Competition Law and Environmental Protection in Europe; Towards Sustainability?
Vedder, H.H.B.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
Introduction
Introduction

This is a book about the integration of environmental concerns and EC competition law. From a legal perspective, Article 6 of the EC Treaty requires such integration.1 This provision, albeit worded differently, was included in the EC Treaty by the Single European Act in 1987 as (then) Article 130R.2 Ever since it was introduced, this integration principle has been the subject of legal research. Recurring themes in these investigations were the legal status of the principle and whether it entailed a preference for environmental considerations over the other policy objectives in which it was to be integrated. The integration principle was first put to practical legal use in the Court’s judgment in Titaniumdioxide.3 Since then, its practical legal role has primarily been confined to disputes concerning the correct legal basis. This, however, has done little to clarify either of the recurring themes mentioned above. A purely legal approach does not suffice to answer the question of what Article 6 EC is all about. Moreover, even apart from the purely legal question of what exactly Article 6 prescribes, there is a growing body of case law that concerns environmental protection requirements and competition law.

With the advent of the environmental agreement4 as an environmental policy instrument and the ever-increasing flow of government funds for environmental purposes, the relation between the EC’s competition laws and environmental protection came to the fore. How should EC competition law, in view of this integration principle, react to environmental agreements that protect the environment but also restrict competition? Similarly, we may ask how the prohibition of state aids in Article 87 EC is to be applied to cases where such aids are granted for environmental purposes but distort competition? In this connection, the precise content of the integration principle in relation to competition law becomes even more important. Environmental agreements and environmental subsidies may be very effective instruments of environmental policy. As such they may very well contribute greatly to achieving more environmental protection at lower costs. Particularly now, when the US have rejected the Kyoto

1 It reads as follows: ‘Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities [...] , in particular with a view to promoting sustainable development’.

2 At that time the text was: ‘Environmental protection requirements shall be a component of the Community’s other policies.’ With the Treaty on European Union the provision was changed to read as follows: ‘Environmental protection requirements must be integrated into the definition and implementation of other Community policies’.


4 An environmental agreement is an agreement between different companies or between a group of companies and a public authority on an environmental matter. See, further, infra, paragraph 3.3.
protocol basically because of the costs involved and the effects of these costs on
the competitive situation, achieving environmental protection more effectively
as well as efficiently is likely to become one of the major challenges for environ-
mental policy makers throughout the world. Completely ruling out categories of
potentially effective and efficient environmental instruments, such as environ-
mental agreements or environmental subsidies, because of their incompatibility
with the competition rules, would therefore seem to run counter to the integra-
tion principle.

From a different perspective we should also recognise that competition is
probably the most effective allocative mechanism known to man. Competition
as the cornerstone of the free market economy has allowed economies to soar to
great heights and brought us myriad innovations. Moreover, Article 4 of the EC
Treaty dictates that ‘the principle of an open market economy with free competi-
tion’ is to be the basis of Europe’s economic policy. Why not, the obvious ques-
tion would seem to be, try and make competition work for the environment?
Why should we not try to innovate in the area of environmental protection
techniques to such an extent that costs are no longer an objection to high levels
of environmental protection?

This, it is submitted, addresses the core of Article 6 EC and with this
observation we have returned to what this book is all about: the integration of
environmental concerns and EC competition law. Put more precisely the central
question in this research is the following:

What is the integration of environmental concerns and EC competition law
required by Article 6 and has such an integration actually taken place?

The question thus asked is actually twofold. Firstly, what should be and secondly
what is the role of environmental concerns and EC competition law in view of
the integration principle? What the role for environmental concerns should
be is not easy to answer. According to Article 6, this role should amount to an
‘integration’. What this concept of integration means is nowhere made clear in
the Treaty. Moreover, as the fact that two themes in connection with the inte-
gration principle (i.e. its legal status and whether it entails a preference for the
environment) are still recurring shows, the exact content of Article 6 EC is still
far from clear. We have seen above how the ideal situation would be one where
the powerful instrument of competition would be used to achieve more environ-
mental protection.

This book consists of three parts. In Part One we will examine how this
ideal situation where competition works for the environment can be achieved

5 See, Dhondt 2003 who, at pages 15-183, addresses these questions and identifies a multitude of opinions.
and what the role of the integration principle is in this respect. Article 6, as we have seen above, prescribes an integration of environmental protection requirements and, inter alia, EC competition law and policy. What does 'integrate' mean in this context? For example with regard to EC competition policy the question may be asked when, if at all, an environmental agreement that restricts competition should be exempted on environmental grounds. The role of the integration principle in this, as it will be referred to, competition perspective of the relation between competition and environmental protection will be further investigated in Part One. As a result, the concept of integration enshrined in Article 6 EC is given a well-defined meaning in connection with EC competition law in Part One of this book. Moreover, as may be gathered from the last sentence of the preceding paragraph, competition can, under the right circumstances, function as an exceptionally powerful instrument to bring about environmental protection more efficiently. The advent of many of the new instruments of environmental policy must be seen in this light. In this respect, the relation between competition and environmental protection is two-way in that it is not just competition law that needs to take into account environmental considerations but environmental policy similarly needs to incorporate certain competitive aspects. This, as it will be called, environmental perspective of the relation between competition and environmental protection will also be investigated in Part One.

