Environmental Law and Policy Development

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Abstract: - The environmental problems had become one of the main priorities that the European Union takes action into. 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?

Key-Words: - development, environmental, European Union, law, policy, prevention, protection, resources, sustainability

1 Introduction

This question can only be understood with a brief explanation of the importance of environmental premise. In this paper, we consider the coexistence 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 regulation 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 consequences harm human health and the environment.

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

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 has not 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.
2 The problem of Protection of the Environment and Human Health in European Context

It’s necessary to analyse the idea of shared natural resources and their protection and the existence of some environmental principles and their economic and social costs.

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 zero [3].

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

- 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 arrangements [2].

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 necessary. 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 is 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 is 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 is still discussed, and different conceptions have emerged in the U.E legal instruments and cases [4]. Precaution principle is a step further than prevention, thus, very often; economic or social risks can interfere with it. Very briefly, it is 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 is called the non-preclusion precaution principle.
- 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 is 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 is 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 results [1]:

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 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 not in itself justify the decision not to regulate not the alternative decision to impose regulation.

Still, in some occasions in can be a brake to the application of some specific environmental regulations against uncertain risks. More precisely, it is 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 regulation.

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.

3 Environmental Regulation in 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 is 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 State aids to perform environmental goals and their complex co-existence with competition law.

Aids to either public funds are, like State interventions, a manifest distortion of competition. To grant subsidies to certain undertakings is giving them favors 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.

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. Subsides which distort or threaten to distort competition through favoring 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 favorable 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 decision 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 state are supported, compared to competitors in other Member States not obtaining such or comparable support. The criterion affect trade between Member States means that a subsidy must have appreciable effects on 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 Program should in the first place address the shortcomings in the implementation of the 5th Program as well as new issues which have emerged since then. The 6th Program 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 internalization of environmental costs on to polluters remains a critical process.

An Environmental action program 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 Program in particular has identified important win-win actions required at national and local level to improve air quality in cooperation 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 predications, 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.

It is said 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 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 social 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 polices, environmental and competition became essential for the EU authorities [5]. 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 underase 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 Commissions is more concern with maintaining competition itself thereby ensuring optimal welfare. It for example a private company decides to produce an environmentally good as for example less pollutant washing machines, 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 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 costs. But this is not always done thus it generates conflicts that the Commission and the Court of Justice resolve in a different way.

4 Conclusion

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 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 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 fulfill their environmental obligations but it is not easy for the Court, or for the Commission, to establish the “results obligations” that the States must implement. It is 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 is 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 fulfillment of environmental principles and goals and the environmental regulation.

References: