

Economics and Environmental Law: dealing with competition law and environmental principles in the European Union context

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Introduction

Environmental principles and competition law are in conflict in the European Union context. The environment is defended by some principles as for example precaution, prevention or polluter-pay, all familiar in Europe and though some of them have been attacked, they have been accepted by the majority of the European Union Members States for the last past five years.

At the same time European competition law is essential to a strong common market. Yet, the complex relation-ship between competition and environment hasn't been satisfactory discussed. This paper is an attempt to add responses to this conflict.

In the absence of clear and precise regulation of these conflicts, the Commission and the Court of Justice have been resolving them following a case-by-case method. Yet, the position of the Commission is different to that of the Court of Justice. The Commission is being more rigorous with the environmental principles than the Court of Justice. Even if the Court of Justice is more environmental friendly, the case-by-case method is not a satisfactory solution for those conflicts because it creates legal insecurity and undermines environmental principles.

This paper asks the following question: in what extent do European authorities respect the founding principles for the protection and defence of the environment and human health that are reflected in the European directives and regulation since they have to deal with competition law and the four essential economic liberties (free movement of capital, goods,

people and services)? In other words, must some environmental principles be sacrificed because of the importance of competition law?

This question can only be understood with a brief explanation of the importance of environmental premise. In this paper, we consider the co-existence of finite natural resources and the rapid growth in human population and industrial activities. It is necessary to protect scarce resources, but to regulate the way they are shared. Environmental policies and regulations are mainly focused on the protection of natural common resources, such as the atmosphere, water, forests, climate system and fisheries.

Three unique factors come into play:

First, the fact that air, water, forests, climate system are common goods or common natural resources. Those resources must be shared because they are finite. This question is a global problem.

Second, the fact that to breathe clean air, to drink pure water, to preserve our climate system are considered fundamental human rights in Europe, and are essential for human health, safety, preserving property along sea coasts and for human happiness. Yet, private agents can use the air, the water or damage the climate system in a private way, for their own profit. They emit pollutants in the atmosphere, they emit greenhouse gases, and they pollute the water and the consequences harm human health and the environment.

Third, those questions create economic, social and political problems.

This complex co-existence has two elements to it:

First the relative lack of coherence in the European law system.

Second the lack of homogenisation about some environmental aspects due to the fact that competition law is always a limitation for the implementation of environmental policies.

In order to better analyse those questions, this paper is divided into three parts. The first part exposes the problem of the protection of shared natural resources and the human health. This part shows that environmental protection means in several occasions the use of some environmental principles as the precaution principle. Those principles can generate excessive economic and social costs. Consequently States need financial State aids to afford those costs.

The second part presents the problem of the compatibility between states subsidies, competition law and environmental aids.

The third part analyses the presence and the importance of competition law and economic interest. Environmental principles can be incompatible with environmental State aids and competition law. Due to this incompatibility, some principles as precaution principle

failed. The paper will show that those principles can sometimes failed and that the Commission and the Court of Justice have different positions which creates a certain instability and is far to produce a harmonisation of environmental policies.

I. The problem of the protection of the environment and human health in the European context

It's necessary to analyse the idea of shared natural resources and their protection in the first subsection (A). The existence of some environmental principles and their economic and social costs will be underlined in the second subsection (B).

A) The idea of shared natural resources and how legal system became aware of their protection

Two questions must be pointed out here: First, the general problem of shared natural resources and second, the necessity of their legal protection and the consequences.

The world available to the terrestrial human population is finite and a finite world can only support a finite population; therefore, population growth must eventually equal zero¹.

In 1968 Garret Hardin first published his classic work "The Tragedy of the Commons", forever changing the way people view environmental problems. In this work, Hardin asks readers to imagine a pasture (a commons) that has been made available to a group of herdsman and their cattle. Being rational beings,² Hardin argues, each herdsman and their cattle on the commons as possible, since each herdsman seeks to maximize his individual gain. Hardin suggests that each herdsman grapples with the following question, "What is the utility of adding one more cow to my herd?" For each herdsman, there is both a positive and a negative to increasing the herd. The positive is that the individual herdsman would gain the proceeds from another animal, a benefit that the herdsman would not have to share. The negative is that another cow would contribute to the overgrazing of the commons, a negative effect that would be shared by each herdsman. Since the individual herdsman receives all the positive, but shares the negative effects of adding additional cows, the incentive is to keep adding more and more cows to the commons. The long-term consequence is that the short term thinking of individual herdsman eventually destroys the common area.

In this context, some researchers drew attention to two human factors that drive environmental change:

¹ G. Hardin, "The Tragedy of the Commons", Sciences, Vol 162, 1968, p. 1243.

² Howard R. Ernst, The Chesapeake Bay Blues Science, Politics and the Struggle to Save the Bay 9-49 copyright©2003 by Rowman and LittlePield. Reproduced by Permission of Rowman and Littlefield Pub Inc.

- The increasing demand for natural resources and environmental services stemming from growth in the human population and *per capita* resource consumption.
- The way in which humans organize themselves to extract resources from the environment and eject effluents into it. In some extent this are the institutional and legal arrangements³.

Those arrangements point out the fact that is necessary to share some natural resources as for example the clean air, the climate system or the clean water and to give them an adequate degree of protection, but that the growth of industries and transports is a real fact and inevitable as well. Moreover, in spite of the fact that European authorities had the intention of protecting the environment as an important goal for the European Union, they realised as well that the way natural resources are shared, protected and used by the population is closely dependent on the way industries growth up and thus, in some occasions, it can be inversely proportional to the free competition principle.

In this context, shall we consider the Bentham's goal of "the greatest good for the greatest number" as an adequate rule for sharing and protecting natural resources? Some very provocative authors held an utilitarianism position, as W. Baxter, who wrote that he rejected the proposition that we "ought" to respect the balance of nature or to "preserve" the environment unless the reason for doing so, express or implied, is the benefit of man. For example, because a river is commonly owned and thus a "free" good, it can be overexploited. From an economic point of view, many pollution problems arise because by their nature, environmental resources such as water and air are commonly owned. The free-access problem can arise when property is commonly held. People can overexploit common resources when given free access. Consequently, some authors have been proposing a private use of some natural resources. But what happens when the use is not environmentally friendly?

European authorities decided that common resources need governance and requires rules to achieve it as for example monitoring and information verification at a relatively low cost (some natural resources as trees are easier monitored as fish, or lakes water is easier monitored than rivers water)⁴. It's easier too if rates of change in resources, resource-user populations, technology and economic and social conditions are moderate.

³ T. Dietz, E. Ostrom, P. Stern, "The Struggle to Govern the Commons", Science magazine, vol 302, 2003, p. 1907.

⁴ Premier's texts UE environment.

In order to achieve the protection of natural shared resources, some environmental principles have been settled out, first in the International Law context, and after in the European legal context. This will be examined in the next subsection.

B) The protection of those natural shared resources and the human health implies the use of a number of environmental principles

It became clear for European authorities that in order to protect the environment and human health, some precise environmental principles will be necessary⁵.

Those principles are basically the prevention, the precaution and the pollutant-pay notion. This paper focuses only on the first two principles. They are very similar but not the same.

The idea of prevention principle is that preventive measures must be taken in case of dangerous activities or activities with well known risk for the environment or human health. Prevention implies two things: the risk is not uncertain but it's well known and regulators must oblige actors to take preventive measures in order to reduce the risks.

The idea of precaution is different because the risks are bad or not known at all. They are uncertain. Moreover, actors can stop completely their activities or act in such an extent to totally reduction of the risks.

Prevention principle has existed for a long time, in many regulations concerning the environment, human health and security rules at work. It's not a new idea. Regulator deals with well know risks factors and establishes obligations for actors in accordance of those certain risks.

Yet, precaution principle is more recent. It's still discussed, and different conceptions have emerged in the U.E legal instruments and cases⁶. Precaution principle is a step further than prevention, thus, very often; economic or social risks can interfere with it. Very briefly, it's possible to identify four types of precaution principle:

In the first one, scientific uncertainty should not automatically preclude regulation of activities that pose a potential risk of significant harm. It's called the non-preclusion precaution principle.

⁵ Council Directive 80/779 fixing limit values and guide values for sulphur dioxide and other suspended particulates that cause acid rain ; Council Directive 89/427 modifying testing procedures ;The IPPC Directive⁵ (96/61) ; Fifth Environmental Action Program ; Paper Precautionary Principle in the UE.

⁶R. B. Stewart, "Environmental regulatory decision-making under uncertainty", Research in Law and Economics 79 (2002).

In the second one, regulatory controls should incorporate a margin of safety; activities should be limited below the level at which no adverse effect has been observed or predicted. It's called "margin of safety precaution".

In the third one, activities that present an uncertain potential for significant harm, should be subject to best technology available requirements to minimize the risk of harm unless the proponent of the activity shows that they present no appreciable risk of harm. According to the last one, activities that present an uncertain potential for significant harm, should be prohibited unless the proponent of the activity shows that it presents no appreciable risk of harm. It's generally admitted that the precaution principle is addressed to uncertain risks type three, the uncertain risks of harm. But this precaution principle has important social and economic costs.

Some critics can say that there are at least four reasons why precaution principle leads to socially undesirable regulatory results⁷:

1) The unrealistic worst case presumption leads to unnecessarily stringent and costly regulation in many cases where the worst case presumption is not justified and activities posing uncertain risks are extremely unlikely to cause serious harm.

2) It leads to a disproportionate allocation of limited regulatory resources to those activities posing relatively more uncertainty, because the worst case assumption inflates their harm value. In short, precaution principle prevents rational environmental regulatory priority-setting. In doing so, precaution principle leads to a quite perverse regulatory paradox: the adoption of more precaution in the face of risks that are more uncertain produces less environmental protection.

3) Precaution principle is incapable of dealing with risk-risk tradeoffs and setting intelligent regulatory priorities. It provides no guidance in dealing with the important class of regulatory problems where regulatory measures to reduce risks (target risks) themselves create risks (non-target risks).

Should regulators simply disregard non-target risks because precaution demands strong measures to reduce or eliminate risks?

4) Precaution principle is likely to lead to perverse efforts by regulators to avoid the draconian impacts of the precaution principle prescription for regulation. Regulators, for a variety of reasons, will in many circumstances seek to avoid imposing such controls. They

⁷ R. B. Stewart, "Environmental regulatory decision-making under uncertainty", *Research in Law and Economics* 79 (2002).

will seek to avoid making threshold determinations of potential risks that trigger precaution principle, either by postponing decisions or applying the decisional criteria inconsistently.

