Protecting the Environment Without Distorting Competition

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I. Introduction

In some cases, environmental and competition policy may be contradictory:

- Environmental regulation could promote certain activities (e.g. sea transport) at the expense of competing ones (e.g. road transport).
- Exclusive rights in order to provide environmental activities (e.g. waste for recovery) eliminate competition in the market.
- Allocation of greenhouse gas emission allowances could unduly distort competition among States, if there is no correspondence between the rights received and the potential of their industry. Allocation could also distort competition by introducing differences between industries or undertakings not based on objective reasons.
- A public contract awarded, taking into account environmental grounds (e.g. electricity supplied from renewable energy sources), may harm other energy producers which could have been better able to take on the provision.
- Standardisation agreements intended to achieve environmental benefits could turn into higher prices or new entry barriers to the market.
- Environmental State aid distort the market, since it grants an economic advantage favouring certain products or undertakings (e.g. biofuel promotion), making the activity of competitors more difficult.

The European Union (EU) shall ensure consistency between its policies and activities, taking all of its objectives into account (Art. 7 TFEU). In this regard, the EU shall work for the sustainable development of Europe based on balanced economic growth, aiming at a high level of protection and improvement of the quality of the environment (Art. 3.3 TEU). Moreover, EU law requires the integration of environmental protection into the European Community's policies, including competition policy (Art. 11 TFEU). This mandate has even been included in the Charter of Fundamental Rights (Art. 37), which is legally binding (Art. 6 TEU). However, stressing environmental protection should not let us forget that promoting economic and social progress through the creation of the internal market is at the core of the EU (Art. 3.3 TEU). This goal cannot be achieved without protecting competition, which falls under the exclusive competences of the Union (Art. 3(1)b) TFEU). Since there is no primacy between the policies,[1] the question is *to what extent and under what conditions is it acceptable that environmental regulation distorts competition?* If we want to express it in a positive way, the issue becomes *how to strengthen the synergies of both policies, while reducing their harmful interferences*.

Key Points

- Distortion of competition is often at the core of environmental protection.
- Environmental regulation has to avoid or, at least, reduce the distortion of competition as much as possible.
- Competition law enforcement can take into account environmental goals to a very limited extent, since it reduces the ability to protect the market.

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1 Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV e.a. tegen Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* (*Dusseldorp*) [1998] ECR I-4075: undertakings entrusted with the exclusive right to incinerate dangerous waste are subject to the Treaty rules (see below); Case C-487/06 P, *British Aggregates Association v Commission* (British Aggregates Association II): the need to take into account environmental protection, cannot justify the exclusion of selective measures (environmental levies) from the scope of Art. 107(1) TFEU (para. 92).

II. Environmental and competition policy, do they work in the same way?

At the outset, we can make the assumption that *there is no radical incompatibility between environmental and competition policy*. Both of them share the ultimate objective of promoting the efficient use of (natural) resources,[2] which explains the interaction between them. On one hand, 'green growth' generates new economic opportunities, as the booming business of renewable energy shows. The same can be said of green technologies, eco-industries and recycling. On the other hand, maintaining effective competition is also important for environmental protection.[3] In competitive markets, price provides information about the value of each product or service. Competition also stimulates industry innovation, which constitutes a driving factor for environmental policy.

However, we cannot forget that *both policies address different goals*. First, environmental regulation (a command and control approach) aims to ensure the best use of natural resources, in order to minimise environmental harm. Experience shows that environmental protection cannot be achieved without State intervention. Many activities carry environmental risks that are to be avoided, where possible.[4] On the other hand, there is a natural incentive to overexploit the environment by shifting negative externalities to society.[5] Second, by contrast, competition law seeks to defend the customer's wealth through the proper functioning of the market.

It turns out that, *in some cases, both policies may be contradictory*. To be clear, *distortion of competition is often at the core of the environmental regulation*, which lays down measures that favour some undertakings or industries but harm others. For example, a policy opting for wind energy can discourage the development of competing renewable energy sources; applying pricing measures on plastic products, favours biodegradable alternatives.

Competition concerns also arise with regard to the so called *market-based instruments*, which have gained growing importance in environmental regulation.[6] As an alternative to mandatory standards, such instruments are meant to correct market failures in a cost-effective way, by influencing prices (via taxation or aid) or by restraining certain activities to quantitative limits (emission trading).[7] The fact is that these instruments may distort competition. Thus, a tax on fuel may vary depending on its intended use (e.g. heating or propellants). The same occurs when environmental goals are achieved through group-related charges (special levies). Poor design and execution of a rights of use scheme may distort competition by favouring some companies to the detriment of others.[8]

It is necessary to find a proper trade-off between environmental protection, *competition policy*, and *industry competitiveness*. Environmental protection has a price. It may be tempting for state authorities to approve 'green regulation', but without paying enough attention to the wider impact their decisions might have on the economy.[9] There is no free ride in environmental protection, even less so in an increasingly globalised world. International agreements may be necessary not only to achieve effective environmental protection, but also to safeguard the competitiveness of domestic industry. On the other hand, regulation often raises the market access barriers, as environmental standards tend to place a proportionally smaller burden on large firms.[10] This could lead to more concentrated markets, perhaps to the detriment of consumers. As a final example, the broad guarantees of administrative procedures in environmental matters, providing the wide participation of all stakeholders,[11] should be compatible

2 Nordic Competition Authorities (joint report), *Competition policy and green growth. Interactions and challenges* (2010) 18, available at http ://www.kilpailuvirasto.fi/tiedostot/Competition-Policy-and-Green-Growth.pdf.

