Competition Law and Environmental Protection in Europe; Towards Sustainability?
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Concluding Remarks and Recommendations
CHAPTER 19  CONCLUDING REMARKS AND RECOMMENDATIONS

**Competition and environmental protection growing toward a mutually reinforcing relation**

From a legal perspective the inclusion of Article 6 EC in the Treaty begs a number of questions. The main question is of course what exactly this ‘integration’ required by Article 6 EC means. Strictly legal reasoning cannot provide an answer to this question, as it will only lead to tautological answers along the lines that it means that environmental considerations must be taken into account. An answer to the question of what integration means could be discovered with the help of the concepts of, firstly, external costs and, secondly, internalisation of external costs. Both are essentially economic concepts that have found their way into law.

The external nature of environmental costs means that they are not taken into account in the decisions made by economic actors. In theory, an actor will pollute the environment because there are no costs arising from this whereas he can most probably save money. An internalisation of environmental costs will mean that environmental degradation will in fact entail direct and quantifiable costs for the polluter just as problems with product quality will also involve costs in terms of consumers switching to competitors. This signifies the role of the perhaps most important player in the process of internalisation: the consumer.

It is submitted that a successful internalisation of environmental costs depends more on changing consumer preferences rather than producer preferences. Producers will not mind changing their products or production processes as long as they feel that the market can bear the extra costs that will inevitably arise from this internalisation of external costs. A certain number of consumers may certainly be willing to bear these costs and indeed pay more for a greener product. This, however, does not yet mean that a full internalisation of all environmental costs on the consumption side of the economy has indeed taken place. Many consumers will simply not ‘feel’ the external costs whilst actually making them feel these costs will involve disproportionately large costs because of the sheer number of consumers involved. As consumers, we must ask our self what exactly it is that makes us pay more for ecologically sound products and why other people will, or rather will not, pay this extra amount? An internalisation of external costs will, in our demand-led market, first and foremost involve changing consumer preferences.

Precisely because the internalisation of environmental costs is still far from complete on the production as well as the consumption side of the economy, the process of internalising environmental costs meets with opposition from the side of industry for the following reasons.

Efficiency considerations often lead to environmental costs being assigned to the production side of a market, again because of the far larger number of actors on the consumption side that would otherwise need to be supervised. The
still incomplete internalisation will, however, mean that the competitive position of that industry will deteriorate *vis a vis* other producers that will not have to internalise these costs. This deterioration of the competitive position will in turn result in reactions from the side of the industry or governments in order to minimise or compensate the deterioration. This, in turn, will bring these governments or industry members within the scope of the competition laws.

With regard to these competition law cases Article 6 EC requires an integration of environmental protection requirements in particular with a view to promoting sustainable development. The integration required by Article 6 EC has been given a more precise meaning with the help of the model of integration.

According to the model of integration competition law should allow restrictions or distortions of competition insofar as they are necessary to bring about the internalisation of environmental costs. The intermediate objective of the application of the competition rules to competition cases involving environmental protection must therefore be the improved internalisation of environmental costs. This for the two interrelated reasons that as a result there will be more environmental protection whilst competition will also be intensified. The level of environmental protection will be higher because a more complete internalisation means that more consumers and producers will try to cut back on their use of the environment. They will be able to do this because producers will start to compete on the environmental characteristics of their products or production processes precisely because consumers will ask this. The result is the introduction of a new element with regard to which competition is possible. The application of the model of integration, it is submitted, is the only way in which competition law can really contribute to the objective of achieving sustainable development.

An overview of the competition law and policy with regard to cultural considerations confirms the validity of the model of integration. Precisely because of the non-existence (and even impossibility) of a principle that works analogously to the polluter pays principle, a role for cultural concerns similar to that awarded to environmental concerns on the basis of the model of integration is unattainable. The result is that the relation between competition law and cultural considerations is confined to the legislative arena because it is impossible for competition authorities to apply the competition provisions in a way that will allow for a symbiosis between competition and culture. The model of integration – being limited to the exercise of discretionary powers by competition authorities – is thus simply inoperative with regard to cultural considerations.

