Competition Law and Environmental Protection in Europe; Towards Sustainability?
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Citation for published version (APA):

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Download date: 14 Dec 2018
‘Es gibt nur ein perspektivisches Sehen, nur ein perspektivisches ‘Erkennen’; und je mehr Affekte wir über eine Sache zu Worte kommen lassen, je mehr Augen, verschiedene Augen wir uns für dieselbe Sache einzusetzen wissen, um so vollständiger wird unser ‘Begriff’ dieser Sache, unsere ‘Objektivität’ sein?’

A Comparison
COMPETITION LAW AND ENVIRONMENTAL PROTECTION IN EUROPE
INTRODUCTION TO PART THREE

Introduction

This part of the book contains comparative legal research with regard to the integration of environmental concerns and competition law. Without going too deeply into the merits and rationales of comparative legal research, it may be stated that the purpose of comparative research can only be to identify and consequently analyse differences between systems of law so as to better understand the reaction of one system of law (i.e. EC competition law) to a particular problem (i.e. the integration of environmental concerns). To use the words of Nietzsche: it is a recognition that there are more perspectives and an attempt to view a matter from other perspectives in order to better understand this matter. These perspectives from which the reaction of that one system of law are thus examined need to be sufficiently different from that one system of law but must at the same time remain comparable. It would, for example, not appear to make much sense to compare the role of environmental concerns and EC competition law with the reaction of Mexican law in Zinacantan to changes in political leadership. Therefore, the person conducting the comparative legal research must be aware of those differences and almost prejudiced with regard to these differences, as he must select the perspectives from which to conduct the research with these differences in mind. In order to be helpful, the selected perspectives must either include or exclude one of the factors that the researcher considers to be relevant (sufficient difference) while remaining comparable.

From the overview in Part Two, essentially three relevant factors can be distilled. The first factor relates to the integration of environmental concerns and competition law as it was developed in part one and seen put into practice to a certain extent in Part Two. We have seen that the model of integration requires that the application of competition law take account of the mutually beneficial role that competition and environmental protection may ultimately play. In Part Two we have also seen this idea being put into practice to a certain extent notably in the area of environmental state aids.

The second factor is one that is typical for EC competition law. This is the market integration objective. It is submitted that all systems of competition law in Europe (possibly the world) share the basic objective of maintaining effective competition. However, of the competition laws of Europe, only EC competition law also has the objective of bringing about and furthering market integration. It has on several occasions been observed that this market integration objective

1 F. Nietzsche, Zur Genealogie der Moral, Third Essay (Was bedeuten asketische Ideale?), paragraph 12.
2 See, with regard to 'functionality', Zweigert & Kötz 1998, p. 34.
3 See, regarding political leadership and legal change in Zinacantan, Collier 1996.
4 Joined Cases 56/64 & 58/64, Consten & Grundig, [1966] ECR 449.
may actually ‘pollute’ the cadre for the appreciation of restrictions of competition.5

A third factor emerging from the examination in Part Two is the economisation of the environmental benefits. Notably with regard to Article 81 EC, the Commission appears to first convert the environmental benefits into more or less clearly defined and quantified economic benefits and only then awards them a role as part of the first requirement for an exemption. Environmental considerations are not of themselves taken into account. This is considered to be the result of the economic nature of the Community’s competition rules directed at undertakings.

After having examined the role of environmental concerns in EC competition law in Part Two we will now be looking at the role of environmental concerns in EC competition law thus examined from what may be called an internal, external and semi-internal perspective. These three perspectives refer to three different exercises in comparative legal research and relate to three factors outlined above.

With regard to the internal perspective the following can be said. Environmental concerns, as we have seen in Part One, are not the only non-competition concerns that can play a role in EC competition law. Considerations of a cultural nature may also play a role in the application of the Community’s competition laws. We will therefore, be looking at the role played by these cultural considerations and compare that with the role played by environmental considerations. This is called the internal perspective since it also departs from the viewpoint of EC competition law. It concerns the first relevant factor outlined above in that the mutually reinforcing role that was considered to form the basis of the integration of environmental concerns and competition law is submitted to be impossible for culture and competition.

As regards the external comparative perspective, we will study the role that environmental protection requirements play in other systems of competition law. For this, we will study British, German, and Netherlands competition law in their relations to environmental considerations. This is referred to as the external perspective since the point of departure is formed by the different systems of competition law of the member states. In certain respects, this may, however, also be called a semi-external perspective as many of the systems of competition law in the member states have in fact been adapted to mirror EC competition law. Nevertheless, this perspective will serve to eliminate the role that the market integration objective may have played in the application of EC competition law with regard to environmental protection. It therefore addresses the second (market integration) factor identified above.

5 See, for a discussion, Jones & Sufrin 2001, p. 138 et seq. See also: Monti 2002.
Moreover, as part of the external perspective we will also examine how and to what extent competition considerations have been taken into account in drawing up environmental legislation. As we have seen in the introductory chapter of Part One, competition is generally considered to be a very efficient economic ordering mechanism. Furthermore, we have observed that environmental policy has sought to apply competition as an instrument to bring about environmental protection more effectively and efficiently. In this regard the implementation of, for example, the Packaging Directive and German Packaging Ordinance cannot be called a complete success as they can, as we have seen in chapter 6 above, be said to have resulted in the emergence of large-scale and monopolistic producer responsibility organisations. The presence of such organisations can hardly be said to be conducive to the creation of a market where the competitive forces assure effective and efficient environmental protection. We will, therefore, scrutinise the environmental policies and legislation of a number of member states in order to see whether they have resulted in the emergence of similar organisations, why these monopolistic systems have come about and what can be done to ascertain a greater chance of an effective competition for the environment coming about.

Because it is recognised that EC competition law as well as environmental concerns are subject to different dynamics as regards their interrelation compared to, respectively, other systems of competition law (external perspective) and other non-competition concerns (internal perspective), a third perspective has been introduced. This is the semi-internal – or, for that matter, semi-external\(^6\) – perspective. According to this perspective we will study the role that environmental considerations play in a part of EC law that is closely connected to the competition rules, namely the ‘internal market’ rules (Articles 23 to 30, 90, 95 and 176 of the EC Treaty). This perspective includes the market integration objective but excludes the (economic) competition related objectives of systems of competition law and replaces that with a purely legal framework for the appreciation of the role of environmental concerns. It thus addresses the third factor identified above.

With the help of a comparison from these three perspectives, we should be able to better value the role that environmental concerns have played and could play in EC competition law and other systems of competition law. Moreover, we can determine whether the model of integration developed in Part One as it was seen implemented to a certain extent in EC competition law in Part Two lends itself for application to other systems of competition law.

This part will consist of three chapters, all of which basically be structured along the same lines: firstly a section setting out the relevance of that area or

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\(^6\) The term ‘semi-external’ will, however, not be used so as to avoid confusion with the second perspective identified above.
system of law for the research. In other words: the comparability of that area or system with the integration of environmental concerns and competition law. Secondly, a section giving a basic outline of the area of law and, thirdly, a section devoted to the study whether or not integration has taken place and how that outcome relates to the relevance or comparability.