3 'Promoting the correct pricing of environmental goods is crucial to a cost-efficient environmental policy and proper innovation incentives. This can best be achieved through effective competition, since otherwise price signals reflecting environmental externalities cannot be effectively transmitted'. Nordic Competition Authorities (joint report) (2010) 7.

4 HJ Papier, 'Rechtsstaat im Risiko' (2010) 13 Deutsches Verwaltungsblatt 805–7.

5 H Vedder, 'Of Jurisdiction and Justification. Why Competition is Good for "Non-economic" Goals, But May Need to be Restricted' (2009) 5:1 The Competition Law Review 54.

6 Moreover, some concern has been raised about the risk of treating nature as a subject of private commerce, as a commodity to be considered purely according to the rules of the market rather than as a common heritage. CT Reid, 'The Privatisation of Biodiversity? Possible New Approaches to Nature Conservation Law in the UK' (2011) 23:2 Journal of Environmental Law 205–6.

7 European Commission, *Green paper on market-based instruments for environment and related policy purposes* COM(2007) 140 final, 3.

8 'DG Competition has persistently advocated externality pricing (through measures like the Emissions Trading Scheme and tradable green certificates) over subsidies to renewable energy suppliers to tackle carbon emissions. The evidence thus far is that these shadow market methods, as implemented to date within the EU, have not incentivised large scale investment away from fossil fuels but rather have bestowed anti-competitive windfall profits on incumbents'. D Wilsher, 'Reducing Carbon Emissions in the Electricity Sector: a Challenge for Competition Policy Too? An Analysis of Experience to Date and Some Suggestions for the future' (2009) 6:1 The Competition Law Review 31.

9 Nordic Competition Authorities (2010) 67.

10 A Heyes, 'Is environmental regulation bad for competition? A survey' (2009) 36 Journal of Regulatory Economics 3; Nordic Competition Authorities (2010) 17.

11 J Schwarze, 'Verfahren und Rechtsschutz im europäischen Wirtschaftsrecht' (2010) 21 Deutsches Verwaltungsblatt 1325–32.

with 'better regulation' proposals which aim to reduce the costs of regulation to business.[12]

III. Regulation and self-regulation

Often environmental policy is explained as a pathway from environmental law to regulation and, then, to governance.[13] However, this approach tends to ignore the *central role of the State and, therefore, of the law in environmental policy*. Naturally, it does not mean that law cannot be based on economic analysis or cannot apply market-based mechanisms, when they appear to be more effective for their intended purposes. Whenever possible, regulation should try to seek the cooperation of citizens and organisations in achieving environmental goals. The effectiveness of law has always relied on broad social acceptance. Legislation is not intended to exclude citizens' initiative, but aims to regulate only what is necessary to defend the general interest and to protect citizens' rights. However, this does not mean a decline in the role of law, which is the main instrument of the State and the tool which guarantees of citizens' rights.

In this regard, we cannot forget that *environmental regulation restricts property rights and economic freedoms.*[14] According to the *democratic principle*, such decisions are to be taken by the legislator, bearing in mind that Community institutions play a leading role in defining EU environmental policy. Moreover, a certain degree of regulatory harmonisation may be necessary at the European level.[15] Purely national renewable energy schemes, for example, cannot be reconciled with the free movement of goods or competition in a liberalised electricity market.

Once standards have been established, their effective implementation and enforcement can be very challenging, as the growing number of infringement cases opened against EU Member States shows. Most public intervention is based on the traditional administrative instruments, ranging from *ex ante* controls to monitoring and punishment tools. However, in order to ensure compliance and to enforce environmental regulation, authorities cannot cease to test other strategies that leave more room for advice, persuasion, and sometimes negotiation.[16]

Self-regulation also plays a useful complementary role to environmental regulation (e.g. environmental certification), provided that its inherent weaknesses are not overlooked.[17] For example, self-regulation could be used as a vehicle for collusion.[18] Businesses could also try to favour their own products over competing ones.[19] It could be used to create a disadvantage for rivals, by setting standards that it is difficult or impossible for competitors to meet.[20] However, correctly designed, independently determined, non-discriminatory certification standards and effective competition are important for achieving environmental benefits. Self-regulation can also precede regulation, as happens with green building standards, which in many countries are no longer voluntary.[21]

IV. Regulation should minimise its impact on competition

As we have noted, the distortion of competition is sometimes the price that has to be paid for protecting the environment. However, at the forefront of regulation should be the aim to minimise its impact on competition. In this regard, restrictions to competition cannot be set up just by invoking environmental protection. On the contrary, legislative and administrative measures have to be effectively suited to address *specific environmental goals*. Regulation should be aimed at ensuring that undertakings internalise the environmental costs resulting from their activity. In this sense, the *polluter pays principle* in itself is consistent with competition policy, since it remedies market failures.[22] By contrast, before adopting measures that go further and try to support additional environmental goals, the intended benefits should be carefully weighed against the costs of distorting competition.

Discrimination between industries or undertakings can only be justified when it is based on an objective and reasonable criterion (*non-discrimination prin-*

12 EA Kirk and KL Blackstock, '*Enhanced* Decision Making: Balancing Public Participation against "Better Regulation" in British Environmental Regimes' (2011) 23:1 Journal of Environmental Law 97–116.

13 Neil Gunningham, 'Environment Law, Regulation and Governance: Shifting Architectures' (2009) 21:2 Journal of Environmental Law 179–212.

14 F Becker, 'Market Regulation and the "Right to Property" in the European Economic Constitution' (Oxford University Press 2007) 26 Yearbook of European Law 255–96.

