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Competition Law and Environmental Protection in Europe; Towards Sustainability?
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Interim Conclusions on the Comparison
18 Interim conclusions on the comparison

What has this exercise in comparative legal research learned us? Has it indeed contributed to our understanding: our objectivity of the relation between competition and environmental protection?

To start with the environmental point of view on the relation between competition and environmental protection. In Part One we have concluded that competition or, in other words, the market mechanism is in many respects the best instrument to achieve an efficient and effective economic order. This holds true for the particular area of environmental protection as well provided that the environmental costs are internalised. The problem is that on numerous occasions attempts to internalise these external costs have actually sidetracked competition. An internalisation of environmental costs without the presence of competition will probably lead to increased environmental protection in the short term (instant recycling). It is, however, unlikely to result in the more dynamic effects associated with an integration of environmental and competition considerations. High levels of innovation, for example, are not to be expected.

We have seen how many of these competition problems arising from environmental legislation and policy can be traced back to the fact that this legislation provides for a product rather than true producer responsibility. In Germany and the Netherlands the relevant legislation takes the form of a product responsibility and has lead to large-scale monopolistic product responsibility organisations. This propensity towards monopolistic structures can in turn be traced back to the large sunk costs arising from the infrastructure that a product responsibility demands.

The United Kingdom government adopted an economically more efficient approach when it handed down the Producer Responsibility Regulations. By laying down a partially non-material specific producer responsibility it has succeeded in creating a market for collection and recycling services. Whether the current number of competitors will continue to exist when the collection and recycling quota go up and the effort and thus costs will also rise remains to be seen. For the moment, however, the conclusion must be that large-scale monopolistic product responsibility organisations are all but the necessary consequence of environmental legislation.

Some of the differences between the UK (true producer responsibility) approach and the product responsibility approach are also reflected in the involvement of the competition authorities. In the UK, the competition authority conducts a preventive competition scrutiny (ex ante) on the basis of the environmental legislation. In Germany and the Netherlands, the government – to put it bluntly – basically left it to the market to sort out the problems with the competition authorities (ex post). Germany later changed this amending the Act against
Restrictions of Competition to explicitly allow for an exemption for product responsibility organisations.

This brings us to the competition point of view on the matter. How does competition law deal with environmental considerations? In Part Two we have seen that the role of environmental protection requirements in the application of Article 81 and 82 EC is at best subservient to that of competition. Such environmental benefits are taken into account only after they have been economised. Even after this economisation, the importance of these benefits can only be characterised as secondary whereas there is still a considerable amount of uncertainty surrounding the actual role. With regard to the competition rules addressed at the member states, the result looks much better. Commission and Court practice pursuant to both Article 86 and 87 EC provides for a direct and unambiguous role for environmental considerations. Competition and environmental protection are thus treated as equals with the environmental benefits being taken into account as such and not after having been economised.

This is confirmed by the research done in this Part. With regard to the internal market rules we have seen how environmental protection requirements – albeit through various methods – can directly and of themselves warrant an impediment of free trade or a distortion of the internal market. The relevant Treaty provisions are addressed at the member states and not at private enterprises. For some reason, governments are allowed more leeway by the Treaty rules to attain environmental objectives than are private companies. Can we explain this? Not from a strictly legal perspective. If we compare Article 81(3) on the one hand with Article 87(3) and 28 on the other, the conclusion must be that none of them even mentions environmental protection. The Commission has been willing to interpret Article 81(3) and 87(3) to also apply to environmental protection. In doing this, the Commission adopted a far more environmentally friendly approach under Article 87(3) than with regard to Article 81(3) EC. The Court has of course not addressed the issue of environmental protection as part of Article 81 but its case law concerning environmental considerations and Article 87(3) and 28 EC shows that it directly balances environmental protection against, respectively, the need to have undistorted competition and free movement of goods. Thus, in provisions that are quite comparable from a legal point of view, the Community institutions are more reluctant to environmental protection to play a role if private companies rely on this compared to the situation where a member state invokes such considerations. An explanation for this tendency could be the fact that the Commission, in applying the Treaty’s antitrust rules is traditionally antagonistic and perhaps even cynical with regard to industry and the arguments forwarded in order to uphold restrictions of competition. Then again, the Commission may be expected to adopt a similar attitude towards member states that grant state aids.
Even though it cannot be compared with the authorities’ attitudes towards government-induced distortions of competition, we have seen that the competition authorities of the member states have adopted a similar approach to environmental considerations as part of the antitrust rules. These are at best awarded a secondary role and may warrant an exemption if accompanying economic benefits are demonstrated. This secondary role together with the economisation of environmental benefits is likely to lead to methodological difficulties as we have identified in the decision-making practice of the NMa. With regard to Germany Section 8 of the Act against Restrictions of Competition shows similar conceptual weaknesses that make its practical value uncertain.

These weaknesses can to a large extent be traced back to the fact that there is no integration of environmental and competition considerations within the meaning of the model of integration developed in Part One. We have seen how such integration is impossible with regard to cultural considerations and competition law. Moreover, we have observed how the reaction from the side of competition law (notably Article 87 EC) is in line with this impossibility to integrate. If we compare the reaction of EC competition law to cultural considerations with the reaction of EC and national competition laws to environmental protection requirements we see that the non-integration of environmental concerns and the competition rules directed at private enterprises lead to comparable reactions. The role of cultural considerations in EC competition law is ascertained only through the express introduction of a Treaty provision (Article 87(3)(d) EC). Similarly, the role of environmental concerns in German competition initially boiled down to the highly unsatisfactory practice of ‘Duldung’. The toleration of DSD is in many ways comparable to the Commission’s approach to Book price cartels. We have seen how the Commission will tolerate such cartels as long as they remain national and only involve cross-border effects insofar as is necessary to avoid U-turns. The Bundeskartellamt ended up doing much the same vis a vis DSD: allowing it to continue its current activities but consistently refusing it to expand into new markets.

The toleration-practice of the Bundeskartellamt has, to a certain extent, been replaced with the introduction of Section 8 into the Act against Restrictions of Competition. Again, we see a parallel with cultural considerations and EC state aid law whereby only the introduction of an express provision could ascertain a role for such considerations. Similarly, the Netherlands legislator in enacting the Competition Act contemplated the introduction of a clause that expressly mentions environmental considerations as a reason to justify an exemption. In the end, this was not put through and the job was left to the NMa. The NMa, as we have seen, has adopted a varying approach to environmental considerations but has always steered clear of integrating environmental concerns and competition law. This point is evidenced best by the decisions relating to the funding of product responsibility organisations though a removal fee.
In sum, Part Three has shown us how many of the inconsistencies and problems of the current case law concerning competition and the environment can be traced back to the fact that there is no integration of the two. This lack of integration is particularly prominent with regard to the competition provisions directed at private enterprises. For no apparent reason (legal, political or economic), environmental arguments brought forward by them cut much less ice than do similar arguments forwarded by the member state governments.