurement, eco-labelling, measures to raise

[18] Amsterdam Protocol on Subsidiarity and Proportionality.
[19] Jans p. 18.
[20] Jans p. 19.
[21] See, for example, Action plan for the single market, CSE(97) 1 final p. 2 and The Internal Market Strategy COM(1999) 624 final p. 3.
[22] Opinion of the Economic and Social Committee on the Action Plan for the Single Market, 98/C 19/26, 9 September 1998.
[23] http://europa.eu.int/comm/environment/integration/cardiff_status.pdf.

levels of knowledge, taxes, State aid, environmental agreements and market-based instruments.

The statement that the integration process has to take place by "balancing environmental protection needs with free movement" is unclear. If the integration strategy were to be implemented through completely harmonised legislation, there would be no barriers to freedom of movement however ambitious the legislation. Presumably, the real intention is for the other Community interests, for which the Internal Market should constitute an implementation instrument, i.e. development of industry, sustainable growth, high employment, etc., to be balanced against the environmental protection requirements.

Another point that is unclear is the meaning of "environmental protection requirements". Does this refer to long-term environmentally strategic work or primarily to safety aspects, e.g. protection for human health with regard to more direct damage? In other contexts, the Community's view on what constitutes an environmental problem appears to be limited to "safe" and quite serious environmental consequences. Even in the current context, it can look as if acute, drastic environmental and health consequences carry greater weight when they are taken into account than the long-term, diffuse disturbances that are counteracted through an Integrated Product Policy.

Legislative measures in the form of framework rules are obviously a possible way of integrating environmental considerations into Community policy. Like many other situations, the Cardiff Process stresses primarily the need for improved implementation of existing Community law. Otherwise, it stresses different types of instruments, just as other situations do. In other words, it is far from obvious that environmental protection considerations are to be integrated into other policy areas through new Community legislation.

The Cardiff Process mentions an Integrated Product Policy specifically as a method of integrating environmental considerations into the Internal Market. What such a policy means and how it should be implemented has to be found in other documents however. The same applies to the Chemicals Strategy, which, after all, ought to form an important complement/contribution to the Integrated Product Policy.

The Commission has presented a Green Paper with a strategy for an Integrated Product Policy.[24] With regard to the scope and focus of the strategy, the policy is said to seek to minimise the environmental impact of products throughout their life cycle, from the mining of raw materials to production, distribution, use and waste management. It should focus primarily on the phases of the life cycle that are decisive to the environmental impact of products during the life cycle. This document does not define the ambition level of the environmental protection requirement in any more detail than that the aim is to find ecologically valuable solutions for the environment and for the development of industry.[25] It is thus not clear to what extent the environment is considered to need protecting, nor what happens when the two objectives are incompatible. The measures proposed in the Green Paper are hardly suited to bringing about an Integrated Product Policy that covers long-term and other more uncertain effects however.[26]

---

[24] Green Paper on Integrated Product Policy, COM (2001) 68 final.

[25] COM (2001) 68 final p. 3.

[26] See also Schliessner p. 87.

The strategy places the main responsibility for the development of more environmentally friendly products on companies and consumers. The ambition is to involve the Stakeholders – companies, consumers and non-Government organisations – in an active process to achieve a more life-cycle oriented product policy. In relation to the aim of this investigation – to investigate the scope for Community legislation on this issue – it can be established that the strategy is primarily intended to be based on market forces and "soft" instruments. The hope is expressed that companies will choose to develop more environmentally friendly products on their own initiative, in part due to consumer pressure. Good examples should be brought to the fore and there should be investment in research and development. The environmental cost of the product, also at later handling levels, should be integrated into the new product price. Information to consumers is stressed as an important instrument. Guidelines for eco-design can be produced. According to the Commission, the Integrated Product Policy is not aimed primarily at creating new legislation, though this possibility should still be part of the set of instruments that can be applied as required. It may, for example, be a question of creating legal frameworks for voluntary undertakings such as eco-labelling, the New Approach legislation, legislation in areas where voluntary initiatives do not lead to the desired results or where legal security is required to avoid distortion of competition and the integration of more holistic and life-cycle oriented elements into other types of legislation.

Parliament has criticised the Commission's strategy proposal for an Integrated Product Policy, in particular because the proposal has not been worked through sufficiently. Parliament stresses legislative measures slightly more positively than is expressed in the Green Paper. One of the things pointed out by Parliament is that the Policy should supplement existing legal instruments and not be used to replace or weaken Community legislation. Further legislative measures should be taken with regard to producer responsibility, and New Approach legislation should be evaluated critically. A certain reluctance for new legislation is also discernible in this document: Parliament stresses that in the main, existing Community legislation ought to be used and that new instruments should only be introduced when there are gaps in the rules.[27]

In the later Commission Communication on an Integrated Product Policy, the Commission again stresses that the strategy should, if possible, be implemented using market-based solutions. The types of measures discussed are also largely of such a kind. The Commission still leaves an opening for legislative measures however, particularly if there is a risk of the Internal Market being distorted without intervention at EU level.[28]

The Commission has presented a White Paper that lays down a strategy for a future chemicals policy.[29] In some regards, the Strategy must be said to formulate quite radical measures for change. All substances, not just "new" ones, are proposed as objects of more extensive control and evaluation. A timetable will be laid down for the way this is to be implemented. It proposes that substances that raise particular concerns should become objects of an approvals procedure that only allows uses that can be deemed to carry a

[27] European Parliament Resolution of 17 January 2002 on the Commission's Green Paper on Integrated Product Policy.

[28] COM(2003) 302 final.

[29] COM(2001) 88 final.

"negligible risk". An important objective is also said to be the promotion of the substitution of dangerous chemicals with those that are less dangerous. Greater responsibility is placed on manufacturers and importers to produce and evaluate data, assess risks and convey information. Information to the public should be improved through a database with information about hazardous substances. While the intention is to extend the system with investigations and assessments of risks, and for classification and labelling to apply to all substances, there are indications of restrictions to the Community classification system to only cover the "most important" hazardous properties such as carcinogenic, mutagen and reproduction-toxic effects. This is motivated by the very large number of existing substances that would need to be investigated and classified and it therefore not being possible to conduct a full investigation at Community level. Furthermore, the Commission feels that the existing labelling provisions should be simplified. How other risks, such as those to, for example, the environment, are to be addressed is not clear from the Strategy. Substances should be tested with regard to their physiological-chemical, toxicological and eco-toxicological properties, but should risks in these regards no longer form the basis for classification and labelling at Community level? If this has been understood correctly, the Strategy for a Future Chemicals Policy is a backward step in important respects from the perspective of an Integrated Product Policy, especially with regard to the fact that the Commission stresses the need for information in other contexts.

In spring 2003, the work on the new Strategy resulted in a legislative proposal by the Commission. It will be discussed in the next chapter, which deals with secondary legislation.

2.3 Environmental policy

This section discussed the scope for the Community to adopt environmental law that takes into account the environmental impact of products from a life cycle perspective. Two main issues are discussed:

- What is the scope for Community legislation within the "traditional" environmental field to establish an Integrated Product Policy?
- Is there scope for environmental product requirements through legislation, and if so what, with the *aim of achieving the environmental objectives* in accordance with Article 175, i.e. beyond what is necessary for the Internal Market in accordance with Article 95?

According to Article 2 of the EC Treaty, one of the aims of EU policy is to promote a high level of environmental protection and improve the quality of the environment. To achieve this, the Community should, according to Article 3k, have an environmental policy. The objectives to be achieved through the environmental policy are described in more detail in Article 174. They include preserving, protecting and improving the environment. According to Jans, this broad formulation indicates that the Community is competent to take all possible types of measures with, for example, a preventative,

reparative or repressive aim.[30] Furthermore, human health should be protected, and natural resources used rationally and with care. The EU should work internationally to solve regional and global problems. Policy should be based on the precautionary principle and the principle that preventative measures should be taken, environmental damage prevented at source and that the polluter should pay. These objectives and starting-points are developed and defined in a large number of official documents and acts of secondary legislation.

These objectives and principles should thus form the basis of environmental policy and thereby also of environmental law. The overall principles obviously do not have any *direct* legal importance, but, as Pagh points out, ought to be able to form the basis of arguments for interpretation and application of Community law.[31] The question is how they should be interpreted.

With regard to the principle that preventative action should be taken, the earliest legislation was probably aimed at installing purification technology to *limit* emissions, as a better alternative to trying to repair or counteract damage afterwards.[32] The bases for more strategic thinking already exist in early directives; the best technology should be used for emissions to air and water,[33] and there are early directives that formulate product-related requirements to limit emissions.[34]

The principle that environmental damage should as a priority be rectified at source has been discussed in connection with a number of Court judgements concerned with waste.[35] The European Court of Justice has interpreted the principle so that binding consideration for environmental protection motivates exceptions to the free movement of waste for final treatment and that the principle leads to waste finally being treated as near the place where it is produced as possible.[36] The principle cannot be applied in this way when it comes to recycling waste, however.[37] This geographic meaning of the principle could not have been the main one that was intended. Jans points out that the principle means that "end-of-pipe" technology[38] should not be enough initially, but instead cleaner production technology and other ways of limiting the disturbances as early on as possible should be developed.

The principles on preventative action and environmental damage rectified at source are essentially closely linked. Even the First Community Environment Action Programme

---

[30] Jans p. 26.

[31] Pagh pp. 50-55, p. 58.

[32] See, for example, Council Directive 76/464/EEC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, and Council Directive 84/360/EEC on the combating of air pollution from industrial plants.

[33] Directive 84/360/EEC Article 4 p. 1, Directive 76/464/EEC Article 6 p. 1 last sentence.

[34] See, for example, Council Directive 70/220/EEC on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles.

[35] C-2/90 Commission v. Belgium REG 1992 p. I-4431, C-155/91 Commission v. Council REG 1993 p. I-939. Jans p. 37, Kapteyn & van Temaat p. 1089, Pagh p. 53.

[36] 155/91 p. 13.

[37] C-203/96 Chemische Afvalstoffen Dusseldorp BV and Others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer REG 1998 p. I-4075 and C-209/98 Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune REG 2000 p. I-3743.

[38] Jans p. 36.

laid down that environmental impacts should be taken into account as early as possible during all technical planning and decision processes, and that pollution and other disturbances should be prevented.[39] The principles have gained a broader content as environmental law has developed. They were further emphasised in the Fourth and the Fifth Programmes. The aim of the Fourth Programme is effective, coordinated preventative measures to prevent pollution from being transferred from, for example, air to water. The Fifth Programme is aimed directly at measures for those activities that use up natural resources and damage the environment instead of waiting until the problems arise.[40]

A product policy that focuses on the whole life cycle of the product is based on the same basic principle as the principles on preventative action and environmental damage being rectified at source, and can be seen as a natural further development of these. A broad spectrum of measures can be used to implement the principles – that is to say, there is scope to integrate life cycle thinking into environmental law. In other words, in principle, an Integrated Product Policy could be implemented within Community environmental policy. Even if it is established that the Community is competent to act, the issue remains in this field of how far-reaching this competence is with regard to the ambition to protect the environment, and which measures the Community can and ought to use to carry out the ambition.

Article 5 of the EC Treaty also involves restrictions with regard to environmental policy. Issues concerned with pollution are often of a transnational nature. The Community is thus competent to act in this area. As discussed earlier, the Community should not, however, take measures beyond what is necessary to meet the objectives of the Treaty. It is thus necessary to consider what the Community's environmental objectives are. According to Article 174 p. 2, environmental protection measures should aim for a high level of protection, but, as Jans points out,[41] a high level of protection is not the same thing as the highest possible level of protection. According to Article 174, the advantages and costs of the measures, and the economic and social development should be taken into account. Here too, some form of balance should be reached between the different interests. Another important issue in this context is how the Community interprets the protection requirement. To what extent does the environment need to be protected against persistent substances that cannot be shown to be toxic? To what extent does the environment need to be protected against the diffuse spread of substances that cannot be shown to have harmful effects in the doses found in nature today? EC environmental law can hardly be assumed to seek to prevent or ban all environmental impact, but only such as the Community sees as serious from a Community perspective.[42] Further support for some restraint at Community level is that Member States may adopt national provisions that are stricter than the Community provisions, provided they

[39] Johnsson p. 14 and fol. p., Mahmoudi p. 38.

[40] Mahmoudi p. 41 and fol. pp. See Johnsson Chapt. 2 for a more detailed report on the development of the Community Environment Action Programme.

[41] Jans p. 32.

[42] See, for example, Council Resolution of 7 October 1997 on the drafting, implementation and enforcement of Community environmental law: "the Community, whilst further developing legislation to address major environmental problems".

otherwise comply with the Treaty. According to Mahmoudi,[43] this fact has led to the general view that acts adopted according to Article 175 should offer a moderate level of protection that is acceptable, overall, to all Member States.[44] The Community measures required for an environmental standard that corresponds to the "basic requirements" of the Treaty are adopted at Community level. In addition to this, the Member States themselves may choose whether they want to have a higher level of environmental protection – provided that the national provisions are not contrary to other Community objectives. The principle of proportionality in Article 5 para. 3 of the Treaty is naturally also important when it comes to the choice of measures within environmental policy. The legislative instrument should only be used if the aim cannot be achieved with less interventionist measures.

The issue is therefore one of how far it is possible to introduce an Integrated Product Policy through legislation at Community level within environmental policy. The scope is limited by Articles 5, 174 and 176, and others. It is not clear how the rules of law should be interpreted however. Different results can be arrived at depending on the interpretation principles applied. It has been stated, for example, that when the Community has explained, through an action programme, its view on the need for legal measures to be taken within a certain area, it is no longer necessary to provide further proof of the need for Community measures.[45] The fact that a strategy for an Integrated Product Policy is needed at Community level would, based on these arguments, win support through the Commission's Green Paper and Parliament's call to draft a more carefully prepared proposal. To what extent do Community institutions think it is possible or appropriate to take legislative measures for an Integrated Product Policy? The principle of proportionality manifests itself in different policy documents of importance to the environmental issue.

The Commission has formulated a strategy for economically, socially and environmentally sustainable development.[46] The document therefore also deals with issues other than those directly concerned with the environment. Many of the issues focused on are nonetheless of direct or indirect importance to an Integrated Product Policy, e.g. the climate issue, long-term harmful effects from dangerous chemicals in everyday use, the threat to biological diversity, increased quantities of waste and soil degradation. The Commission states that many of the threats to the environment have their bases in earlier decisions on production technology, land use and investment in infrastructure. Strong political involvement is required to turn the development around. Policy changes have to take place in a fair and balanced way, though narrow sectorial interests must not be given precedence over the well being of society as a whole. The Commission states that the policy for economically, socially and environmentally sustainable development has so far developed with insufficient coordination between

---

[43] Mahmoudi note 166 p. 116.

[44] Compare pt. 3 in the introduction to Directive 97/11 on amendment to Directive 85/337/EEC: Whereas the main principles of the assessment of the environmental effects should be harmonized and whereas the Member States may lay down stricter rules to protect the environment.

[45] Mahmoudi p. 38 with references.

[46] COM (2001)264 final A Sustainable Development for a Better World: A European Union Strategy for Sustainable Development.

different policy areas. The lack of a long-term perspective in the policy leads to too much focus being placed on short-term gains and too little attention being paid to solutions that lead to better social progress in the long term. The Commission further states that sustainable development has to become a central objective of all sectors and policy areas. Policy in one area must take account of the effects the policy in its sector has on other areas. Careful assessments of the full impact of a proposal must include the economic, environmental and social consequences inside and outside the EU. The Commission further states that the Community's working methods have to change in order to successfully integrate economically, socially and environmentally sustainable development into Community policy.

With regard to the ambition level for environmental protection, the document lends some support to the taking into account of long-term environmental aspects, and to the need for environmental protection to really be allowed to take precedence if the opposing interests are narrow enough. It is still a question of balancing different interests however. Employment and strong companies are naturally important conditions of sustainable development. The question of how long-term environmental concerns are to stand up when they are set against job losses and less favourable economic development from a short-term perspective is not discussed in this document. When it comes to choosing measures to implement the ambition, the Commission proposes mainly different types of market-based measures. Many of these can – and ought – to be established through a legal framework, but legislative measures are mentioned as a principal measure only when it comes to implementing the Community's Chemicals Strategy.

The document only expresses support for an Integrated Product Policy in connection with the management of natural resources. The Commission intends to develop such a policy in cooperation with the companies to reduce the use of resources and the environmental problems of waste. The content and ambition level of this policy do not emerge from this document.

The Sixth Community Environment Action Programme sets a further more ambitious tone for Community environmental policy.[47] Development should be promoted that leads to a clean and healthy environment with clean air and water, where technology and products do not pollute the environment and do not lead to global warming, and where biological diversity is protected. Some of the issues given special attention in the Action Programme are counteracting climate change, protecting biological diversity, environment and health, sustainable use of natural resources, and sustainable waste management. The Action Programme only directly supports an Integrated Product Policy on certain issues, but can contribute suitable measures for implementing the objectives of the Action Programme even if this is not specifically mentioned.

With regard to climate change, the Community wants to take measures to promote energy efficiency, energy saving and the use of renewable sources of energy and raw material. Climate objectives should be integrated into transport policy. The information to the public and industry on climate change and the consequences thereof should be improved. There is support here for an Integrated Product Policy with regard to energy

[47] Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme.

efficiency, consumption of material, limiting pollution and, not least, information measures.

To protect biological diversity, the Community wants to improve the implementation and management of the territorial protection set up within Natura 2000. Community legislation is needed to protect water quality and water supplies, air pollution and other disturbances. The need for important natural areas to be protected is stressed. An Integrated Product Policy can offer further developed protection for biological diversity, e.g. by taking the environmental impact of the mining of raw materials and of production into account at a later level, and attaching greater importance during product design and production to the direct and indirect effect of pollution on the quality of important habitats.

With regard to the environment and health, the overall objective is to achieve an environmental quality that means that levels of pollution do not have any significant effect on or risks to human health. The ambition level for the issues discussed under this point thus seems to be limited mainly to protecting human health, though polluting the environment can indirectly affect human health. When looking at specific issues, such as developing investigations and risk assessments for chemicals, user information, pesticides, water quality and air pollution, the agenda also includes limits on environmental impact. Such issues ought to have an obvious space within an Integrated Product Policy.

The objectives of the Action Programme, with regard to natural resources and waste management, are to restrict resource use and its effects so they do not exceed what nature can cope with, and to use resources more efficiently and prevent waste from being produced. This should happen by, *inter alia*, incorporating the waste objective into the Integrated Product Policy.

The Action Programme stresses the environmental objectives and describes the desired achievements within the different areas from this perspective. Here too, it is stressed, though to a lesser extent than in many other documents, that the environmental objectives have to be balanced against financial and social interests.

A strategy with a broad spectrum of measures has been formulated to implement the objectives. As in other contexts, soft instruments are stressed ahead of more binding measures. When it comes to legislative measures, the emphasis is primarily on improving the implementation of existing environmental law. Otherwise, it states principally that environmental objectives should be achieved through integrating the environmental protection requirements into policy in the areas concerned, increased cooperation with the market, greater influence by the public, changed behaviour patterns and more environmentally friendly physical planning and land use. The Integrated Product Policy is discussed explicitly under the heading "Working in Partnership with Business".[48] The environmental characteristics of the product throughout its life cycle should be improved by, *inter alia*, developing economic incentives for more environmentally friendly products, promoting green demand through improved information to consumers, developing the principles of public procurement, and promoting more environmentally friendly product design, e.g. through voluntary undertakings by companies. If required,

[48] Strategy p. 16 and fol. p.

these measures can be supplemented with standardisation and legislation, but it is clear that the intention is for the strategy to be implemented firstly through other means. One issue that the Commission stresses is the need for information so that consumers can make their "green" choices. The Commission will "look at options to ensure that companies provide the necessary information".[49] Eco-labelling programmes should be promoted, as should information on the content of hazardous substances and whether the product can be recycled. The importance of the Århus Convention to the supply of environmental information is stressed.

To sum up, the Sixth Community Environment Action Programme does in itself support an Integrated Product Policy, but it can hardly be said to offer support for extensive new legislative measures in order to achieve this objective. As in the Commission's Green Paper on Integrated Product Policy, it states that the policy should primarily be implemented using market-based and soft instruments.

The previous section discussed Community policy with regard to the integration of environmental considerations into the policy for the Internal Market. We established that the interest in "limiting the environmental impact of products" can result in environmental requirements for products according to Article 95 only if this is motivated with regard to the needs of the Internal Market. The question is whether it is possible to get around this limitation by instead adopting legislation in accordance with Article 175.

It is clear that there is scope within environmental policy for measures that are more or less directly related to products. On a few occasions, the European Court of Justice has had to decide on the legal basis of different directives that deal with environmental issues and which affect the Internal Market or some other area of policy. The Court has established, for example, that Directive 91/156/EEC on waste does affect the functioning of the Internal Market, but that the aim of the Directive is not to implement free movement of waste but to implement the principle that environmental damage should as a priority be rectified at source.[50] With regard to Regulation No 259/93 on the supervision and control of shipment waste within, into and out of the European Community, the Court has said that this too lies within the scope of Community environmental policy and cannot be considered to be aimed at implementing free movement of waste.[51] Furthermore, the Court has also judged the legal basis for direct product requirements in Regulation No 3954/87 on the maximum permitted levels of radioactive contamination of foodstuffs and feeding stuffs. The Regulation prohibits the sale of foodstuffs and animal feed that contain levels of radioactivity that are higher than those specified as permitted. According to the Court of Justice, as the aim of the Regulation is to protect the population from foodstuffs and animal feed contaminated with radioactivity, it could be adopted on the basis of Article 31 of the Euratom Treaty. The fact that it also covers a prohibition on the sale of products that do not adhere to the maximum residue limit values does not mean that it also has to be based on (the then) Article 100a of the EEC Treaty. As this prohibition is only a condition for the maximum residue limits to be applied effectively, a

[49] Programme p. 18.
[50] C-155/91 Commission v. Council REG 1993 p. I-939.
[51] C-187/93 European Parliament v. Council of the European Union REG 1994 p. I-2857.

harmonisation of the conditions for the free movement of goods is only a side effect of the Regulation.[52]

The Court of Justice appears to take the principal aim as given for the act as the starting-point for the assessment.[53] If the aim is to bring about environmental protection, then Article 175 provides the right basis, even if the act can also affect the functioning of the Internal Market.[54] It thus ought to be possible, to some extent at least, to adopt product-related provisions in accordance with Article 175 if they are designed carefully with environmental protection as the starting point. Exactly how great the scope is cannot be determined in the light of the scant material that deals with the issue. There may be reason to investigate this further in the practical work.

According to Article 174 p. 2, environmental protection measures should now aim for a high protection level, but there are still other concerns to take into account. Even if the Community can set environmental product requirements in accordance with Article 175, the protective measures should, as discussed above, still be balanced against economic and other considerations. There is reason to interpret Articles 5 and 176 so that Community competence in the environmental field is limited to a "base requirement" for environmental protection. The principle of proportionality means that legislation should only be used when less interventionist measures are insufficient. Exactly *what* the practical outcome will be of an interpretation of these provisions naturally depends on the political consensus that can be reached on the need for measures at Community level. It cannot be ignored, however, that the Treaty in itself places certain limitations on the Community's ability to act.

2.4 Public procurement

The aim of this section is to briefly present the regulations that affect public procurement within the EU. Legislation on public procurement is one of the many elements of the project for a European Internal Market that covers the four strategic objectives (especially free movement of goods, persons and services).

The procurement policy should contribute to implementing the Internal Market by creating the necessary competition for public contracts to be awarded in a non-discriminatory manner and for a public means to be used rationally by only accepting the best tender.

The application of these principles should lead to public purchasers getting the best value for money by following certain rules on how the subject-matter of the contract should be defined, how tenderers should be selected based on objective requirements and for awarding contracts based only on the price or alternatively a set of objective criteria.

The regulatory framework on public procurement is not discussed within the competition rules of the EC Treaty but has a close factual link to this area. The EC Treaty

[52] C-70/88 European Parliament v. Council REG 1990 p. I-2041.

[53] See also the later cases C-164/97 and C-165/97 European Parliament v. Council of the European Union, REG 1999 p. I-1139 and Opinion of the Court of Justice 2/00, REG 2001 p. I-9713.

[54] Mahmoudi p. 115 and fol. pp.

lacks special rules for public procurement. Discrimination against a company in another EU State for reasons of nationality is in contravention of the basic principles of the Treaty (including the prohibition of discrimination in Article 12.1) and is affected by the prohibition in Article 28 against measures with the equivalent effect with regard to goods and the rules for services. It was nonetheless difficult to break the ingrained pattern within the EU of favouring domestic companies when carrying out public work.

One case in which the Commission brought an action against Ireland is illuminating.[55] A municipal water works in Dundalk had stated in its requirements specification for a construction project that the cement pipes used had to meet a certain specified Irish quality standard. Spanish-made pipes were not considered to meet this standard even though they were essentially equivalent. The European Court of Justice found the standard requirement to contravene Article 28 of the EC Treaty, as it was not considered to be motivated by objective quality considerations.

The Council has built up an extensive regulatory framework for public procurement through directives based on Article 95 of the EC Treaty with the aim of ensuring that large procurement is carried out in forms that ensure open competition in which companies throughout the EU can take part on equal terms and not risk irrelevant considerations. The directives standardise, for example, the procurement procedure for large orders, in terms of both invitations for tenders and the assessment of tenders.