15 D Wilsher (2009) 32.

16 N Gunningham, 'Enforcing environmental regulation' (2011) 23:2 Journal of Environmental Law 169–201.

17 E Hüpkes, 'Regulation, Self-regulation or Co-regulation?' (2009) 5 Journal of Business Law 429–430; D Schiek, 'Private rule-making and European governance—issues of legitimacy' (2007) 32 European Law Review 443–66.

18 OCDE/GD(96)22, 8.

19 Nordic Competition Authorities (joint report) (2010) 65.

20 OCDE/GD(96)22, 8.

21 S Fox, 'A climate of change: shifting environmental concerns and property law norms through the lens of leed building standards' (2010) 28:2 Virginia Environmental Law Journal 299–341.

22 OCDE/GD(96)22, 5.

ciple),[23] taking into account all the facts and technical/scientific data available at the time.[24]

According to the *rule of law*, regulation may restrict, but not eliminate citizens' rights (regulatory taking), unless proper compensation is provided in order to offset the patrimonial loss.

Environmental regulation must be based on sound reasoning, while trying to minimize its impact on competition and respecting the rights involved.[25] The problem is that authorities enjoy wide discretionary powers, which make judicial review very unlikely. It is not easy to draw the line between regulation and taking (privation).[26] This often leads to striking a very difficult balance between opposing demands.[27] It is not easy either to determine the level of economic measures to be applied (taxes, fees, aids). How should we quantify the environmental costs, including those of preserving the environment for future generations?[28] European case law acknowledges a broad discretion where legislative or administrative action involves political, economic, and social choices and where it is called on to undertake complex assessments and evaluations.[29] Moreover, when it comes to establishing a complex system, the Community legislature is entitled to have recourse to a step-by-step approach and to proceed according to the experience gained.[30]

V. Special and exclusive rights related to environmental activities

In a market economy, *economic activities are to be carried out on a free competition basis*, regardless of whether or not they are related to environmental protection. This is exactly what the internal market means (Art. 2 TEU), based on the economic freedoms (Arts 26, 39(3), 52 TFEU), which can only be suspended for reasons of public order provided for in the Treaty itself (Arts 36 TFEU), where environmental protection is not to be found.[31] Moreover, Member States shall liberalise services beyond the extent required by the directives, if their general economic situation and the situation of the economic sector concerned so permit (Art. 60 TFEU).

However, there are activities which cannot be carried out through competition, mainly because they are natural monopolies (e.g. water supply and sewage disposal). Most of them can be classified as *services of general economic interest*, which are subject to a specific legal regime (Arts 14 and 106(2) TFEU, Art. 36 Charter of Fundamental Rights and Protocol No 26). Undertakings entrusted with the operation of such a service *may refrain from applying Treaty rules*, in particular those on competition, insofar as the application of such rules obstructs the performance, in law or in fact, of the particular tasks assigned to them (Art. 106(2) TFEU).[32] Thus, if necessary, public authorities could grant special or exclusive rights for providing the service and, where appropriate, impose particular tasks.

European case law has already dealt with the application of this provision to activities related to the environment. In this regard, it is necessary to point out the following aspects:

- This provision only applies to economic services, not to non-economic services or to activities involving proper public authority powers (e.g. anti-pollution surveillance).[33] The latter are not subject to the internal market rules.

23 Economic analysis helps to decide when different regulatory treatments mirror sound policy options. R Betz, T Sanderson, T Ancev, 'In or out: efficient inclusion of installations in an emissions trading scheme?' (2010) 37 Journal of Regulatory Economics 162–79.

24 Case C-127/07, paras 57–59.

25 JA List and DM Sturm, 'How elections matter: Theory and evidence from environmental policy' (2006) CXXI:4 The Quarterly Journal of Economics 1249–81.

26 F Becker (2007) 278.

27 The right of access to environmental information held by or for public authorities (Art. 1 of Directive 2003/4), e.g., cannot mean the failure to protect intellectual property rights or the rightful commercial interest of third parties, which often have to submit valuable commercial information in the framework of a national procedure for authorisation of certain activities [Art. 4(2) of Directive 2003/4]. Case C-266/09, *Stichting Natuur en Milieu et others*, paras 52–53.

28 Commission Community Guidelines on State aid for environmental protection (2008), para. 25.

29 Case C-127/07, paras 57–59.

30 In Case C-127/07, the Court supported the exclusion of the chemical sector from the scope of Directive 2003/87, reasoning that it would have made the management of the allowance trading scheme more difficult and would have increased the administrative burden (para. 65). The difference in treatment between the chemical sector and the steel sector may be regarded as justified (para. 69).

31 Case C-2/90, *Commission v Belgium* (*Walloon Waste*) [1992] ECR I-4431: ECJ did allow the Belgian law prohibiting the importation of waste to Wallonia, reasoning that waste had a particular status, and the measure did not discriminate against imports (Art. 28 TEC), despite being worded to that effect. Case C-209/98 *Sydhavnens* [2000] ECR I-3743: Art. 35 TFEU (Art. 29 TEC) prohibits a system for the collection and receipt of non-hazardous building waste destined for recovery, under which a limited number of undertakings are authorised to process the waste produced in a municipality, if that system does not allow producers of waste to export it. Such an obstacle to exports cannot be justified on the basis of Art. 36 TFEU (Art. 30 TEC) or in the interests of environmental protection [Art. 191(2) TFEU (Art. 174(2) TEC)] (para. 51). R Hendler (Hrsg.), Abfallentsorgung zwischen Wettbewerb und hoheitlicher Lenkung (2001).

