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

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CHAPTER 14

The Integration of Environmental Considerations in EC Competition Law: an Interim Conclusion
Interim Conclusion

As we have seen environmental considerations have played a more or less modest role with regard to nearly every provision of Community competition law. Even within areas of competition law where no such practical examples of a role for environmental considerations could be found, we could at least consider the possibility. Thus, for example, practice pursuant to the Merger Regulation was, as far as we have been able to establish, an affair aimed solely at competition objectives. Nevertheless, we were also able to identify some aspects of the Merger Regulation that could possibly allow for a role for environmental concerns.

Did this more or less modest role for environmental considerations also amount to an integration of environmental concerns? In Part I of this study we have concluded that an integration of environmental and competition considerations requires that they can function in a mutually reinforcing relation. This in turn requires not so much that environmental considerations take precedence over competition considerations but rather that they are treated on equal footing with this objective of a mutually reinforcing relation in mind. If, for example, competition considerations can never be set aside for environmental reasons, then no integration can take place. The relation between competition and environmental considerations can in such cases at best be qualified as an interactive one. If we look at the provisions of EC competition law and the practical application of these provisions by the Commission and Court with this model of integration in mind the following picture emerges.

With regard to the competitive appraisal on the basis of Article 81(1), environmental considerations can play an interactive role at best. Article 81(1) is about establishing whether or not there is an appreciable restriction of competition and this, of course, does not allow for weighing of environmental with competitive concerns in the first place. However, environmental concerns can play a role in that agreements on certain environmental aspects may be considered not to appreciably restrict competition. With regard to agreements that involve decisions on 'the environmental price' (i.e. environmental surcharges, removal fees), the Commission has taken a strict approach. Such agreements are considered to amount to price fixing and therefore qualify as hard-core restrictions since they restrict the freedom for the consumer to shop around for the lowest environmental price. It is submitted that the Commission's approach in this respect is not entirely consistent. As may be recalled, in the area of state aids, the Commission has allowed schemes whereby environmental costs had to be passed on to consumers in their totality. Allowing the state to make such

1 Supra, paragraph 8.4.
2 Supra, chapter 13.
a decision while completely refusing identical schemes set up by private parties cannot be economically explained. In such cases form (issued by the state or by private parties) would seem to go over function (both amount to price fixing). Moreover, reasoning according to which environmental costs must be borne by the industry because they are the polluters is also submitted not to be valid. It was shown that in many cases the polluter (consumer or producer) could not be appointed. The lacking environmental friendliness of production can most probably be traced back to both consumers and producers. As a result of this, agreements that involve the passing through of environmental fees that arise from a producer responsibility to consumers, should not be qualified as price fixing if this characterisation is accompanied by statements that an exemption will be nearly impossible.

In the sphere of Article 81(3) environmental considerations could be integrated. For this to take place, it would be necessary for the Commission (and Court) to recognise that environmental benefits can, of themselves, constitute 'technical or economic progress' within the meaning of Article 81(3). However, as we have seen, the Commission will not use that provision to directly balance a restriction of competition with an environmental benefit. At best, environmental considerations play a subservient role whereby they may be taken into account as 'a factor which contributes to improving production or distribution or to promoting economic and technical progress'.\(^3\) [emphasis added, HV] The more recent DSD case shows that the weight attached to environmental concerns appears to be increasing. At the same time, however, the uncertainty as to exactly how much weight is attached, remains. Moreover, it is uncertain to what extent the role played by environmental protection requirements in Article 81(3) can actually be said to comply with the model of integration.

It is submitted that particularly in the light of the upcoming decentralisation of the application of Article 81(3) more and clearer guidance from the Commission is needed. Moreover, this guidance will need to be in line with the model of integration. If these preconditions have not been met, the result is very likely to be a diverging application of Article 81(3) throughout Europe as some Courts chose to interpret Article 81(3) in the light of the integration principle whereas others will not integrate environmental protection requirements and Article 81(3).

As to the application of Article 82, decision-making practice is scant at the moment. The DSD case, however, conveys a very powerful message: the Commission will not take environmental considerations into account in considering whether or not abuse of a dominant position took place. In fact: the word 'environmental protection' was barely mentioned in the decision. Even more disturbing is the background to the DSD case where member states implement

Community law in such a way as to lead to large monopolistic systems and — together with the Commission — consequently insist on creating competition where it is not a priori clear as to how this should work. The conclusion with regard to Article 82 must therefore be that integration could take place if environmental considerations could function as an objective justification. At the moment, however, the role that such considerations play is uncertain to say the least. Most probably, the environmental aspects have played a very limited role in the DSD case if they have played a role at all. Integration has therefore not taken place in practice.

Practice pursuant to the Merger Regulation is, as was mentioned above, purely aimed at the competition objectives. The Merger Regulation does allow for a role for environmental considerations if they are taken to constitute ‘technical or economic progress’ within the meaning of Article 2(1)(b) of the Regulation. Even then the wording of the Merger Regulation is clear beyond doubt in that such benefits can never compensate for a creation or strengthening of a dominant position. The role for environmental considerations could therefore, at best, be interactive.

With regard to the useful effect doctrine much is still uncertain. If the Court indeed adopted the general interest exception, then there may actually be an integration of environmental concerns in this respect. However, the Court’s case law is still far from well established. The parallel between the useful effect doctrine and Article 86(2) would, however, seem to point in the direction of the existence of this exception. Furthermore, the parallel between Article 86(2) and the general interest exception within the useful effect doctrine should also have the same effects in that the Treaty rules cease to applicable with regard to agreements and government actions that fall within the scope of the general interest exception.

Since the Sydhavnen Sten & Grus case, Article 86(2) allows for a direct balancing of environmental goals with the need to apply the Treaty rules. Insofar as this is necessary for the fulfilment of the special environmental task, the Treaty rules are not applicable. This is nothing short of a true integration of environmental considerations within this area of competition law. Since Article 86(2) applies with regard to all Treaty rules, the impact of this is very significant. It must not, however, be forgotten that Article 86(2) is limited to cases where privileged undertakings have been entrusted with the performance of a special (environmental) task. As the law stands, the ‘being entrusted with’ is interpreted rather narrowly. The negative role for environmental requirements is limited to cases where the privileged undertaking is directly or indirectly under environmental obligations.

Finally, environmental protection requirements have also been fully integrated in the rules on state aid. The Commission’s long-standing policy in this field, as laid down in the Guidelines, shows that environmental objectives may
certainly justify the granting of aid if this is necessary to attain the environmental goals and in accordance with the polluter pays principle. The negative role that environmental concerns may play is somewhat more uncertain and probably limited.