The directives are detailed. The rules are based in part on one international agreement (GPA) entered into within the frame of WTO. There are a few common main principles intended to counteract discrimination. To these can be counted the requirement for "transparency", i.e. companies in other EU States should be able to find out about current tender procedures including through publication in the TED (Tenders Electronic Daily). Contracting entities that invite tenders may not bring about discriminatory effects through technical requirement specifications and should apply objective, businesslike criteria when it comes to inviting and verifying tenders.

2.5 Competition policy

2.5.1 Introduction

This section seeks to present briefly the bases of Community competition policy and competition law regulation at Community level and to discuss how environmental concerns can be handled in the context of competition policy.

Unlike the policy areas discussed earlier, here we are dealing with a regulatory framework that is targeted primarily and directly at companies in Member States. The rules have a largely direct effect and can be invoked by individuals before national courts. In light of our assignment, we have chosen to present "the law" in this policy area in a little more detail. To the person working with environmental issues in other EU policy areas, competition policy and law, and their applicability can at times appear complicated and "different".

[55] 45/85 Commission v. Ireland REG 1989, p. 4929, Swedish special edition, tape 9.

Chapters 3 and 4 will discuss different handling levels based mainly on a few chosen policy areas. A discussion of competition rules does not fit well within this structure, as the competition rules do not target specific products, but rather the actions or situations of companies in a market. There is no doubt that environmental regulation affects companies by setting requirements for product design, production, marketing, sales and destruction, etc.,[56] but the regulation in the competition area is general in nature and targets all companies. There is a lack of guiding judgements and decisions that discuss environmental concerns in the competition area. We have therefore considered it a pedagogic advantage to keep the discussion on competition law together.

First, it should be stated that environmental issues are discussed very sparingly within competition law. As far as we know, there are no studies aimed at competition aspects at Community level for the implementation of an Integrated Product Policy.[57] Only a few Commission decisions or Court judgements comment on environmental issues in cases where competition law is the main issue. In two recently adopted acts of secondary legislation, environmental issues are dealt with more explicitly however. The Commission Notice on the applicability of Article 81 to horizontal cooperation agreements discusses environmental agreements in particular.[58] The Commission has also adopted Community Guidelines on State Aid for Environmental Protection.[59] These two acts are discussed in section 3.5.

The European Court of Justice has established that the enforcement of effective competition is so important "that without it, numerous provisions of the Treaty would be pointless".[60] Even if it is not expressly clear from the EC Treaty, Community competition policy has two basic – and supplementing – objectives: to promote effective competition in the Common Market and to act for the integration of the Common Market.

A stated aim of competition policy within the EU is to defend and develop effective competition in the Common Market by influencing the structure of the market and the actions of financial actors. The Member States and the Community shall pursue an economic policy according to the principle of an open market economy with free competition. The Community's competition rules are based on the principle that the best way to guarantee financial effectiveness is to expose a market to competition. This applies to resource allocation as well as to production efficiency. In a market economy, it is left to the market forces to decide which products are bought and sold, when, where and at what price.

Competition between companies is a fundamental mechanism in a market economy and an important driving force that leads to increased innovation, lower production costs and strengthening of the competitiveness of the economy in relation to the EU's trade partners. Trade in the Community is controlled by supply and demand. When the

[56] The efficiency and profitability of companies can also be discussed based on a certain type of product or production process. This is not discussed in our study.

[57] With regard to Sweden, see "The Environment, Trade and Competition – playing rules for efficient markets", The Swedish Competition Authority report series 1998:1.

[58] Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, EGT C 3, 6.1.2001, p. 2.

[59] Community Guidelines on State Aid for Environmental Protection. EGT C 37, 3.2.2001, p. 3.

[60] C 6/72 Europemballage and Continental Can v. Commission, REG 1973 p. 215.

companies are stimulated by competition, the goods and services that are offered become more attractive in terms of price and quality.[61] An important part of the competition policy is to provide conditions for consumers to make rational choices. This affects the actions of companies, and the competition on the market. The consumer perspective is clear in the implementation of the competition policy. The decisions that are taken within the context of EC competition policy are seen directly in daily life. It may be falling prices, increased choice of products or improved opportunities to purchase goods in the country where the prices are lowest.[62] It could also be about supplying more environmentally friendly products, though it is not an expressed aim of the Community competition policy in particular to act for different environmental objectives.

Competition issues are often judged from a supply and demand perspective. The pricing mechanism in a market is – if the market works – a result of the relationship between supply and demand. The Green Paper on Integrated Product Policy focuses largely on these conditions and particularly on the pricing mechanism.[63] The Commission has not placed a competition perspective on the different incentives and instruments that are discussed however. The environmental costs can be added to the products through different measures targeted at the supply side. Regulatory instruments that can be targeted at the supply side are different kinds of public regulations and taxes, as well as cooperation initiatives between actors on the market. Cooperation can lead to conflict with competition regulations, however. Producers joining forces, for example, can lead to entry barriers. Companies that merge can achieve a dominant position and weaken competition in the market. The Green Paper's proposal on increased cooperation throughout the product chain can lead to weakening of competition. On the demand side, the Green Paper focuses on consumer information.

The importance of sound competition emerges already in the introduction to the EC Treaty. In the fourth point "RECOGNIZING..." in the preamble, the parties concluding the Treaty explain the importance of guaranteeing "steady expansion, balanced trade and fair competition", though nowhere in the Treaty does it emerge what sound competition really means. This can clearly not be discussed within the scope of this report however. A lot of literature is available for further study by the interested reader, primarily within the area of political economy.

One of the Community's tasks is to act for "a high degree of competitiveness", Article 2 of the EC Treaty. To achieve this objective, the Community's activities should include "a system ensuring that competition in the internal market is not distorted", Article 3 g of the EC Treaty.

According to the Commission, the Community's competition policy plays an important role in the deepening of the Internal Market. The competition policy affects the structure of the market through action against private or public initiatives that seek to prevent or

---

[61] The applicability of competition law is closely associated with economic considerations and economic theory formation. This report does not leave scope for a more detailed review of competition theory or the economic aspects of competition. Information can be obtained in, for example, Simon Bishop/Mike Walker, The Economics of EC Competition Law, 2 ed. Sweet & Maxwell 2002 and Doris Hildebrand, The Role of Economic Analysis in the EC Competition Rules, 2 ed., Kluwer 2002.

[62] For the latest on the car sector, see also http://europa.eu.int/comm/competition/car_sector/.

[63] Green Paper on Integrated Product Policy, COM(2001) 68 final.

delay the setting aside of market borders. The competition policy "stimulates the operation of the single market by promoting positive cooperation between companies in areas such as R & D or environmental protection…"[64] The competition rules thereby supplement the rules on free movement and on the Internal Market.

The principles of European cooperation thus already make clear the importance of effective competition and that the European competition policy rests on a framework of Community law expressed directly in the EC Treaty. As long as an Integrated Product Policy is aimed at effective competition in the Common Market, both objectives go hand in hand.

The above-mentioned basic provisions of competition law are substantiated and further developed in Articles 81-89 of the EC Treaty. The substantive rules of importance are found in Articles 81, 82, 86 and 87. Article 81 prohibits cooperation between companies that seeks to restrict, or results in restriction of, competition and affects trade between Member States. Article 82 prohibits companies from abusing their dominant positions to the extent that it affects trade between Member States. Article 86 explains that, in principle, the same competition rules apply to public enterprises as to other companies. The just-mentioned rules are based on the principle that certain types of action are prohibited.[65] It is also important in this context to mention the Council Regulation on the control of concentrations between undertakings[66], which regulates mergers and acquisitions of companies. Issues of State aid to companies are regulated in a separate section of the EC Treaty. According to the general rule in Article 87, State aid that distorts competition and affects trade is contrary to the Common Market and thereby prohibited. Community competition policy differs from many other policy areas, for example, by being expressed more tangibly in separate provisions of the Treaty. This does not mean, however, that its application would be simpler or clearer.
The EC Treaty rules on competition are generally applicable in the sense that they apply to companies that develop, produce, market and sell goods and/or services. The Treaty therefore does not differentiate between goods and services in the competition policy.

The rules in Articles 81, 82, parts of Article 86, and the Merger Regulation are targeted directly at companies and their actions. The addressee of the rules on State aid is the Member State that plans to grant State aid, but it is a company in the Member State that is the recipient of the aid. In all cases in the competition area of Articles 81-89, the focus is on one or more companies. These are companies that act in a certain way in the market, and companies that are prepared to receive State aid.

The competition rules of the Treaty and the Merger Regulation are only applied when trade between Member States is affected. If this is not the case, it can in some cases be possible to intervene by applying national competition rules. Most of the Member States have national competition legislation based on the same principles as Community law, i.e. the prohibition principle.[67] This does not mean, however, that the EC rules and the

---

[64] XXIXth Report on Competition Policy, 1999, p. 31.

[65] Previously the so-called "missbruksprincipen" was applied, at least in Sweden. See, for example, Ulf Bernitz, Den svenska konkurrenslagen, Juristförlaget 1996.

[66] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, EGT L 395, 30/12/1989 p. 1.

[67] With regard to Sweden, see the competition law (1993:20).

national rules, despite being similar or even having the same wording,[68] should be interpreted and applied in the same way. National competition regulations are completely disregarded here.

The Commission's work within competition policy is concentrated to four big areas:[69]

- combating agreements that restrict competition and abuse a dominant position
- control of company concentrations
- deregulation of economic sectors with monopolies
- control of State aid

There is no doubt that the competition policy and competition rules are of great importance to Community activity. The Commission's Competition Directorate has far-reaching competence to apply the competition rules in the EC Treaty. Issues of competence are discussed below in section 2.5.3. The Commission carries out extensive work in the field of competition. In the last five years, the Commission has worked intensively to reform and modernise the competition rules.[70] The modernisation work has been carried out based on the more general objectives for strict application of competition law, effective decentralisation, simplification of the procedures and a uniform application of legislation and rulings throughout the Community. As far as we have been able to deduce, environmental considerations have not been observed during the reform work. Just before Christmas 2002, a new implementing decree was adopted for the competition rules of the Treaty. From 1 May 2004, it replaced the new implementing decree from 1962.[71]

2.5.2 Details of the rule structure

This section looks at the primary legislation framework in more detail. Articles 81 and 82 (also Article 86) are based on the prohibition principle, which means that the legislator has chosen to prescribe prohibitions against certain types of action from the companies' side directly in the Treaty text. With regard to State aid, a restrictive view applies with a prohibition as the basic principle and some exceptions stated in the Treaty text. The secondary legislation in this field is extensive, but most of the acts have no direct relevance to this study and only a few will be discussed below and in section 3.5. Some of the material discussed below should really be considered in Chapter 3. We have

---

[68] Comp. Article 81 of the EC Treaty and 6 § the Swedish competition law.

[69] This is expressly clear on the Competition Directorate's homepage: http://europa.eu.int/comm/competition/index_sv.html.

[70] White paper on modernisation of the rules implementing Articles 85 and 86 (now Articles 81 and 82) of the EC Treaty, Commission programme 99/027, Brussels 28/4/1999.

[71] Council Regulation (EC) No 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty EGT L 1, 4/1/2003, p. 1 supersedes Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, EGT P 13, 21/2/1962 p. 204, Swedish special edition Chapter 8 Volume 1 p. 8.

considered it to be of systematic value to discuss the area of rules collectively already here.

Article 81 – Prohibition against anti-competitive cooperation

Agreements between companies can eliminate competition. Well-known examples of such practice include price-fixing agreements, so-called cartels, when companies agree on a certain price level or discount system. Customers can then not benefit from competition between producers to bring down prices. This generally results in the consumer having to pay a higher price. The companies can also come to agreements where they share or restrict production or divide up the market between themselves. All the examples above illustrate agreements that restrict or distort competition and damage actors in the market, and they are therefore prohibited according to Article 81(1).[72] A prohibited agreement is also subject to civil law sanctions. According to Article 81(2), agreements that restrict competition are not allowed. This is a very interventionist sanction in a contractual relation between parties and takes effect automatically.[73]

Three criteria must be met for Article 81(1) to be applied. *Firstly,* there must be an agreement or coordinated procedure between the companies (agreement criterion). *Secondly,* this agreement or coordinated procedure should seek to or result in preventing, restricting or distorting competition in the market (anti-competitive criterion). A non-exhaustive list in Article 81(1) gives examples of inadmissible anti-competitive practices. Such an agreement can consist of purchase or sale prices being fixed, or other business terms being laid down. It can also concern restrictions on production, markets segments, technical development or investment. It may involve markets or sources of supply being divided up between competitors. Finally, it can entail discriminatory conditions that bring competitive disadvantages to those companies that are not part of the agreement. These agreements are considered restrictive because they largely eliminate the normal interplay between supply and demand. *Thirdly,* trade between Member States should be affected (trade criterion). The European Court of Justice established in the Consten/Grundig Case that the trade criterion is met if the agreement directly or indirectly, actually or potentially can affect trade between Member States.[74] This thus involves a very broad application of Article 81. There is sometimes a *fourth prerequisite* which involves an agreement that restricts competition having a noticeable effect on the market, i.e. the parties should be of a certain minimum size for the rules to be applied.[75] If the parties in a horizontal agreement have a combined market share of less than 10%, the agreement is not considered to affect competition on the market sufficiently to warrant action. In vertical contractual relations, the corresponding limit is set at a market share of 15%.[76]

---

[72] A corresponding, and almost identical, regulation can be found in 6 § of Swedish competition law (1993:20).

[73] Comp. 7 § competition law. The grounds for invalidity in Swedish law are otherwise regulated in contract law.

[74] 56 and 58/64 Consten & Grundig v. Commission, REG 1966 p. 299.

[75] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81.1 of the Treaty (de minimis), EGT C 368, 22 December 2001, p. 13.

[76] Horizontal and vertical relationships are often differentiated between within competition law. Horizontal relationships are those where the parties are active at the same level of the trade chain, e.g. two producers

An example. If three big market leaders producing pigment and paint in the Community agree to cooperate and sell their products at the wholesale level, and the agreement contains certain price fixing clauses, then there is reason, from the point of view of competition law, to look closer at the agreement. Let us say that the agreement involves wholesalers that sell on to specialist paint shops paying one price while all the D.I.Y. stores have to pay 15% more for the same paint. The agreement also gives paint shops that can offer "environmentally friendly" recycling of old paint cans a 20% price reduction bonus. Such an agreement presents serious doubts from a competition point of view. The Commission takes any form of price coordination seriously and will almost certainly declare the agreement to be prohibited according to Article 81(1).

Despite a restrictive aim or effect, certain agreements can still be pro-competitive, and these can then be exempted, with the application of Article 81(3), from application of the prohibition in Article 81(1). There are four conditions that must all be met for an exemption to be granted. The agreement should improve production or distribution of goods or promote economic progress. The consumers (intermediate and end) should be assured a reasonable share of the profit generated by the agreement. The restrictive practices should be necessary for the conditions above to be met. Competition must not be eliminated for a substantial part of the goods or services in question.

There is scope in Community legislation for exemptions in individual cases (after application to the Commission) and also for categories of agreements of the same type e.g. distribution agreements. The latter type of exemption is regulated by so-called Block Exemption Regulations. These are divided into two main types - horizontal and vertical[77]. In our example above with the paint producers, it is unlikely that the agreement would be granted exemption from the prohibition in Article 81(1). The companies would be unlikely to able to show that the four above conditions were met. A price cartel typically does not give the consumers a lower price but rather the opposite, a higher price. A cartel also generally means that there is less competition for the products in question.

Article 82 – Prohibition against abuse of a dominant position

A company can be very successful and become completely dominant in a market. There is nothing reprehensible about this in itself. It can be a result of the company's efficiency. If, on the other hand, the company uses its influence to eliminate competition, then it is abusing its position, thereby restricting competition, and this is prohibited according to Article 82.[78] Three prerequisites must be met to apply Article 82. *Firstly,* the company

that enter into cooperation within research and development. In vertical contractual relations, the parties operate at different levels of the trade chain, e.g. a producer and a distributor that enter an agreement on the resale of a certain product. Companies operating at the same level are often competitors, and the Commission therefore takes a tougher view on different types of horizontal cooperation than on vertical relationships.

[77] See http://europa.eu.int/comm/competition/antitrust/legislation. For vertical Block Exemption Regulations, there is a general regulation on vertical agreements, 2790/1999. Further regulation concerns the motor vehicle sector, 1400/2002, and agreements on the transfer of technology, 240/1996. Block Exemption Regulations on a horizontal plane also apply to specialisation agreements, 2658/200, and research and development agreements, 2659/2000. All Block Exemption Regulations are available in electronic form at the Competition Directorate's homepage.

[78] Comp. 19 § of the Swedish competition law (1993:20).

must be dominant in the Common Market or an essential part of it. *Secondly,* it should abuse its position in the market. *Finally,* it should act to influence trade between Member States.[79]

It is thus not the dominant position in itself that is prohibited but the way in which the company uses its position in the market. A company is considered dominant when it is able to act independently of other companies in the market.[80] A company in a dominant position does not need to take account of reactions from intermediate or end competitors or customers. The company can then use its strong position to force competitors out of the market with different pricing strategies. The company can also act unreasonably in relation to other actors in the market by forcing unreasonable prices on them or granting some customers discriminatory advantages in order to control their behaviour. Such practices eliminate competition. For consumers it means higher prices, less choice of goods and services, and unreasonable trade conditions. An exemplifying list in Article 82 shows the types of practices that are normally seen as abuse. Over the years, the Commission has taken a very tough stand against companies that have abused their dominance. There is no possibility of an exemption from the application of Article 82 and there is no invalidity sanction with the prohibition.

An example. Company A produces a chemical substance that is used in a diabetes medicine. The company has a strong market position in the Community, and can be considered dominant. When the pharmaceutical company B asks to buy the substance to produce the diabetes medicine, A imposes conditions on the sale so that B has to introduce a more environmentally friendly production process in its factories in Europe. A also wants B to sign an undertaking not to sell the finished product to Denmark, where A already has a delivery agreement with another pharmaceutical company. A's practices contravene Article 82 by forcing unreasonable business terms on B.

Control of concentrations

The Common Market is continuing to develop. Trade is also increasing internationally. To act in a bigger market, a company may need to concentrate its operation and work to reach a size that allows it to compete in the global market. When companies merge into bigger entities, it usually has a positive effect on the market, as the companies become more efficient and competition increases. Concentrations between undertakings in the form of mergers, acquisitions or setting up of joint ventures therefore do not present any great worry from a competition point of view. A merger between companies can give economies of scale in a number of areas. It could be research and development of new products. Restructuring can lead to reductions in production and distribution costs. Increased competition can give the end customers better goods at a more reasonable price.

[79] The trade criterion is judged principally in the same way as Articles 81 and 82.

[80] To assess the economic influence of a company, the Commission often starts out from the company's market share, but other factor are also important such as the existence of competitors, its own distribution net, access to raw material, technological knowledge, ownership of intellectual property rights. See also Commission Notice on the definition of a relevant market, EGT C 372, 9/12/1997.

In recent years, we have seen an increased number of concentrations in the Common Market. Some kinds of concentrations are not acceptable however. These are concentrations that involve the creation or strengthening of a dominant position to the detriment of trade within the Community. All actors in the market have reason to worry about the development of dominant structures that risk leading to higher prices, less choice of goods or less innovation. In accordance with the Merger Regulation[81], the Commission can prohibit such concentrations. All concentrations that exceed certain thresholds have a notification obligation to the Commission as they are considered to have a Community dimension.[82] The aim is thus to give the Commission the opportunity to *ex-ante* merger control of the structural changes in the market. This is not about control measures as in Articles 81 and 82. It is a requirement for companies to report a concentration with a Community dimension for examination by the Commission before the agreement comes into force. The rules of the Merger Regulation also mean that a planned deal can be prohibited. In many cases, the companies make undertakings following consultation with the Commission, leading to the concentration being approved.[83] The conditions often consist of the disposal of assets or winding up of interests in other companies. The vast majority of concentrations are approved, which means that concentrations that lead to the creation or strengthening of a dominant position are relatively rare.[84] Since 1990, the Commission has only communicated 18 decisions on prohibitions against the implementation of a concentration.[85]

[81] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings. The Regulation has regulated the Community's system of control of concentrations between undertakings since 1990. The rules are currently under review. For more information see: www.europa.eu.int/comm/competition/mergers/review.

[82] Affected companies should have a turnover of at least 5,000,000,000 Euro in the whole world and at least two of the companies should have a turnover of at least 250 million Euro within the Community.

[83] See Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, EGT C 68, 2/3/2001, p. 3.

[84] See p. 34 and fol. pp. §§ competition law (1993:20) concerned with national control of concentrations.

[85] http://europa.eu.int/comm/competition/mergers/cases/stats.html

.

An example. Companies C and D want to merge into a joint venture to produce private cars and lorries. By merging, the companies will become market leaders in all the countries in the Community. Competing companies have very small market shares. C and D state in their application for a concentration that their cooperation will lead to some environmental benefits. Taking into consideration that, in principle, competition will be eliminated in the Common Market, it is unlikely that the Commission will let the companies carry out their merger.

Deregulation

Under the heading of deregulation, the Commission works with issues of deregulation and subjecting markets to competition. It is clear already from the Treaty that public authorities in a Member State may grant special rights, e.g. a monopoly position, to public or private companies, see Article 86(1). Such a company still has to follow the competition rules of the EC Treaty. The basic idea is that the same competition rules should apply to all companies that operate in a market. Special rights may be granted if a general economic interest is met. This can be the case within areas such as, for example, railway transport, postal services, production and distribution of electricity. These special rights generally correspond to the responsibility that is associated with the company's task to supply services to the whole community. The special rights may not be more far-reaching than is required to achieve the task. Otherwise there is a risk of restrictive practice, which cannot be accepted. A monopoly situation is never good for competition, and according to the Commission, it is therefore necessary within the context of the EC Treaty to also act to introduce competition into monopoly sectors.

The monopoly to which the Commission has turned most of its interest exists and has existed within the so-called network industries. Above all, it is concerned with transport, energy and telecommunications. It is a question of separating the infrastructure from the services that are supplied via it. Bringing about a new competing infrastructure can prove very difficult. It is possible, however, to introduce competition into the usage level. If exclusive ownership of the infrastructure is to be retained, then the monopoly company has to allow access to the infrastructure in question (e.g. the telephone network) by a third party that wants to compete with the services supplied by the monopoly company. Competition has positive effects for the intermediate users as well as for the end customers.

The Commission takes care that Member States that grant special or exclusive rights follow the competition rules. It is then particularly important that the authorities do not go any further than is absolutely necessary when laying down the conditions for the execution of the assignment. This is clear in Article 86(2).[86]

To implement the work to open up monopoly markets to competition, the Commission has several instruments at its disposal.[87] The Commission can adopt or suggest that the Council or the European Parliament adopts a Liberalisation Directive. This has happened in the case of, for example, telecommunications, transport, postal services, electricity and gas. The Commission then oversees that the objectives are carried out.

[86] See, for example, KKV Doc no 35/2002, Rapport till Europeiska kommissionen angående övervakning av det svenska detaljhandelsmonopolet för alkoholdrycker, 19 December 2002.

[87] Article 86(3). See also http://europa.eu.int/comm/competition/liberalization/legislation/.

State aid

State aid that distorts competition is prohibited according to the EC Treaty. When the State grants aid, some companies may be favoured to the detriment of others and that constitutes a serious disruption of competition. The Commission has exclusive competence to exercise control over State aid that authorities in Member States grant to companies in a those states. In some cases, the Commission may consider the positive effects that aid can have on the EU as a whole by applying an exemption according to the provisions of the EC Treaty and allowing the aid. This can be motivated by, for example, regional development or because it promotes certain common political interests. Environmental protection can be such an interest.

Article 87(1) prohibits aid, regardless of form, that is given by the State or with State funds and which distorts competition by giving certain advantages to companies or the production of particular goods. One condition of the prohibition is also that the aid influences trade between Member States. The form under which aid is granted is essentially irrelevant. Aid may be paid as, for example, grants, interest grants, tax reductions, State guarantees, the supply of goods or services on advantageous terms or State ownership.

General government aid is usually paid to support a company, economic activity or region to promote its development or lessen its problems. At first sight, State aid is positive, but it often only means that necessary restructuring is postponed, without helping the company to regain its competitiveness. State aid can also appear discriminatory in relation to competing companies that do not receive any aid. These latter companies have to act by themselves to stay competitive in relation to the company, which may not need to make any cost cuts or set aside funds for research and development because of the State aid. This can lead to companies that do not receive any aid ending up in difficulties, and this can then affect their competitiveness. In the long term, the whole market is therefore affected negatively by State aid, as is the competitiveness of the whole of the European economy.

Article 87(2) of the EC Treaty allows certain forms of listed support measures that are compatible with the Common Market. This is aid of a social nature or aid to redress damage caused by natural disasters or other exceptional events. Aid given to some areas in Germany that have been affected by the division of Germany is also considered allowable.

Article 87(3) allows for the possibility of certain listed forms of aid. Aid considered acceptable is that aimed at contributing to the development of particularly disadvantaged regions, redressing a serious disturbance in the economy of a Member State, promoting certain activities of common interest to all Member States or aid of a cultural or social nature. Aid to particularly disadvantaged regions may be used to give these regions the chance to catch up in their development. Restructuring aid can also be relevant as one-off aid. Looking at the Commission's decisions on issues of State aid, it is clear that despite the general prohibition principle, it has approved large amounts of State aid.

The Commission has clarified its policy on State aid through framework rules and guidelines for, for example, environmental protection. See also section 3.5.