32 Case C-209/98, *Sydhavnens*, [2000] ECR I-3743, para. 75 (waste for recovery).

33 Case C-343/95, *Calì & Figli*, [1997] ECR I-1547: Art. 106 TFUE is not applicable to anti-pollution surveillance with which a body governed by private law has been entrusted by the public authorities in an oil port, even where port users must pay dues to finance that activity. Such an activity is connected by its nature, its aim, and the rules to which it is

- The undertaking has to be entrusted by an act of public authority with the provision of the service. On the contrary, general limitations imposed on all undertakings to protect the environment cannot be considered services of general economic interest.[34]
- Last but not least, not applying the Treaty is not the rule but the exception. Most services of general economic interest are provided by private companies on a competitive basis.[35] In general, undertakings entrusted with the provision of such services are subject to the Treaty, including competition rules (Arts 106(1) and 106(2) TFEU, *a contrario sensu*).[36] It is true that in the absence of EU legislation, Member States have wide discretion to qualify the activity as a service of general interest and to define the most convenient legal regime.[37] However, in doing so, they are linked to the objectives of the Treaty. In short, special or exclusive rights are permitted only to the extent that the intended environmental goal cannot be achieved equally well by other less restrictive measures.[38] In addition, the development of trade must not be affected to such an extent as would be contrary to the interests of the Union (Art. 106(2) TFEU, *in fine*).

In activities subject to exclusive rights there is no competition in the market, but there may exist *competition for the market*. Public authorities can take on the activity using their own resources,[39] but very often they contract out the provision. In such cases, public procurement rules ensure transparency, non-discrimination, and sound administration. On the other hand, competition law prohibits collusive agreements and concerted practices through which the bidders could distort competition,[40] including joint bidding agreements.[41]

VI. Administrative allocation of rights of use

Developing certain economic activities requires first obtaining of rights of use (water discharge permits, allowances of greenhouse gases, rights to install facilities on public or private property, etc.). In this regard, we can highlight the three following issues:

(i) *Regulation may favour certain States, industries, or undertakings*, at the expense of others.[42] Clearly, any differential treatment must be based on solid grounds. However, as we have stated, judicial review may be limited,[43] due to the difficulties of controlling administrative discretionary powers.

(ii) Often, establishing a rights of use scheme aims to achieve *a more efficient use of natural resources through the creation of a market*. However, this is anything but a simple task. Regulation requires that authorities dispose of valuable information, which is difficult and expensive to obtain. An emissions trading scheme, for example, can only work if the global amount of allowances granted is lower than the global expected needs of undertakings.[44] On the contrary, if there is over-allocation, undertakings should not be permitted to either reduce their pollution or buy allowances on the market, as happened in many cases in Europe with the first allocation of emission certificates of

subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. Therefore, it is not of an economic nature justifying the application of the Treaty rules on competition.

34 Case C-159/94, *Commission v France*, [1997] ECR I-5815: constraints of environmental protection cannot form part of the particular tasks entrusted to EDF and GDF since those constraints are not specific to those undertakings, but apply more or less generally to all economic operators (paras 64, 69).

35 G Püttner, 'Daseinsvorsorge und Wettbewerb von Stadtwerken' (2010) 19 Deutsches Verwaltungsblatt 1189–1190.

36 JC Laguna de Paz, *Servicios de Interés Económico General* (2009).

37 M Reese and HJ Koch, 'Abfallwirtschaftliche Daseinsvorsorge im Europäischen Binnenmarkt—zugleich ein Beitrag zur Auslegung von Art. 106 AUE' (2010) 22 Deutsches Verwaltungsblatt 1396–9.

38 Case C-203/96, *Dusseldorp*: Art. 90 of the Treaty [Art. 106 TFEU], in conjunction with Art. 86 [Art. 102 TFEU], precludes such rules whereby a Member State requires undertakings to deliver their waste for recovery to a national undertaking on which it has conferred the exclusive right to incinerate dangerous waste unless the processing of their waste in another Member State is of a higher quality than that performed by that undertaking if, without any objective justification and without being necessary for the performance of a task in the general interest, those rules have the effect of favouring the national undertaking and increasing its dominant position.

39 Case C-480/06, *Stadtreinigung Hamburg*, para 45.

40 A Lotze and S Mager, 'Entwicklung der Kartellrechtlichen Fallpraxis im Entsorgungsmarkt' (2007) 3 Wirtschaft und Wettbewerb 249–51.

41 GL Albano, G Spagnolo and M Zanza, 'Regulating Joint Bidding in Public Procurement' (2009) 5:2 Journal of Competition Law & Economics 335–60.

42 The Directive 2009/29/CE of the European Parliament and of the Council, of 23 April 2009, amending Directive 2003/87/EC, lays out an ongoing concern in order to prevent that allowance allocation leads to undue distortions of competition between industrial activities or Member States.

43 In Case C-127/07, *Arcelor*, the Court concluded that the Community legislature did not infringe the principle of equal treatment by excluding the chemical and non-ferrous metal sectors from the scope of Directive 2003/87/EC. The Court held that although these sectors are in a comparable situation to the sectors included, the difference in treatment between them can be justified by objective reasons. The exclusion of the chemical sector can be justified by the desire to avoid making the allowance trading scheme more difficult and increasing the administrative burden. On the other hand, the exclusion of the non-ferrous metal sector can be justified by the difference in its level of emissions as compared with the other sectors covered.