Because the integration principle binds the Community institutions when they define and implement the Community's policies, the meaning of the concept 'integration' and thus Article 6 EC, can be called a model of integration. Ideally, the role awarded to environmental concerns in EC competition law should comply with that prescribed by the model of integration.

As part of the examination of what the role of environmental concerns and EC competition law is, we will also investigate in Part Two whether that role is in accordance with the model of integration developed in Part One as far as the competition perspective of the relation between competition and environmental protection is concerned. In order to do this we need to first establish the role that environmental concerns have played in EC competition law. This question is relatively straightforward to answer. All that needs to be done is to closely examine and analyse the EC competition laws and their application in order to determine what role environmental concerns have played. This constitutes the bulk of Part Two. In this Part the whole of EC Competition law, i.e. Article 81-87 of the EC Treaty, the Merger Regulation and the so-called useful effect doctrine, is examined to ascertain the role played by environmental concerns.

---

7 Also referred to as 'new norm'. It consists of Article 3(t)(g) in connection with Article 10 and 81 of the EC Treaty.
The perceptive reader will have noticed that the environmental perspective of the model of integration ('to what extent is competition used as an instrument to achieve environmental protection most efficiently?') is not addressed in Part Two. The explanation for this is rather simple. EC environmental policy primarily makes use of Directives that need to be implemented by the national legislator. In this context, the EC Directive lays down the instrumental framework but it is up to the national legislature to prescribe the type of instrument that will be actually used. The Directive will generally only lay down the broad framework for the national environmental policy instrument that must make the Directive practically effective. The question to what extent competition is used as an instrument of environmental policy is therefore best answered at the level of member state implementing legislation. This can be seen with regard to the implementation of the Packaging Directive. Whilst the transposition of this Directive has resulted in monopolistic producer responsibility organisations in Germany, France and other member states, the United Kingdom's approach to the implementation resulted in the creation of a market on which several competing producer responsibility organisations are active. Interestingly, the approach adopted by the UK is as much a correct transposition of the Directive as that used by the German or French governments. This striking difference in terms of the market structure resulting from the implementation of one Directive shows that the Directive itself is not the primary factor that determines whether or not and to what extent competition is used to achieve environmental objectives most efficiently.

In Part Three we will look at the findings of Part One and Two from three different perspectives as part of a comparative legal analysis. We will thus compare the relationship between environmental concerns and EC competition law both as it is and how it should be according to the model of integration, with, firstly, the role played by cultural considerations in EC competition, secondly, the role of environmental protection and national competition law and, thirdly, the role of environmental concerns in the internal market rules.

This comparative legal exercise will help us to establish the value of the model of integration as well as the validity of our findings with regard to whether or not the model of integration was applied in practice. On the basis of our findings in both Part One and Two, we will be able to discern three factors relative to the model of integration that are typical and decisive in EC competition law and environmental protection. In Part Three we will address these three factors by looking at the model of integration from the three different perspectives listed in the preceding paragraph. Every perspective addresses one of the factors considered to be critical for the model of integration and can thus be

---

8 The implementation of the Packaging Directive and the resulting market structures in Germany and the United Kingdom will be examined in chapter 10.
used to test the model of integration. In a nutshell, the first of these three factors is the mutually reinforcing relationship between competition and environmental protection in view of the polluter pays principle. It is submitted that a similar role cannot be envisaged for other so-called ‘non-economic’ considerations and that as a result the role of such considerations in EC competition law should differ from that played by environmental concerns. To test this hypothesis, we will examine the role awarded to cultural considerations within EC competition law. Because this comparison takes place within the framework of EC competition law it will be called the internal perspective. The second factor is not so much unique to or decisive for the model of integration but rather is considered relevant for the Community's competition law in general. It has on many considerations been observed by scholars, practitioners, and the Court alike that the competition rules of the EC not only serve to ensure effective competition but also function in the light of the market integration objective. This market integration objective is, by definition, absent in the competition laws of the member states even though these have in many cases been modelled on EC competition law. The second – external – perspective eliminates this market integration objective as a factor that is relevant for EC competition law but at the same time possibly distorting in view of the model of integration. The third factor relates to what will be called the economisation of environmental benefits. As will be shown, EC competition law (partly) takes environmental aspects into account after they have been ‘converted’ into economic benefits. Such economisation is explicitly refused by the Court in connection with the internal market rules in the EC Treaty. The interpretation of this area of Community law is purely legal. The third – semi external – perspective therefore excludes the economisation as a factor that could possibly affect the operation of the model of integration in practice.

Moreover, as part of the second perspective, the role of environmental protection requirements and national competition law, we will also address the environmental perspective of the model of integration. To this end we will look at the way in which several Directives that lay down a producer responsibility have been implemented. These directives allow for implementation by means of an environmental agreement as an attempt to introduce more ‘market-based’ instruments of environmental policy. The harsh reality is, however, that in many cases the resulting producer responsibility organisations are in fact large-scale nationwide monopolists. As part of Part Three we will therefore examine the factors that are responsible for this failure to effectively make competition work for the environment.

---

9 The distorting effect of the market integration objective can be seen in, for example, the initially (overly) wide scope of Article 81(1) EC. See further, infra, paragraph 7.2.
On the basis of the findings in these three parts we will formulate our conclusions and make recommendations. These recommendations should allow us effectively to use the most efficient economic instrument known to man to achieve better environmental protection through bringing about a competition for the environment.