2.5.3 Application of the competition rules

The Council and the Commission can issue the acts of secondary legislation that are necessary to apply Articles 81 and 82, see also Articles 83-85. This competence has been used to a considerable extent, as can be seen on the Competition Directorate homepage.[88]

The Commission is competent to apply the competition rules of the Treaty. In certain cases, the competence is shared with national authorities and courts. In other cases, the competence of the Commission is exclusive. The latter concerns issues of individual exemptions according to Article 81(3), merger control according to the special regulations and issues of State aid according to Article 87. With regard to application of the prohibitions in Articles 81(1) and 82, competence is shared with national courts. In a number of Member States, national competition authorities are also competent to apply the competition rules of the Treaty.

Currently, only the Commission is competent to apply the provision of Article 81(3). An individual exemption requires an application to the Commission in accordance with Regulation 17/62. The Block Exemption Regulations are applied by the company concerned, which has to decide for itself if it meets the requirements. As from 1 May 2004[89], a decentralised system will be introduced, leading to the abolition of the application process. The reason for this is that a large number of the agreement applications do not constitute any serious competition problem. The Commission wants to be able to use its resources for really serious restrictive practices, e.g. cartels, and for the work to implement the competition policy in the Community. For the reform process, the Commission also wanted national competition authorities and courts to be made to participate more in the implementation of the Community competition rules.[90]

Regulation 17/62[91] has given the Commission far-reaching powers when applying the competition rules in Articles 81 and 82. The Regulation gives the Commission the right to analyse and investigate on its initiative or after the application. The Commission has the right to carry out unreported inspections at a company to collect information about suspected restrictive practices, so-called dawn raids.

The Commission's measures on account of the competition rules in Articles 81 and 82 take effect through different decisions and penalties. The Commission can issue a prohibition against certain practices (e.g. cartel cooperation) or decree that a certain practice should cease (e.g. a refusal to deliver). A restrictive practice can also be sanctioned through fines. The amount of the fine is determined in view of the type and duration of the contravention. Large fines have so far been imposed for, for example, cartel cooperation. According to a special act, the Commission may take aggravating

---

[88] http://europa.eu.int/comm/competition/index_sv.html.

[89] Through Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, EGT L 1, 4/12003, p. 1.

[90] There was already scope for cooperation with national competition authorities and courts, see Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, OJ C 39, 13/2/1993, p. 6 and the Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Article 85 or 86 of the EC Treaty, OJ C 313, 15/10/97, p. 3.

[91] Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty. The Official Journal of the European Communities No P 13, 21/2/1962, p. 204.

circumstances (e.g. repeated contraventions) and extenuating circumstances (e.g. companies that cooperate with the Commission) into account when deciding on the amount of the fine. Fines of up to a maximum of 10% of the turnover of the company concerned may be imposed.

The Commission's competence with regard to Article 86 is immediately clear from the wording of the third paragraph: "The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

The Commission has sole competence to examine whether State aid can be allowed, Article 88. Member States have a duty to report all plans to grant State aid. Aid must not be effected until the Commission has given its approval. The Commission has the right to instruct recipients of aid that has been granted illegally to repay it to the authority that granted it. The Member State must then ask for the money back immediately.

Commission decisions in cases concerned with applicability of competition rules can be appealed against to the Court of First Instance or the European Court of Justice. There is extensive case law in this area. Many cases also come to the European Court of Justice as a request for a preliminary ruling according to Article 234 of the EC Treaty.

Articles 81 and 82 are directly applicable and have direct effect. This means that the rules are binding at national level and that they create rights and obligations for private companies, which can invoke the rules in national courts. The Block Exemption Regulations are also directly applicable.

As established earlier, authorities and courts in Member States can also apply parts of the Community competition law. This application shall not have a national bias, but follow the principles that have been set by Community institutions. Uniform application of the law and predictability are extremely important to companies that act in an international market. As soon as trade between Member States is affected by a measure, the competition rules of the Treaty can be applied. Regardless of which authority or court the case ends up with, the application must comply with the rulings developed by the European Court of Justice.

In Sweden, the Competition Authority is competent to apply Articles 81(1) and 82.[92] The task of the Swedish courts is to safeguard the rights and duties that follow from the EC Treaty competition rules.[93] National courts shall also try civil law effects between parties of a particular agreement based on national legislation. It may be a question of whether all or parts of an agreement shall be invalid according to Article 81(2) on non-compliance with Article 81(1). It could also concern the issue of damages owing to the contravention of EC competition rules. As far as we can see, Swedish courts have not handled any case that specifically relates to the issue of environmental concerns in competition law.

Based on the rules on competence when applying EC competition rules, it can be established that the Council and the Commission are competent in accordance with the

---

[92] 5 § competition law and 2 § 1 para. the Act (1994:1845) on the application of the European Communities' rules on competition and state aids. See also Carl Wetter, Johan Karlsson, Olle Rislund, Marie Östman, Konkurrenslagen – en handbok, Thomson Fakta, 2 ed. 2002 p. 61 and fol. pp.

[93] See also Notice on cooperation between the national courts and the Commission in applying Articles 81 and 82 of the EC Treaty, EGT C 39, 13/2/1993, p. 6.

existing regulatory framework of Articles 83-85 to take measures, in the competition area, towards an Integrated Product Policy. This can take place by introducing regulations, but also through different types of guidelines and other non-binding instruments. It could concern, for example, exemptions for agreements with environmentally friendly effects, the influence of green claims on concentration assessments, or the right to State aid for integrating environmental concerns into a particular production process. One condition is obviously that this agrees with the fundamental attitudes to competition policy within the Community.

2.5.4 Competition law, competition policy and environmental concerns

It is clear that the competition rules of the EC Treaty do not expressly regulate environmental issues. The question then is whether the substantive rules can leave scope to allow the applying institutions to integrate environmental concerns into, or even form obstacles to, an Integrated Product Policy.

According to Article 6 of the EC Treaty, Community law requires environmental considerations to be integrated into all Community policy. This also applies to competition policy. The aim of Article 6 of the EC Treaty is therefore for the Community to not stop at just attending to environmental problems, but for environmental protection requirements to be integrated into all areas of Community policy already at the design stage. For this to be possible, participation is required by actors, companies and consumers. It is important to note that there is no conflict of interest between competition policy and environmental policy. Environmental protection requirements should be integrated into the definition and implementation of competition policy, in particular to promote sustainable development.[94]

The increased importance of environmental protection has led to new economic activities and new markets, e.g. the market for waste management and recycling. The competition rules should also be applied to these "new" areas. [95]

When applying the competition rules, the applying authority must consider environmental concerns within the scope of Article 6 of the EC Treaty. It is difficult, however, to present one or more types of agreements or practices in more detail from companies or situations where a Member State has granted aid and it is clear that environmental concerns have been decisive to the outcome of the case. As was evident earlier in this study, the contents of Article 6 are not sufficiently clear either. Environmental reasons seem to rather have "slipped into" argumentations and motivations without standing out as completely decisive. The very fact that environmental concerns are referred to in acts, decisions and judgements points clearly to at least the Commission and the Court having had their eyes opened to the importance of taking green claims into account when implementing competition policy.

With regard to Article 81 and prohibited restrictive cooperation, it is clear that the wording in the article does not leave any direct scope for environmental concerns to be

[94] See Community Guidelines on State Aid for Environmental Protection. EGT C 37, 2/1/2001 p. 3.

[95] European competition policy for the recycling market, speech by Jean-François Pons, Deputy Director General, DG Competition, at Pro Europe International Congress "Recycling as part of Daily Life in Europe", Madrid 20 September 2001. www.europa.eu.int/comm/competition/environment.

taken into account in the application of the prohibition in Article 81 (1). The criterion restricting competition has so far been judged based on the competition policy starting-point described above. The Community shall promote such competition that leads to economic efficiency and increased integration. As is clear in section 3.5 below, the Commission can also take account of green claims in its exemption assessment according to Article 81(3).

As far as we have been able to ascertain, there are no decisions by the Commission or judgements by the European Court of Justice where environmental reasons have been decisive in evaluating the possible abuse of a dominant position. The structure of Article 82, with an absolute prohibition on the abuse of market dominance, does not allow for any exemption assessment. When establishing market dominance, environmental concerns cannot have any importance. A company's strength on the market is measured based on its position on the market and in relation to the position of its competitors. It might be possible to claim that someone with an environmentally friendly production process has a real competitive advantage and that this would further strengthen a strong market position. Environmental reasons have not been mentioned so far, however, as a factor that makes a difference to the assessment of market strength. It can therefore not matter whether the company's production is more or less environmentally friendly. The abuse prerequisite does not include any special regulations for environmental concerns. The assessment of the company's practices on the market should not be affected by environmental concerns, at least not according to the wording. It cannot be reasonable to allow a dominant company, for example, to refuse to deliver only because the dominant company uses an environmentally friendly process. It could be discussed purely hypothetically, however, whether environmental concerns should constitute such objective reasons that motivate a refusal to deliver. Let us say that the prospective purchaser is going to use the product in the agreement in an environmentally hazardous process. Should the dominant purchaser in such a case have the right to refuse to sell the product? As far as we can judge, environmental concerns are not (yet?) such an objective reason that can motivate a refusal to deliver. Concurrently with environmental concerns gaining in strength, however, it is not inconceivable that environmental consideration could also be taken within Article 82, with the result that there would be a contract obligation for the dominant company if the purchaser could specify acceptable environmental reasons to demand delivery.[96]

The issue can also be turned around. Can a company that applies an environmentally ambitious production policy be treated more favourably in an assessment of possible abuse than a company that does not appear to have any environmental awareness?

Competition law is a dynamic area of law. In the Commission's work to revise the competition rules, there is a clear shift towards using more economic analyses when interpreting and applying the rules.[97] The extent to which this assessment with a more economic focus should include environmental concerns will be left unsaid. In the reform

[96] It might be possible to compare it with the development of the doctrine on necessary facility that has developed into a form of contract obligation, see, for example, Bellamy & Child, European Community Law of Competition, 5th ed. Sweet & Maxwell, 2001, p. 738 and fol. pp.

[97] This is expressed clearly in, for example, the Green Paper on Vertical Restraints in EC Competition Policy, Brussels 22/1/1997, COM(96) 721 final.

work that is underway in many areas of competition policy, environmental concern does not appear to be a priority area.

The companies' interest in taking part in the work towards an Integrated Product Policy will affect their actions on the market, not least in different types of agreements that touch on environmental issues. Competition law is a legal area that is constantly under development and where changes in industry also affect the wording and application of the competition rules. The political will within EU institutions to implement an Integrated Product Policy is limited by efficiency concerns in the competition area. As long as we have a goal of effective competition in the Common Market, environmental reasons can be among the considerations that motivate a certain agreement or practice and can also be accepted as part of exercising Community competition policy. The Commission can choose to stimulate companies to work towards minimising the environmental impact of their activities through competition law regulation.

The efficiency argument is also at the centre of the IPP Strategy. It is clear from the Green Paper that: "Its central element is the question how the development of greener products and their uptake by consumers can be achieved most efficiently."[98] There is therefore no formal clash of interests between the objectives of the competition policy and the objectives of the IPP work. The Commission places the responsibility of making products more environmentally friendly on companies and consumers. The most important decisions on the environmental impact of products are taken at the drawing-table and in the shops. According to the Commission, the Integrated Product Policy will therefore focus primarily on eco-design (i.e. the R&D stage) and on information and incentives for consumers (they should have sufficient information to ask for more environmentally friendly products in the shops). This approach will influence competition at all the handling levels. No area of competition policy is thus either pointed out or excluded from the discussion on an Integrated Product Policy. The fact that a "cradle to grave" perspective has been chosen, however, could point to a desire, from the view of competition policy, to concentrate on the research and development stage of a product. Maybe restrictive practices in the product's "cradle" should be accepted for environmental reasons, as they could lead to greater development of environmentally friendly products. Such a strict approach is neither possible nor appropriate. As long as environmental concerns are not expressed as a prioritised interest in respect of competition policy, there is nothing to say that a certain stage of the production process should be guaranteed special assessment from the point of view of competition law. In some cases, however, environmental concern could be one of the factors that affects the assessment of whether there is effective competition in a market.

2.6 Summary

The Commission of the European Communities intends to develop and implement an Integrated Product Policy that takes into account the environmental impact of products from a life cycle perspective. Other institutions have also made positive statements for

[98] Green Paper on Integrated Product Policy, COM(2001) 68 final, p. 3.

such a policy. It is indisputable that there is space for an Integrated Product Policy within the Community, but it is also clear that there are certain limitations.

The legal basis for the Community to be able to take measures to harmonise legislation is found in Article 95. It is clear that environmental protection aspects can be taken into account when the Community takes measures that are necessary to the functioning of the Internal Market. The aim of the policy for the Internal Market is not to achieve complete harmonisation, however, neither is it primarily to achieve a high degree of environmental protection. Measures can be taken when the Internal Market can be disturbed by national rules on environmental protection concerns that can form grounds for national exemptions from the principle of the free movement of goods. Article 6 further stresses the need for environmental consideration, but there is hardly scope to interpret this provision so that environmental concerns would carry more weight than other Community objectives. According to Community institutions, it is a question of achieving a good balance between different interests. Measures to limit such negative environmental impact as the Community is fairly "sure" will happen and which it also sees as important can be implemented within this context, but an Integrated Product Policy that seeks to limit diffuse and long-term environmental impact rather than direct and acute damage will probably have to give way to economic considerations when Articles 6 and 95 form the basis of legislation.

The Community's environmental policy can also form the basis of an Integrated Product Policy with a life cycle perspective on the environmental impact of products. Requirements for, for example, production conditions and waste management can be developed within the context of the "real" environmental policy. There is also an undetermined amount of scope within EC environmental policy to develop legislation with product-related requirements aimed at protecting health and the environment. Environmental policy shall also assume a high level of protection, though it should not only be environmentally but also socially and economically sustainable, which is why it has to be balanced against other interests. A long-term Community strategy for better products will also be balanced within environmental policy against economic issues that will probably often be seen to carry greater weight.

Even if Community institutions are competent within this framework to implement an Integrated Product Policy, there are restrictions on the measures that can be used. The principle of proportionality in Article 5, para. 3 of the Treaty is intended to be interpreted as the Community leaving as much scope as possible for Member States to act. Binding legislation should not be used if less far-reaching measures are sufficient. The Community institutions emphasise mainly market-based and other soft instruments to implement the Integrated Product Policy. Legislation is possible to support these and as framework legislation supplemented with standardisation, but extensive harmonisation in the form of obligatory, defined requirements for the environmental impact of products does not appear to be relevant, except to some extent within the Chemicals Strategy.

The competition policy objective of effective competition in the Common Market and retained or increased market integration does not in itself involve any obstacles to the implementation of an Integrated Product Policy. The scope to take measures is limited, however, in that environmental concerns can only be accepted as long as they are part of Community competition policy.

3 Scope and obstacles within current secondary legislation to limit the environmental impact of products from a life cycle perspective

3.1 Product design

3.1.1 Technical harmonisation

3.1.1.1 Introduction

A Member State that wants to set effective requirements for product design, contents of substances and components, or regulate the environmental impact of the products in some other way essentially has to resort to acting for the Community to take measures for technical harmonisation of Member State legislation. Goods move across the borders, and it is hardly rational, and probably not even possible to any great extent, to set national requirements that differ significantly from those of other Member States in this regard. The previous chapter discussed the scope within the overall EC policy for the Internal Market to set environmental requirements for products. In this section the secondary legislation that sets environmental product requirements (and also some proposals of particular interest in the context of new legislation) should be investigated with regard to how it can promote and counteract an Integrated Product Policy that takes account of the environmental impact of products from a life cycle perspective. The report is structured to start with some issues that we consider central to an Integrated Product Policy.

A deciding factor of the real opportunity for authorities, companies and consumers to take account of the environmental impact of products from a life cycle perspective is the extent to which relevant and sufficient information that is necessary to make correct assessments is available. This factor is as important for someone who wants to apply life cycle thinking voluntarily as it is to someone who has to do it for reasons of binding law. Regardless of the preferred method for implementing the Integrated Product Policy, it is a basic requirement for the Community and Member States to be able to demand that Stakeholders *investigate* and *convey information* about the environmental impact of a product throughout its life cycle to a great enough extent.

To speed up the implementation of an Integrated Product Policy, it is reasonable to formulate requirements for the "environmental performance" of products from a life cycle perspective. It is then interesting to investigate the extent to which *real requirements* that are important to the environmental impact of products throughout their life cycle can be set.

"Flexible measures" are usually emphasised as an alternative to "lame legislation". The former usually refers to economic and other instruments that give choices and scope for action, the one that is "controlled". It is clear that a provision for product P to be designed in a certain way locks both the one who feels that the measure is too far-reaching and the one who thinks that the requirements should be more stringent. Legislative measures can also be formulated to allow scope for flexibility and strategic long-term development work that incorporates greater environmental consideration from a life cycle perspective. Examples of such measures are requirements for environmental consequence assessments which in the context of products can be translated into requirements of *reflection when it comes to product design*, and requirements to choose *better alternatives* when such are available. To what extent does secondary legislation leave scope for such binding measures and the possibility of such choices on a voluntary basis?

As discussed above, technical harmonisation in accordance with Article 95 aims firstly to create better conditions for the Internal Market. Secondary legislation that places environmental requirements on products within this area seems to focus primarily on these issues:

- Risk assessment and classification of hazardous substances and preparations
- Assessment of how hazardous substances and preparations should be handled "in a safe way"
- Limitations and other restrictions for certain substances that are considered particularly hazardous
- Direct product requirements for certain product types that are used in very large quantities
- Requirements aimed at waste management, targeting certain types of products
- To some extent, waste-related provisions can also work to control product design.

Secondary legislation can act as a platform for the development of an Integrated Product Policy with a life cycle perspective on the environmental impact of the product, but it also works the other way: as the provisions in the product-related directives often give maximum residue limits and other requirements that are fixed at a certain level, they limit the scope for environmental concern to that regulated by the directive. To go further and tighten the requirements demands new legislation. Secondary legislation will be investigated below with regard to the scope and limitations that it poses to the application of an Integrated Product Policy. The presentation does not claim to be comprehensive.

3.1.1.2 Knowledge and information spread

Knowledge is essential to the application of a life cycle perspective with regard to the environmental impact of products. The companies cannot choose more environmentally friendly production methods and input unless they know the environmental consequences of different alternatives. The consumers cannot promote environmentally friendly product development through "green choices" unless they have access to the information they

need to make these choices. Regardless of how the implementation of an Integrated Product Policy is otherwise thought to be implemented, it is necessary for a rational policy to ensure that the actors on the market have access to sufficient information. Secondary legislation provides some of the components that can be part of a knowledge and information system that is to support an Integrated Product Policy, but many pieces are missing before you can say that the system provides the necessary information in an appropriate way.

Important information from a life cycle perspective is whether the product contains hazardous substances, and how and where in the life cycle these substances can be dangerous. Secondary legislation contains some rules on how such knowledge should be produced and passed on.

An important part of the "knowledge system" is Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, and Directive 1999/45/EC of the European Parliament and of the Council concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations.[99] A labelling or other easily accessible system to provide clear information must form the basis for dealing with risks related to hazardous substances. Classification simplifies the information for the user of the product at a later level as the type of hazard and, to some extent also, the degree are shown in such a way that scientific competence is not necessary to understand the underlying investigations. In other words, a limited life cycle perspective can be read into the rules on classification and labelling.

The scope of current provisions is limited in many ways. The obligation to classify and label applies to hazardous substances and preparations, not to products. A user of something that is categorised as a product, input or finished product cannot obtain information about the substances that make up that product and any possible hazards without own research. A further limitation is that the provisions only include moderately hazardous substances and preparations. Substances that do not reach one of the stipulated categories of danger do not have to be labelled. The categories are extensive and grading is limited. In the main, they are also aimed at risks to human health and safety. The information on risks to the environment are much more limited. Furthermore, it is the risks associated with isolated substances that are investigated and classified. Cumulative and synergy effects, which can prove to pose serious problems in the diffuse spread of chemicals into the biosphere, are not covered by the assessments. Long-term and less dramatic effects are difficult to discover with the current methods of investigation. Current information systems about the risks of hazardous substances can thus only be of limited help to those who want to avoid substances that have a negative effect on the environmental impact of the product from a life cycle perspective.

---

[99] There are also supplementary directives on information, e.g. Commission Directive 91/155/EEC defining and laying down the detailed arrangements for the system of specific information relating to dangerous preparations (as last amended by Directive 2001/58/EC), which regulates safety data sheets for substances and preparations that are not in themselves classed as dangerous but which contain a certain amount of dangerous substances.

Council Directive 67/548/EEC also contains provisions for "new" substances to be subject to a preliminary application. The producer or importer should provide the information required to assess the risks of the substance. As a rule, the authorities then have 60 days to assess if the substance carries any risks and if any special recommendations are needed to reduce the risks. There are principles for assessment in Commission Directive 93/67/EEC laying down the principles for assessment of risks to man and the environment of substances notified in accordance with Council Directive 67/548/EEC. The Community thus receives some information with regard to possible harmful effects on health and the environment of "new" substances. This information does not appear to be made public other than for reasons of risk reducing measures. These provisions are thus of limited help to the manufacturers and consumer who want to choose the best possible products.

According to Council Regulation (EEC) No 793/93 on the evaluation and control of the risks of existing substances, "existing" substances that are produced and imported in certain quantities become subjects of risk assessment. Lists of prioritised substances have been drawn up, i.e. substances that require special attention based on, for example, dangerousness or exposure. Principles for assessment can be found in Commission Regulation No 1488/94. This system is clearly very inefficient; of the substances that have been pointed out as prioritised, only a few have become subject to assessment.

Some development of the rules on information has, as stated above, been announced in the Commission's Strategy for a Future Chemicals Policy. The Commission has recently put forward a proposal for new legislation, (REACH),[100] in which new and existing substances will gradually be assessed according to the same system. The proposal is intended to replace earlier Community provisions concerned with the issues that are regulated. This means that all substances (except those that are excluded) shall be registered. For the registration, the manufacturer or importer should provide information to the responsible authority. The information obligation has a different scope depending on the quantities concerned. If the proper information is not supplied, then the registration is refused. In some cases, further tests are required. These are carried out by the company concerned, but the assessment and decision on possible measures are the responsibility of the authority. Some particularly hazardous substances require approval for "safe" fields of use. The assessment is not only based on risks to health and the environment. Even if the conclusion is that the risks cannot be adequately controlled, use can be approved if the socio-economic benefits of the substance are considered to outweigh the risks. In this case, the possibility of choosing a substance that is less hazardous should also be considered. If restrictions on use have been decided on, the substance may only be used if these restrictions are followed.

The proposal also contains provisions on information obligations between handling levels. Anyone who handles a substance or preparation, even at a later handling level, has to carry out a chemical safety assessment and fill in a safety data sheet with the necessary information required for the safe handling of the substance. There is also an obligation to supply information back down in the supply chain, e.g. if a user at a later level discovers

[100] Registration, Evaluation, Authorisation and Restrictions of Chemicals. The proposal is published on the Internet at http://europa.eu.int/comm/enterprise/chemicals/chempol/whitepaper/whitepaper.htm.

that the risk assessment that has been made is not reliable. If a user at a later level intends to use the substance in a way that the producer has not foreseen, this must be reported to the authority concerned.

To a limited extent, the proposal is also aimed at products. A fundamental obligation is proposed for producers and importers to ensure that their products do not have any serious effects on health and the environment. Furthermore, it is proposed that the producer or importer of a product that contains a substance that is not registered for the relevant field of use has to make such a registration under certain conditions.

With regard to classification and labelling at Community level, it is proposed that in the future only substances that are carcinogenic, mutagenic or reproduction-toxic should be covered by harmonised provisions.

The proposal seeks to increase transparency. The intention is for the information about substances that have been evaluated and the results of the assessments to be published on the Internet. Adequate contact should be developed between authorities and Stakeholders. Regulation (EC) No 1049/2001 on public access shall be applied to documents at the EC authority that is to be set up. The provision of chemical safety information to the public should also be developed.

Compared with the existing rules, the proposal should improve slightly the possibilities for Stakeholders to apply an Integrated Product Policy of their own good will. If it is implemented, it will lead to greater knowledge on more products being drawn up and conveyed to the users concerned and to the authorities, at an earlier as well as a later level. If the ambitions to place as much of the information as possible on the Internet or make it available in some other way is successful, then this will certainly be an advantage over the current system.

Compared with the Commission's statements on the Chemicals Strategy, the proposal appears to be a backward step. The strategy stresses that work to substitute hazardous chemicals with those that are less hazardous should be promoted. The precautionary principle should form the basis of the assessments that are made. These principles have been toned down considerably in the later proposal. The proposal to restrict harmonised classification can hardly be said to be a step forwards from an information point of view either. The information that is supplied has to be so clear and easily accessible that it allows users at later levels as well as consumers to decide if the alternative products on the market are preferable, bearing in mind intrinsic properties and risks. A central database with non-confidential information available to the public is an improvement compared with current situation. The question, however, is whether this is the most effective way to build up knowledge and information as a strategic part of an Integrated Product Policy. The ordinary consumer is hardly likely to sit down in front of the computer to study a technical database in detail in order to compare the content of hazardous substances of different paints before deciding on which one to buy. The information has to be available in the form of labelling or some other easily available way in the decision situation.