44 Commission Community Guidelines on State aid for environmental protection (2008), para. 55.

greenhouse gases.[45] Moreover, at the core of every market is the scarcity assumption. Therefore, a rights of use scheme weakens competition by increasing market entry barriers, since it restricts the number of undertakings able to carry out the activity or, at least, raises their costs. In short, the intended benefits of environmental protection resulting from the establishment of a rights of use scheme must be weighed against the costs of weakening competition.

(iii) *An administrative allocation procedure* of rights of use is also crucial. In this regard, some general criteria stand out:

- *Grandfathering* is the most distorting procedure, insofar as it grants benefits to players already in the market, which inevitably increases entry barriers. However, this procedure can be unavoidable when it comes to introducing a new system that represents a substantial change in the legal system in force, as happened with the *EU Emission Trading System*. It would be unreasonable to require a substantial change in business conditions, without providing a period of adaptation. As markets mature, steps must be taken to find other allocating procedures.
- The advantage and disadvantage of the *beauty contest* is the broad scope for administrative discretion that it entails. The assumption that authorities are well suited to find out what is best for public interest does not always match reality.
- Therefore, whenever possible, rights of use should be *auctioned*. This gives buyers the chance to pay the theoretical market value for the rights they acquire. It also avoids the risk that the allocation entails State aid, favouring the establishment of a secondary market for rights of use.

VII. Environmental criteria in public procurement

Public contracts are to be awarded under the specific principles of transparency, free concurrence and non-discrimination. These principles ensure that contracts are entrusted to those who are better able to take on the provision, at the best possible price. This way, not only are the contracting authorities' interests protected, but also those of citizens, who have the right not to be discriminated against by the huge business opportunity created by public procurement. The point is that regulation allows awarding the contract to the most economically advantageous tender, among other criteria, taking into account *environmental characteristics* linked to the subject matter (Art. 53(1)(a) of the Directive 2004/18/EC of the European Parliament and of the Council, of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts).

The so-called green public procurement is meant to be an expression of the duty to integrate environmental protection into other Community policies (Art. 11 TFEU). This trend is also clearly supported by the European Commission, which argues that public procurement can create or enlarge markets for environmentally friendly products and services.[46] It also provides incentives for companies to develop environmental technologies. Taking into account environmental factors could help the avoiding of externalities, for example those resulting from transportation.[47] The Court has also accepted the inclusion of non-economic criteria in public procurement, provided that they:[48] (i) are linked to the subject matter of the contract; (ii) do not confer an unrestricted freedom of choice on the authority; (iii) are expressly mentioned in the contract documents or the tender notice; and (iv) comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

However, all of this should not undermine *the risk that environmental criteria could, in fact, gain an undue role in awarding contracts*.[49] Environmental pressure could be enough to reduce the effectiveness of public procurement's proper aims. Undue prominence of environmental criteria, among other results, could then lead to the following:

45 C Knill and T Bernheim, 'Das Europäische Parlament zwischen Klimaschutz und Wettbewerbsfähigkeit: Entscheidungsfindung und Konfliktlinien am Beispiel der Revision der Richtlinie zum Emissionshandel' (2010) 2 Zeitschrift für Umweltpolitik & Umweltrecht 169.

46 Commission Communication, 'Public procurement for a better environment' [COM(2008) 400/2], para. 1.1, 3 and 'Roadmap to a resource efficient Europe' [COM(2011) 571 final], 7.

47 C Hilson, 'Going local? EU Law, localism and climate change' (2008) 33 European Law Review 194–210.

48 Case C-513/99 *Concordia Bus* [2002] ECR I-7213: public contract for the provision of urban bus transport services.

49 In Case C-448/01, *Wienstrom*, the Court stated that Community legislation on public procurement does not preclude a contracting authority from applying, in the context of the assessment of the most economically advantageous tender for a contract for the supply of electricity, *an award criterion with a weighting of 45 per cent* which requires that the electricity supplied be produced from renewable energy sources. The Court even stated that the fact that that criterion does not necessarily serve to achieve the objective pursued is irrelevant in that regard.

- distortion of competition, when environmental criteria are not directly linked to the provision;[50]
- inefficiencies, by reducing the number of undertakings able to submit bids, which will presumably increase the price and reduce the quality of the provision;[51]
- discriminatory treatment, by favouring certain undertakings for reasons other than their suitability to take on the provision;
- greater discretion by the contracting authorities, since the environmental benefits of certain products or services are difficult to measure.[52]

In short, contracting authorities can take environmental protection into account as an ancillary criterion, provided that, in fact, it does not involve awarding the contract to the undertaking that is not best placed to assume the provision.

VIII. To what extent can competition law enforcement take into account environmental protection?

Defining competition law goals has been always a highly controversial issue.[53] Perhaps, the answer to this question, to a greater or lesser extent, cannot be separated from perceptions about the role of government intervention in the economy.[54] Notwithstanding this, it can be accepted that it *protects the competitive process in the market*, which in turn fosters economic efficiency and thus consumer welfare. This assumption does not ignore that, from the beginning, EU competition law has been permeable to exogenous goals (market integration, industrial and sectoral policies, intellectual property), including nowadays *environmental protection.*[55] In this regard, the following should be noted:

Agreements or concerted practices among undertakings with anticompetitive effects are not prohibited by competition law (Art. 101(1) TFEU),[56] provided that they do produce tangible benefits to consumers or significant technological advances that outweigh their anticompetitive effects (Art. 101(3) TFEU). Agreements may be necessary, for example, to share the costs involved in the research or application of less polluting technologies. Infrastructure sharing by mobile phone companies may also reduce the environmental impact involved in its establishment. Standardisation agreements[57] usually produce significant positive economic effects, but when they restrict competition, they frequently give rise to significant efficiency gains that are taken into account by competition authorities.[58] In all these cases, it is necessary to evaluate the environmental benefits resulting from the agreement and compare them to the estimated social costs of diminishing competition (higher prices or new entry barriers to the market). In this regard, in order to be allowed, restrictive practices and agreements must meet the following four conditions:

- The agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress.
- The restrictions must be indispensable to reach the intended objectives.[59]
- A fair share of such efficiencies must be passed on to the consumer. The greater the restriction of competition, the greater the efficiencies must be and these have to be passed on to consumers.[60] When the agreement causes a substantial reduction in the competitive constraint facing the parties, extraordinarily large cost efficiencies are normally required for sufficient passing on to occur.[61] As the European Commission points out, competition is an important long-term driver of efficiency and innovation.[62]
- An agreement must not give undertakings the opportunity to eliminate competition in a substantial part of the product sector concerned. 'Ultimately the protection of rivalry and the competitive process

50 W Frenz, 'Naturschutz im europäischen Vergaberecht' (2007) 29 Natur und Recht 107–11.

51 Nordic Competition Authorities (2010) 7.

52 European Commission acknowledges that there is limited established environmental criteria for products and services, and insufficient information on life cycle costing of products and the relative costs of environmentally friendly products and services [COM(2008) 400/2], para. 1.4, 5.

53 R Whish, Competition Law (6th edn, 2009) 19–23.

54 S Kingston, The role of environmental protection in EC Competition Law and Policy (2009) 1 available at https://openaccess.leidenuniv.nl/bitstream/handle/1887/13497/Suzanne+Kingston+PhD+Thesis.pdf?sequence=1.

55 Kingston (n 54).

56 Article 101 TFEU does not apply where undertakings are required by national law to act in an anticompetitive way. Cases C-359 & 379/95P, *Commission and France v Ladbroke Racing* [1997] ECR I-6265, para. 33.

57 M Walther and U Baumgartner, 'Standardisiergungs-Kooperation und Kartellrecht. Eine Betrachtung aus europäischer und US-amerikanischer Sicht' (2008) 2 Wirtschaft und Wettbewerb 158–167; C Koenig and A Neumann, 'Standardisierung—ein Tatbestand des Kartellrechts?' (2009) 4 Wirtschaft und Wettbewerb 382–394.

58 European Commission Guidelines Horizontal Agreements (2011), paras 257 *et seq.*

59 Environmental agreements often contain unnecessary restrictive provisions which are irrelevant for their purpose. OCDE/GD(96)22, 25.

60 Guidelines (2004), para. 90.

61 Guidelines (2004), para. 101.

62 Guidelines (2004), para. 92.

is given priority over potentially pro-competitive efficiency gains which could result from restrictive agreements'.[63] Agreements cannot lead to an abuse of a dominant position.

EU merger regulation permits a narrow margin in order to appraise whether a *concentration* should be authorised taking into account environmental goals:

- In assessing the compatibility of a concentration, the European Commission, among other criteria, must take into account the development of technical and economic progress (Art. 2.1 (b) of the Council Regulation EC n 139/2004, on the control of concentrations between undertakings). To a limited extent, this provision could leave the door open for environmental objectives.
- Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the EU merger Regulation, provided that they are compatible with Community law (Art. 21(4) Regulation EC n 139/2004). Such interests should be communicated to the Commission, which has to assess their compatibility in advance.
- In mergers without a Community dimension, national regulation can also empower public authorities to take into account environmental criteria (Art. 1 Regulation EC n 139/2004).

The prohibition of *abuse of dominant position* leaves no room to take environmental goals into account, since it has no exceptions (Art. 102 TFEU).[64] The issue is then to define precisely what conduct falls within the prohibition. In this regard, it should be pointed out that behaviour that is objectively justified does not constitute an abuse of dominance (e.g. a requirement for the supply of products that meet certain environmental requirements).

As we have seen, *environmental goals can play a role in competition law enforcement, but in a very restrictive way*,[65] since they reduce its ability to protect the market. In the USA, balancing the public policy goals of competitive markets and protecting the environment is the role of the legislators, not courts or antitrust enforcers.[66] On the other hand, weakening competition has social costs which may outweigh the benefits that environmental policy is intended to provide.[67] In a nutshell, environmental goals cannot impede competition law to ensure a non-distorted functioning of the market. Taking into account environmental objectives is not the same as putting competition policy at the service of environmental protection.[68] Competition law cannot be instrumentalised,[69] becoming environmental, industrial, or social policy. If it did, it would have ceased to fulfil its principle purpose, which would mean a clear loss of social welfare.

IX. Many economic benefits granted by the State are to be considered as State aid

Environmental policy is also subject to the State aid scrutiny. Article 107(1) TFEU focuses on all measures reducing the burdens that undertakings normally have to face, regardless of the objectives they intend to meet.[70] However, *it is not always easy to find out when a measure has to be qualified as State aid*, since public authorities use increasingly more sophisticated techniques in order to encourage environmental objectives. In this regard, measures must meet all the requirements laid down in Article 107(1) TFEU:

63 Guidelines (2004), para. 105.

64 Case T-151/01, *DSD*, judgment of 24 May 2007: *DSD* abuses a dominant position in requiring payment of a fee for the total quantity of packaging bearing the *Der Grüne Punkt* logo and put into circulation in Germany, even though evidence is provided that its clients do not use the *DSD* System of take-back and recovery for some of the packaging.