The lesson is that inflexible draconian regulatory requirements that are not justified by the standard regulatory decision making framework are likely to provoke evasive tactics on the part of regulators that undermine that transparency and integrity of the regulatory process.

In this condition, the definition of uncertainty is essential. It can be define as “ a lack of scientific knowledge or scientific consensus indicating a particular level of risk”. Uncertainty can’t in itself justify the decision not to regulate not the alternative decision to impose regulation⁸. Still, in some occasions in can be a brake to the application of some specific environmental regulations against uncertain risks. More precisely, it’s particularly the case when some economic interests as the protection of the free competition, are in conflict with the environmental regulation. In those cases, uncertainty is used as a restraint to the application or improvement of environmental regulations.

Moreover, due to the costs of precautionary based regulation, the European Commission has decided in some occasions that environmental domestic regulations were incompatible with the competition law.

II. Environmental regulation in the European context: the necessity of State subsidies and the relation-ship with competition law

It must be here underline that the protection of the environment is a European cause of concern. It’s important to point out as well in this subsection, that many environmental domestic regulations of States members are supported by their governments in a financial way. In those cases, the Commission has been considering that their co-existence with the competition law is difficult. This subsection would like to show the importance of environmental State aids to perform environmental goals and their complex co-existence with competition law.

Aids to either public or private undertakings by public funds are, like State interventions, a manifest distortion of competition. To grant subsidies to certain undertakings is giving them favours in relation to others results in the exclusion of normal market economy conditions. The granting of subsidies results in undertakings receiving them acting under different conditions than their competitors since they may carry out activities even though they only make losses.

⁸ Cartagena Protocol trying to clarify the concept of uncertainty.

State Aids are regulated in the Treaty by Arts 87-89 (formers arts 92-94). In principle, all forms of subsidies which are financed by public funds are caught by this provision. Subsidies which distort or threaten to distort competition through favouring certain undertaking or certain productions are deemed to be incompatible with the Common Market in so far it affects trade between Member States. Only sector subsidies or subsidies granted to individual undertaken are caught by art 87. This means that subsidies of a more general nature like advantages for the total economic life in a Member State such as favourable depreciation rates, are not caught by art 87. Furthermore, art 87.2 accepts subsidies of a social character and subsidies serving the purpose of repairing damages due to natural catastrophes. It also states that certain types or subsidies may be deemed to be compatible with the Common Market if they serve the purpose of regional development, the carrying out of projects of a common European interest, to remedy serious disturbances in the economy of a Member State, to support culture and the preservation of the cultural heritage or other types of subsidies which are proposed by the Commission and decided by the Council by qualified majority.

Subsidies do not correspond to normal commercial conditions. Furthermore, the granting of a subsidy also results in State influence on the activities of the undertaking in question. This means that the autonomy to take decisions within a company is affected by the granting of aid. Also aid to consumers or aide of a social nature, or aimed at improving research which presupposes the purchasing of certain domestic goods, fall under the notion of aid contained in art 87.

The notion “Member State” is interpreted widely which means that all types of public bodies granting subsidies fall under the scope of art 87. The notion of “distortion” of competition is different compared to the notions used in arts 81 and 82. In the context of art 87 a distortion of competition is assumed to occur when certain undertakings or certain economic sectors within a Member State are supported, compared to competitors in other Member States not obtaining such or comparable support. The support in question must be limited to certain undertakings or certain sectors of a Member State’s economy. The criterion “affect trade between Member States means that a subsidy must have appreciable effects ion the competitive situation of undertakings in other Member states. They must put at a disadvantage due to the subsidy granted by a public body within another Member State.

Developments in areas that create environmental pressures, such as transport, energy or agriculture often outweigh the benefits of new regulations. This requires commitment by societal stakeholders and citizens as well as by the member States and regional and local

authorities. This includes the better targeting of measures through scientific and economic studies and stakeholder dialogue as well as new market-based and financial instruments. Despite some improvements, however, the state of the environment overall remains a cause for concern and pressures on the environment are predicted to grow even further in some areas, as highlighted in the European Environment Agency's recent state-of-the-environment report.

A 6th Environment Action Programme should in the first place address the shortcomings in the implementation of the 5th Programme as well as new issues which have emerged since then. The 6th Programme will also need to be seen in the broader context of an enlarged European Union, taking account of the specific issues in the candidate countries.

The full implementation of the environmental *acquis* remains another urgent priority. However, without a reinforced integration of environmental concerns into economic sectors to address the origins of environmental problems and without a stronger involvement and commitment by citizens and stakeholders, our development will remain environmentally unsustainable overall despite new environmental measures.

Better information and citizens' involvement in environmental decisions as well as more accountability for actions which might harm the environment should be pursued as other priority objectives. The effective application of the polluter pays principle and the full internalisation of environmental costs on to polluters remains a critical process.