The proposal ends with a clause on free movement. The Member States may not, on grounds related to the proposal, prevent, limit or obstruct the production, import, sale or use of substances, preparations and products that meet the requirements of the proposal. The same also applies to the acts that the proposal intends to replace, but here, such a

clause may have an unfortunate content. As the proposal is intended to regulate a number of measures, from registration requirements to restrictions, the clause could be seen as the Member States not being allowed to have any views at all on the sale or use of a substance that is registered but which has not been found to require far-reaching restrictions. This would be unfortunate, not just from an environmental and integrated product perspective, but also with regard to the implementation of EC environmental law.[101]

The Community has also adopted some acts in accordance with Article 95 that place requirements on conveying information about factors other than hazardous substances: Council Directive 86/594/EEC contains provisions on labelling of noise levels for household appliances, and Council Directive 92/75/EEC prescribes that household appliances shall be labelled with information about the energy consumption, water consumption and chemical consumption by the appliance. If the appliance is to be labelled with regard to noise (according to the above-mentioned directive), this information should also be contained in the labelling. Special implementing directives for different types of appliances should state the measuring standards and methods to be applied to produce the information. There are implementing directives for household electric refrigerators, freezers and their combinations (94/2/EC), household combined washer-driers (96/60/EC), household dishwashers (97/17/EC) and household lamps (98/11/EC). The Member States may not prohibit or restrict the placing on the market of appliances that meet the labelling requirements. (Other provisions on labelling have been adopted in accordance with Article 175. See also section 3.1.2.)

3.1.1.3 Product requirements

Together with the directives that regulate biocides and pesticides, Council Directive 76/769 on the approximation of the laws, regulations, and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (the Emissions Directive) forms a main directive with regard to health and environmental requirements for products. The Directive restricts allowable fields of use, levels, sales methods, etc. for a number of hazardous chemicals.[102]

With kind interpretation, this Directive can be said to have a life cycle perspective insofar as control is required for really hazardous products not to enter the handling chains in such a way that handling can cause damage. The environmental need to regulate hazardous substances should clearly not be lessened, though from a strategic life cycle perspective, these rules are more of an obstacle. The fields of use and levels given are "approved". Member States may not prevent or make it more difficult for products that meet the maximum residue limit and other prescribed requirements to be placed on the market or for them to be used.[103] The Directive thus prevents Member States as well as the Community from applying an Integrated Product Policy that is more ambitious than the Directive allows with regard to the most hazardous substances. In the long term, the

[101] It may be necessary to regulate the use of some dangerous substances regionally in order to meet the requirements of Framework Directive 2000/60/EC on water.

[102] The proposal on REACH is intended to supersede this directive.

[103] The Directive prevents general restrictions, but there ought to be scope according to the environmental law to set requirements in individual cases.

Directive also forms a strategic obstacle to the development of less hazardous alternatives. The driving forces for the companies to produce better alternatives are limited, as tried and tested substances can be used within the current restrictions. In our opinion, this is a big disadvantage in the effort to develop an Integrated Product Policy that, *inter alia*, takes account of the content of hazardous substances in a product. A general application of the substitution principle ought of course to form a central component of a strategy to minimise the environmental impact of products from a life cycle perspective.

Directive 2001/95/EC of the European Parliament and of the Council on general product safety is of limited importance to an Integrated Product Policy that seeks to limit the environmental impact of products, as its aim is to protect the health and safety of consumers and not to provide more general environmental protection. It is nonetheless interesting to bring it up in this context as it contains important elements that also ought to be obvious for an Integrated Product Policy. The Directive sets a standard for what is acceptable: producers may only place "safe" products on the market. The product may not carry any risk, or only those minimum risks that are considered acceptable. To assess if the product is safe, it is not enough to just investigate the field of use that is closest to hand, but all reasonably foreseeable fields of use should be taken into account. The producer should consider the properties and composition of the product so that there is no risk of, for example, hazardous substances being released from the product during use. An important aspect from a risk point of view, which is often ignored in other contexts, is that synergy and cumulative effects should be taken into account, and consideration should be given to the possible effect of the product on other products. It is also interesting to notice that extra consideration is given to the sensitivity of the "recipient"; the product should be safe for children and other consumer groups at special risk. The Directive also contains provisions on how the producer should act to further increase safety. Consumers should be supplied with information that allows them to assess the risks of a product during the whole of its reasonably foreseeable time of use. The producer should take the necessary measures to obtain information on the risks that the product may carry, and should also be able to act in such a way that risks can be avoided. Control and further investigations may be needed to improve safety during use. Products should be labelled so that they can be identified at later checks, random tests should be carried out on marketed products, and investigations should be conducted in light of complaints received. Distributors also have a responsibility to not supply products which they, for reasons of expert knowledge, ought to know do not conform to the safety requirements, convey information on risks, and take part in the efforts to remove such risks. Member States are obliged to make sure that producers and distributors comply with the Directive. The authorities responsible should have the right to recall products that are found to carry a serious risk. If this should happen, the Commission and other Member States must be informed.

There is a lot to consider here for those who want to draw up an Integrated Product Policy. Discussions are also being conducted on whether such a policy can be drawn up by amending the Product Safety Directive to also regulate environmental concerns. This issue is discussed further in section 4.2.

In addition to the above-mentioned provisions of more general scope, some categories of products are specially regulated. Technical harmonisation in accordance with Article 95 is not particularly extensive with regard to environmental requirements for products. In the main, there are a few special product groups that are subject to such measures, namely, motor vehicles, fuels, cleaning agents and electrical products.[104]

Council Directive 70/156/EEC on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers defines how they should be constructed. Appendix IV contains a compilation of the specific requirements for type-approval to be notified, together with references to follow-on directives in which the requirements are defined. It is mainly a question of technical requirements and safety aspects. The environmental issues that are regulated are noise, exhaust emissions and fuel consumption. The issues that are regulated thus concern environmental impact during use, not other issues related to the life cycle. A type-approval should be given for vehicles that meet the requirements of the Directive.[105] If Member States or the Community want to introduce increased life cycle thinking with regard to vehicles, this must be formulated through amendments in legislation or in some other way.[106]

Environmental requirements for fuels can be found in Directive 1998/70/EC of the European Parliament and of the Council on the quality of petrol and diesel fuels,[107] which defines a number of environmental specifications for such fuels. In principle, the Member States may not prohibit, limit or prevent fuels that meet the requirements from being placed on the market. The formulation of the Directive is such, however, that it involves development in a positive direction. The environmental requirements are defined on two levels. As from 2005, the higher quality shall be the standard. It has also been announced that the requirements may be tightened further, concurrent with technical developments. This is an interesting construct, maybe one that should act as a model in other contexts. There are clear signals that any advances that are made are intended to be made use of, and also where to go from here, so that companies have time to adapt to more stringent requirements. In particularly exposed or sensitive areas, even more stringent requirements can be applied to the current fuels used.

According to Council Directive 73/404/EEC on the approximation of the laws of Member States relating to detergents, Member States should prohibit detergents from being placed on the market or used if they do not meet the requirements for biodegradability and toxicity that are prescribes in the Directive. However, a Member State may not refer to such properties to limit or prevent detergents that meet these requirements from being placed on the market or used. The Commission has put forward a proposal for a regulation on detergents that is intended to supersede earlier acts.[108] The proposal contains more stringent requirements with regard to the biodegradability etc. of

[104] There are also provisions on foodstuffs, cosmetics, medicinal products, biocides, etc.

[105] The same applies to Directive 2003/37/EC of the European Parliament and of the Council on type-approval of agricultural or forestry tractors, etc. and Directive 2002/24/EC of the European Parliament and of the Council relating to the type-approval of two and three-wheel motor vehicles.

[106] Supplementary environmental requirements have been introduced by the "back door" through Directive 2000/53/EC on end-of-life vehicles. See also section 3.4.2.

[107] Last amended by Directive 2003/17/EC.

[108] COM(2002) 485 final.

the agents. As pointed out earlier, however, complete harmonisation means that the scope to apply an ambitious product policy is limited, as more stringent requirements can often only be formulated through new changes in the law.

Different electric articles are subject to environmental product requirements in various directives. The content of hazardous substances, energy efficiency and noise are subject to regulation. Some are technical requirements, but mostly it is a question of labelling with information about the energy efficiency of the product. (Some acts that only regulate labelling are presented in section 3.1.2.)

Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic products prohibits, with some exceptions, the use of six hazardous substances in such products. The Directive contains information that further substances and fields of use will be regulated when there is scientific support for this, but does not give detailed timetables or aims for such measures. Council Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances[109] contains similar restrictions. It is prohibited to sell batteries and accumulators that contain more than 0.0005 per cent by weight of mercury. The cadmium and lead content is also regulated. There is thus an ambition to restrict the content of hazardous substances, something that is naturally of importance to the environmental impact of the product at handling levels. The latter Directive is also aimed at other measures with the same effect. Batteries should be collected and recycled. They should be labelled with heavy metal content and with information on collection and recycling. Batteries may, as a principal rule, only be fixed in appliances that are easy to dismantle by the consumer when they have been used. Member States should ensure that separate collection is efficiently organised, and they may also introduce measures to encourage recycling, e.g. in the form of financial instruments.[110]

According to Directive 96/57/EC of the European Parliament and the Council on energy efficiency requirements for household refrigerators, freezers and combinations thereof, such appliances may not be placed on the market if they have a higher energy consumption than is prescribed in the Directive. Council Directive 92/42/EEC on energy efficiency requirements for new hot water boilers fired with liquid or gaseous fuels states that boilers must meet certain efficiency requirements laid down to be allowed to be placed on the market and put into use. Member States may not prohibit, limit or prevent appliances that meet the requirements from being placed on the market or put into use. The Member States may, however, decide to apply a special system of labelling for energy performance of the boilers, where energy efficiency can be defined in three steps.

3.1.1.4 Product design

Several of the above-mentioned directives are obviously important to the design and composition of products. The different waste directives are also likely to be of great indirect importance to the design of products, though no act of secondary legislation

[109] Amended through Directive 1998/101/EC.

[110] Directive 2002/96/EC (the WEEE Directive) is indicated because its provisions will be tightened, see also section 3.4.2.

aimed directly at environmental product design in a more general sense has, as far as we know, been adopted yet.

However, the Commission has recently presented a proposal for a framework directive on eco-design for energy-using products.[111] The proposal means that the Commission will have the power to adopt provisions on eco-design requirements for specially indicated products or for certain important environmental aspects of the products. Such measures can be adopted if the product in question represents a significant proportion of the trade, has a marked impact on the environment taking the whole life cycle of the product into account and there is considerable potential for improvement, provided it does not significantly affect the use of the product, health and safety aspects, the effect on the consumer and the competitiveness of the companies. If general eco-design requirements are introduced for a product, a sort of "EIA for products" should be carried out according to Appendix I of the proposal. The Appendix specifies the aspects of the product and its life cycle that are to be investigated. Methods to lay down specific eco-design requirements are given in Appendix II. The producer should assess that the product meets the requirements that have been laid down according to the proposal. This should be documented and handed to the authority on request. The proposal also involves certain requirements for producers of subcomponents – for the producer of the finished product to be able to make correct assessments, she must have access to the relevant information on the subcomponents.

This proposal is in line with the development of an Integrated Product Policy. The "EIA" requirement in particular appears to be appropriate. Even if direct requirements are not set with regard to the environmental impact of the product, it leads the producer to reflection. Maybe the product can be designed better. It is not clear exactly what ambition level the Commission will enforce, but as a basis for continued efforts to limit the environmental impact of products, the proposal is very interesting.

3.1.2 Environmental policy

As pointed out earlier, acts that regulate environmental aspects of products can also be adopted within environmental law.

There is a framework for voluntary eco-labelling (the EU flower logo) in Regulation (EC) No 1980/2000 of the European Parliament and of the Council on a revised Community eco-label award scheme. In accordance with these and earlier provisions, criteria have been developed for voluntary, positive eco-labelling for a now quite large number of product groups.[112] These criteria do have some degree of life cycle perspective. The criteria for vacuum cleaners, for example, aim to reduce energy consumption, contribute to vacuum cleaners being durable and recyclable and reduce the use of hazardous substances by restricting the content of these in the product. The criteria are not formulated with the principal aim of the environmental impact of the product from a strategic life cycle perspective however.[113]

[111] COM(2003) 453 final.
[112] Most recent for detergents according to Commission Decision 2003/200/EC.
[113] Commission Decision 2003/121/EC.

Regulation (EC) No 2422/2001 of the European Parliament and of the Council on a Community energy efficiency labelling programme for office equipment lays down rules for Community energy efficiency labelling for office equipment, the so-called Energy Star labelling programme. Like eco-labelling above, taking part in the programme is voluntary, but the participants undertake to promote energy efficient products that meet the requirements of Energy Star labelling.

Council Directive 1999/32/EC on reduction of sulphur content of certain liquid fuels states the highest permitted levels of sulphur in heavy fuel and gas oil and is one example of binding environmental provision for products. This Directive is a minimum directive, i.e. Member States may have stricter requirements if they wish.

A further example that can be mentioned is the Commission's proposal for a Directive on the promotion of the use of biofuels.[114] According to the proposal, Member States must make sure that the minimum proportion of biofuel sold on their markets is at least 2% of all the petrol and diesel sold for transport purposes. This proportion should be increased gradually in accordance with a proposed timetable. The objective can be met through, for example, national legislation on petrol and diesel to be mixed with ethanol or certain other alcohols.

Binding provisions adopted in accordance with Article 175 do not form the same obstacle to further measures as is usually the case with acts adopted in accordance with Article 95. Such a minimum construct is probably less useful when it comes to more complex products. For a Member State to be able to implement stricter environmental requirements for this, the national industry has to have full control of the composition of input. As applies to company ambitions for the voluntary application of environmentally friendly product policy, a lack of information is a decisive obstacle.

3.2 Production

3.2.1 Environmental policy

3.2.1.1 Introduction

A large part of the EC environmental policy and environmental law is aimed at limiting the effect of production emissions on human health and the environment. This section, investigates the extent to which Community legislation demands or at least allows a life cycle perspective in the production process.

The best conditions for setting up a complete life cycle perspective for the environmental impact of the product ought to be at the production level. Production can be said to be the transformation process in which raw material, other included components and transport turn into something that can be treated as a product through the supply of energy and technology. Here it is possible to establish a strategic environmental perspective on the included components through consistent demand for the best possible alternatives, on the transformation process by using optimal technology and materials

[114] COM (2002) 508 final. The proposal is an example of Article 175 forming the basis of environmental requirements for products.

from an environmental point of view, and on the environmental impact of the finished product at later levels through its design and substance content. Important benefits from an implementation point of view are that production facilities are often big and thereby easy to identify, not too numerous, and they are also already largely subject to various authorisation requirements. In other words, there is already a structure that could be used to aid the implementation of an Integrated Product Policy.

EC environmental law is generally formulated as minimum legislation. Member States have the right to introduce and apply stricter national rules provided they are not otherwise incompatible with the Treaty. In light of this, it may seem unnecessary to analyse environmental law – after all, it does not *prevent* the introduction of a national Integrated Product Policy. The investigation seeks to investigate the *support* in EC legislation for a life cycle perspective on the environmental impact of products, and how this can be developed. It is thus of interest to investigate if there are any requirements in environmental law that can be interpreted as a requirement for a life cycle perspective, and the support that can otherwise be found for such an attitude. This can be important, not least in a situation where the principle of the Internal Market is incompatible with the principle of environmental protection and preventative measures. If an environmental directive supports a type of restriction, in a case concerning a special activity, it can hardly be rejected with just a reference to a general principle on the free movement of goods.

Environmental law can be categorised in different ways with regard to the function of the rules. Collecting and spreading knowledge is as important with regard to the environmental impact of activities as it is for hazardous substances. In this regard, Community law provides rules and bases for decisions before examinations of bigger projects, and general provisions on the right to environmental information. The regulation on the environmental impact of activities is another type of measure in which the Community takes an interest. Provisions on environmental quality, though indirect, provide another way to influence the environmental requirements that are set for activities.

3.2.1.2 Investigating environmental consequences

Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment seeks to supply the authorities responsible with the relevant information so that they can make decisions on a project with the full knowledge of the likely significant environmental impact.[115] To achieve this, Member States should ensure that projects that may lead to significant environmental impact due to their type, size or location become subject to requirements for authorisation and assessment for their effect on health and the environment before permission is given. (Requirements for actual limitations on the environmental impact of activities require application of other legislation.)

It is the environmental impact of the *project* that should be assessed. The Directive's definition of "project" is "carrying out building or construction work or other installations or work". The projects specified in Appendices I and II are principally different types of

[115] The Directive was last amended by Directive 97/11/EC.

industrial activity and infrastructure projects. The investigation and assessment usually cover environmental impact during the construction of the future operation of the planned activity. The environmental impact during phasing out may need to be investigated according to Appendix II p. 13.[116]

An Integrated Product Policy is not aimed primarily at the environmental impact of projects but products, though the environmental impact of production is naturally an important part of the environmental impact of the product from a life cycle perspective. The support given by the Directive to the investigation and assessment of the direct environmental impact of the construction and operation of the activities is therefore in itself of interest. This knowledge forms one of the bases for the licensing authority's chance to contribute to its part of the process to implement an Integrated Product Policy. It could also form an important basis for producers and users at later levels, including consumers, to apply such a policy, voluntarily or in accordance with other instruments. It is also interesting to investigate, from a slightly wider perspective on the issue, if, and in that case what, support the Directive provides for the investigation and assessment of environmental impact at other levels. With regard to previous levels, it is a question of the extent to which the Directive supports the use of information that already exists, and the support that it lends to the production of a new investigation. For environmental impact at later levels, it is a question of investigating how the product can be designed to minimise this impact.

There is no reason to go into a detailed account here of the requirements of the Directive with regard to the investigation of the environmental consequences of constructing and operating a project – this ought to be very familiar to anyone who has cause to study this report. It is clear, however, that an EIA should cover direct as well as indirect effects of relevant environmental factors. In terms of language, indirect effects could also include those at levels other than the one in question, e.g. that the raw materials used cause environmental problems during extraction or that the material produced gradually causes land pollution in a landfill site. The Directive could thus be interpreted as containing a general requirement to investigate effects at other levels. The Directive and its introduction do not, however, give any other support to such interpretation, which is why it is reasonable to assume that this is not intended either. On some specific issues, however, there appears to be a reason to consider other handling levels.

The content of the EIA, as outlined in Article 3, states that the assessment should, *inter alia*, cover the effects on material assets. Among the criteria given in Appendix III can be mentioned the use of natural resources. It is thus clear that issues on the *management* of material and natural resources can and should be taken into account in the EIA. Another issue is whether *environmental impact* during extraction or preparation of material and natural resources should be included in the assessment of a project at a later level. The Directive gives some support for interpretation in that direction. Appendix IV mentions specifically, as a separate point at the side of the assessment of emissions and other disturbances, that the environmental impacts of using natural resources should be assessed. It is difficult to see what environmental impact the use of natural resources can

[116] The phasing out of nuclear power is covered in Appendix I.

have on current activity that does not express itself in emissions or other disturbances. Such an effect ought to occur at earlier levels in the form of utilisation of the resource itself, as well as environmental impact during extraction and preparation. Serious environmental impacts at earlier levels that result from to the use of natural resources in the current project can thus be seen to form such indirect effects to be investigated. (We do not, however, know of any legal case or other legal source that supports such an interpretation.)

To make a separate investigation of environmental impact at earlier levels would be unnecessary if this was carried out continuously during the development of the product from the cradle to the handling level in question. In principle, it also ought to be possible to make use of descriptions of environmental consequences for activities from earlier production levels in order to sum up the environmental impact, e.g. for energy production, raw material extraction or the production of base material for the production in question. Such activities often require descriptions of environmental consequences according to Community law. However, the Directive does not ensure that such information can be produced at later stages. The EIA should be made available during the authorisation process, but there is no general principle of public access in this regard. In addition, descriptions of environmental consequences are not always drawn up at earlier levels. The Directive only covers activities that are normally big and very disturbing to the environment. National provisions can cover more activities, but this is of less use to a manufacturer that imports a large proportion of the input.

With regard to later handling levels, it is clear that the waste level should be taken into account in some way in the EIA. Waste production is one of the criteria in Appendix III p.1 that is used to decide if a project could have significant environmental impact. According to Appendix IV, the type and quantity of residues should be assessed. In addition, the more important environmental impacts of the disposal of waste should be shown. To have some reasonable content, the latter ought to cover transport as well as handling of the waste.

It is *the project's* effect on the environment that is to be assessed. This must include assessing pollution and other disturbances that can arise from the use of products in the activity if this is important to the environmental impact of the activity. The assessment includes the consideration of alternatives. If an additive or lubricant causes any significant environmental problems in the form of emissions of pollutants from the activity, it reasonably ought to be possible to demand an investigation into whether the product can be substituted by some alternative that does not give rise to the problems.

In accordance with the EIA Directive, it ought not be possible, however, to set requirements for the investigation of the substitution of substances or alternative product design if the aim is to limit the environmental impact of the product at other handling levels (possibly apart from the waste issue). It is not, as mentioned before, the environmental impact of the products that might be produced that should be investigated.

3.2.1.3 Environmental requirements during production

Council Directive 96/61/EC (IPPC Directive) seeks to prevent and control pollution to air, water and land from some specified activities through coordinated measures. (There

are also other directives with corresponding aims and largely similar application principles.)

The aim, as it is described in the introduction and in Article 1, is to limit pollution *that originates from* the activities concerned. This hardly gives scope to take environmental consequences into account at earlier levels nor product-related environmental consequences that do not result in emissions from the activity. The Directive definition of the term "emissions" is along the same lines: directly or indirectly they are emissions of substances etc. from point sources or diffuse sources *within the facility*.

The concept "best available techniques", as defined in the Directive, can to some extent be interpreted to not only mean that "emissions from the facility" should be taken into account. According to Appendix IV, the application of the best techniques should also include considerations for the use of substances that are less damaging, energy efficiency, management of raw materials, the use of waste-efficient technology and the promotion of recycling of substances and waste. The question is whether, according to the Directive, such measures can only be taken with the aim of limiting emissions from the activity concerned or if the intention is that they could also be taken with the aim of limiting the impact of the activity (the product) from a life cycle perspective.

It is possible to apply the principle of substitution of hazardous substances with the limited aim of reducing emissions from the activity concerned. As the expressed aim of the Directive is limited in this way, it is hardly possible to arrive at any other conclusion than that this is the interpretation that ought to be applied. The Directive supports the substitution of hazardous substances if these can be replaced with those that are less hazardous and this leads to the emissions from the facility concerned being restricted. However, this directive does not support a general substitution principle to produce, for example, a product with less dangerous properties.

Even if management of raw materials is an aspect that should be taken into account, there is hardly room for an aspect of pure thrift within the aims of the Directive. Restricting quantities of raw material in order to limit the environmental impact of earlier handling levels or saving resources for the future ought not be included in the obligations set by the Directive. Management of raw material (including water) can limit emissions and waste from the activity by avoiding unnecessary waste. Management may also be able to limit emissions in such a way that less energy is used in the process and for transport within the activity. These ought to be the measures that are relevant. Similar arguments have to be pursued with regard to energy efficiency. Improvements in efficiency have to be aimed at the internal processes not, in this context, at the energy efficiency of the finished product.

The aim of reducing emissions from the activity thus comprises measures on waste. The thing to be counteracted and limited, however, is emissions from sources within the facility. The aim therefore ought to be to reduce the amount of waste that is generated by the *activity*, in part through the use of waste-efficient technology. The aim cannot, for example, be for the product to be designed in such a way that waste management is made easier at a later level. Further criteria for the best available technology according to Appendix IV are to encourage the recycling and re-utilisation of substances that are used in the process and, where appropriate, of waste. These criteria could be interpreted to mean that it would be possible to set product-related requirements to promote such aims

in general. Here too it is more in line with the aim of the Directive to interpret the requirements to mean that substances and waste that are handled and generated within the facility can be reused within the activity itself.

The IPPC Directive can thus hardly be interpreted to support measures that seek to reduce the environmental impact of products at other handling levels than the one in question. In this regard, the application area can be likened to the strict application of the Environmental Protection Act in order to limit the environmental impact *of the activity* compared with the slightly broader application area of the Environmental Code for which the aim is to minimise environmental disturbances more generally. Even if these limits exist, the Directive provides fairly strong support for measures aimed at limiting the environmental impact of the production of products. The definition of the best techniques combined with the criteria in Appendix IV provides directions on taking an overall hold to limit the disturbance from the activity.

The conclusion can also be drawn, however, that the aim of the Directive is not to bring about "as much environmental protection as possible". It covers very disturbing activities, and the substances specified in Appendix III, for which the Community should lay down emission limit values, are those that are very hazardous.[117] As discussed in section 2.3, it is the really big problems that are regulated at Community level while Member States regulate the other issues themselves within the scope of the Treaty.

As with the EIA Directive, it is interesting to consider the possibility of using the authorisation procedure that takes place, as the basis for information for later handling levels. The conclusion is the same. Here too the authorisation application should be made available to the public, but there are no requirements in this Directive for the application or the authorisation to also be public later.

3.2.1.4 Environmental quality

Environmental quality standards obviously do not have any direct influence on the design of the products from a life cycle perspective. Indirectly they can be important to the amount of environmental impact that can be allowed, especially at the production level. As emission limit values for environmental quality should be enforced, they are important to the allowable amounts of emissions of substances covered by or that affect environmental quality standards.

The two most extensive regulations in the area are Council Directive 96/62/EC on ambient air quality assessment and management, and Directive 2000/60/EC of the European Parliament and of the Council on establishing a framework for Community action in the field of water policy.[118] The latter can be especially important to the

[117] The IPPC Directive is supplemented by a fairly large number of directives that are aimed at special activities and types of emissions. These directives also have common emission limit values and lists of substances for which emissions should be restricted. Other directives can also be important to the permissibility of emissions of pollutants.

