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

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An Introduction to Integration
1 An introduction to integration

At first sight the concepts competition and environmental protection have about as much to do with each other as do the concepts of free market economy and pollution. All four concepts are abstract and hard, if not impossible, to define accurately. For a legal scholar this definitional uncertainty is nothing more than an inconvenience as soon as he is able to retreat into his habitat that is filled with well-defined legal concepts and reasoning. The inconvenience becomes a core question as soon as this habitat is ‘polluted’ with a legal principle that is less than well-defined. An example of such a site that requires rehabilitation is Article 6 EC. This provision contains a so-called integration clause and 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.’

To the relief of the lawyer, the wording of this provision, ‘must be integrated’, indicates that it is a legally binding obligation to integrate environmental considerations. Moreover, the judgment in PreussenElektra shows that the Court has recourse to this provision in order to be able to interpret Community law in a specific case. Yet another case shows that other environmental principles can be invoked in legal proceedings and are thus certainly not confined confined to the political arena. A further reading of the provision similarly comforts the legal scholar as he can learn from Article 3 of the EC Treaty what exactly are the ‘Community policies and activities’ mentioned in Article 6 EC.

Interestingly, and this brings us to the main theme of this research, competition policy is one of the Community policies. The institutions responsible for the definition and implementation of the Community’s competition policy are thus under an obligation to integrate environmental protection requirements and competition requirements. However, already in the introduction to this book a number of questions arose the answers to which are far from obvious. Simply prohibiting environmental agreements without even mentioning the environmental aspects involved will probably fall foul of the integration principle in Article 6 EC. Similarly, granting the parties unlimited possibilities to restrict competition as soon as some environmental interest is involved is also uncalled for. The answer to the question what role for environmental considerations in EC competition law Article 6 EC exactly requires, is obscure and probably lies

3 Article 3(t)(g) EC.
somewhere between the two extremes mentioned above. The first part of the main question indicated in the introduction asks precisely this question: ‘what role should environmental protection requirements play in the EC’s competition law and policy?’

Initially, this research took the abovementioned Article 6 EC as a point of departure in order to embark on a purely legal journey. The first part of the main question is, however, impossible to answer within this purely legal framework. According to Article 6 this role should amount to an ‘integration’. This only leads to the question what the concept of integration exactly means. Most explanations of this concept verge on the tautological in that they boil down to a statement that the environment must ‘be fully taken into account’ or ‘should be taken into consideration’. The Court’s case law refers to the integration principle on a number of occasions concerning the choice of the legal basis for Community action in a certain field. These cases, even though they again show the legal character of the integration principle, do little to clarify the concept of integration itself.

Fortunately, Article 6 itself already contains the beginning of an answer to the riddle of what constitutes integration. Such integration, according to Article 6, should in particular ‘promote sustainable development’. This leads us to the question of how sustainable development must be defined. Again in a nutshell, sustainable development means that there is economic development, however, it should be in keeping with, _inter alia_, environmental protection considerations. Sustainable development does not mean a return to the early hominin way of life even though that will undoubtedly mean less environmental degradation. The other extreme, unmitigated economic growth without any consideration for other factors than economic growth and financial profit, certainly also falls outside the scope of sustainable development. Sustainable development is all about finding a _modus vivendi_ for economic growth and environmental protection. This balanced relationship cannot be found using legal reasoning alone. As it concerns economic growth, economic reasoning should also form part of the analysis.

In order to define what constitutes sustainable development and, consequently, integration within the meaning of Article 6 EC, the legal scholar must venture into a world where economics and the law are not studied as separate things that exist in a vacuum. He must enter a world where economics and law

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5 See for an overview of this case law: Jans 2000, p. 10, 12 and 44 et seq.
6 This objective could also be deduced from Article 2 EC where it is listed as one of the ends of the Community.
7 An example of other considerations taken into account as part of sustainability would be the social and working conditions.
are seen as two methods (instruments) to explain and, to a greater or lesser extent, steer behaviour in a society. In this view, neither law nor economics is seen as absolute and both are recognised to be interrelated (and related to other factors).

Economics and the law have already been tentatively applied to the specific problem of environmental pollution in the introduction. We can see everywhere around us how, if left uncorrected, the free market economy, relying on competition as its foremost allocative mechanism, can lead to environmental degradation.\(^8\) This is not inherent in the free market economy or competition but is the result of the external nature of the environment. A certain amount of environmental degradation will not involve costs for any specific economic actor but for society in general only and even then in many cases only on the longer term. Pollution in many cases does not entail any direct costs for an individual economic actor. This is the external nature of the environment and this is why the individual, guided by economic efficiency considerations, will not consider it necessary to protect the environment or invest in environmental innovations. The existence of externalities has been recognised in economics for a long time.\(^9\) Moreover, the implications of externalities for the free market economy and competition have received considerable attention in economic writing. Basically, economists see externalities as a market failure. Such a market failure is a factor that will generally lead to something being considered, in the economic sense, a public good or bad. According to some economists that is where the government, and with it regulation and lawmaking, enters the market. The answer to the question of what the concept 'integration' means, takes a beginning in the appreciation of the economic relations between competition and the free market economy on the one hand and environmental protection on the other.

This research is thus, in part, such an escape from the legal habitat into the 'real world' where economics and law interrelate and neither is absolute. More precisely, we will first investigate the evolution of competition law and policy and how it relates to the free market economy. This will be called 'a legal and economic analysis of competition' and will take place in chapter 2. In the course of this overview we will also deal with the concept of externalities and its relation with competition as the prime instrument of the free market economy. After the competition-side of the matter has thus been charted, the evolution of environmental law and policy will be investigated in chapter 3 to reveal how competition and environmental policy have slowly become interrelated. In this

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\(^8\) For example, the success of low-budget air carriers has resulted in (ridiculously) low air fares. Such low fares encourage air travel (one Dutch carrier advertises with a family who decide on Saturday to spend a Sunday in London) which is certainly not beneficial to the environment.

\(^9\) It can be traced back British economist Arthur Cecil Pigou's work from the beginning of nineteenth century. Probably, Pigou's thinking on externalities has its roots in the earlier work of Marshall.
chapter environmental law and policy are analysed from a legal as well economic perspective. Since the writer of this book has not been educated as an economist and this book has been prepared as a PhD thesis for a law faculty, the economic reasoning contained in this chapter will be limited and open to refinements. With the help of the insights into this mutually reinforcing relation between competition and the protection of the environment we will define a model for the integration of environmental protection requirements and competition in chapter 4. This model will be used to answer the question of what the role of environmental protection requirements in competition law should be.