65 On the contrary, Saskia Lavrijssen supports a 'mixed approach', which leaves more room for non-competition interests in Competition law enforcement. See *What role for National Competition Authorities in Protecting Non-competition Interests after Lisbon?*, (2010) 35 European Law Review 636–59.

66 DAF/COMP/WD(2010)96, para. 22.

67 Nordic Competition Authorities (2010) 16.

68 H W Friederiszick and LH Röller, 'Überwälzungen der Opportunitätskosten von CO2-Zertifikaten als Ausbeutungsmissbrauch—eine ökonomische Analyse' (2008) 9 Wirtschaft und Wettbewerb 940.

69 P Ibáñez Colomo, 'On the Application of Competition Law as Regulation: Elements for a Theory' (2010) 29 Yearbook on European Law 276–306.

70 In Case T-210/02, *British Aggregates v Commission* [2006] ECR II-2789, the Court of First Instance stated that, in the absence of coordination in that field, 'the Member States are free, in balancing the various interests involved, to set their priorities as regards the protection of the environment and, as a result, to determine which goods or services they are to decide to subject to an environmental levy. It follows that, in principle, the mere fact that an environmental levy constitutes a specific measure, which extends to certain designated goods or services, and cannot be seen as part of an overall system of taxation which applies to all similar activities which have a comparable impact on the environment, does not mean that similar activities, which are not subject to the levy, benefit from a selective advantage' (para. 115). However, resolving the appeal, in the Case C-487/06 P, *British Aggregates Association v Commission* (*British Aggregates Association II*), the Court of First Instance stated that with this reasoning the contested decision had disregarded the former Art. 87(1)EC (para. 86). The system in fact reflects a desire to exclude some sectors from the levy in order to protect their competitiveness (para. 87). See also Case C-409/00 *Spain v Commission* [2003] ECR I-1487, para. 46, and Case T-55/99 *CETM v Commission* [2000] ECR II-3207, para. 53.

- The measure has to entail an *economic advantage*. It includes not only positive benefits (subsidies), but also measures which mitigate the charges which are normally included in the budget of an undertaking and which thus have the same effect.[71] An economic advantage for renewable energy producers is involved when regulation imposes on suppliers the compulsory purchase of green certificates.[72] The State granting of greenhouse gas emission allowances below their market value also entails an economic advantage for the beneficiary undertakings.[73] On the contrary, there is no economic advantage when State measures compensate an undertaking for services provided in discharging public service obligations.[74]
- The economic advantage has to be *selective*, that is it has to favour certain undertakings or the production of certain goods. General measures, which apply without distinction to all firms in all economic sectors in a Member State are not State aid. Selectivity is also lacking where the advantages or burdens just arise from the application of the legal scheme.[75] On the contrary, selectivity is to be found where there is a difference in treatment that is not objectively justified.[76] From this point of view, in the European greenhouse gas scheme, for example, it is arguable that advantages related to installations with certain thermal capacity lack selectivity because of the limited scope of the measure.[77]
- Each measure must be comprised of *State resources*, granted by the State (directly) or by a public or private body designated or established by the State (indirectly).[78] State resources are comprised when the State subsidizes an activity, but also when it forgoes income that it could have obtained, as happens when authorities grant tax benefits or put at the disposal of undertakings emission allowances free or charge, whereas they could have been sold or put up for auction.[79] On the contrary, the ECJ rejected the claim that the obligation imposed by German legislation—requiring private electricity supply undertakings to buy electricity produced in their area of supply from renewable resources at a minimum price higher than its true economic value— constituted State aid.[80] The reason is that it did not involve the transfer of State resources, since the financial burden resulting from that obligation had to be distributed between those electricity supply undertakings and upstream private electricity network operators.

On its own, State aid entails a distortion of the market, no matter if it is intended to achieve environmental goals (the acquisition of clean transport vehicles, energy saving, waste management, etc.) or not. Therefore, the next question is *whether and, if so, to what extent the granting of state aid for environmental protection is allowed*.

From an environmental point of view, State aid is the second best option.[81] EU law is based on the polluter pays principle, which means that the concerned undertaking has to bear the negative externalities resulting from its activity. Therefore, State aid may be granted in order to facilitate the implementation of more stringent environmental standards than those set at EU level,[82] but which cannot be justified in order to meet mandatory standards already in force.[83]

From a competition law perspective, State aid shall be deemed incompatible with the internal market, insofar as it affects trade between Member States (Art. 107(1) TFEU). However, this rule is subject to the exceptions foreseen in the Treaty. The main legal basis for environmental aid is Article 107(3)c) TFEU.[84] Aid

71 Case C-66/02 *Italian Republic v Commission* [2005] ECR I-10901, para. 77; Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, para. 38; Case C-501/00 *Spain v Commission* [2004] ECR I-6717, para. 90.

72 In its decision of 25 July 2001 [aid N 550/2000, Belgium—'Green Electricity' Certificates (OJ 2001 C 330, p. 3)], the European Commission stated that the green certificates provided the only official proof of the production of the green electricity, but the State had not agreed to forgo resources in providing them free of charge to the producers.

73 Case T-233/04, *Netherlands v Commission (Netherlands NOx)*, para. 74; Case T-387/04, *EnBW* [2007] ECR II-1195, paras 131–132.

74 Case C-280/00 *Altmark* [2003] ECR I-7747.

75 Case 173/73, *Italy v Commission* [1974] ECR 409, para. 33; Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, para. 49. It is for the applicant to adduce sufficient evidence: Case C-409/00, *Spain v Commission* [2003] ECR I-1487, para. 53, and Joined Cases T-127/99, T-129/99, and T-148/99 *Diputación Foral de Álava and Others v Commission* [2002] ECR II-1275, para. 107.