[118] The latter also regulates a number of other issues. It is debatable whether the quality objectives and quality standards that are to be drawn up according to the Directive have the same legal status as other environmental quality standards. There is no reason in this context, however, to further develop these peculiarities; the subject for discussion is the extent to which the directives support an Integrated Product Policy.

permitted emissions from the manufacturing industry. According to the Directive, all surface water should have good surface water status, according to quality criteria that will be laid down no later than 15 years after the Directive comes into force. The same applies to groundwater. Emissions to water of substances that may jeopardise the quality objectives thus have to be limited. It is therefore not just a question of the chemical status of the water; it should also have good ecological status. The Directive has adopted a list of prioritised substances for which pollution should be reduced or, for some of them, cease.

Council Directives 79/409 and 92/43 on the conservation of wild birds and of natural habitats and of wild fauna and flora can also be mentioned in this context. Plans or projects may not be carried that can harm the habitats in areas set aside as Natura 2000 according to these directives. This may affect the extraction of raw materials, and production that causes damage or disturbance to the habitats.

3.2.1.4 The right to environmental information

According to Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information, public authorities in the Community have a duty to give out such environmental information to its citizens as is found at the authority concerned. Member States may, however, prescribe that the obligation does not include bodies when they act in the capacity of a judging or legislative authority. This would mean that companies at a later handling level that want to apply an Integrated Product Policy do not have the firm support of this Directive to gain, for example, judgements with reports of environmental consequences and authorisation decisions for proposed suppliers of input with the aim of conducting an assessment of the environmental impact of the production. (There is no obstacle to Member States applying more generous rules however.)

3.2.2 The Internal Market

Limiting the environmental impact of activities and measures within the own country is largely a national matter, supplemented by certain minimum common rules adopted within EC environmental policy. The principle of free movement and secondary legislation adopted in accordance with Article 95 of the EC Treaty may, however, be important to the scope for interpretation of national as well as common environmental rules that affect the production level as well as the user level. The main principle is that products that can be imported into and sold in a Member State, and which meet the relevant requirements for technical harmonisation, shall enjoy the same freedom in all other Member States.

Different environmental directives prescribe an obligation for Member States to take measures to limit emissions of pollutants from production, and protect important nature and environment values. It must naturally be possible to implement such measures, even if they, directly or indirectly, should involve product-related restrictions in the individual case. Member States may not prohibit the placing on the market of a product that contains, for example, cadmium if the product is approved according to the Directive. This does not mean, however, that the product may be produced or used in just any way.

Cadmium emissions to the air and water should, where appropriate, be regulated in the authorisation according to the IPPC Directive. If the emissions cannot be kept within the current emission limit values, or if any environmental quality standard for cadmium is breached, this naturally has to affect the content of the authorisation. The same has to apply to the use of the product that is in itself authorised.

Similar arguments can be pursued with regard to other directives; if a Natura 2000 area risks being damaged, then the production or use of a product that is in itself allowed may have to be restricted. The measures needed to achieve sufficient protection for the values that Community environmental law aims to protect naturally have to be implemented even if this means restricting the use of a certain product in the particular case.

In some cases, this is expressed directly in the act concerned. In Directive 98/70/EC on the quality of petrol etc., there is scope for, for example, Member States to demand stricter environmental specifications on fuel that is sold within some particularly vulnerable or sensitive areas. This may be needed to enforce an environmental quality standard or to protect a particularly sensitive Natura 2000 area.

The IPPC Directive also contains an explicit provision on product restrictions. Substitution of hazardous substances is given as a suitable precautionary measure within the context of the best available techniques. It would be very odd if this were to mean that hazardous substances and products that are not regulated by Community law could become objects for substitution, but those regulated by it, and which are therefore considered to be the most hazardous, were not covered by the provision. In our opinion, there is no other reasonable interpretation than that all substances (which must also indirectly include products that contain hazardous substances) can be substituted by those that are less dangerous according to this provision.

Similarly, it is conceivable that national authorities may need to limit or regulate the use of pesticides, detergents or other substances/preparations which in themselves meet Community requirements, in order to enforce environmental quality standards or to protect sensitive natural areas. Such situations can probably be brought more to the fore when the framework directive for water has been fully implemented and the Member States have a duty to enforce good water quality.

It is obvious, but still worth pointing out in the context, that the producer naturally has the right, of his own good will, to design his product so as to minimise its environmental impact. The Commission proposes a series of measures to encourage such initiatives, e.g. financial instruments and voluntary agreements.[119]

3.3 Waste

3.3.1 Technical harmonisation

Community legislation on waste is extensive. There is no reason to go into all the rules in detail here. The report concentrates on acts and issues that are of special interest to an Integrated Product Policy.

[119] COM(2001) 68 final and COM(2003) 302 final.

Council Directive 75/442/EEC on waste must be mentioned briefly in this context, as the fundamental principles of the Community's view on waste are formulated here. The aim is firstly to prevent the generation of waste. For waste that is, nonetheless, generated, harmful properties should be limited. Secondly, waste should be recycled and reused, or used as a source of energy. Only if there is no alternative, should waste finally be disposed of. Instruments available according to the Directive are waste plans, authorisation for handling waste, etc.

The main aim of the Community's waste policy appears to be to minimise the amount of waste that is finally deposited. The most worrying environmental impact of waste is clearly that it requires space. The aim is therefore to purposefully promote other ways of dealing with the waste. This work (and obviously also when it finally comes to depositing the waste) is necessary for the waste to be as harmless as possible and, also from other aspects, to be able to be used for some useful purpose. The life cycle perspective in the basic directive is mainly concerned with this aspect. The more recent acts on waste further build on the basic principles and develop them from a life cycle perspective. The producer is given responsibility that forces her to, so to speak, "look in the rear-view mirror" from the waste horizon: how should the product be designed to be reusable in a suitable way?

In Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste, adopted in accordance with Article 100a, there is a clear life cycle perspective, especially with regard to *limiting* the quantities of waste, but also to some extent with regard to the *content* of hazardous substances. Reducing volumes of waste is, as mentioned in the introduction, a necessary condition of sustainable growth that is expressly stated in the Treaty on the European Union. To achieve this, the generation of waste must firstly be prevented, and then basic principles such as re-utilisation, material usage and other methods of recycling applied. This naturally requires a working system of returns as well as requirements for the composition of packaging so that it can be recycled or used for energy without risk to the environment.

The Directive specifies that a certain amount of packaging waste should be recycled. Of this, a specified part should be used for material. Member States should organise return and recycling systems. Packaging should be labelled to clearly show the materials that have been used. The content of some heavy metals is restricted. The Commission should promote the drafting of European standards for the essential requirements given in Appendix 2, as required. These involve limiting the volume and weight of packaging as far as possible without neglecting important safety and hygiene requirements, designing and handling packaging so that it can be reused or recycled and the impact on the environment be minimised during the handling of packaging waste, and producing packaging in a way that minimises the content of harmful and other hazardous substances and material. The objectives for recycling and material usage of packaging waste are further raised and defined in the Commission's proposal for an amendment to the Directive.[120]

The Directive is thus a harmonisation directive. Member States must not prevent packaging that meets the requirements of the Directive. It is worth noting that, in

[120] COM (2001) 729 final.

principle, they must not be more successful with their recycling than the limits set by the Directive. A recycling policy that is too successful in a Member State is considered to carry risks of trade barriers and distortion of competition. Exemptions are granted, but the Commission must give its approval.

The Directive contains several important stages of life cycle thinking. The producer of the packaging has to design the product in view of reuse, the material in the product should be able to be used again, and it should be usable for energy or be degradable. It also contains important elements for information systems: packaging should be labelled to show how it should be handled as waste. The economic actors should provide the information that is necessary to supervise the implementation of the objectives of the Directive, including details of flows of packaging and packaging waste, and information on hazardous substances or properties. The users of the packaging should be given the information they need to be able to implement their part of the recycling strategy. The strategy is also important to resource usage as packaging should contain a minimum amount of material and the material that is used should be recyclable. Aspects of energy economy do come into it indirectly, as the product should contain as little material as possible (less energy is spent during transport), and because energy extraction is considered a good way to recycle packaging. No other energy aspects are expressed, however.

3.3.2 Environmental policy

Directive 2000/53/EC of the European Parliament and of the Council on end-of-life vehicles, adopted in accordance with Article 175, seeks to prevent the generation of waste from vehicles. It also aims to increase the environmental performance of all actors during the lifetime of the vehicle. The Directive starts off gently with Member States calling on producers to take account of issues of facilitating material usage already at the design stage, restricting the use of hazardous substances, and using recycled material in vehicles. After that the Directive goes on to more precise requirements: the economic actors have to take responsibility for end-of-life vehicles being taken care of in a way that is acceptable from an environmental point of view, and at least 85% of the average weight per vehicle should be reused and recycled (95% by 2015). Collection systems should be set up. The use of lead, cadmium, mercury and hexavalent chromium is restricted. The actors, including consumers, should have access to the information they need to take into proper account the environmental aspects of waste management.

The Directive will affect the choice of material in, and maybe above all the composition of, vehicles. Directive 70/156/EC on type-approval of motor vehicles should be supplemented by standards on how vehicles can be dismantled and the material recycled. This thus forces a life cycle perspective onto the production phase. Even from the point of view of economy, there is a clear life cycle perspective. If 95% of the material is recycled, then considerably less iron ore and other resources will be needed for car production.

Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste from electrical and electronic equipment seeks to prevent the generation of waste from such products. It also seeks to improve the environmental performance of all

actors affected during the life cycle of the products. To achieve this, Member States should encourage such design and production of electrical and electronic products that take into account and facilitate dismantling and recycling. Member States should take appropriate measures so that the producers do not, through special design properties or production processes, prevent WEEE from being reused, unless such properties or processes have decisive advantages, e.g. with regard to environmental or safety requirements.

The Member States should take appropriate measures to minimise the disposal of WEEE as unsorted waste, so that WEEE is largely collected separately. For WEEE from private households, Member States should, no later than 2005, have set up systems that make it possible to return such waste without charge. There should be sufficient waste receiving facilities. Distributors of new products should be responsible for allowing waste of the kind that they have supplied to be returned to them. Producers should be allowed to set up and operate systems for the return of WEEE. By 31/12/2006 at the latest, an average quota of 4 kg of WEEE per person from private households should be collected. For waste other than from private households, Member States should ensure that the producers see that such waste is collected. WEEE that is collected and not reused in its entirety should be transported to authorised treatment plants.

The waste should be treated according to the regulations in the Directive. Member States should encourage the facilities to introduce certified environmental management systems. The Directive also specifies the amounts of different kinds of waste that are to be collected.

Users of electrical and electronic products should have access to all necessary information that WEEE may not be disposed of unsorted, the collection systems that exist and the potential environmental impacts from the presence of hazardous substances in the products. The producers should label the products with a recycling symbol, and other information can also be requested of them. Member States should take appropriate measures for consumers to contribute to collection and for the treatment plants to have the information they need for recycling and treatment. Products should be labelled for easy identification.

This Directive also has a clear life cycle perspective; even if appears only to regulate waste issues.

3.4 Public procurement

3.4.1 Introduction

The general rules of the EC Treaty also apply to public procurement. The most important rules consist of Articles 28, 39, 43, 49 and 86 (previously 30, 48, 52, 59 and 90). The different directives on public procurement have not led to the Treaty rules becoming less important; the Treaty articles form primary legislation in relation to the Directives, which make up the secondary legislation in the field of public procurement.

Article 6 of the EC Treaty provides a legal basis for the Member States to integrate the environmental protection requirements into the formulation and implementation of Community policy and activity.

The first of the Community directives on public procurement dates back to 1971, when the Directive concerning the coordination of procedures for the award of public works contracts was adopted. Since then, the Directive coordinating procedures for the award of public supply contracts has been adopted, as have the directives on the supply sectors.[121] The directives have been amended several times, but the basic principles have remained the same.

The procurement directives do not contain any explicit references to environmental protection or environmental considerations or any other aspects beyond the core parts of the Internal Market policy, which is not surprising bearing in mind the time when these directives were adopted.

Since the procurement directives were adopted, the Community and the Member States have taken a series of environmental initiatives.

It should be noted that in the proposed amendments to the procurement directives the Commission adopted on 10 May 2000, environmental characteristics are expressly listed among the criteria that can be used to establish which is the most economically advantageous tender.[122]

The aim of this part of the report is to investigate and clarify the possibilities, according to the regulatory framework in force for public procurement, so that the greatest possible account can be taken of environmental protection during public procurement. This section reviews the different phases of tender procedure, and investigates how environmental consideration can be taken at each phase.

Other parts of the report will discuss the possibilities of incorporating environmental concerns over and above current legislation.

---

[121] 1 Council Directive 71/305/EEC on the award of public works contracts, superseded by Council Directive 93/37/EEC (no Swedish language versions), as amended by Directive 97/52/EC of the European Parliament and of the Council.
Council Directive 77/62/EEC coordinating procedures for the award of public supply contracts (no Swedish language version), superseded by Council Directive 93/36/EEC, as amended by Directive 97/52/EC of the European Parliament and of the Council. Council Directive 92/50/EEC on the coordination of procedures for the award of public service contracts, as amended by Directive 97/52/EC of the European Parliament and of the Council. Council Directive 93/38/EEC of 14 June 1993 on coordinating the procurement procedures for entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/04/EC of the European Parliament and of the Council.

[122] Article 53 of the proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of supply contracts, public service contracts and public works contracts – (COM(2000) 275 final, 10/5/2000), and Article 54 in the proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in water, energy and transport sectors – (COM(2000) 276 final, 10/5/2000).

3.4.2 Environmental law and public procurement

First and foremost, it must be emphasised that environmental and other legislation, whether it is Community legislation or national legislation compatible with Community law, is naturally binding for contracting entities.

All procurement directives contain a provision for contracting entities to define the technical specifications "without prejudice to the legally binding national technical rules". This means that national legislation, which must always be compatible with Community law, may contain prohibitions against, for instance, the use of specific substances that the national authorities consider hazardous to the environment, or requirements for a certain minimum environmental standard to be observed. Contracting entities must obviously observe such legislation.

In order to promote transparency, the contracting entities must provide technical specifications, according to the Directives, in the general or specific contract documents. The objective of these rules is to open up the markets, create real competition and prevent the markets from being reserved for national or specific companies (i.e. avoid discrimination). The technical specifications should contain all the requirements set by the contracting entities for the product or service to fulfil its intended purpose. These technical specifications contain objective and measurable details of the subject-matter of the contract and therefore have to be directly linked to the subject-matter of the contract. This link to the subject-matter of the contract thus makes it more difficult to carry out a procurement that is environmentally friendly, in a more general sense.

The directives on public procurement contain a detailed system of obligatory references to standards and comparable instruments with a clear order of precedence: priority is given to the European instruments and, in the absence of these, reference may be made to international or national standards or comparable instruments.

According to the directives, it is also prohibited to specify products of a certain brand, origin or production, as these favour or exclude certain companies. Specifying trademarks, patents, type designations, or specific origins or production is allowed, however, if the subject-matter of the contract cannot be described with enough precision and intelligibility for all parties concerned. Such specifications must always be followed by the words *"or equivalent"* where such exceptions are allowed according to the directives.

Contracting entities may deviate from these rules and refrain from the reference to standards or comparable instruments. This applies in particular where the contract has a genuinely innovative nature for which standards would not be relevant.

It should be emphasised that the requirement to refer to (European) standards does not imply that contracting entities are bound to only purchase products and services that conform to these. The authority is only bound to specify these instruments as a guide, giving suppliers the opportunity to offer equivalent solutions.

There are currently few European or national standards that apply to the environmental performance of products and services. This means that until environmental performance is integrated into the standards, contracting entities can define the level of performance that, in their opinion, is required for a particular procurement, provided that this does not lead to discrimination.

Contracting entities may insist on higher environmental protection on specific points than is laid down in legislation or in standards, but this may not lead to restricted access to the contract or to discrimination against potential tenderers.

The possibility to prescribe which basic materials should be used

The concept "technical specification" covers the possibility of prescribing the basic materials that should be used, if this contributes to the properties of the goods or service in such a way that the objective that is intended by the contracting authority is met. As long as these requirements are compatible with Community law and, in particular, non-discriminatory, contracting entities may prescribe the materials to be used for a particular contract, e.g. a requirement in a particular contract for the window frames of an administrative building to be made of wood or for recyclable glass or other recycled material to be used.

The possibility to demand the use of a specific production process

The definition of technical specifications in the Directives does not expressly refer to production processes, but provided that this does not reserve the market for certain companies, the contracting entities may demand that a certain production process is used if this helps to define the requirements for product performance (visible or invisible). The production process covers all the requirements and aspects relating to the manufacturing of the product and which can contribute to describing the product without it necessarily being visible in the finished product.

This means that the product differs from identical products with regard to production or appearance (whether or not the difference is visible) because an environmentally friendly production process has been used, e.g. organically cultivated foodstuffs or "green" electricity. The contracting entities must ensure that the requirements for a specific production process are not discriminatory. Requirements that do not affect the production itself, e.g. the way the company is run are not technical specifications, however, and may therefore not be binding.

3.4.3 Eco-labelling

Contracting entities may formulate the subject-matter of the contract in the way that is best, in their opinion, from an environmental point of view, or use alternative formulations by using different designs, but this must not lead to the availability for procurement being restricted so that tenderers from other Member States are treated unfairly.

Eco-labels show that products are classed as more environmentally friendly than comparable products in the same product group. The labels are awarded on a voluntary basis to products that meet specific criteria, with the aim of informing consumers about environmentally friendly products.

There are different types of eco-labels: the Community eco-label,[123] national eco-labels and multinational eco-labels. There are also private eco-labels.[124] The environmental requirements for different product groups are given in the relevant acts.[125]

The requirements are based on the life cycle of the product and relate to different aspects, e.g. product performance, product material, production processes, taking back and reuse, user instructions and consumer information. They are technical specifications in the meaning given in the directives on public procurement. Decisions on awarding the Community eco-label and (multi)national eco-labels are taken according to the procedures laid down in the relevant instruments.[126] These systems guarantee transparency and are open to all producers/suppliers. Private eco-labels are given out by private persons or organisations. To use a private eco-label requires permission from the owner of the label. No common features or common system has been agreed or harmonised at national, multinational or EU level.

In the absence of requirements for references or if the contracting entities demand higher environmental protection standards than is required by standards or legislation, they can define technical specifications for environmental performance in accordance with the requirements for eco-labelling, and they can specify that products with a specific eco-label are assumed to comply with the technical descriptions in the contract documents.

3.4.4 Definition of the subject-matter of the contract

The first opportunity to take environmental concerns into account during public procurement is in the phase just before the procurement directives become applicable, namely when choosing the actual subject-matter of the contract, in other words, when the question is asked: what do I, in the capacity of authority, wish to construct or purchase? At this stage, the contracting entities have a lot of scope for taking environmental considerations into account and choosing an environmentally friendly product or service.

---

[123] The European eco-labelling system was first laid down in Council Regulation (EEC) No 880/92 of 23 March 1992 on a Community eco-label award scheme, EGT L 99, 11/4/1992, pp. 1-7. This Regulation has been repealed and superseded by Regulation (EC) No 1980/2000 of 17 July 2000 of the European Parliament and of the Council on a revised Community eco-label award scheme, EGT L 237, 21/9/2000, p. 1.

[124] An important group of private eco-labels is those that specify that wood products come from sustainable forestry.

[125] The environmental requirements for the European eco-label for personal computers, for example, is found in the Commission Decision of 26 February 1999 on establishing ecological criteria for the award of the Community eco-label to personal computers. EGT L 70, 17/3/1999, p. 46.

[126] A decision on awarding the Community eco-label is taken according to the procedure laid down in Regulation (EC) No 1980/2000 of the European Parliament and of the Council, and decisions on awarding (multi)national eco-labels are taken according to the procedures that are laid down in national rules. Article 10 of the Regulation on the Community eco-label states the following: “In order to encourage the use of eco-labelled products the Commission and other institutions of the Community, as well as other public authorities at national level should, without prejudice to Community law, set an example when specifying their requirements for products.”

The extent to which this will actually be done depends largely on the awareness and knowledge of the contracting entity.

It should be emphasised that current environmental law and other legislation, whether it is Community legislation or national legislation that is compatible with Community law, can limit or influence this freedom of choice.

Supply contracts generally apply to the purchase of finished products. In addition to the basic and very important choice of the subject-matter of the contract ("what shall I procure?"), the possibilities to take environmental concerns into account are not as extensive as for works contracts and service contracts. Environmental awareness will influence this choice.

The procurement directives do not in any way prescribe what the contracting entities should purchase and are therefore neutral when it comes to the actual subject-matter of the contract.

If there are different ways to meet a need, the contracting entities themselves have to formulate the subject-matter of the contract in the way that they consider most environmentally friendly, even with the use of alternative designs.

This freedom has limitations however. In the capacity of a public body, a contracting authority must observe general rules and principles of Community law, to be precise, the principles of the free movement of goods and services according to Articles 28-30 (formerly 30-36) and 43-55 (formerly 52-66) of the EC Treaty.

This means that the subject-matter of a public contract may not be formulated so that the objective or result is such that only domestic companies may take part and tenderers from other Member States are kept out.

According to the Commission, contracting entities may formulate the subject-matter of the contract in the way that they consider best from an environmental point of view, or use alternative formulations by using different designs, but this must not lead to access to the contract being restricted so that tenderers from other Member States are treated unfairly.

3.4.5 Selection

This section deals with the rules, according to the procurement directives, that apply to the selection of tenderers that the contracting authority considers able to execute the contract.

The rules in the procurement directives can be divided into three categories. The first category concerns the reasons that motivate a tenderer being excluded from taking part in the procurement. These relate to the entity concerned, e.g. having been declared bankrupt, having been convicted of an offence, being guilty of a serious professional misconduct or non-payment of taxes and social fees.

The second category concerns the tenderer's financial and economic standing. These rules do not give scope for environmental considerations.

The third category is concerned with the technical capacity of the tenderer. These rules make it possible, to some extent, to integrate environmental concerns, e.g. by specifying a minimum level of equipment or premises that guarantee the correct execution of the contract. The directives state that the information that is required as evidence of the

supplier's financial and economic standing as well as technical capacity has to be limited to the subject-matter of the contract. The possibilities that arise through these rules are discussed in more detail below.

On the supply side, the contracting entities have a greater assessment margin when it comes to the capacity of the tenderers, as Directive 93/38/EEC only requires the application of objective rules and criteria, which are stated in advance and put to the interested tenderers.

Grounds for exclusion from participation in the procurement

All the procurement directives give grounds on which a company may be excluded from participating in procurement. The relevant grounds in this context are as follows:
The supplier/contractor/service provider may be excluded from participating in the procurement who
c) has been convicted of an offence of professional ethics, according to a legal judgement,
d) has been guilty of serious professional misconduct in the exercise of his profession, which can be established, in some way, by the contracting authority.

If non-compliance with environmental legislation is considered to be an offence of professional ethics according to law, the directives on public procurement allow a contracting authority to exclude a tenderer from participating on the grounds stated under c) if the company has been convicted of the offence and the judgement has gained legal force.

The Commission has also proposed a Community directive with definitions of a minimum set of criminal offences to the detriment of the environment. The concept "serious professional misconduct in the exercise of the profession" has not yet been defined in Community legislation or case law and it is therefore left to the Member States to define this concept in national legislation.

Requirements for the technical capacity of tenderers

The procurement directives state how the evidence of the tenderer's technical capacity may be supplied. The directives give an exhaustive list of evidence of technical capacity that may be stated depending on the type, the quantity and the purpose of the subject-matter of the contract. Each individual requirement that the contracting authority places on the technical capacity of the tenderer therefore has to fall under one of the references given in the directives.

The objective of the selection phase is to find the tenderers that the contracting authority considers able to execute the contract in the best way. The different requirements must therefore have a direct link to the subject-matter or the execution of the contract.

Among the exhaustive list of evidence in the procurement directives, the following can sometimes refer to environmental aspects:

- Information on the tools, machines and technical equipment that the tenderer has at his disposal to carry out the contract.

- A description of the supplier's technical resources, measures to guarantee quality, and his research and development resources.
- Information on the techniques or technical bodies that can be used to execute the contract, even if they do not belong directly to the company, especially those that are responsible for quality assurance.

The possibility to require specific (environmental) experience

If the contract requires special environmental know-how, then specific experience is a legitimate criterion to determine that the tenderer has the technical knowledge and ability, and it may therefore be required (e.g. to build a waste management facility).

The possibility to require suppliers to have an environmental management system

Environmental management systems have been introduced through an international standard (ISO 14001) and in an EC Regulation (EMAS).[127] In the revised regulation in respect of EMAS, EMAS registration and public procurement are discussed. It states here that public organisations should consider how they should take account of EMAS registration when they set criteria for their procurement policy. The aim is to promote supplier participation in EMAS. As EMAS registration is also possible for public activity, this ought to be a possibility for some contracting entities that have registered to place requirements on suppliers in accordance with the rules of the regulation.

3.4.6 Award of the contract

When the tenderers have been selected, the phase starts when the contracting entities assess the tender, leading to the award of the contract.

There are two alternatives in the procurement directives: the contract can be awarded on the basis of either the lowest price or *"the economically most advantageous tender"*. The aim of the second alternative is to allow the contracting entities to get the best value for money. To determine which tender should be considered economically most advantageous, the contracting authority has to specify in advance which criteria should be decisive in awarding the contract. These different criteria should be specified either in the procurement communication or in the contract documents, if possible in order of preference.