An Environmental action programme should be one pillar in an overall Community strategy for sustainable development addressing environmental, economic and social objectives in a mutually reinforcing way. The way in which legislative proposals are developed has also improved many European environmental aspects: Cost-effective and cost-benefit deeper analyses, with better analysis of the environmental issues and the economic and cost-benefit implications. The analysis of environmental proposals should also identify the "winner" and "loser" of the initiative in question. Initiatives such as the Water Framework Directive, the IPPC Directive and Auto-Oil show that it is possible and positive to involve the relevant actors and sectors in finding solutions to environmental problems. The Auto-Oil Programme in particular has identified important win-win actions required at national and local level to improve air quality in co-operation with the industries concerned.

In order to implement the measures as they require more flexibility will be done to States members. But, in the implementation phase, it will be important to ensure that this flexibility is not used in ways that prejudice the achievement of the objectives set. There is some progress too on broadening the range of the instruments:

1) Market based instruments. Market-based instruments include taxes, charges, environmental incentive payments, refundable deposit schemes, permit trading systems, eco-labelling schemes and environmental agreements etc. They aim at encouraging producers and consumers, via price and information signals in the market place, to adopt practices or make choices that take into account the environmental cost of the production and consumption of goods.

2) Financial instruments. Development banks have begun to incorporate environmental criteria into their lending operations. However, progress with private banks and insurers in providing "green" financial products, green housekeeping or increased environmental risk assessment is still fairly limited.

In this particular context, subsidies can have significant impacts on the environment, either positive or negative. Even if they are not deliberately established with the intention of harming the environment, they are often introduced without taking the environmental consequences into account. Overall, the experience of the last few years shows that there is potential to direct funding, directly and indirectly, towards environmental benefits. But further progress must be made, in particular for energy and transport subsidies to ensure environmental criteria. They are fully integrated into EU funding criteria (e.g. for the structural funds).

3) Overall progress towards sustainable development. On the one hand, economic growth, better communications and transport contribute to an improved quality of life. On the other hand, however, the growth and nature of human activities, expressed through growing consumption of products and services, also means increased use of natural resources and increasing pressures on the environment. Environmental policy has had some success in combating the effects of these pressures, for example in encouraging cleaner fuel or in reducing or preventing industrial discharges into rivers, the air and ultimately the sea. However, according to current predictions, it will not be able to keep pace with or account for the increasing aggregate demand for road transport, electricity, house or road building, etc. There are a number of issues which highlight, in a particular way, the need for addressing the environment together with the economic and social dimensions.

In the *Green Paper "Towards Fair and Efficient Pricing in Transport"*⁹, it's say that the external economic costs caused by a lack of environmental controls and unsustainable patterns of production and consumption demonstrate the inefficiency of an unsustainable

⁹COM (95) 691 final.

development path and how it affects European citizens. They underline the case for an overall strategy bringing together the environmental, economic and social dimensions. They illustrate the need for addressing environmental problems through changes in different economic sectors and the broader economic and social benefits which would accrue from such a broader approach.

Finally, the trends highlighted in this Communication however show that given the societal trends underlying environmental pressures, more environmental legislation alone will not be sufficient. And that environmental legislation needs to be properly achieved, the presence of economic instruments and the pursuit of competition principles.

In this context, the integration of both policies, environmental and competition became essential for the EU authorities¹⁰. On behalf of art 6 Treaty, environmental protection must be integrated. 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. On behalf of art 37 of the Charter of Fundamental Rights of the EU, “a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”. But competition policy is one of the Community policies as it appears in art 3, 1, g EC. It seems that environmental requirements and competition requirements must be both integrated. The integration must lead indeed to a sustainable development. How this must be defined? In this extent, economics and law are not any more separated things as sustainable development must be understand as ‘all about finding a *modus vivendi* for economic growth and environmental protection’.

Some words in short about the competition concept for European Institutions. The concept of competition for European Commission is more concern with maintaining competition itself thereby ensuring optimal welfare. If for example a private company decides to produce an environmentally good as for example less pollutant washing machines¹¹, the products will be more expensive than less environmental friendly products. The company will try to incorporate these costs in the price of its products so that, ultimately, the consumers end up paying the costs of protecting the environment. This internalization has an effect on the competitive situation on the market. In this perspective, many environmental private

¹⁰ H. Vedder, Competition Law and Environmental Protection in Europe, Towards Sustainability?, Europa Law Publishing, Groningem 2003.

¹¹ Case 1999 5064, IV.F. 1/36.718 CECED, JOCE L 187/47, 26.7.2000.

initiatives lead to a monopoly situation or to excessive external costs and thus to adulterated competition situation. From the environmental point of view, if private stakeholders should stop some environmentally friendly initiatives (as recycling their wastes but with higher external costs) this probably means the end of the initiative and thus a lower level of environmental protection. It should be necessary, from a competition point of view, to internalize the environmental costs¹². But this is not always done thus it generates conflicts that the Commission and the Court of Justice resolve in a different way.

III. The economic and competition interest in the European environmental context: a limit to the environmental protection?

This part intends to underline that better technological techniques can't always be applied in order to accomplished better environmental goals because they can be in conflict with some essential competition principles that must be respected. Thus, European environmental law must deal with the fact that the "construction of a common European market" can't be done without the very strict application of competition law and the limits it imposes. The importance of economic interests and competition law means that there is not only environmental or health risks but also economic and social risks (as employment) and that they must all together be putted in a balance.

This part aims at demonstrating the fact that European authorities must put in a balance the existence of risks for the health and the risks for the environment in one hand and the necessity of a cost-benefit analysis and a strict implementation of competition principles in the other.

We must consider some essential facts. In order to achieve several environmental targets as the reduction of the air pollution, the reduction and stabilization of the quantity of emissions of greenhouse gazes causing damages to our climate system, and other environmental goals, European authorities have established a large environmental Program¹³ and a large number of regulations.

As it was shown in the precedent part, in the one hand, in the document *Europe's environment: What directions for the future? The global assessment of the European community programme of policy and action in relation to the environment and sustainable*

¹² Decision commission look for.

¹³ Vth Environmental Program.

*development, 'Towards sustainability'*¹⁴ what is central is the recognition that environmental legislation in itself is not sufficient to improve the environment.

In the other hand, the Commission affirms that competition policy is one of the best instruments to improve the environment¹⁵.

At the same time, as we have said previously, several firms need State aides to compliance their obligations towards environmental targets (investments in buildings, plants and equipments, new technologies etc.). Many European States need to help their industries or transport sectors with financial aids in order to fulfil the ambitious environmental goals fixed by the European directives. Still, the problem is that, Environmental aids are often considered by the European Commission as States aids.

Furthermore, State aides are often considered illegal by the Commission because they came into conflict with the antitrust and competition European law. And, the respect of European competition law and of the four European essential economic liberties (free movement of capital, people, goods and services) fixed by the U.E Treaty are one the most important goal in the construction of the European Union, as it's pointed in several European regulations.

In this particular context, the Commission and the European Court of Justice have been analysing several cases in which economic interests and competition law interests are put in a balance with environmental interests¹⁶. In the conclusions of those cases, mainly the Commission decisions, it's easy to see that environmental interests are not always preferred and that it's the competition law and the promotion of the four liberties that prevails.

The main point of this part is based in the fact that for the European authorities, economics is really an important and essential issue in the European environmental law context and that the compatibility between competition law and environmental regulation can't be ignored. However, one consequence of this particular context is the fact that the precautionary principle and other environmental principles won't be applied in all circumstances and could even fail sometimes, because of their costs, and thus be sacrificed.

What's more, what are called "environmental principles" (precaution principle, prevention principle, polluter-paid) are still discussed in the European Union environmental legal system. Consequently, they are not unanimous and they can even be sometimes

¹⁴ COM/99/0543

¹⁵ Document *Information from the Commission, Community guidelines on State aid for environmental protection, 2001.*

¹⁶Case C-343/95 Port de Genova 10 décembre 1996-monopole. Monopole in the surveillance and policy intervention in case of pollution in the port of Genes.

contradictories. This contradiction can be explained since the environmental policies are often the product of different combined factors and some controversial arguments. Those factors and arguments are: the “science in progress”, the “state of the science”, “scientific and economic expertises about the effects on the human health of industrial activities and pollutions”, and last but not least, “industrial and economic interests, basically competition law”.

This part wonders about the way European authorities might deal with those premise. This part asks the question of in what extent, competition and economic interest interfere in environmental regulations and jurisprudence. It will be pointed as well how those different regulations (Competition law, State aides, Environmental regulation) and principles (precaution principle, prevention principle, protection of human health, protection of common natural resources, cost-benefit results, competence promotion) can be compatible, and in what extent and under what conditions, the promotion and protection of the environment should be heading.

This part considers some decisions and regulations focused on air pollution and climate change. Both, the clean air and the climate system are natural resources that are shared and must be protected. It’s also regarded here the presence of two environmental principles: prevention and precaution. Very often, prevention principle is preferred because precaution presents too much uncertainties and economic costs that should need State aids and thus are incompatible with competition law.

Finally we must consider that the Commission’s position of ‘no distortion of competition’, implies a no possible balance of interests. However, the Court’s position shows that they consider the necessity of a balance. In spite of this more flexible position, we have found some failures in the Courts’ decisions as for example the insufficient analysis of the financial investment or the economic benefice for the industries or firms. In this specific context, we would like to ask the following question: is the Court always fair with the economic analysis of competition law?

The directives premises about those questions will be analysed in the first subsection (A). The Commission and the Court of Justice positions will be also examined in the second subsection (B).

A) The directive’s premises

First, it must be pointed out in this subsection that the demand for environmental regulation is overwhelmingly a demand to prevent harm. However, it is difficult to predict

precisely what activities will cause what harm¹⁷. Scientific uncertainty makes the dilemma of preventative regulation particularly acute with respect to regulation of toxic substances.

In the Judgement of the Court of 1 October 1991¹⁸, it's discussed the transposition of the 85/203 directive, fixing of a limit value applicable to the concentration of nitrogen dioxide. In the introduction of the directive, the Commission says:

“Whereas any discrepancy between the provisions already applicable or being drawn up in the various Member States with regard to nitrogen dioxide in the air could give rise to unequal conditions of competition and could in consequence directly affect the functioning of the common market. Whereas one of the basic tasks of the community is to promote throughout the community a harmonious development of economic activities and a continued and balanced expansion, which is inconceivable without an attack on pollution and nuisance or an improvement in the quality of life and the protection of the environment. The measures taken pursuant to this Directive must be economically feasible and compatible with balanced development”.

We can easily see that in this directive, the Commission aims to promote the environment but the economic activities also. To fulfil this goal, the prevention principle is appeal but no the precaution principle which will suppose more costs due to the uncertainties of the risks caused on human health¹⁹. “In addition to the limit value, there is a need to provide for guide values to improve the protection of human health and contribute to the long-term protection to the environment. There will be a committee on adaptation to scientific and technical progress”, says the directive. But the very idea of “health effect” is not fixed. Is it a detectable change in blood chemistry, or only changes proved to have an adverse effect on bodily functions? What populations should be used as the measure of effects given that small children and the elderly may be more susceptible to effects of air pollution? Should it matter that the most human exposure to a particular air pollutant is from no air sources? What constitutes a margin of safety if there is no known threshold for a particular pollutant? The answer to each of these questions is crucial, because the ambient air quality standards serve as the basis for both, short-term and long-term exposure limits applicable to the entire country, with potentially billions of euros in industry control costs dependent on the outcome²⁰.

In the Resolution of the Council December the 7th 1998, energy efficiency in the UE, the resolution of the Council of December the 18th 1998 about an European strategy to promote the combined production of heat and electricity and the conclusions of the Council

¹⁷ Percival, Environmental regulation, cit p.343.

¹⁸ Commission of the European communities v French republic case C-14/90.

¹⁹ “Preventive action can help reduce the formation of photochemical oxidants which can be harmful to man and the environment”.

²⁰ Percival Schroeder Miller Lealpe, Environmental Regulation Law, Science and Policy, p. 503.

May 11th and June 17th 1998 about Climate change in addition to the Chartes europeenes for the conversion of energy and the conclusions about sustainable development, the Commission announces the big orientations about the energy efficiency. The Commission underlines the contribution of an efficient use of the energy and the security of the approvisionnement, the economic competitiveness and the protection of the environment and confirms the important role of the energy efficiency in the creation of wider economic possibilities and employment.

There are however, some obstacles to a satisfactory energetic development and the public institutions must create an adequate framework in order to help public or private initiatives. In this perspective, the Commission would like to promote the subsidiarity principle. The adequate and incentive measures can be the taxes measures, economic incentives and other economic measures in order to reduce the emissions to the atmosphere. But if the State aides are required, says the Commission, they can't be affecting the competence law.

In the directive 2000/76/CE of the Parliament and Council of December the 4th 2000 about the waste incineration, some of those questions are also pointed out. In accordance with the principles of subsidiarity and proportionality as set out in article 5 of the Treaty, there is a need to take action at the level of the Community. We can see in this directive that, if the precaution principle is first enumerate, it becomes very quickly an empty principle and only the prevention principle is underline and pointed in the rest of the document²¹. The aim of this directive is to prevent or to limit as far as practicable negative effects on the environment, in particular pollution by emissions into air, soil, surface water and groundwater, and the resulting risks to human health, from the incineration and co-incineration of waste. However, says the directive, it must be taken into serious consideration the costs of the prevention and that the movement of wastes must no affect the free movement of goods and the anti trust law.

In the directive markets greenhouse emissions of October the 13th 2003, it's first underline that "the climate system is a shared natural resource". The VI program for the environment made a priority to preserve against the climate change and to limit and stabilised the GH emissions. The directive says very clearly that "*The European market must be formed en damaging the less as possible the economic and the competence development and the*

²¹ "The precautionary principle provides the basis for further measures...". "The limit values set should prevent or limit as far as practicable negative effects on the environment and the resulting risks to human health. The Communication from the Commission on the review of the Community Strategy for waste management assigns prevention of waste the first priority, followed by reuse and recovery and finally by safe disposal of waste; in its Resolution of 24 February 1997 on a Community Strategy for waste management, the Council reiterated its conviction that waste prevention should be the first priority of any rational waste policy in relation to minimising waste production and the hazardous properties of waste".

employment". It's also underlined that "*The integrity of the European market must be preserved and it's necessary to allow all competence distortion*". The directive continues saying that "*It's necessary to improve the relation ship costs efficiency*". Finally it's said that:

"The exchange and trading of emissions permits must be done in a global and coherent context of policies and measures. In this context, States can take the measures they wish on order to improve the taxes system or any other measure that could improve the reduction of emissions and the trading permits. But arts about competence must be always respected".

B) The position of the Commission and the Court of Justice in the case by case method

The Commission and the Court of Justice are confronted in some occasions to the complex co-existence of economic and competition interests, environmental risks and principles²². This subsection aims to show this confrontation. We will see that both, the Commission and the Court have different positions. Consequently, it's hard to say that it exists a harmonisation in the environmental policies. It will be more realistic to say that the Commission intend to build a policy harmonisation and that the competition law strict application is one of the favourite instruments to it. The main issue here is that it seems that the harmonisation will be based in a raise to the bottom strategy.

In the Case C-431/92 February the 21st 1995, Commission v/ Germany, it's reproach to the German government that they didn't do any environmental study impact and thus that directive 85/337/CEE concerning pollution prevention measures has not been applied. The directive establishes clearly a politic based on the prevention principle. The directive appeals to the "reasonable principle" which means that it's sensible to require the installator to give the necessary information in order to be sure that there is no danger for the environment.