The application of the model of integration becomes particularly important with regard to cases where the producer responsibility principle is involved. Traditionally this principle is understood to refer to instances where producers are made responsible for the environmental impact of their products once these
products reach their end of life. It is submitted that the concept of producer responsibility can be understood in a much wider sense and lends itself for application with regard to a wider array of environmental problems. The government could, for example, prescribe environmental goals to be met by industry with regard to energy efficiency, certain production methods and many other environmental aspects relating to production and products. Producer responsibility is an instrument that will internalise environmental costs and assign them to the industry without the disadvantages that are inherent in the either the pigovian- or the command-and-control approaches.

The fact that producer responsibility is an instrument aimed at achieving better internalisation of external environmental costs already shows that the internalisation is actually a process under way. During the transitory phase during which environmental considerations are being internalised, distortions of competition will arise. The reactions of governments and industry to these distortions should be dealt with by competition law according to the model of integration.

The applicability of the model of integration is not restricted to any particular system of competition law. As it only requires as replacement of the short-term objective of maintaining competition with a longer term objective of protecting effective competition, there need not be insurmountable problems concerning the objectives of competition law and policy.

The model of integration may seem to be addressed only at the competition side of the integration of environmental concerns. While this view is logical because the model of integration has its most far-reaching effects with regard to competition law, it is not justified since the model of integration also imposes demands upon the environmental side of the matter. More specifically, it demands that environmental policy instruments are chosen in order to facilitate the internalisation of external environmental costs. Only then can the mutually reinforcing relation between competition and environmental protection that lies at the foundations of the model of integration come about and will sustainable development become an option. As a result of this observation, it is suggested that legislators need to be more careful about choosing environmental policy instruments. In this respect we may point at drive to achieve ‘instant recycling’. This has led to product responsibility schemes that, compared to true producer responsibility schemes, are more likely to lead to competition problems.

The model of integration is – as the name already shows – nothing more than a model. As such it can only function as a guideline for the exercise of discretionary powers in cases that involve environmental considerations. Whether and to what extent is has been applied in practice is investigated in the second part.
Environmental protection and EC competition law

The role played by environmental concerns in EC competition law differs widely between the various provisions. There are a number of reasons for this. The most mundane being the relative abundance or lack of cases concerning environmental protection.

With regard to Article 81 EC the Commission has already decided a relative wealth of cases. The majority of these cases have concerned producer responsibility schemes. These cases either not involved serious objections from the side of competition law or have been dealt with in a rather standard manner.

The ‘green dot’ cases, for example, primarily raised competition problems because of foreclosure issues. The foreclosure problems were dealt with in a way that is not different from the way in which the Commission has solved this type of restriction outside the field of environmental agreements. A further group of cases involved agreements the restrictiveness of which could be doubted in the first place. A number of agreements to cut back and energy usage or emissions on an industry-wide basis were – hardly surprisingly – found not to restrict or distort competition in the first place. These two groups of cases did not allow for an application of the model of integration for the simple reason that it was unnecessary to make a trade-off between the maintenance of competition and the furthering of the internalisation. A standard application of the competition rules is in these cases perfectly satisfactory.

One case in which a trade-off needed to be made was VOTOB. In this case the Commission opted for a standard competition law approach that has now been codified in the Guidelines on Horizontal Agreements. According to this approach, agreements that involve hard-core restrictions such as price-fixing will always restrict competition and therefore always fall foul of Article 81(1) EC. Furthermore, an exemption is highly unlikely according to the Commission. Despite the fact that the absence of a formal decision in VOTOB is probably indicative of the lack of serious consideration of the relation between competition law and environmental protection, is does appear to be functioned as a model for many more recent cases notably those involving removal or environmental fees.

Even though the model of integration does not in itself require a change of the Commission’s policy in this respect, the general ‘economic approach’ to competition law could be taken to mean that the appreciability of an agreement involving that passing through of a minimal (environmental) fee can be doubted.

In general the role of the model of integration with regard to the first paragraph of Article 81 EC is minor. This is so because the model of integration deals primarily with the exercise of discretion, i.e. the moment where a trade-off between competition and environmental protection or the internalisation is to
be made. Since Article 81(1) EC is essentially a legal clause governing the scope of the competition provisions, the model of integration has no role to play. This is different only where the intensification of competition that will result from the application of the model of integration is to be expected on a relatively short term. In such a case it could be held that the short-term restriction of competition must, in a rule of reason, be balanced with the increase of competition on a longer term.