3.4.7 The economically most advantageous tender

The directives give examples of criteria that can be used to determine which is the most economically advantageous tender. Other criteria are possible.

In general, the procurement directives involve two conditions being set for the criteria that will be applied to determine which is the most economically advantageous tender. Firstly, non-discrimination applies and secondly the criteria applied should involve an economic advantage for the contracting authority. According to the European Court of

[127] Regulation EC/761/2001

Justice, the aim of the procurement directives is to avoid the risk of national tenderers being given priority when the contracts are awarded by the contracting entities, and the possibility of a body that is financed or controlled by either the State or by regional or local bodies governed by public law allowing reasons other than financial ones to influence the decision. Financial reasons may include aspects of environmental protection, e.g. the energy consumption of a product.

In common to all the criteria applied when evaluating the tenders is that, just as those that are explicitly stated, they have to apply to the type of work to be carried out or the way in which it is done. The criteria that are applied should be such that the contracting authority can compare the different tenders objectively and choose the one that is most advantageous on the basis of objective criteria such as those listed as examples in the directives. The aim of this assessment is to determine which tender best meets the needs of the contracting authority.

The function of the award criteria is therefore to assess the fundamental quality of the tenders. This means that the award criteria have to be directly linked to the subject-matter of the contract.

Environmental considerations are not expressly mentioned in current procurement legislation; the article on award criteria must, nonetheless, be interpreted in such a way that environmental concerns can lead to special award criteria being laid down. Without being defined in more detail, the "environmental soundness" of a product cannot be measured and does not necessarily carry any economic advantage for the contracting authority. Contracting entities can take "environmental soundness" into consideration however, e.g. consumption of natural resources, by "translating" the environmental objective into specific, product-related and economically measurable criteria by demanding specific energy consumption. In most cases, such requirements relate to the quality performance of the product or the execution of work and services (i.e. quality or technical merit according to the specification of the award criteria). The environmental aspects of a product or service would thereby be placed on a level with the aesthetic and functional properties of the products or services, which are criteria that are expressly given in the procurement directives in the capacity of the assessment of what can be measured economically.

Environmental factors can be used to determine which is the most economically advantageous tender if these factors carry an economic benefit for the contracting entity that can be attributed to the product or service that is the subject-matter of the procurement.

The question then arises of whether the concept " economically most advantageous tender" means that each individual award criterion has to carry a direct economic advantage for the contracting authority, or if each individual award criterion has to be measurable in economic terms, but without having to carry a direct economic advantage for the contracting authority in the contract concerned. The question was put to the European Court of Justice in Case C-513/99.[128] In a case from Helsinki, the European Court of Justice could hear the question of whether it is permissible to take into account

[128] C-513/99 Concordia Bus Finland Oy ab and Helsingin kaupuki, HKL-Bussliikenne, Judgement of 17 September 2002.

low nitrogen oxide emissions or low noise level when a contracting entity awards a contract on the basis of the most economically advantageous tender. The question in the case was whether the tenders could be awarded additional points that would be taken into account when the tenders were compared during the evaluation on whether the emissions or noise level were below a specific level.

The European Court of Justice established in two earlier decisions, the cases Beentjes, and Evans Medical Ltd and Macfarlan Smith,[129] that the contracting authority may decide freely on the criteria to use as a basis for awarding the contract when assessing the most economically advantageous tender.

In the case concerned, three criteria were to be taken into account during the assessment: the total price of the operation, the quality of the bus fleet and the contractor's quality and environment systems. The question was whether tenders could be awarded additional points that would be taken into account when the tenders were compared during evaluation if the noise level or emissions were below a specific level.

Firstly, the Court examined whether it was permissible to apply environmental protection criteria when assessing the most economically advantageous tender. The Court basis its opinion on Article 6 of the EC Treaty and also refers to the wording in Article 36.1a of the service directive, which with the words "for example" when listing the criteria to be considered for the most economically advantageous tender does not make an exhaustive listing. Furthermore, the Court also states that Article 36.1a should not be interpreted so that all criteria that a contracting entity uses must be exclusively of an economic kind.

In accordance with Article 36.1a of the service directive, the answer is therefore that the application of environmental protection criteria when assessing the most economically advantageous tender is not ruled out. The Court also states that a contracting entity cannot apply all the criteria of this type.

Secondly, the Court had to decide under which conditions it would be permissible to consider environmental protection criteria when examining the economically most advantageous tender. The Court refers to the cases of Beentjes, and Evans Medical and Macfarlan Smith, as well as SIAC Construction[130] where it points out that only criteria that aim to lay down the most economically advantageous tender are permitted and at the same time these criteria should have a link to the subect-matter of the procurement.

The contracting authority should be able to assess the incoming tenders and come to a decision by applying qualitative and quantitative criteria that can vary depending on the type of contract. The Court also refers to previous decisions in the cases of Beentjes and SIAC Construction with a caution that an award criterion that had the effect of giving a contracting authority unrestricted choice in awarding the contract is contrary to Article 36.1a of the service directive.

According to point 2 of the same article, the criteria shall be expressly stated in the contract documents or the communication on procurement, if possible in order of urgency with the most important one first, with the aim that all possible suppliers should be able to find out about these criteria and their scope. Yet again the Court refers to the case of

[129] 31/87 Gebroeders Beentjes BV v. State of the Netherlands, European Court Reports 1988 p. 4635 and C-324/93 Evans Medical Ltd and Macfarlan Smith, REG 1988 p. 4929.

[130] C-19/00 SIAC Construction Ltd. v. County Council of the County of Mayo, REG 2001 p. I-7725.

Beentjes, where it is laid down that all these criteria should be compatible with the basic principles of Community law, above all with the principle of non-discrimination.

The Court found that in the case in question, the criteria for emissions and noise level could be considered to be linked to the subject-matter of the procurement. The Court also stated that such criteria that consist of additional points being awarded to the contracts that meet certain specified, objectively measurable environmental requirements do not mean that the contracting authority has unrestricted choice.

Taking these factors into account, the European Court of Justice interprets Article 36.1a of the service directive in such a way that a contracting authority that has decided to award the procurement contract to the economically most advantageous tender can observe such environmental criteria as nitrogen dioxide emissions of buses and their noise level, if these criteria:

- are linked to the subject-matter of the contract
- do not give the authorities an unlimited choice
- are specified in the contract documents or in the communication on procurement
- are otherwise compatible with the principles of Community law and, above all, with
- the principle of non-discrimination

The Court also evaluated the third interpretation issue - whether the principle of equal treatment forms an obstacle to considering such environmental protection criteria as those concerned with the case when it is clear that the contracting authority's own transport company is one of a just a few companies that can supply vehicles that meet these requirements.

Concordia stated that there were very limited possibilities for offering natural gas-driven buses. HST was the only tenderer that could practically offer gas-driven buses, and it should therefore not be permissible to award additional points for low nitrogen dioxide emissions and noise level, at least not if all the companies in the trade did not have a chance, even theoretically, of offering services that would give the right to such points.

The European Court of Justice based its assessment on its standpoint in the case in question where it is established that the procurement criteria have been considered to be objective and were applied without discrimination to all tenders. The fact that only the contracting entity's own transport company could meet the environmental protection criteria that led to the award of the contract of the most economically advantageous tender does not in itself mean that the principle of equal treatment is set aside.

The answer to the third question is therefore that the principle of equal treatment does not constitute an obstacle to considering such environmental protection criteria as those that are relevant in the present case just on the grounds that the contracting entity's own transport company is one of just a few companies that can supply vehicles that can meet these requirements.

The Commission has analysed this issue in its Interpretive Communication on environmental considerations[131] and stated that environmental factors can be used to determine the economically most advantageous tender if these factors carry an economic advantage for the contracting entity and can be attributed to the goods or service that is the subject-matter of the procurement.

In the case in question, the Court found that the criteria with regard to emissions and noise level could be seen to be linked to the subject-matter of a contract on procurement of local bus services. The Court also found that criteria that consist of additional points being awarded to tenders that meet specific specified environmental requirements that can be measured objectively do not mean that the contracting entity is given unrestricted choice.

The Court established that the procurement criteria in question were objective and applied without discrimination to all tenders.

The possibility to consider all costs during the whole life cycle of a product

The life cycle costs are all the costs that arise during production, consumption/use and disposal of a product or service ("from the cradle to the grave").

The price that a contracting authority pays for a product reflects the costs that have arisen in the phases completed so far (usually planning, material, production and sometimes testing and transport) and should therefore not be considered again during the award procedure. All costs that arise after purchasing the product and which will be borne by the contracting authority and thereby directly affect the economic aspects of the product, may, however, be taken into account during the examination of the most economically advantageous tender.

The directives specifically give operating costs and cost effectiveness as award criteria. Such costs can include direct operating costs (energy, water and other resources used during the life cycle of the product), investment in future savings (e.g. investment in better insulation to save energy and thereby money in the future) and costs for maintenance or for recycling the product. When the tenders are examined, a contracting organisation can also take into account the costs of waste management and recycling.

The possibility of taking into account the external costs to which the tenders give rise

External costs are damage or profit that are not paid for by either the polluter or the beneficiary under normal market conditions. They are defined as costs or benefits that arise when a group operates a social or economic activity that affects another group and the first group fails to take responsibility for its impact. There is a conflict of interests between external costs and benefits, and "traditional" costs and benefits, e.g. operating costs and proceeds from sales. The latter costs are characterised by being paid at a price that is set by the market.

[131] Commission COM (2001) 274 Interpretive Communication on Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement.

In general, external costs are not borne by the purchaser of a product or service, but by society as a whole and can therefore not be considered to be award criteria according to the definition.
In its Interpretive Communication, the Commission "notes in this respect that contracting authorities retain the possibility to define the subject matter of a contract or impose conditions relating to the execution of the contract and to integrate at these stages of the tender procedure their environmental preferences linked to eventual occurrence of external costs"[132]

Only in some cases, e.g. when external costs arise as a result of the execution of the contract and are at the same time borne directly by the purchaser of the product or service in question, will these costs will be taken into account.

In such cases, the contracting entities have to be careful not to introduce systems that lead to preference or disguised discrimination. So far, there has not been a harmonised system to evaluate and economically assess the external costs.

Additional criteria

This concept has been developed by Court case law. The concept first appeared in Case 31/87,[133] where the Court claimed that such a criterion (appointing long-term unemployed persons) has no connection with the assessment of the tenderer's economic and financial suitability, technical ability or skill, nor with the award criteria listed in Article 9 of the Directive. The Court also considered that these criteria are nonetheless compatible with the directives on public procurement if they comply with the current principles of Community law.

In Case C-225/98, the Court claimed that the contracting entities could apply a condition that was linked to the campaign against unemployment, provided this condition agreed with the basic principles of Community law, but only if the entities had to consider two or more economically equivalent tenders.[134] Such a condition could be applied as an additional criterion after the tenders had been compared from a strictly economic point of view. With regard to the criterion linked to the campaign against unemployment, the Court laid down that it could not have a direct or indirect effect on those that presented tenders from other Member States in the Community and had to be clearly specified in the communication for the contract so that potential tenderers could establish that such a condition existed.

This could be applied in the same way as conditions relating to environmental protection or environmental performance.

[132] Commission Interpretive Communication COM(2001) 274 on Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, p. 21.
[133] 31/87 Beentjes, 1988, REG - 4635.
[134] C-225/98 Commission of the European Communities v. French Republic (Région Nord- Pas de Calais), 2000 REG I- 7445.

3.4.8 Execution of the contract

The contracting entities may impose (detailed) contractual clauses related to the way the contract will be executed. The contractual clauses may not be (disguised) technical specifications, selection criteria or award criteria. They must only be related to the execution of the contract. This means that all the bidders must be in a position to meet these clauses if they are awarded the contract. To guarantee transparency, the clauses in the contract should be communicated to the bidders in advance.

The clauses in the contract are not covered by the procurement directives. The clauses in themselves must correspond with the general provisions and principles of the Treaty, in particular the principle of non-discrimination.

The contracting entities have a wide range of possibilities for determining the contractual clauses that seek to protect the environment. Below are examples of special additional conditions that have a bearing on the performance or execution of the contract and which finally meet general environmental objectives that are sufficiently specific, correspond to the principles of Community law and are compatible with the directives:

- Delivery/packaging of goods in big consignments instead of individually.
- Recycling or re-utilisation of packaging material and the used products by the supplier.
- Delivery of goods in reusable containers.
- Supplier collection, taking back, recycling or re-utilisation of waste that is generated during or after use or consumption of a product.
- Transport and delivery of chemicals (e.g. cleaning products) in concentrated form with dilution at the place of use.

With regard to the question of whether requirements may be placed on a specific environmentally friendly means of transport for the delivery of goods, it should be borne in mind that such a requirement should be specified to have a bearing on the performance or execution of the contract and should be compatible with the principles according to Community legislation.

A contracting entity may therefore require the transport of the goods to be delivered to be carried out using a specific means of transport, provided that this requirement does not lead to discrimination in the particular case.

3.5 Competition policy

As is clear from section 2.5, only in exceptional cases is the formulation of the competition rules aimed at specific products or processes. Even if environmental law becomes increasingly product-oriented, there is nothing to indicate that a similar legislative technique would be used within the field of competition policy. The competition rules typically have a more general formulation. In the application of, for

example, Article 81 (1) concerning prohibition against agreements that restrict competition it does not matter if it is a product development agreement, a production agreement or a waste recycling agreement. The rules apply to all the levels of trade. Only in some cases has the Commission had reason to specially regulate individual sectors. This applies to, for example, agreements within the motor vehicle trade,[135] deregulation directives within energy, post and telecommunications,[136] and specific types of State aid.[137] In some cases, this regulation is specific to products or services.

Section 2.5 establishes that the competition rules of the Treaty do not include any indication that environmental consideration should be given any right to special treatment from a view of competition law. Neither is it particularly likely that the Community should choose to work with other definitions of the concepts "sound competition" or "effective competition" than those that have been developed through the regulations and rulings so far. However, there may be scope to take environmental views into consideration in cases where it is possible to make some form of assessment of reasonableness or evaluation of different factors in an individual or other type of case. The extent to which this already happens in acts and decisions, and whether it is possible to integrate environmental concern into a specific type of assessment in the future will be discussed below.

Environmental concerns do not affect the criterion restricting competition in Article 81(1).[138] Environmental issues can be considered, however, in connection with the assessments that come up under Article 81(3), i.e. issues on exemptions. In light of the formulation of Article 6 of the EC Treaty, the Commission is obliged to take into account, for example, the effect of a particular agreement on sustainable development. It could be, for instance, a cooperation agreement on research and development for more environmentally friendly production or an agreement on waste management cooperation. Agreements that at first sight contain restrictive practices – e.g. competitor cooperation – can therefore be granted an exemption if these are outweighed by environmental benefits (and other prerequisites in Article 81(3) are met). This does not mean, however, that there is a presumption for environmental policy taking precedence when it conflicts with competition policy. An agreement that is prohibited on grounds of restrictive practices will not automatically be allowed because it has environmental benefits. The Treaty does not lay down any such hierarchy of rules. Authors also express that an agreement that restricts competition ought not be allowed solely on the grounds of environmental considerations.[139] There are other ways to protect the environment and sustainable development. Correspondingly, an agreement that does not contain any restrictive practices, but may be damaging to the environment should be handled according to rules other than Article 81 of the EC Treaty.

Restrictive cooperation, e.g. a production cartel that has the effect of dividing up the market, cannot generally be accepted based on competition law, even if the company can point to specific environmental benefits. Different forms of cooperation, rules and

[135] http://europa.eu.int/comm/competition/car_sector/
[136] http://europa.eu.int/comm/competition/liberalization/legislation/
[137] http://europa.eu.int/comm/competition/state_aid/legislation/
[138] Jonathan Faull and Ali Nikpay (ed.), The EC Law of Competition, OUP 1999, p. 65.
[139] Jonathan Faull and Ali Nikpay (ed.), The EC Law of Competition, OUP 1999, p. 65.

practices that can contain prohibited restrictive practices can thus not be set up within the environmental work.

It is difficult to make a general assessment of the type of environmental agreement or cooperation that could be granted an exemption from the prohibition in Article 81(1). As discussed above, Article 81(3) sets out four prerequisites all of which have to be met for an exemption. The fact is that many agreements are simply not big enough to be noticeable on the market. These smaller agreements generally fall completely outside the applicability of the Community's competition rules. Environmental agreements - such as an agreement where the parties undertake to reduce emissions to the environment - are not normally contrary to the competition rules unless the companies have a large share of the market and this leads to the parties of the agreement having influence over each other's production or sales or significantly affecting the production of other companies.[140]

An act that deals explicitly with environmental issues is the Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements.[141] The Guidelines seek to help companies assess their cooperation within the context of the competition rules.[142] It is also the first – and only! – act under Article 81 that expressly deals with environmental agreements.

The Commission expresses by way of introduction in point 10 that the Guidelines only apply to cooperation that can lead to efficiency gains, and to this can be counted, *inter alia*, environmental agreements. The Commission defines environmental agreements as "those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set out in Article 174 of the Treaty. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations. This excludes agreements that trigger pollution abatement as a by-product of other measures."[143] Only such agreements that seek to reduce environmental impacts are thus covered by the definition of environmental agreements. Examples of environmental agreements are those where the parties lay down standards of environmental performance for products (input or manufactured products) or production processes. Other examples of environmental agreements are those where the parties are responsible for jointly meeting an environmental objective, e.g. recycling of specific materials, reduced emissions or improved energy efficiency.[144] Rules on producer responsibility for waste can also lead to cooperation agreements.

Every agreement should be assessed based on the market it covers. Not until the market is known can the agreement's effect on competition be assessed. The question of which is the relevant market should be judged based on the Commission Notice on the

[140] Carl Wetter, Johan Karlsson, Olle Rislund, Marie Östman, Konkurrenslagen en handbok, Thomson Fakta, 2 ed. 2002, p. 224.

[141] Commission Notice with Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, EGT No C3, 6/1/2001, p. 2 and fol. pp.

[142] Some environmental agreements are obligatory or encouraged by State authorities. If such agreements are compatible with Member State obligations according to the EC Treaty, they are left out here.

[143] Point 179 of the Guidelines on horizontal cooperation agreements.

[144] Point 180 of the Guidelines on horizontal cooperation agreements.

definition of a relevant market.[145] If the environmentally harmful substance is not a product it itself that constitutes its own market, then the relevant market consists of the market for the product that contains the environmentally harmful substance. If it concerns an agreement on collection or recycling, the effects of the product must be observed not just on the market or markets where the parties are active as producers and distributors but also on the market for collection services that can cover the goods concerned.[146]

According to the Commission, certain environmental agreements probably fall outside the applicability of the prohibition in Article 81 of the EC Treaty, regardless of the joint market share of the parties. Such a situation exists if the parties have not imposed any individual responsibility, or the parties have undertaken in general to contribute to reaching an environmental objective for a particular sector. Here the assessment is aimed at the technical and economic means available to the parties to achieve the environmental objective according to the agreement. According to the Commission, the more varied the methods, the less important the potential restrictive effects.[147]

Agreements that lay down the environmental performance for products and processes and which do not significantly affect the diversity of products and production in the relevant market or which only marginally affect purchase decisions, also fall outside the applicability of Article 81. If certain categories of a product are prohibited or are being phased out of the market, the restrictions are not considered to be important, provided that these product categories have a small market share.[148]

Environmental agreements can also create new markets, e.g. agreements on recycling. Such agreements are not normally considered to restrict competition and are thereby allowed, unless the parties can carry out the activity on their own, as there are no alternatives and/or competitors.[149]

Prohibited environmental agreements, on the other hand, are agreements that are not really concerned with meeting an environmental objective but are a way of taking part in a hidden cartel. These may be agreements on price fixing, limiting production or dividing up the market.[150]

If an environmental agreement covers a large part of a line of trade in an individual Member State or at Community level and the agreement also significantly restricts the possibilities for the parties of the agreement to lay down the properties or production method for a product, then it is likely that the agreement is covered by the prohibition in Article 81(1). Such an agreement can give the parties influence over each other's sales and production and would have a restrictive effect.[151] In addition to the restrictions imposed between the parties by the agreement, it can also affect the competitiveness of third parties, e.g. suppliers or purchasers. An agreement that phases out or seriously affects at large part of the parties' sales with regard to their products or production

[145] Commission Notice on the definition of a relevant market, EGT C 372, 9/12/1997, p. 5 and point 182 of the Guidelines on horizontal cooperation agreements.
[146] Point 182 of the Guidelines on horizontal cooperation agreements.
[147] Point 185 in the Guidelines on horizontal cooperation agreements.
[148] Point 186 in the Guidelines on horizontal cooperation agreements.
[149] Point 187 in the Guidelines on horizontal cooperation agreements.
[150] Point 188 in the Guidelines on horizontal cooperation agreements.
[151] Point 189 in the Guidelines on horizontal cooperation agreements.

processes may be prohibited according to Article 81(1) if the parties have a large market share. According to the Commission, the same thing applies to agreements through which the parties share individual pollution quotas.[152] An agreement that appoints a company as the only one to supply, for example, collections and/or recycling services can be restrictive if the parties in the agreement have a large market share.[153]

The Commission takes a positive view on the use of environmental agreements as a political instrument to reach the objectives set in Articles 2 and 174 of the EC Treaty and in the Community action programme for the environment. The agreements must be compatible with the competition rules however. Even if an environmental agreement is covered by the prohibition in Article 81(1) of the EC Treaty, it can lead to economic benefits at the individual or aggregate consumer level that compensate for the negative effects of the agreement on competition. An agreement can be accepted if it has "net benefits" with regard to less pressure on the environment as a result of the agreement compared with the situation if the agreement did not exist. The expected economic benefits must thus outweigh the costs.[154]

If the parties of the agreement can objectively show that an environmental agreement is economically efficient, then a restrictive provision would probably be considered necessary for the environmental objective to be met and the environmental agreement to thereby be granted exemption from application of the prohibition in Article 81(1).[155] Regardless of whether the agreement has benefits for the environment and economy and whether the parties can show that the planned agreement is necessary, the agreement may not eliminate competition with regard to differentiation of the products or methods, technical innovation or market entry in the long or medium term. If, for example, the agreement gives a company exclusive rights to collection and recycling and there are potential competitors to this company, the Commission ought to consider this when assessing the period of validity of the exclusive right in connection with the application for exemption.[156]

In one example in the Guidelines, almost all the producers and importers within the EU of a particular household appliances (e.g. washing machines) are included, at the request of a public authority, in an agreement to no longer produce and import products that do not meet certain environmental criteria (e.g. energy efficiency).[157] Together the parties in the agreement have 90% of the Common Market. The products covered by the agreement will form a considerable part of the total sales. They will, however, be replaced by more environmentally friendly but more expensive products. The agreement will also lead to a fall in production by third parties (e.g. electricity supply companies and subcontractors of washing machines). According to the Commission analysis, the agreement will be

[152] Point 190 in the Guidelines on horizontal cooperation agreements.
[153] Point 191 in the Guidelines on horizontal cooperation agreements.
[154] The benefits can be assessed in two stages, see point 194 of the Guidelines on horizontal cooperation agreements. Costs to take into account include, for example, the effect of reduced competition and the cost for economic operators to meet the environmental requirements and/or effects on third parties, points 193 and 194 in the Guidelines on horizontal cooperation agreements.
[155] Points 195 and 196 in the Guidelines on horizontal cooperation agreements.
[156] Point 197 in the Guidelines on horizontal cooperation agreements.
[157] Point 198 in the Guidelines on horizontal cooperation agreements.

covered by the prohibition in Article 81(1). Consumer choice will fall and prices will rise, but the new products that will be placed on the market are technically more advanced and will reduce environmental problems (e.g. emissions from electricity production). According to the Commission, the environmental improvement can compensate for the increased costs. For the consumer, the cost reduction lies in lower operating costs. According to the Commission, in an overall assessment of all the criteria in Article 81(3), the agreement can be exempted from the prohibition in Article 81(1).[158]

The Guidelines on horizontal cooperation agreements give companies a basis on which to decide whether a particular agreement is covered by the prohibition in Article 81(1) and if it could be removed, if necessary, in accordance with Article 81(3). The section on environmental agreements is relatively extensive and illustrative, though it contains a number of hypothetical arguments that can be difficult for companies to assess. In individual cases, this can lead to uncertainty during contract negotiations and application of the agreement. The very fact that the Commission has had reason to comment on environmental agreements in a special section means that some focus is being placed on the environment within the Competition Directorate. The Guidelines are not binding, however, and can thereby only serve as guidance.

The Commission Notice on Guidelines on Vertical Restraints[159] does not contain any corresponding section on environmental agreements. This does not mean that the Commission should have a completely different view on environmental concerns in vertical contractual relations. In the individual assessment according to Article 81(3), the Commission could well attach such importance to the environmental reasons referred to by the parties that these together with the other prerequisites in Article 81(3) give scope for exemption from the prohibition.

In a few cases, the Commission has arrived at decisions, according to Article 81(3), that explicitly refer to environmental concerns. According to the Commission, in Exxon/Shell the reduction in emissions resulting from the agreement between Exxon and Shell would lead to a technological advancement according to the aims in Article 81(3).[160] In the European Council of Manufacturers of Domestic Appliances, the Commission exempted an agreement between 95% of the producers and importers of washing machines in the Common Market.[161] The agreement restricted the right of the producers and importers to produce or import "the least energy-efficient washing machines". The Commission pointed out that the agreement did restrict competition according to Article 81(1) – the agreement would reduce the alternatives for consumers as there would be fewer cheap washing on the market - but the agreement would lead to

[158] There may be a reason to briefly touch on the time aspect. An individual exemption is communicated for a limited period. It is up to the parties in the agreement to argue for a suitable period of time for the exemption. The Commission rarely grants exemptions for a long period of time. With regard to technical development, not least in the environmental field, it is unlikely that the period of the agreement will cover any great length of time.