The interpretation of the Court about the application of the directive is that before 1988, the States are not forced to do the verifications for the installation and the environmental impact. The Court invoques the principle of proportionality which means that States have to fulfil their obligations under a directive but only in the proportion of their own possibilities and if the measures that must be taken are proportionate to the goal. The Court

²² *Environmental Governance in Europe*, A. Weale, G. Pridham, M. Cini, D. Konstadakopulos, M. Porter, B. Flynn, Oxford U P, 2002.

concludes saying that the costs of the information about the prevention of the pollution were not proportionate, according to the risk of pollution, still not well known before 1988.

The case C-343/95 Port of Genova, December the 10th 1996 about a monopole illustrates even more this difficult co-existence. The case is focused on the monopole in the surveillance and policy intervention in case of pollution in the port of Genes, Italy.

The question asked to the Court was if there is a dominant position in the market or a substantial part of the market. This case is essential for three reasons:

First because the question of the co-existence between the two interests is clearly asked. Second because the Commission has a very different position as the Court has. The Court is environmentally friendly and the Commission is competition interest friendly. Three, because the Court considers that environmental interest is a “general and public interest” and thus, in a sense, higher to the antimonopoly rules.

The Court underlines as well, the principles of the European environmental policy, named the triple “P”: Precaution principle, prevention principle, pollutant-pay principle. The decision of the Court is that: *“Article 86 of the Treaty must be interpreted as not being applicable to anti-pollution surveillance with which a body governed by private law has been entrusted by the public authorities in an oil port of a Member State, even where port users must pay dues to finance that activity. Such an activity is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition”.*

But the Court is not always as environmentally friendly as she should be. The Court can have some severe positions with environmental questions, mostly in the case of State aids. This question is clearly asked in the Case C-379/98 about energy resource, air pollution and electric renewable power in Germany. In this case, three main questions were asked to the Court:

- 1) Do the measures financed by the financial state resources are a State aid?
- 2) If a national measure giving to the national plans a more favourable treatment than the treatment for the imported products, can this be justified for environmental reasons? In other words, non discrimination principle can it be sacrificed for environmental reasons?
- 3) Is an environmental friendly measure within the precaution principle as important as a distortion of the free competition between member States?

4) The fact to encourage domestic production of renewable electricity in Germany is it against the principle of free movement of goods established by the Treaty?

Very briefly exposed, the facts were: the German law Str EG 1998 accorded a minimum prize to the renewable electricity. Renewable electricity is considered as an energy source and thus as a natural resource that must be protected and shared. In order to encourage the production of renewable electricity, Germany has been giving a minimum prize to renewable electricity.

The Commission considered that the fact to give a minimum prize to the renewable electricity is a State aide and thus incompatible with the free competition principles of the Treaty. The Commission has not considered that to produce renewable electricity is a public interest activity because it reduces the greenhouse gazes emissions and consequently protects our climate system (natural shared resource) against global warming.

About the restriction to the competence law and the free movement of goods, the question was the limitation to imports that the StrEG can imply can it be justified in the virtue of the Treaty in the name of the interest of the environmental protection? The environmental protection is not one of the exceptions of the art 36. But the Court has accepted that certain limitations to the free movement of goods can be accepted to the extent of their necessity to satisfy some imperatives demands of the law. And the jurisprudence has repeatedly said that environmental protection is one of the imperatives demands of the law that could limit art 30.

It's clear, that the StrEG pursues environmental essential objectives. The production of electricity from sources of renewable energy can contribute in a significant manner to the reduction of the pollution and the greenhouse effect and can contribute too to the preservation of some source of energy that are limited. The idea of finite resources, unlimited population and a limited use of the resources came into play.

It seems, after a report from the Commission, that the StrEG constitutes a system of impressive incrementation of the preservation of resources of renewable energy. But it doesn't seem obvious for the Commission that they can found the decision on environmental raisons: First, because the Treaty doesn't consider, for the moment, that to produce electricity from renewable resources is not an obligation for States members. States members are still free to produce electricity from renewable resources or traditional resources. Second, because if the measures are not applied indistinctly to domestic and to importations, this measures can't be justified as an "imperative demand".

The StrEG establishes that electricity produced from renewable resources can be favorised by a minimum price for buying; this measure does not exist in other countries. It

seems, therefore, that the StrEG sees on different way domestic electricity than foreign electricity. It results that the jurisprudence based on art 36 and 30 can't be applied in this case and thus, that the environmental protection can't be used as a justification.

Another previous case called "the Wallons wastes" could be appealed here in order to justify the measures of the StrEG based on environmental raisons. In the Wallon case, the Court has considered that even if there was a limitation to the free movement of goods because wastes from foreign countries couldn't come to Wallon, that could be justified by the "particular nature of the object, a waste" and because of the environmental protection. The Court considered in the Wallon case, that even if this measure could be considered as a discriminatory measure, it could be justified for environmental raisons. The Court applied the "rule of raison" as an exception to the free movement.

It seems, if we read carefully the Treaty, that the environmental protection is an essential and imperative requirement for the European Union, and must be for the States members either.

Damages caused to human health, environment and animals can be in a long term a terrible damage against the sustainable development principle underlined by the Treaty. From this point of view, it seems difficult to accept that it's more important to defend some commercial agreements, in the name of the art 36, than to defend sustainable development, precaution principle against global warming, and air pollution.