This is different with regard to the third paragraph of Article 81. This provision allows the Commission to exempt agreements from the prohibition and therefore involves the exercise of a discretionary power to balance competition consideration with other considerations. The Commission’s policy in this regard is far from clear. What is certain is that environmental considerations can and actually do play a role in the Commission’s exemption policy. The following statement from the 1995 Competition Report is exemplary in this respect.

‘In particular, improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress.’

The model of integration requires that the Commission exempts an agreement that restricts or distorts competition insofar as this is necessary in the light of achieving an internalisation. This will as a first step require the Commission to acknowledge that environmental concerns can, of themselves or in connection with economic considerations, warrant an exemption. Following this first step, the model of integration requires little more than a standard application of the exemption clause. Since environmental benefits inherently accrue to the society at large, the requirement that consumers receive a fair share in the benefit should not prove problematic. Moreover, the environmental aspects of products or production are only one of many aspects with regard to which competition is possible so that the final requirement for an exemption should not lead to problems either. The actual balancing of the environmental protection and internalisation in the one hand and the need to ensure effective competition on the other, should take place as part of the proportionality requirement.

Current Commission practice, as already becomes apparent from the above quote, hardly complies with the model of integration. Rather, the Commission appears to mention environmental considerations in a haphazard manner without according any real weight to them. A ‘light at the end of the tunnel’ can in this respect be found in the DSD (Article 81) decision. There, the Commission appears to be granting an exemption on what are primarily environmental grounds. Nevertheless, this increased role for environmental concerns is accompanied by a remaining uncertainty as to what exactly the role for these environmental concerns has been. This is disappointing for a number of reasons. For
one, it is not in keeping with the Commission’s role that follows from the fact that it is at this moment the only institution empowered to apply Article 81(3) EC. Following the Commission’s plans for a decentralised application of that provision, guidance by the Commission will be much needed. This will hold all the more true with regard to the complex issues involved in integrating environmental and competition considerations with regard to producer responsibility schemes. Moreover, the Commission has on multiple occasions shown itself to be pleased with the spontaneous harmonisation of the competition laws of the member states after the Community model. Thus, the application and interpretation of analogous provisions of national competition law will depend on the practice of the Commission. In these circumstances the non-existence of a sufficiently established and consistent practice and thereby the lack of guidance becomes all the more pressing. This lack of guidance is only augmented by the commonly lamented Commission practice of issuing comfort letters.

This lack of clear guidance will lead to risks with regard to the uniform interpretation of Article 81(3) when this provision becomes directly applicable. It is submitted that national authorities that apply Article 81(3) EC, can also, on the basis of Article 6 EC, integrate environmental protection requirements. The relatively unimportant role awarded to environmental concerns in the Commission’s practice makes it quite probable that a national authority may consider itself obliged to ‘go beyond’ what the Commission has already done. These risks to the uniform interpretation, it is suggested, should not be addressed through a rule according to which national authorities may not apply Article 81(3) in a manner that runs counter to Commission decisions. Rather, Commission practice should sufficiently clear, authoritative and ‘integrative’ that it is no longer necessary for any national authority to depart from the Commission’s practice or distinguish the case before it from one in which the Commission has already decided.

Last, but certainly not least, the Commission’s practice is to be lamented for the simple reason that it fails to apply the model of integration. By opting for a standard competition law-approach, the Commission forgoes the possibility to apply Article 81(3) with the longer-term objective of achieving sustainable development in mind. It is submitted that Article 6 EC but also Articles 2 and 3 EC read in conjunction require the Commission to do this. Moreover, the model of integration suggests that an application of Article 81(3) in accordance with this model may prove to be beneficial for both the intensity and undistortedness of competition as well as the protection of the environment.

Commission practice with regard to Article 82 EC is similarly disappointing. In the only case, DSD, that has involved environmental considerations to this date; the Commission has managed to completely ignore the environmental aspects. In a rather formulaic approach, the Commission decision remains completely silent with regard to the issue of the producer responsibility induced
distortions of the competitive situation. It was argued that many of the abuses identified by the Commission could in fact be traced back to and explained by the producer responsibility enacted by the German government. The model of integration would require the Commission to also take these considerations into account when deciding whether or not the abusive practices were actually objectively justified on environmental grounds. The Commission has completely refused to do so. The degree of solidarity and collectivism that is inherent in producer responsibility is completely left unaddressed by the Commission. This is considered to be a missed opportunity because the monopolistic nature of DSD can, in the author's opinion, be traced back to the environmental policy of the German government. As such, DSD could have been used not only to better define competition policy in the waste sector but also to better define environmental policy in the waste sector.