[159] Commission Notice on Guidelines on Vertical Restraints, EGT No C291, 13/10/2000, p. 1.

[160] Commission Decision (IV/33.640) Exxon/Shell, EGT No L144, 1994 p. 20.

[161] Commission Decision (IV.F.1/36.718) Ceced, EGT L 187, 26/7/2000, p. 47. IP/00/148. Alison Jones, Brenda Sufrin, EC Competition Law, Text, Cases and Materials, OUP 2001, p. 195 and fol. p. See also Commission Communication (IV/C-3/36.494), EACEM EGT C 12, 16/1/1998, p. 2 and Commission Decision in the CEMEP Case, EGT C 74, 15/3/2000, p.5, IP/00/508.

important benefits and cost savings for consumers, especially with regard to reduced emissions. Competition Commissioner Mario Monti explained in a press release in view of the above decision that environmental concerns were by no means contradictory to the competition policy. According to Commissioner Monti, the decision illustrates the principle built into the Treaty that restriction of competition should be proportional and necessary to achieve the environmental objectives set, for the benefit of current and future generations.[162] This decision is found as an example in the Guidelines on horizontal cooperation agreements, point 198.

Within the field of product design and product requirements, there is reason to comment briefly on the issue of the resale of products and the possibility of allowing the special properties of the products to influence the choice of retailer and thereby also the regulation of the distributor agreement. The Commission's Competition Directorate has acted here, especially within the motor vehicle sector. In a special Block Exemption Regulation concerning vertical agreements within the motor vehicle sector, the Commission has decided to generally exempt certain types of distribution agreements.[163] One of the things the Commission deals with in the regulation is selective distribution systems. Such a system means that retailers and vehicle repairers are chosen according to a number of criteria listed in the regulation (Article 1 f). A selective distribution system may not prevent vehicle retailers or repairers from supplying tools and equipment needed for repairs and maintenance of motor vehicles or to implement measures to *protect the environment* also to independent operators, i.e. outside the selective system. If the supplier refuses this, the agreement is not exempted from the prohibition in Article 81(1), i.e. the Block Exemption does not apply (Article 4.2 in the Block Exemption Regulation).

The Commission has recently explained its competition policy view on the field of packaging waste.[164] The Member States incorporate EC environmental law in different ways and lay down national laws and regulations within the framework that is to apply to industry. Industry creates systems for collection and recycling of packaging. In a number of so-called comprehensive system, which the Commission has reviewed quiet recently, there are agreement relations between the company that runs the system and the producers /distributors of the packaged goods, the collection companies and the guarantee/treatment facilities.

The Commission's approach is generally to act in the interest of consumers. The aim is to make sure that the new markets that open within the field of packaging waste are also kept open to competition, while maintaining adequate environmental protection.

During 2001, the Commission arrived at many decisions and drew up several administrative communications.[165] In these documents the Commission laid down the

---

[162] IP/00/148.

[163] Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, EGT L 203, 1/8/2002, p.30.

[164] XXXIst Report on Competition Policy 2001, p. 39.

[165] Two decisions in the Case Dual System Deutschland, COMP/D3/34.493, Decision of 20 April 2001, EGT L 166, 26/6/2001, p.1 and Decision of 17 September 2001, EGT L 319, 4/12/2001, p.1, a decision in the Case Eco Emballages, COMP/D3/34.950, Decision of 15 June 2001, EGT L 233, 31/8/2001, p. 37. Administrative letters in the cases of Pro Europé, COMP/D3/38/051, Returpack-PET, COMP/D3/35.656 and COMP/D3/37.224, Returpack-Aluminium, COMP/D3/35.658 and Returglas COMP/D3/35.669.

basic competition principles to which recycling systems have to conform. These principles are presented briefly in the Commission's annual report for 2001.

Companies that have to recycle their waste ought be able to choose between several systems or other ways of following the rules. According to the Commission's assessment, existing companies have a very strong position in the market. It should be possible to conclude a full agreement with the dominant system or only for some of the packaging. Alternative actors must therefore have access to the market. The competition policy should also aim to make the development of new types of activities possible in the field of recycling of packaging. The Commission therefore does not approve abuse that consolidates the dominant position of an existing actor. This will be assessed as abuse of a dominant position and prohibited according to Article 82 of the EC Treaty.

The Commission will observe in particular the scope and length when assessing restrictive practices within the area of recycling of packaging waste. The Commission is generally critical of all types of exclusive contracts that lack convincing economic justification. It must thus be possible to motivate an exclusive contract with economic arguments.

In practice, it is often difficult to double an existing infrastructure for the collection of recyclable household packaging. It would be very laborious for households to use separate containers for different collection systems for the same materials, and it would probably not be a profitable solution. In the Commission's opinion, it is therefore a condition of competition working in practice for the collecting companies to share collection facilities. There would thus be unlimited access to the collection infrastructure.

The Commission concludes that marketing of the collection companies' secondary raw material should be as free as possible. Collected and sorted packaging material can be reused as secondary raw material for different new products.

The principles that have now been mentioned will be applied by the Commission to current and future cases. According to the Commission, consumers will benefit directly from this competition policy, as increased competition will reduce the price that customers ultimately pay for the products that end up in the recycling systems.[166] The fact that the Commission has taken a collective view on issues of packaging waste also means that serious competition problems have probably been observed in an area of great importance, particularly to consumers in the Common Market.

We have now mainly discussed the scope within Article 81 of allowing environmental concern to influence the assessment in individual cases. With regard to the applicability and interpretation of Article 82, we find no reason to further discuss the extent to which the provision leaves scope to limit the environmental impact of products from a life cycle perspective. As stated in section 2.5, there is no possibility of exemption from the prohibition on abuse of a dominant position. Article 82 may leave scope to take account of environmental concerns in an assessments of abuse, but this requires an explicit decision by the Commission or the Community court.

The Community's control of concentrations between undertakings is a forward-looking control of a structural nature. Over the years, the Commission has heard a large number of cases, but only a few of these have led to the prohibition of a planned concentration.

[166] XXXIst Report on Competition Policy 2001 p.40.

The wording of the Merger Regulation and of the comprehensive documentation available on the regulation, through Commission notices, etc.,[167] do not give express support for taking special account of environmental concerns during the assessment of whether or not to allow a concentration. Decisions from the Commission and the scant case law from the European Court of Justice give no guidance either.

In its assessment, the Commission shall decide whether the concentration is compatible with the Common Market. The assessment really consists of two parts. The Commission investigates whether the concentration creates or strengthens a dominant position for the companies concerned. The Commission shall then carry out a competition test to investigate whether the effective competition within the Common Market or a significant part of it would be markedly obstructed if the concentration was carried out. If this is the case, the concentration should not be allowed. The Commission tries to assess whether the competitive pressure on the market after the concentration is sufficient to maintain effective competition. This assessment includes complicated economic considerations but also gives some flexibility to the control. The Commission should make allowances for the need to preserve and develop effective competition within the Common Market in light of the structure of the companies and the actual or potential competition from other companies inside or outside the Community. The Commission should also make allowances for "the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition."[168]

Companies that want to form a joint company to develop and produce a new product can give environmental reasons in their concentration application to the Commission. It is not unlikely that the Commission, within the scope of this task, would also take environmental reasons into account for a concentration. The text in the regulation, as quoted above, also appears to give some scope for such considerations. Cooperation may lead to more effective competition on the market. The consumers may benefit from new and "better" products on the market. We have not found any decision that shows that the Commission has put special focus on environmental reasons in a merger case. In its current reform work within merger control, the Commission has not addressed environmental issues in particular either and thereby does not appear to have given a high priority to the change process.

Within the sectors of the economy where there has been deregulation work under Community initiatives, EU institutions have also drawn up different types of documents with decrees and recommendations on deregulation. So far, the focus has not been on environmental issues in those sectors in which the Commission has worked mainly on deregulation (the energy sector, telecommunications and postal services). There is, however, nothing to preclude the Commission from also discussing environmental concerns within the context of deregulation efforts.

[167] http://europa.eu.int/comm/competition/mergers.
[168] Article 2, Merger Regulation, 4064/89.

The Commission's Competition Directorate has increasingly addressed the supervision of recently deregulated markets. According to the Commission's annual report for 2000, new electronic markets and voluntary environmental agreements within some trades are two examples of rulings that have developed and led to a Commission Decision.[169] Deregulation efforts within the Community should not be seen as a narrow field within competition policy. Issues of deregulation and opening up of previous state monopolies really affect the development and function of the whole of the Internal Market. The competition rules are affected to the extent to which the actions of public enterprises in, for example, deregulation work affect the market.

According to the Commission, Member States should have the right to impose obligations for environmental protection on services of public interest,[170] e.g. the energy and natural gas sectors, without this being considered incompatible with Article 86 of the EC Treaty, as the obligations can be part of a service that is in the interest of the public.[171]

In the competition policy work on deregulation at secondary legislation level, the Commission has thus at least formally seen some scope for focusing on environmental aspects. In practice, however, this has not happened to any great extent.

The Commission has long admitted that State aid may be necessary under certain conditions in order to support a company's environmental work. The Commission has therefore drawn up Community Guidelines on State Aid for Environmental Protection.[172] One reason for adopting new guidelines in 2001 was that the Commission had observed that environmental measures by Member States had increased and that the Member States had also started to make use of new forms of aid, such as fee reductions or exemptions. According to the Commission, new forms of operating aid have also been developed.[173]

The aim of the Guidelines is to allow companies to find out about the criteria that the Commission will apply in an assessment of whether State aid is compatible with the Common Market. According to the Commission, it is necessary to take into account the extent to which the aid really promotes sustainable development, and that the principle that the polluter pays is applied in full. According to the Guidelines, aid for companies to meet specific environmental objectives of the current EC rules is no longer allowed, except to small and medium-size companies that may receive aid for a limited period. Instead, the Guidelines focus on the possibility of paying out aid to companies that exceed the current standards. The Guidelines focus on the extent and the conditions under which State aid may be necessary to improve environmental protection and sustainable development without disproportionately affecting competition.[174] The Guidelines are general and cover all sectors of industry affected by the EC Treaty, including areas covered by special Community provisions.

---

[169] XXVth Report on Competition Policy 2000, p. 21.

[170] With regard to definitions of "services of general interest", see Commission Communication Services of General Interest in Europe EGT C 17, 19/1/2001, p. 4 and Commission Communication Services of general interest in Europe, EGT C 281, 26/9/1996, p.3.

[171] Report to the Laeken European Council, Services of General interest, Brussels, 17/10/2001 COM(2001) 598 final p. 19.

[172] Community Guidelines on State Aid for Environmental Protection, EGT C37, 3/2/2001, p. 3. The Commission issued the first guidelines on State aid for the environment already in 1974.

[173] Point 2, Community Guidelines on State Aid for Environmental Protection.

[174] Point 5, Community Guidelines on State Aid for Environmental Protection.

For the purposes of issues of State aid, environmental protection is taken to mean "any action designed to remedy or prevent damage to our physical surroundings or natural resources, or to encourage the efficient use of these resources".[175] According to the Commission, here, a measure that promotes energy savings or renewable energy sources can also be designated as an environmental protection measure.
Commission control of State aid for environmental protection has to meet double requirements:
a) The control should "ensure the competitive functioning of markets, while promoting the completion of the single market and increased competitiveness of firms."
b) The control should "ensure that the requirements of environmental protection are integrated into the definition and implementation of competition policy, in particular in order to promote sustainable development."[176] This is a prioritised objective to internalise the environmental costs. Here the Commission could consider utilising instruments that are market-based or based on regulation.

In recent years, issues of environmental aid have been handled by the Commission in a number of cases concerned with the prerequisites in Article 87 and their application. The issues have concerned the aid concept (origin of resources,[177] selectivity[178]). With regard to the assessment of aid compatibility with the Common Market, the Commission has applied the Community Guidelines on State Aid for Environmental Protection on a number of occasions.[179] With regard to sector aid there are also special rules depending on the area of industry concerned.[180] There is no space in our study to report on and discuss all the decisions that affect environmental concerns and State aid in detail.[181] As has already been shown in section 2.5, we feel that a discussion of the rules on State aid falls largely beside the main aim of this study. Issues of State aid generally have their origins in national issues or handling. In light of the formulation of the assignment, we therefore do not see any point in discussing issues of State aid and environmental concerns any further. It can, however, be stated that State aid appears to be an area within competition law where there is some scope for environmental concerns.

In all, it can be said that the competition rules do leave some, if limited, scope to introduce an Integrated Product Policy within the Community. From the perspective of competition policy, however, we can see some difficulties with this work. In the two acts in which the Commission has so far dealt with environmental issues in competition law, the regulation tends to be general, theoretic and difficult to interpret as well as "case-based", which does not leave any scope for reliable assessment or vision for the future.

---

[175] Point 6, Community Guidelines on State Aid for Environmental Protection.
[176] Point 14, Community Guidelines on State Aid for Environmental Protection.
[177] XXXIst Report on Competition Policy 2001 p. 112 and fol. p.
[178] XXXIst Report on Competition Policy 2001 p. 113.
[179] EGT C 27 3/2/2001 p. 3. XXXIst Report on Competition Policy 2001 p. 118 and fol. p.
[180] See, for example, XXXIst Report on Competition Policy State aid to steel companies for environmental protection, p. 122, Rail, p. 125, Maritime transport p. 126. XXXth Report on Competition Policy 2000, p. 103 Steel, p. 109 Agriculture, p. 114 and fol. p. Public health.
[181] In the Commission's Annual Reports on Competition Policy it is quiet easy to get a picture of the type of cases it concerns.

3.6 Summary

The previous chapter established that the competence of Community institutions according to the EC Treaty to legislate on environmental requirements for products has some limitations. It is also clear from the secondary legislation that has been adopted in the field, that Community legislation on environmental requirements for products is fairly limited. The areas regulated are those where environmental impact from the type of product or activity concerned is significant. Traffic-related pollution and the needs to save energy and limit quantities of waste are obvious problems within the Community. Apart from classification and labelling, when it comes to hazardous substances only the most dangerous are subject to restrictions. It is clear that the institutions interpret – or use – their competence quite strictly when it comes to environmental requirements for products. The proposal for a directive on eco-design provides an idea of the way the Commission regards competence, or alternatively the need to adopt provisions on environmental requirements for products: for measures to be possible, the product should be sold in very large volumes, have significant environmental impact (and it has to be assumed, in a direct and acute sense), there should be considerable potential for improvement, and other interests including those of the company should not be negatively affected in any way.

A crucial question to the possibility of implementing an Integrated Product Policy is the extent to which it is possible to produce information on the environmental impact at other handling levels. Information requirements therefore need to be largely binding, even if the policy is otherwise based on voluntary efforts. Current Community law is hardly adequate in this regard. In the Chemicals Strategy and the proposal on REACH, the Commission defines some measures to improve information on the level of danger of substances to users. Voluntary eco-labelling will gradually be extended to cover an increasing number of product groups. Labelling requirements for products with regard to different environmental aspects are becoming more common. The rights of citizens to environmental information are now also confirmed by law in the Community. However, a lot remains to be done to improve Community law in this area.

One problem of the, in itself, necessary but often inadequate product legislation is that changes in the law are required to tighten requirements on the environmental performance of products. Some acts are more flexible, however, and work is underway on different levels where the Member State can choose which to apply and on advertising which rules will gradually be tightened. When Article 175 is used as a basis, there is also a general power for Member States to have more stringent national legislation, provided that it does not meet any obstacles due to other Treaty provisions. In directives aimed at the waste issue, there are often clear trends to develop a life cycle perspective on the environmental impact of products. The Directives can regulate issues of, for example, collection and recycling, the content of hazardous substances and labelling so that the consumer can decide how waste should be dealt with.

Community legislation with environmental requirements for the production level do not appear to give scope for observing environmental impact at other handling levels, other than to some extent for waste generated during production.

A clear life cycle perspective is being developed in the field of waste. This should probably be based on the Community seeing waste as a serious problem, not least bearing

in mind the space requirements to dispose of it. The waste policy basically seeks to minimise quantities of waste. This leads to aims of recycling and re-utilisation, which in turn assume that different components in the products can be separated and do not contain hazardous substances that cannot be dealt with in a suitable way. The effort to minimise the quantity of waste thus leads to a life cycle perspective through the rear-view mirror, so to speak – how should the product be designed to minimise landfill?
The rules on public procurement give limited possibilities for separate priority to be given to environmental concerns. The link between the subject-matter of the contract and the environmental aspects has to be clear. As specified in the Concordia Bus Case, there is a possibility, however, for environmental concerns to be specified when these:

- are linked to the subject-matter of the contract
- do not give the authorities unlimited choice
- are specified in the contract documents or in the communication on procurement
- are otherwise compatible with the principles of Community law and above all the principle of non-discrimination.

From the perspective of competition law, it can be established that there is a newly awakened interest in environmental issues. Scant secondary legislation does not really give any clear indication of how Community institutions will deal with an Integrated Product Policy based on competition policy. The guidelines for this area are not binding, the Commission decisions do not contain enough motivation for a general position, and the Block Exemption Regulations leave it to the companies themselves to assess whether the environmental concerns fit within an agreement or practice.

4 Possible ways to develop an Integrated Product Policy within the Community

4.1 Introduction

EU institutions have thus expressed a wish to introduce an Integrated Product Policy that takes into account the environmental impact from a life cycle perspective. The possibilities and limitations to implement such a product policy within some areas of the common policy have been stated and discussed above. In this chapter, we will discuss some stages of such a policy where, in light of the previous study, we consider that there may be a greater chance than in other areas to gain a response from the Community's institutions to use legislation to introduce such a policy, and/or where we feel that it is particularly important, from a strategic point of view, to develop the instrument.

We stated above that with the Community institutions' current interpretations of the Treaty, there are certain limitations on the competence of the Community to take environmental measures. It is basically a question of a balance between economic interests and the need for environmental protection. The outcome of this balance is largely dependent on how these different interests are interpreted. Today, the Community seems to express mainly the view that the environmental problems that need to be counteracted are those where it can be clearly established that quite far-reaching problems can arise unless measures are taken. This hardly gives scope for a more ambitious environmental policy that seeks to minimise environmental problems "as far as possible". The Community also expresses certain preferences with regard to the types of environmental protection measures that ought to be taken. The preference is for legislation to be avoided as far as possible in favour of other types of instruments. In our opinion, this appears to inhibit the efficiency of the policy being pursued.

This view is also likely to influence the ambition of the Integrated Product Policy. The Commission does express, however, that the policy seeks to reduce the environmental impacts of products throughout their life cycle. References are made to, *inter alia*, the Sixth Community Environment Action Programme, the need for resource management and the waste problem. In its implementation, the different interests need to balance each other, however, and the policy should, as far as possible, be implemented voluntarily by producers and consumers. It is doubtful whether the policy, in its current formulation, fully supports a long-term ambition to limit the environmental impact of products as far as possible. Even if it has a more limited ambition, it must still be seen as a positive first step on the way.

4.2 Product design

4.2.1 Information

As expressed earlier, a basic condition of binding as well as voluntary environmental measures is for the actor to have access to the relevant information. Community institutions have also stressed the need for increased access to environmental information in many different contexts. There is thus some support for further development of Community policy in this respect, with regard to the substantive issue and the need for legislative measures to implement the policy.

The Green Paper stresses that the consumer, in a private as well as a professional sense, ought to have access to information that allows her to make rational choices also with regard to environmental impact. In other words, access to relevant information is an important part of Community policy. Based on the Commission Communication, it ought to be possible to achieve considerably more far-reaching and effective information systems than those that exist today. After all, the aim is to give real opportunities for different actors on the market to really take their responsibility voluntarily to apply the principle of "green choices". It is uncertain how far the Community is prepared to go to create as complete an information system as is technically and economically possible, depending on, *inter alia*, the limited view on the environmental problems. How far is the Community prepared to force producers to supply information so that other producers and consumers can apply an Integrated Product Policy in line with the Commission's intentions?

Investigation, classification and labelling of substances are a pillar of the information system. As pointed out earlier, the REACH Proposal contains positive as well as more vague proposals. It is naturally important that Sweden works to strengthen the positive parts of REACH, including risk assessment for all substances, for POP to be part of the criterion of dangerousness, special control of particularly hazardous substances and a developed reporting obligation also at later levels. Sweden should work to clarify the parts of the proposal that are unclear, in a positive direction. It should be explained that the classification and labelling of substances that are not among the most dangerous has to be done satisfactorily in all Member States. Furthermore, the proposal to build up databases with consumer information is unclear. It is an idea that can be developed, but as a supplement to other measures. For the consumer – the professional as well as the private person – it ought to be more important that relevant information is distributed in connection with tangible considerations on choice between different products.

Sweden should work to further develop systems with environmental information on products. Such work is already underway in several areas, but there is still a lot to be done here. For companies to be able to apply an Integrated Product Policy, producers of subcomponents and finished products must have relevant information from earlier supply chain levels. To achieve this, an information system needs to be built up with a "from the cradle to the grave" perspective on products (there is a basis in the REACH Proposal). Such a system should be designed so that it can gradually be extended to include more parameters. The information could start by covering, for example, energy consumption

per product and the content of hazardous substances in a product (the choice could be made using, for example, a list of undesirable substances).[182]

There is also basic support within the Community to extend the systems with eco-labelling for consumers. These are trends that Sweden should support. Such labelling could be voluntary with the EU flower logo or binding through legislative measures, which have already been taken for certain product groups. Regardless of the method that is used, it is important to carefully consider which criteria are of special importance to eco-labelling from a life cycle perspective. It is not obvious that all the labelling criteria for all product groups are optimal in this regard. Labelling ought also be designed to allow the consumer to compare products with a similar field of use.

4.2.2 Product requirements

It is probably more difficult to gain support for radical development when it comes to direct requirements for the environmental adaptation of products. Here too there are some positive development trends (often linked to an effort to promote recycling and re-utilisation of waste from products, see below for more details). Sweden obviously ought to give its support to and work for the best possible outcome insofar as the Community is ready for direct product requirements.

As shown above, some of the directives have clear signals that the environmental requirements for the product concerned will be tightened in the future. Such provisions have the potential to work as instigators to company product development. It seems sensible to continue to develop the product so that it can be adapted without difficulty to the requirements when they come. At the same time the provision is not as binding as a substantive requirement rule and thereby maybe less controversial. In other words, working for as detailed formulations as possible can be an important strategy to promote an Integrated Product Policy.

In the context, we want to stress that, in our opinion, Sweden also ought to work for the principle of the best available techniques to become an obvious part of product policy just as it is in other parts of Community environmental policy. It should be an obvious minimum basis for environmental protection that anyone who wants to run an activity or take action should at least not cause more negative environmental impact than is necessary to achieve the intended result. Anyone who wants to install purification technology must choose one that corresponds to the best technology. The same should apply when choosing other types of products. The substitution principle, which is stressed in the Commission's Chemicals Strategy, should be lifted in the REACH Proposal to also adopt a prominent position in the continued discussion on an Integrated Product Policy in general.

It is sometimes pointed out that an Integrated Product Policy could be implemented within Directive 2001/95/EEC of the European Parliament and of the Council on general product safety.[183] As far as we can understand, this would assume that the Product Safety Directive is amended to also cover environmental concerns. In our opinion, a general

[182] A complement, or alternative, could be for the EIA to be made available to producers at later levels.
[183] See, for example, Schliessner p. 87.

"environmental safety directive" according to such a model would not be a good solution. The Directive thus seeks to only place "safe" products on the market. The product may not carry a greater risk than is considered acceptable. The safety issues that the Directive regulates today are relatively limited and often quite easy to test, discover and formulate standards for. The product should be "safe" for the consumer to use in the way that was intended (are the teddy's eyes fixed, can the razor be used without giving electric shocks, is the plastic of the garden furniture stable enough to withstand wind and weather for as long as it can be expected to be used?) An environmental life cycle perspective often raises much more complex questions. Not only should the product be safe for the consumer but for the environment as a whole, also from a long-term perspective bearing in mind the prospective effect of the different component parts. The question of synergy effects enters a completely different perspective when it comes to the emission of several different substances that may react with each other or affect the environment in an unexpected way to the garden furniture having to withstand cold and heat, wet and dry. Investigating cumulative effects of wear and tear on the teddy is quite different to investigating the effects of a long-term accumulation of potentially harmful substances in the environment. An ambition to pronounce a product "safe" also for complex aspects of environmental protection is, in our opinion, misguided. Firstly, it is not possible with the current knowledge (and probably not in the future either) to say that a product is safe in every respect. There are far too many factors of uncertainty. Secondly, it would mean giving a "green light" to a load of products that met some minimum standard for environmental impact with regard to such factors as are known today. Bearing in mind the Community's liberal policy on the use of hazardous substances, it is hard to imagine that this minimum standard would be overly ambitious. Instead, the consequences would probably be that a lot of more or less dubious products were given approval according to the Directive and were put forward as equivalent, from an environmental point of view, to other products that can actually be established as being clearly better. A further limitation it that the perspective of the Product Safety Directive is limited to the life of the finished product while an Integrated Product Policy ought to focus on the whole supply chain, i.e. also earlier levels.