76 Case C-409/00, *Spain v Commission* [2003] ECR I-1487: economic advantages granted to vehicles purchased by natural persons and SMEs, but not to large undertakings, because they could afford to purchase such vehicles, are selective measures.

77 Case T-233/04, *Netherlands NOx* (paras 87–96). H Vedder (n 5).

78 Case 82/77 *Van Tiggele* [1978] ECR 25, paras 24 and 25; Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, para. 16; Joined Cases C-52/97, C-53/97, and C-54/97 *Viscido* [1998] ECR I-2629, para. 13; Case C-200/97 *Ecotrade* [1998] ECR I-7907, para. 35; Case C-295/97 *Piaggio* [1999] ECR I-3735, para. 35; Case T-233/04 *Netherlands v Commission* (*Netherlands NOx*) [2008], para. 62.

79 Case T-233/04 *Netherlands v Commission* (Netherlands NOx) [2008], paras 70 and 75.

80 Case C-379/98 *PreussenElektra* [2001] ECR I-2099, para. 58.

81 Commission Community Guidelines on State aid for environmental protection (2008), para. 24.

82 Guidelines on State aid for environmental protection (2008), para. 22.

83 Guidelines on State aid for environmental protection (2008), para. 29.

84 Guidelines on State aid for environmental protection (2008), para. 12.

to promote an important (environmental) project of common European interest could also be considered compatible with the common market under Article 107(3)(b) TFEU.

Under certain conditions, it is quite possible that State aid can contribute to improving environmental protection. However, experience shows that much State aid not only fails to achieve its intended purposes, but is a serious factor in the distortion of competition.[85] Therefore, (i) State aid has to be well targeted; (ii) it is also necessary to be sure that the undertakings would not, without the aid, have made the investment or have engaged in the same activity because of its intrinsic benefits;[86] (iii) in addition, in assessing whether aid can be deemed compatible with the common market, the Commission has to carefully balance the positive impact of the measure in reaching an objective of common interest (increased environmental protection) against its potentially negative side effects, such as distortion of trade and competition (crowding out investments, keeping inefficient firms afloat, strengthening market power, etc.).[87]

The *control procedure* of state measures also deserves some attention. As a general rule, prior controls established in European sectoral regulation cannot be considered as *lex specialis* in relation to the general procedure for the control of State aid laid down in Article 107.3 TFEU. Consequently, if necessary, the Commission will have to apply the general procedure of State aid control.[88]

X. Conclusions

The most important conclusions that can be drawn from this article are as follows:

1. Since the mere invocation of environmental goals does not justify an automatic departure from the Treaty rules, including those of competition, the issue is how to strengthen the synergies of both policies, while reducing their harmful consequences. In this regard, it is necessary to find a proper trade-off between environmental protection, competition policy, and industry competitiveness.
2. Environmental policy must avoid or, at least, minimise distorting competition. Measures restricting property rights and economic freedoms have to be based on Parliamentary Acts. Whenever environmental regulation entails not just restricting, but taking property rights, the loss of value must be compensated. A different treatment between industries or undertakings can be justified, provided it is based on objective and reasonable criteria. However, given the wide discretion enjoyed by public authorities, judicial review may be very unlikely.
3. In the absence of EU legislation, Member States can grant special or exclusive rights for the provision of services of general economic interest, but only to the extent that the intended goal cannot be achieved equally well by other less restrictive measures.
4. The intended environmental benefits resulting from the establishment of a scheme of rights of use must be weighed against the costs that could represent weakening competition. Rights of use should be auctioned, but grandfathering can be unavoidable when it comes to introducing substantial changes to the existing legal system.
5. Environmental goals can be taken into account as ancillary criteria for awarding public contracts only to a very limited extent. On the contrary, if they are overstated, it could lead to entrusting the contract to an undertaking that is not best placed to assume the provision. This would distort competition and may lead to discriminatory treatment along with an inefficient application of public funds.
6. Environmental protection can play a role in competition law enforcement, but in a very restrictive way, since it reduces its ability to protect the market.
7. Environmental aid must be necessary and well targeted to obtain the intended goals. Its benefits have to be carefully weighed against the risks of distorting competition.

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85 OECD, Environmentally harmful subsidies. Challenges for Reform (2005); S Khalilian and S Peterson, 'Auf dem Weg zu einer effizienteren Regulierung im Energiebereich—Subventionsabbau und Grundlegenden Reformen' (2011) Zeitschrift für Umweltpolitk & Umweltrecht 183–211.

86 Guidelines on State aid for environmental protection (2008), paras 27–28.

87 Guidelines on State aid for environmental protection (2008), paras 16, 71, *et seq*.

88 In Case T-387/04, *EnBW* [2007] ECR II-1195, the Court noted the differences between the Commission review powers in the prior control of the NAPs under Article 9(3) of Directive 2003/87 and in the State aid procedure (para. 113). Sometimes the notification of the NAP can also be considered as notification for the purposes of Article 88(3) TFEU (para. 132). If necessary, the Commission must carry out a preliminary review of those aspects of a NAP notified to it which might infringe Art. 87 EC and that review might give rise to the initiation of a parallel procedure under Regulation No 659/1999 (para. 133). Directive 2003/87 cannot constitute a *lex specialis* permitting the review of State aid in the course of the review procedure laid down in Article 9(3) of Directive 2003/87 (para. 134).