As was already alluded to above, it is submitted that most examples of producer responsibility legislation actually contain a product responsibility. A degree of solidarity and collectivism are not just inherent in product responsibility, they are corollary. Enacting a producer responsibility in the form of a product responsibility whereby the basic obligation is one to take back the products that have been marketed will invariably lead to large-scale producer responsibility organisations and thus the competition problems that come with monopolies. Preventing such problems from arising in the first place is the responsibility of the environmental legislator. That an environmental market may actually successfully be created is shown by the British implementation of the Packaging Directive.

Once a monopolistic take back and recycling system has come about, the competition problems should not be exaggerated. Again, DSD can be used as an example. The representation of both up- and downstream industries in the governing board of DSD as well as the specific way in which this representation has been regulated will ensure a balance of power. As a result, the chances of DSD being used as a vehicle for abuse by either industry are greatly reduced. Again, the Commission does not address this issue. It is thus suggested that the competition authorities recognise the environmental difficulties (as well as reduced economic efficiency) that are likely to result when more than one take back recycling system exist alongside each other. Moreover, these authorities should take into account the institutional structure and its capability to prevent a take back and recycling from being abused. However, apart from the competition authorities, the environmental authorities should also take these effects of the institutional structure into account when they decide to opt for a product-rather than a true producer responsibility.

With regard to the Merger Regulation the conclusion can be succinct. It does not allow for an integration of environmental considerations if this would involve 'an obstacle to competition.' It is submitted that the model of integra-
tion would not require such a merger to be given the go-ahead for the simple reason that a healthy competition is most probably the best recipe for a good internalisation of environmental costs. If, however, during the transitory phase certain concentrations are deemed necessary from an environmental perspective, the environmental policy instruments will most likely be of the product responsibility type. The competition problems in those cases can thus be said to be the result of the environmental legislation. It is submitted that a different application of concentration control is not necessary and not called for in order to remedy these defects in the environmental legislation. This absence of a need to apply the concentration control regimes in a different manner may seem to fit in rather difficulty with the changed that are demanded with regard to the interpretation of Article 82 EC as concerns large scale take back and recycling systems. In this respect it must be taken into account that the Merger Regulation is an ex ante instrument that is primarily concerned with the market structure. Article 82, on the other hand, is an instrument that comes into play only after the market structure is already less than satisfactory from a competition perspective and abusive behaviour occurs. The structure-based character of the Merger Regulation, as opposed to the conduct-based character of Article 82, makes it uncalled for to widen the scope of concentration control regimes in order to remedy failures by the environmental legislator. In such cases a second intervention by the same public authorities that laid down the product responsibility seems more apt.

As far as the competition rules addressed at undertakings are concerned, the result as regards the model of integration or any other approach concerning competition and environmental protection for that matter, is not too positive. A consistent Commission practice can hardly be said to exist. The experience that has been gathered does not comply with the model of integration or with any other well thought through vision on the relation between competition and environmental protection. This is remarkably different with regard to the competition rules addressed at the member states.

A first and striking difference follows from the fact that environmental concerns are accorded a clear and well-defined role with regard to those competition rules. With regard to both Article 87(2) and Article 87 EC, environmental considerations are explicitly recognised to warrant and exemption or justification. In Sydhavnens, the Court has stated that environmental considerations may indeed warrant the application of Article 86(2) EC. As part of the proportionality test on the basis of this provision, the Court conducts a test that comes close to the test required by the model of integration. By considering that an exclusive right may be necessary for the duration of the amortisation of new installations and investments, the Court appears to be including reasons related to the internalisation of external costs in its judgment. The Commission’s practice with regard to environmental subsidies provides us with an even better exam-
ple of the role of environmental concerns. Firstly, these concerns can allow for an exemption on the basis of Article 87(3)(c) EC. Secondly, notably with regard to operating aids, the Commission practice is clearly aimed at bringing about an internalisation. This is done by firstly recognising that some compensation of the deterioration of the competitive position may be necessary to make this internalisation acceptable to the industry in the first place. The second step is the limited duration of this compensation and the fact that is may be degressive.

Apart from this clarity, another major improvement from the perspective of the model of integration is the fact that environmental benefits can of themselves warrant an exemption. Only with regard to the useful effect rule is this unclear, primarily because of the absence of a well-established case law. This view that environmental considerations are awarded a clear role in the competition rules addressed at the member states is confirmed by an examination of other rules in the EC Treaty addressed at the member state institutions. With regard to the rules on the free movement of goods and the rules concerning more stringent national measures after harmonisation, the conclusion was that these rules certainly allow for an environmental justification.

The remarkable difference between the Commission's approach to environmental considerations forwarded by undertakings and the approach by the Court and Commission to environmental justifications brought forward by member states cannot be explained with the help of the model of integration or any legal, economic or political argumentation. The model of integration requires that all reactions – whether of private undertakings or public institutions – to the internalisation of environmental costs be judged on the basis of their contribution to the internalisation. This, as was shown above, requires that environmental considerations be awarded a clear and unambiguous role in the first place. Secondly, this role must be such that environmental considerations can of themselves warrant a justification or an exemption. Legal arguments for willingness of the Court and Commission to take environmental considerations into account in applying the competition rules addressed at member states do not exist either. Suffice in this respect that fact that the absence of any reference to environmental considerations in Article 87(3) EC has not kept the Commission from exempting state aids on environmental grounds alone.

Indeed, it seems that, contrary to what the model of integration would seem to require, this difference can be traced back to a perception by the Commission of environmental policy. According to this perception environmental policy is to be conducted by the member state authorities and is not primarily the matter of private companies. As a result the Commission is reluctant to take environmental considerations seriously if they are advanced by private undertakings as arguments for an exemption. This perception of environmental policy, of course,

\[1\] Articles 95(4) and (5) and 176 EC
completely ignores the essence of the producer responsibility principle. Moreover, producer responsibility is endorsed by the Commission as is evidenced by a number of recent legislative initiatives that have all embraced the producer responsibility principle as a mainstay.  

The Court's case law contains some evidence indicating that it may be willing to extend its case law with regard to environmental considerations brought forward by the member states. Nestlé/Perrier is an example of case where the Court of First Instance took a wider view of the factors that are to be included in the appraisal on the basis of competition law. In this respect, the judgment in DSD is anxiously awaited.

All in all, much is still uncertain with regard to the relation between competition law and environmental protection as far as the competition rules addressed at the member states are concerned. This uncertainty can also be seen in the member states. In Germany the toleration by the Bundeskartellamt of DSD has in the meantime partly been addressed by the legislator in the form of an amendment to the German competition law. In the Netherlands much experience has been gathered with regard to the application of the competition rules to environmental agreements. Although it is slightly more consistent than the Commission's, the case law of the NMa still lacks the clarity that is needed to be able to speak of a well thought through vision of the relation between competition law and environmental protection. Moreover, the case law concerning removal fees shows that the NMa is unwilling to apply the model of integration that was developed in this book.

A first step in the right direction would appear to be the recognition by the competition authorities that industry has a major part to play in bringing about an internalisation of environmental costs and thus environmental protection. There are a number of different methods to reach this goal. As the example of Germany shows, an option is to change the competition legislation so as to include an environmental justification expressis verbis. It is submitted that this is unnecessary even though it may be preferable from the perspective of the democratic legitimacy of such a choice. A far less bothersome alternative would be to simply apply the model of integration in the exercise of discretionary powers by the competition authorities.

How this already works in practice can be seen by looking at the Commission's practice with regard to environmental state aids. How this could work in practice can be shown with the help of the removal fee. Essentially, the removal fee consists of two elements that are relevant as far as competition law is concerned. Firstly, the removal fee is fixed for a certain category of products

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3 Three recent judgments in the field of competition law (Merger Regulation) have shown that the Court of First Instance is more than willing to closely and critically examine the Commission's decisions.
on a horizontal basis. Secondly, the removal fee must be passed on to consumers visibly and in its entirety. Current practice is to grant an exemption for fixing of the removal fee but to categorically refuse such an exemption for the pass through obligation. The model of integration would require this to be exactly the other way around. An exemption should certainly be possible for the pass through obligation because this aids the internalisation of external costs with the consumers whereas the exemption for the collective horizontal fixing of the removal fee should be temporary and limited only to the time span during which the historical waste is dealt with. As a result, consumers are made aware of the environmental costs of their purchases and will thus internalise the environmental costs. Only if such internalisation takes place do we stand a chance of bringing about sustainable development. In the end we must ask ourselves what undistorted competition is worth if there is nothing left to compete for.