As pointed out above, the Product Safety Directive can act as a source of inspiration and provide proposals for part-solutions that are also useable for an Integrated Product Policy, e.g. with regard to the requirements for the assessment of the product and for information within the supply chain. A "framework directive for environmental safety" might also be possible in accordance with Article 175, with the aim of establishing a basic control so that products do not lead to unacceptable environmental impacts. It is then important to formulate the provisions to make it clear that it is not a question of product "approval" from an environmental point of view (as pointed out above, the level of knowledge is much too low in most of the areas concerned with the environmental impact of products for such general approval to be given) without an assessment that targets the opposite end of the scale of environmental impact. Possible labelling of products that correspond with the requirements of the Directive must, in our opinion, also be formulated to make this clear. Positive eco-labelling ought to be reserved for those products that really meet high environmental requirements. Furthermore, it should be considered whether it is politically possible to bring about a basic level of environmental

safety for products through such a directive to tighten the requirement on environmental adaptation in relation to the secondary legislation that is directly aimed at specific environmental aspects of the specified products.

4.2.3 Product design

The Commission's White Paper stresses that an Integrated Product Policy ought to promote life cycle thinking within companies through, *inter alia*, the development of a general strategy to integrate environmental aspects into the design stage, so-called eco-design. A number of legislative measures that more or less directly seek to influence the design of the products have also been taken. In other words, there is support within the Community for such measures. Sweden should support such initiatives and work to further develop them.

A more direct example of such legislation is the Commission's proposals for a directive on eco-design of products intended for end-use. Despite the somewhat limited ambition level of the proposal, it is important strategic new thinking in EU environmental policy. The principle "that environmental damage should as a priority be rectified at source" has gained a further dimension. The producer of goods covered by "implementing measures" should, according to the proposal, make an assessment of environmental aspects covering the whole life cycle of the product, and also evaluate alternative product designs. The assessment should be documented and the relevant information communicated to the consumers and others. This assessment can be compared to an EIA for products – though in a way more far-reaching than a traditional EIA, as the whole life cycle of the product should be covered by the assessment. Sweden ought to support and work to further develop the Commission's initiative. There may also be a reason to consider a closer link between the rules on the environmental assessment of the product and the environmental assessment of production.

4.3 Production

According to the Commission's White Paper on an Integrated Product Policy, legislative measures can be relevant to the integration of a more holistic and life-cycle oriented approach into other types of legislation. Such integration can be achieved not just in product legislation but also in secondary legislation on environmental requirements for production. The best chance to limit environmental impact is at the production stage. It is at this stage that the decisions on input and subcontractors, transport, and the design of the product and the activity are decided. In other words, a successful IPP Strategy also ought to target the production level. The Commission has observed the importance of environmental management systems to a successful Integrated Product Policy. This is naturally positive, but legislative measures with even more direct effect can be taken.

Above, we have analysed the scope of the IPPC Directive to set environmental requirements from a life cycle perspective. We have established that the current rules do not support anything other than the requirements that seek to limit emissions from the activity concerned. No great legal technical intervention is required in the Directive (or in

other directives with similar aims) to create scope for a more life-cycle oriented perspective. As in the Environmental Code, the aim of the Directive can be formulated more generally so that the negative environmental impact in general should be counteracted. The concept "best available techniques" (BAT) poses no obstacle in itself to taking environmental impact into consideration also at earlier and later handling levels. For the sake of clarity, this should be expressed explicitly however. The way BAT is formulated, no decisive additional costs ought to be involved for the companies with regard to protective measures – the measures should, after all, not only be technically but also economically available.

A similar line of reasoning can be followed with regard to the EIA Directive. The aim can be broadened to cover not only the environmental impact *of* the project but also the environmental impact *because of* the project. The latter can cover earlier and later handling levels. The investigation can naturally become slightly more complicated if other handling levels also have to be investigated. This Directive also contains restrictions. The factors that the Member State feels need to be investigated should become subject-matters of such. The minimum requirement is that the main environmental impact is investigated. In some types of activities, it may be the raw material supply that gives rise to the main environmental impact. In other activities, it may be the waste management that is most problematic. It is probably possible to achieve a better environmental appraisal if other handling levels are also taken into account, without the costs and time spent on the investigation becoming too great.

An important factor in facilitating these measures is to prescribe a more extensive information obligation in both directives than that which applies today. If producers at later levels have access to information on the design and environmental impact of the activity at earlier levels, it becomes much simpler to evaluate what can constitute the best technology and the environmental impact of the different alternatives.

Furthermore, we look for a better link between the different acts, between product rules and environmental rules, as well as between different types of environmental rules. A number of acts define the standards and protection for environmental quality in different ways. The Community has thus brought out specific aspects of environmental protection that have particular importance. Greater importance ought to be attached to these than seems to be the case today in assessments of environmental consequences and when drawing up activities that can have a negative environmental impact. Even if the species protected by the Natura 2000 area are not seriously disturbed, and the water quality does not become so bad as to no longer correspond to good water quality, these factors still ought to be included in the assessment when deciding on location, choice of subcontractors and other issues that can affect environmental quality. The same ought to apply if the activity has a negative effect on air quality standards.

A life cycle assessment should also take into account the environmental consequences that the *use* of the products can cause. Even if the product is in itself approved and can be used generally, its use in a particular place or special way may be unsuitable.

We do not have the necessary information to decide what support the kind of measures discussed here have in Community institutions and Member States. Most of the measures do not require any great action however.

4.4 Waste

The waste problem is obviously taken very seriously by Community institutions. The increasing quantity of waste is largely seen as a problem of space. To limit the need for landfill space, the waste has to be re-used or recycled in different ways. This in turn requires the products that eventually become waste to be put together in such a way that they can be dismantled and recycled. The Community has also taken a number of measures to restrict waste quantities and aid re-utilisation and recycling.

In other words, new life cycle aspects in the field of waste may have the necessary prerequisites to gain a response from the Community. It may be a question of further developing existing directives or regulations on new product groups. It is certainly more successful to restrict the use of hazardous substances in a type of product through a waste directive than by a general tightening of product rules.

Producer responsibility for waste may in itself be seen as a detour when it comes to taking care of the waste. Producer responsibility aimed at recycling and re-utilisation of products can be effective however, when it comes to controlling product design. The responsibility can be formulated as direct requirements on product composition or as an economic instrument, as it becomes more expensive to give out products that do not correspond to certain criteria.

4.5 Procurement

Some environmental concerns have already been integrated into public procurement. Case law has shown that social as well as environmental concerns have gained in importance and strength, not least through the decision in Case C-513/99 Concordia Bus, which shows that environmental concerns can be prioritised under certain conditions.

The European Court of Justice interpreted Article 36.1a of the service directive to mean that a contracting authority that has decided to award the procurement contract to the most economically advantageous tender can take into account such environmental criteria as the nitrogen dioxide emissions or noise level of buses, if these criteria:

- are linked to the subject-matter of the contract
- do not give the authorities unrestricted choice
- are defined in the contract documents or in the communication on procurement
- are otherwise compatible with the principles of Community law and, above all, with
- the principle of non-discrimination

If public undertakings set environmental requirements on products, even within the scope of these restrictions, then public procurement is a powerful tool to create increased demand for environmentally friendly products. However, the restrictions within current EC legislation make clarification of the IPP Strategy urgent before future amendments to

directives. The way the directives are formulated now and the link to the Internal Market and to taking into account environmental protection requirements that are clear with reference to Article 6 of the EC Treaty means that a revision of the conditions for a link to the subject-matter of the contract, such as cost efficiency, is the most appropriate.

4.6 Competition policy

There is no doubt that environmental considerations should be integrated into the competition policy. This is explicitly clear from Article 6 of the EC Treaty. The Competition Directorate does not have any special responsibility for an Integrated Product Policy, though the Directorate has a general duty to take environmental protection requirements into account according to Article 6 in the same way as other institutions within the Community. Competition policy should also support the efforts made in other policy areas. In the end, there should be constant balancing against other interests and policy areas.

The current formulation of the competition rules also leaves some scope to include an Integrated Product Policy in the application of the rules. As is clear above, it is primarily in the exemption assessment according to Article 81(3) that environmental concerns can be taken into account. With regard to the assessment according to Article 82, the Merger Regulation, the deregulation efforts and the rules on State aid, the Commission and the Community court can attach more or less importance to environmental concerns in their considerations. Even if the Competition Directorate has not shown any particular awareness so far with reference to the importance of Article 6 of the competition policy, there are still signs of a newly awakened interest from the Directorate with regard to environmental concerns.

The concept of competition incorporates a wish to compete and come first. Companies that do not benefit by taking a certain measure are unlikely to take it. This means that a company that chooses to work with more environmentally friendly production also has to have a "reward" for this. Such a "reward" could be that the company is allowed to enter a certain form of agreement or purchase a competing company. The Commission's wish to use market forces to promote products with good environmental characteristics risks becoming a "wishful dream" however, unless environmental concerns are considered to be such a "reward", which, for example, allows restrictive cooperation with a competitor. The Commission is surely right in its conclusion that the companies will improve their environmental performance and the environmental quality of their products if it is in the economic interest of the companies.[184] Companies may be able to use environmental work as a competition tool. Making consumers change their demand to more environmentally friendly products can form a part of such work. After all, the Commission has stressed information efforts in the Green Paper. The competition rules are generally applicable. The market actors, on the other hand, are a heterogeneous group ranging from multinational companies to small contractors. While big companies may be able to see an incentive in working with environmentally friendly product development (it

[184] Green Paper on Integrated Product Policy, p. 10.

can give goodwill or a stronger trademark), small companies often do not have the same possibility to just prioritise environmental considerations.

It is currently not clear whether the Competition Directorate has a strategy for integrating environmental protection requirements into competition policy. The Commission can choose to "reward" companies that work together for more environmentally friendly products by, for example, granting exemptions for cooperation or approving a concentration. There is some scope within the competition rules for assessments of reasonableness, where environmental considerations can be included. In practice, the incentives for the companies and the consumers, as creators of the demand, will be important. So far, the Commission has presented objectives for this work in the Green Paper on Integrated Product Policy as well as in later documents.[185] In our opinion, the implementation process is considerably more complicated than the Commission wants to let on however. Reading these documents gives the impression that competition law can play an important role here. The focus on companies and consumers is clear. The Commission has not, however, linked the discussion on an Integrated Product Policy to a perspective on competition law.

A starting-point ought to be that measures towards an Integrated Product Policy that restrict competition within the Community or reduce the competitiveness of Sweden and other EU States in relation to each other and the surrounding world should not be introduced. Environmental requirements that are too high within the EU can also damage competition in relation to trading partners outside Europe.

Through the introduction of the new implementing decree from 1 May 2004, the number of formal decisions will almost certainly decrease considerable. The responsibility for assessing the compliance of an agreement with Article 81 will be placed, to a greater extent than before, on companies and their advisors. Increased interest in and awareness of environmental issues is likely to lead to the Commission having to work more actively with different types of guidelines and communications concerned with competition and the environment.

Environmental considerations may not impact negatively on sound competition and all it entails. We are uncertain about using competition law to steer development towards specific environmental objectives. It would mean writing a new competition concept within the Community where environmental consideration was included in the efficiency criteria. This appears to be a next to impossible task. In our opinion, it is not appropriate, despite existing scope, to regulate environmental issues within competition law. The Commission can, however, as has already happened through guidelines and communications, give instructions in situations where environmental considerations should have a greater or lesser influence in the decision of a case.

[185] Communication from the Commission to the Council and the European Parliament, Integrated Product Policy, Building on Environmental Life-Cycle Thinking, Brussels 18/6/2003, COM(2003) 302 final.

References

Bibliography

Allgårdh, Olof /Norberg, Sven: *EU och EG-rätten*, Norstedts Juridik 1999

Bellamy & Child: *European Community Law of Competition*, Sweet & Maxwell 2001

Bernitz, Ulf: *Den svenska konkurrenslagen*, Juristförlaget 1996

Bishop, Simon / Walker, Mike: *The Economics of EC Competition Law*, Sweet & Maxwell 2002

Chliessner, Ursula: *Integrated Product Policy: Where is the EU Heading*, EELR March 2001

Craig & De Búrca: *EU Law; Text, cases and material*, Oxford University press 2003

Emiliou, Nicholas: *Subsidiarity: An effective barrier against "the enterprises of ambition*", European law review 43 1992.

Emtairah, Tareq *et al.*: *Av vem skapas marknaden för miljöanpassade produkter?* Background report for the Swedish Environmental Protection Agency's Government assignment on environmental product policy, July 2002

Faull, Jonathan / Nikpay, Ali (ed.): *The EC Law of Competition*, OUP 1999.

Hildebrand, Doris: *The Role of Economic Analysis in the EC Competition Rules*, 2 ed., Kluwer 2002

Jans, Jan H: *European environmental law*, Europa Law Publishing 2000

Johnson, Stanley P; *The environmental policy of the European Communities*, 2 ed. Kluwer Law International 1995

Kapteyn, P.J.G & VerLoren van Themaat, P: *Introduction to the Law of the European Communities*, Kluwer Law International 1998

Nilsson, Annika: *Att byta ut skadliga kemikalier, Substitutionsprincipen en miljörättslig analys*, Nerenius & Santérus 1997

Pagh, Peter: *EU miljöret*, Christian Ejlers Forlag 1996

Rasmussen, Hjalte: *EU-ret i kontext*, Gad Jura 1998

Wetter, Carl / Karlsson, Johan / Rislund, Olle, Östman, Marie: *Konkurrenslagen – en handbok*, Thomson Fakta, 2 ed. 2002 p. 61 and fol. pp.

Government publications

Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, 2002/L 242/1

Community Guidelines on State Aid for Environmental Protection EGT C 37, 3/2/2001, p. 3.

Council Resolution of 28 October 1999 on mutual recognition (2000/C 141/05)

Council Resolution of 7 October 1997 on the drafting, implementation and enforcement of Community environmental law, 97/C 321/01

Council Resolution of 7 December 1992 on making the Single Market work (1992/C 334/01)

Integrated Product Policy – Council Conclusions on June 7th 2001, Press Release 9116/01

Communication from the Commission to the Council and the European Parliament: Integrated Product Policy COM(2003) 302 final.

A Sustainable Development for a Better World: A European Union Strategy for Sustainable Development COM (2001) 264 final

Proposal for a Directive of the European Parliament and of the Council on establishing a framework for eco-design for energy-using products and amending Council Directive 92/42/EEC, COM(2003) 453 final

Proposal for a Regulation of the European Parliament and of the Council on detergents, COM(2002) 485 final

Amended proposal for a Directive of the European Parliament and of the Council on the promotion of the use of biofuels for transport presented by the Commission according to Article 250.2 of the EC Treaty, Commission's amended proposal for a Directive of the European Parliament and of the Council on the promotion of the use of biofuels for transport, COM (2002) 508 final

Green Paper on Integrated Product Policy COM(2001) 68 final

White Paper – Strategy for the future Chemicals Policy COM(2001) 88 final

Report to the Laeken European Council, Services of General interest COM(2001) 598 final

Proposal for a Directive of the European Parliament and of the Council amending Directive 94/62/EC on packaging and packaging waste, COM(2001) 729 final

Proposal for a Directive of the European Parliament and of the Council on coordination of procedures for the award of public supply contracts, public service contracts and public works contracts COM(2000) 275 final

Proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors – COM(2000) 276 final

Communication from the Commission to the European Parliament and the Council on The Internal Market Strategy COM(1999) 624 final
Green Paper on Vertical Restraints in EC Competition Policy COM(1996) 721 final
White Paper from the Commission: Completing the Internal market COM(85) 310 final
Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, EGT C 3 2001
Commission Notice on corrective measures that can be adopted according to Council Regulation (EEC) No 4064/89 and Commission Regulation (EC) No 447/98, EGT C 68 2001
Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81.1 of the Treaty (de minimis), EGT C 368 2001
Commission Notice on Guidelines on Vertical Restraints, EGT C 291 2000
Commission Notice on cooperation between national courts and the Commission in applying Articles 81 and 82 of the EC Treaty, EGT 1997 C 39
Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Article 85 or 86 of the EC Treaty, OJ C 313 1997
Commission Notice on the definition of a relevant market, EGT C 372 1997
White Paper on modernisation of the rules implementing Articles 85 and 86 (now Articles 81 and 82) of the EC Treaty, Commission programme No 99/027, Brussels 28/4/1999
Action plan for the single market, Communication from the Commission to the European Council, CSE(97) 1 final 4 June 1997 p. 2
European Parliament Resolution on the Commission's Green Paper on Integrated Product Policy (COM(2001) 68 - C5-0259/2001 - 2001/2117(COS)), TA(2002)0014 of 17 January 2002
Opinion of the Economic and Social Committee on the Action Plan for the Single Market, 98/C 19/26, 9 September 1998
Commission's XXIXth Report on Competition Policy, 1999
Commission's XXVth Report on Competition Policy, 2000
Commission's XXXIst Report on Competition Policy, 2001

OECD rapport: *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes*, June 2003

Government Communication 1999/2000:114 A Strategy for an Environmentally Sound Product policy

KKV Doc No 35/2002, Rapport till Europeiska kommissiones angående övervakning av det svenska detaljhandelsmonopolet för alkoholdrycker, 19 December 2002.
Report of the Swedish Competition Authority 1998:1 *The Environment, Trade and Competition – playing rules for efficient markets*
The Swedish Environmental Protection Agency's Report 5043 *Producenters ansvar för varors miljöpåverkan*
The Swedish Environmental Protection Agency's Report 5296 *Towards greener products*

Internet sources

European competition policy for the recycling market, Speech by Jean-François Pons, Deputy Director General, DG Competition, Pro Europe International Congress "Recycling as part of Daily Life in Europe", 20 September 2001 (14/08/2003) www.europa.eu.int/comm/competition/environment

Competition (14/08/2003)
http://europa.eu.int/comm/competition/index_sv.html.
http://europa.eu.int/comm/competition/car_sector/.
http://europa.eu.int/comm/competition/liberalization/legislation/
http://europa.eu.int/comm/competition/state_aid/legislation/

Status of the Cardiff Process, December 2002 (14/08/2002)
http://europa.eu.int/comm/environment/integration/cardiff_status.pdf

The Strategy for a future Chemicals Policy – REACH (14/08/2003)
http://europa.eu.int/comm/enterprise/chemicals/chempol/whitepaper/whitepaper.htm

Stakeholder Consultation on the Integrated Product Policy (14/08/2003)
http://europa.eu.int/comm/environment/ipp/2001developments.htm

OECD Report *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes*
http://www.oecd.org/document/9/0,2340,en_2649_201185_2789257_1_1_1_1,00.html (14/08/2003)

Acts

The Amsterdam Protocol on Subsidiarity and Proportionaliy, EUT 1997 C 340 p. 105
Regulation (EC) No 2422/2001 of the European Parliament and of the Council on a Community energy efficiency labelling programme for office equipment
Regulation (EC) No 1980/2000 of the European Parliament and of the Council on a revised Community eco-label award scheme (supersedes Regulation No 880/92)
Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty
Council Regulation (EEC) No 793/93 on the evaluation and control of the risks of existing substances
Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, EGT L 395, 30.12.1989 p. 1.
Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, EGT P 13, 21/2/1962 p. 204, Swedish special edition Chapter 8 Volume 1 p. 8.

Commission Regulation (EC) No 1400/2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector

Commission Regulation (EC) No 1488/94 on laying down principles for the assessment of risks to man and the environment of existing substances in accordance with Council Regulation (EEC) No 793/93

European Parliament and Council Directive 2003/4/EC on public access to environmental information, and repealing Council Directive 90/313/EEC

Directive 2003/37/EC of the European Parliament and of the Council on type-approval of agricultural or forestry tractors, their trailers and interchangeable towed machinery, together with their systems, components and separate technical units and repealing Directive 74/150/EEC

Directive 2002/24/EC of the European Parliament and of the Council relating to the type-approval of two and three-wheel motor vehicles and repealing Council Directive 92/61/EEC

Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic products

Directive 2002/96/EC of the European Parliament and of the Council on waste from electrical and electronic equipment (WEEE)

Directive 2001/95/EC of the European Parliament and of the Council on general product safety

Directive 2000/53/EC of the European Parliament and of the Council on end-of-life vehicles

Directive 2000/60/EC of the European Parliament and of the Council on establishing a framework for Community action in the field of water policy

Directive 1999/45/EC of the European Parliament and of the Council concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations, as last amended by Directive 2001/60/EC

Directive 1998/70/EC of the European Parliament and of the Council on the quality of petrol and diesel fuels, as last amended by Directive 2003/17/EC.

Directive 96/57/EC of the European Parliament and of the Council on energy efficiency requirements for household refrigerators, freezers and combinations thereof

Directive 94/62/EC of the European Parliament and of the Council on packaging and packaging waste

Council Directive 1999/32/EC on reduction of sulphur content of certain liquid fuels and amending Directive 93/12/EEC

The Council Directive 96/61/EC on co-ordinated measures to prevent and control pollution

Council Directive 96/62/EC on ambient air quality assessment and management

Council Directive 93/36/EEC on coordinating procedures for the award of public supply contracts (no Swedish language version, supersedes Directive 77/62), as amended by European Parliament and Council Directive 97/52/EC

Council Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts (no Swedish language versions, supersedes Council Directive 71/305/EEC), as last amended by Directive 97/52/EC

Council Directive 93/38/EEC of 14 June 1993 on coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, as amended by Directive 98/04/EC

Council Directive 92/42/EEC on energy efficiency requirements for new hot water boilers fired with liquid or gaseous fuels, as last amended by Directive 93/68/EEC

Council Directive 92/43 on the conservation of natural habitats and of wild fauna and flora

Council Directive 92/50/EEC on the coordination of procedures for the award of public service contract, as amended by Directive 97/52/EC

Council Directive 92/75/EEC on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, implemented through

- Directive 94/2/EC with regard to energy labelling of household electric refrigerators, freezers and their combinations
- Directive 96/60/EC with regard to energy labelling of household combined washer-driers
- Directive 97/17/EC with regard to energy labelling of household dishwashers
- Directive 98/11/EC with regard to energy labelling of household lamps

Council Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances, as last amended by Directive 1998/101/EC

Council Directive 86/594/EEC on airborne noise emitted by household appliances

Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as last amended by Directive 97/11/EC

Council Directive 84/360/EEC on the combating of air pollution from industrial plants

Council Directive 79/409/EEC on the conservation of wild birds

Council Directive 76/464/EEC on pollution caused by certain dangerous substances into the aquatic environment of the Community

Council Directive 76/769/EEC on the approximation of the laws, regulations, and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (tin, PCP and cadmium), as last amended by Directive 2003/53/EC

Council Directive 75/442/EEC on waste, as last amended by Directive 91/156/EEC

Council Directive 73/404/EEC on approximation of the laws of Member States relating to detergents, as last amended by Directive 86/94/EEC

Council Directive 70/156/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the type-approval of motor vehicles and their trailers, as last amended by Directive 2001/116/EC

Council Directive 70/220/EEC on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles, as last amended by Directive 2002/80/EC

The Council Directive 67/548/EEC on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, as last amended by Directive 2001/59/EC

Commission Directive 93/67/EEC laying down the principles for assessment of risks to man and the environment of substances notified in accordance with Council Directive 67/548/EEC

Commission Directive 91/155/EEC defining and laying down the detailed arrangements for the system of specific information relating to dangerous preparations in the

implementation of Article 10 of Directive 88/379/EEC, as last amended by Directive 2001/58/EC

Case law

C-19/00 SIAC Construction Ltd. v. County Council of the County of Mayo, 2001 REG I-7725
C-513/99 Concordia Bus Finland Oy ab and Helsingin kaupuki, HKL-Bussliikenne, 2002 REG I-7213
C-209/98 Entreprenørforeningens Affalds/Miljøsektion (FFAD) v. Københavns Kommune 2000 REG I-3743
C-225/98 Commission of the European Communities v. French Republic (Région Nord-Pas de Calais), 2000 REG I- 7445
C-164/97 and C-165/97 European Parliament v. Council of the European Union, 1999 REG I-1139
C-203/96 Chemische Afvalstoffen Dusseldorp BV and Others v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer 1998 REG I-4075
C-187/93 European Parliament v. Council of the European Union 1994 REG I-2857
C-324/93 Evans Medical Ltd and Macfarlan Smith, REG 1995 4929
C-155/91 Commission v. Council 1993 REG I-939
C-2/90 Commission v. Belgium 1992 REG I-4431
C-70/88 European Parliament v. Council 1990 REG I-2041
31/87 Gebroeders Beentjes BV v. State of the Netherlands, 1988 REG I- 4635
302/86 Commission v. Denmark 1988 REG 4607
45/85 Commission v. Ireland 1989 REG 4929, Swedish special edition, tape 9
C-6/72 Europemballage and Continental Can v. Commission, 1973 REG 215
56 and 58/64 Consten & Grundig v. Commission 1966 REG 299
Opinion of the Court of Justice 2/00 the Cartagena Protocol 2001 REG I-9713

Report 5338 • December 2003

An integrated product policy in the EU

– some EC legal conditions

To further develop the Integrated Product Policy, IPP, it is useful to illustrate the potential of current instruments to bring about change. Legal instruments can create clear rules for market actors and, as such, are an important driving force for environmental work by companies. As far as possible, a starting-point ought to be a common regulatory framework within the EU.

This report investigates and discusses the scope within Community law for measures to implement an Integrated Product Policy. It looks at the possibilities and obstacles set by primary and secondary legislation to regulate the environmental impact of products through legislation from a life cycle perspective.

The report is the result of research compiled on behalf of the Swedish Environmental Protection Agency.

ISBN 91-620-5338-8.pdf
ISSN 0282-7298

NATURVÅRDSVERKET (The Swedish Environmental Protection Agency)