Finally, it will be necessary to examine if the StrEG applies the proportionality principle with its particular friendly measures to the renewable electricity. It seems that it's proportionate because, helping the production of renewable electricity means to produce electricity close to the areas of consumption and thus it reduces considerably the costs and bad effects of transport.

But it seems to the Commission that the German law discriminates renewable electricity from others countries and that could be consider as a discriminatory measure and a limitation to the free movement of goods.

In spite of the Commission not environmental friendly position, the Court concludes:

-To fix a minimum prize for renewable electricity in Germany is not a State aid. It's not incompatible with the competition law because it's in the public and general interest of the protection of the environment.

-The obligation for Germany to buy German renewable electricity is a measure against the principle of free movement of goods. Yet, it can be justified by environmental friendly reasons.

What conclusions after the exam of this essential case?

It's important to underline that:

-The Commission has a clear not environmental friendly position and prefers competition and economic interest.

-The Court of Justice is more moderate and supports an environmental friendly position. The Court is more flexible and open to environmental arguments than the Commission is.

-Still, this different position shows that environmental principles are not firmly affirmed by the Commission and that a case by case method doesn't reassure them.

In the Case C-513/99 December the 13th 2001 about environmental friendly transports in Finland, the question asked to the Court was: does a municipality consider ecological reasons when it has to choose the more interesting transport offer? If the choice based on ecological reasons is made in order to reduce the pollutant emissions, the Court must give serious consideration to the case. The Court said that it's necessary in all cases to respect the four liberties: competence, free movement of people, capital and goods. But the Court said too, that it's possible to give special consideration to environmental arguments if they contribute to help the choice of the more interesting offers since a global economic point of view.

It must be here conclude, once again, that the Court is more environmentally friendly than the Commission is. Still, in this case, the Court says very clearly that environmental considerations are taken seriously only if they contribute to more interesting economic choices. What's the exact meaning of this conclusion? It seems that the Court doesn't want to go too far in her environmental friendly position because the confrontation with the Commission position is too uncomfortable and unsustainable. Thus, The Court founded some kind of "juste milieu" position. In other words, the Court has to moderate her too environmental friendly position and she has to adapt her decisions to the respect of the four economic liberties and competition law of the Treaty.

Yet, in some other occasions²³, the Court has been more firmly with the environmental obligations of the States and has considered that those obligations are “results obligations” and not only “means obligations”. In other words, if a State has an obligation of results, it means that environmental goals are considered as much important as if he had a “means obligations” with environmental goals. Therefore, competence and economic goals of the Treaty are not more important than environmental goals are.

In those cases, the Court considered that precaution principle have to be applied in order to achieve the environmental results fixed by the directives.

It’s easy then to observe, that the Court is having a separate and different environmental opinion as the Commission has. Moreover, the Court of Justice does not always put in a balance environmental interests and competition interests.

Furthermore, the Court of Justice considers in her last decisions that environmental subsidies are not incompatible with the state aids regulation and the competition European law.

This position can easily be seen in the Case C-351/98 September the 26th 2002 about State aides in Spain Kingdom. In this case, the Commission considered that Spain has given financial aide to the emplacement of vehicles too pollutants. It was an aide for environmental friendly transports. The Commission said that it was incompatible with the competition and the principle of free trading exchange in the European Market. Despite the Commission’s opinion, the Court said that it was compatible with the competition law and with the European trading exchanges. The Court considered that it’s not an Environmental aid because an environmental aid must be “an aide in order to improve environmental targets in the extent of more than it’s necessary following the legislation”, which is not the case in this Case. In this Case, the environmental aid is not for the investisment or operational but only for functioning which is not “more that the legislations demands”. Consequently, the Court concluded that it was not an environmental State aid.

Some conclusions

-One of the problems concerning European environmental protection is the relative lack of coherence in the European legal system. It would be necessary to establish clearly in

²³ Case C-60/01 January 31st 2002; Case C-53/02 and C-217/02 September the 25th 2003; Case C-139/00 February 21st 2002, Spain, pollution air, waste incineration, obligations State Member means or results.

the regulations in which cases environmental goals and principles are essential and when they can be sacrificed on the name of competition law.

-The lack of homogenization of different environmental aspects must be also underlined. Different environmental risks exist from different sources: industries, transports, wastes incineration. Each sector has its own regulation (directives) corresponding to different standards and protection goals (some appeals to the prevention principle, others to the precaution principle), some appeals to different states of the sciences and science on progress. In this condition, States must fulfil their environmental obligations but it's not easy for the Court, or for the Commission, to establish the "results obligations" that the States must implement. It's always a case by case method and consequently it creates too many differences between different sectors or States members.

-As the precautionary principle does not appear in all the regulations with the same force, it's not a requisite *sine qua non* in all the case by case solutions. There is here a lack of coherence. Moreover, because States Members have to apply an obligation of means and others an obligation of results, the degree of exigency of the precaution principle or other environmental principles is not the same.

- Finally, this paper concludes that it could be desirable, to the European authorities, to review their environmental policies and regulation and to install a more coordinated, coherent and satisfactory relation-ship between the competence law, the pragmatic and realistic fulfilment of environmental principles and goals and the environmental regulation.