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**Applicability of the Model of Integration**



## 5.1 Introductory remarks

Now that the outlines of the model of integration have been charted, a number of things have become clear. For one, the model of integration, as it was developed above, is not specific to any legal context. Above, we have referred to EC competition law only for the purpose of giving examples. Moreover, the initial reference in the introduction to Article 6 functioned only as a starting point for further investigations. In many respects, it can be called the legal frame of something that is essentially an economic painting. The model of integration developed above is all but endemic to EC competition law. It thus lends itself just as well for an application in the context of the European Community's as well as the member states' competition laws. This observation and the non-legal character of the model of integration does, however, not mean that it is unnecessary to further inquire into the legal framework within which it should be applied.

Particularly from the side of the German competition authority concerns have been voiced as to the appropriateness of any inclusion of non-competition considerations in the competition laws. Similar concerns can be heard in the Netherlands where the prohibition of *détournement de pouvoir*<sup>1</sup> is cited as precluding such practices.<sup>2</sup> Moreover, there is no such thing as an integration clause in, for example, the competition laws of Germany or the Netherlands. The result of the inclusion of non-competition factors in the process of administering the competition laws, according to these criticisms, would be that the objective of these laws is changed so as to include these considerations. The absence of any specific considerations or provisions to this effect in those competition laws, so the argument continues, must mean that the legislator did not intend for this to happen. As a result, purely legal considerations result in the exclusion of any role for environmental concerns and thus completely rule out the applicability of the model of integration. These questions and concerns all deal with the problem of the applicability of the model of integration to a certain legal context.

In the following chapter we will deal with the issues surrounding the applicability of the model of integration to a number of specific legal contexts. We will thus examine the competition laws of the EC, the Netherlands and Germany. These considerations will necessarily have to be of a somewhat more general nature since we will compare these systems of competition law more extensively in Part Three.<sup>3</sup> Below, we will be looking at the place that the

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<sup>1</sup> This a prohibition, as part of general administrative law, to use a power for other objectives than those for which it was first conferred upon the administrative entity.

<sup>2</sup> Van der Meulen 2000, p. 196 *et seq.*

<sup>3</sup> *Infra*, chapter 10.

competition laws occupy in these societies and how that influences the structure and administration of these laws. Despite the fact that we will embark upon this exercise, it is useful to bear in mind the conclusion formulated above, that the model of integration is not alien to any specific system of competition law. An integration of environmental and competition considerations in accordance with the model of integration neither means nor requires that the objectives of competition law are changed. Rather, it means that the objective of achieving and maintaining effective competition is temporarily set aside in order to achieve more effective competition on the longer term. It is thus perfectly compatible with a longer-term perspective on the maintenance of competition as the objective of competition law.

## 5.2 European competition policy – the special case of the integration principle

The structure of EC competition law is that of a widely construed prohibition together with an exception or the possibility of an exemption. With regard to, for example, prohibition of cartels the exemption clause in Article 81(3) EC provides proof of the fact that a restriction of competition is not necessarily prohibited but may actually be tolerated because of its benefits to society at large. The very structure of the competition provisions with the omnipresent possibility of exemptions from the basic rules, points at the fact that EC competition law serves other objectives alongside the maintenance of effective competition.<sup>4</sup> Furthermore, as we have seen above, the question whether environmental protection requirements should play a role in European competition policy already seems to have been answered by the Treaty's drafters in the form of Article 6 of the EC Treaty.<sup>5</sup>

In its current form there is relative consensus among scholars that the integration principle represents a legal obligation.<sup>6</sup> Moreover, the judgment of the European Court of Justice in *Bettati*, show that the Court is willing to test – be it marginally – whether Community legislation is in accordance with the environmental principles enshrined in then Article 130 R which at that time, also contained the integration principle.<sup>7</sup> The judgments in *PreussenElektra* and *Concordia Bus* illustrate that the Court will – be it slightly haphazardly – invoke

<sup>4</sup> Cf. Monti 2002, p. 1059 *et seq.*

<sup>5</sup> Cf. Wasmeier 2001.

<sup>6</sup> Cf. Jans 2000, p. 22, Doherty 1999, p. 381, Dhondt, Uylenburg 2000, p. 127 and Dhondt 2002, p. 154 and Advocate-General Jacobs' opinion in case C-379/98, *PreussenElektra*, [2001] ECR I-2099, para. 231. However, Grimeaud appears to be more reluctant, Grimeaud 2000, p. 215 *et seq.*

<sup>7</sup> Case C-341/95, *Bettati*, [1998] ECR, I-4355, para 33 *et seq.*

Article 6 in order to substantiate its decision to uphold an environmental practice of a member state.<sup>8</sup> As the wording of Article 6 shows, 'environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3' (emphasis added). According to Article 3, first paragraph, sub g, of the Treaty 'the activities of the Community shall include (...) a system ensuring that competition in the internal market is not distorted'. Clearly, therefore, the Community's competition policy is subject to the integration principle.

Moreover, the structure of Article 3 and Article 2 of the EC Treaty lends even further support to this thesis. Furthermore, it may also provide an answer to the question of whether the integration principle could result in environmental protection being one of the objectives of European competition policy even though this would not be necessary for the model of integration. As we understand it, the very structure of the EC Treaty leads to the conclusion that achieving sustainable development and ensuring a high level of environmental protection are among the objectives of EC competition law.<sup>9</sup> This conclusion is based on the reasoning that the policies and activities mentioned in Article 3 EC are means to attain the whole catalogue of objectives formulated in Article 2 of the Treaty, taken together.

It is common ground that the means listed in Article 3 serve the attainment of the Community's goals listed in Article 2.<sup>10</sup> The problem, however, is that according to Article 2 the Community seeks the attainment of a multitude of objectives some of which may perhaps be difficult to reconcile with another. A solution to this problem would be to accept the Community's objectives as one and indivisible. Another view of the relation between Articles 2 and 3 and the objectives listed in Article 2 is that they represent a 'three stage rocket'.<sup>11</sup> This approach holds that Community substantive secondary law (the third stage) follows from Part Three of the Treaty (the second stage), which in turn is based on Articles 2 and 3 (the first stage). A possible implication of this approach could be that the specific means listed in Article 3 are linked only to the corresponding specific objectives in Article 2. This in turn leads to the conclusion that the system ensuring that competition is not distorted does not necessarily have to aim at, *inter alia*, protecting the environment. We would argue against this

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<sup>8</sup> Case C-379/98, *PreussenElektra*, [2001] ECR I-2099, at para. 76 and Case C-513/99, *Concordia Bus Finland v. Helsingin Kapunki* (*Concordia Bus*), [2002] ECR I-7213, para. 57.

<sup>9</sup> See further Wasmeier 2001 and Monti 2002, who at p. 1078 considers it possible that the duty to integrate may even bring with it a preference for the protection of the environment over the protection of competition.

<sup>10</sup> The very wording of Article 3 EC makes this clear beyond doubt. Cf. Kapteyn, VerLoren van Themaat 1998, p. 117.

<sup>11</sup> Cf. Kapteyn, VerLoren van Themaat 1998, p. 115.

approach to the scheme of the Treaty and the structure of Articles 2 and 3 in particular on the following ground. With regard to some of the means listed in Article 3, no clear link can be established with an objective mentioned in Article 2. Whereas, for example, the Treaty envisages a 'contribution to education and training of quality and to the flowering of the cultures of the Member States'<sup>12</sup>, no corresponding objective is to be found in Article 2. If not all means listed in Article 3 serve a corresponding objective in Article 2, the *a contrario* conclusion must be that the means serve the attainment of *all* the objectives of Article 2. The Court's judgment in *Albany* reflects this. On the basis of, *inter alia*, the fact that social protection as well as effective competition is listed in both Article 2 and 3 of the EC Treaty, the Court comes to the conclusion that it needs to opt for 'an interpretation of the provisions of the Treaty as a whole which is both effective and consistent'. In doing so, the Court explicitly recognises that the objectives listed in Article 2 EC cannot be seen separately.

The Community's objectives include 'a (...) sustainable development of economic activities, (...) sustainable (...) growth (...) a high level of protection and improvement of the quality of the environment (...)'. The conclusion must therefore be that environmental protection is certainly one of the objectives of the EC and as a result also an objective of EC competition policy. This conclusion is further substantiated by the fact that Community competition policy is primarily made by the Commission acting which is a collegiate body.<sup>13</sup> Accordingly, all Commissioners, including the Commissioner responsible for the environment, in principle have to agree with a decision and may thus influence decision-making.<sup>14</sup> Once more, we can see how the administration of the Community's competition laws, although it takes place in a strictly legal framework, is essentially a *policy* serving the objectives mentioned in Article 2 EC.<sup>15</sup>

The above legal exercise, even though in principle superfluous because of the nature of the model of integration, was undertaken nonetheless because legal considerations are often invoked as reasons against a role for non-competition considerations as part of competition law. It may be concluded that the structure of the Competition rules and their place within the Treaty clearly show that the model of integration may be applied to EC competition law.

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<sup>12</sup> Article 3(1), (q).

<sup>13</sup> Cf. Goyder 1998, p. 128 *et seq.*

<sup>14</sup> See in general: Bellamy & Child 2001, p. 915 *et seq.* More specifically with regard to the effects that this may have on the decision: Monti 2002, p. 1070.

<sup>15</sup> Cf. Monti 2002, p. 1070.

### 5.3 Netherlands competition policy – the special case of the indirect effect of the integration principle?

The structure of the competition provisions in the Netherlands is identical to those of the EC. Therefore, the possibility of an exception or exemption from the prohibition can also be taken as proof of the only relative status of the maintenance of effective competition as the objective of the Dutch competition laws. With regard to the question of whether environmental considerations form an objective together with that of the maintenance of effective competition, matters are not as clear as they are for the competition policy of the EC. This is so because the Netherlands Competition act is a piece of legislation that functions in relative isolation from other laws and policies.<sup>16</sup> It is not part of an overarching system as is the case with the Community competition provisions. Moreover, in the Netherlands no specific legal provision comparable to the integration principle may be found.<sup>17</sup> On the level of environmental policy making, however, external integration is considered as a means to achieve environmental protection.<sup>18</sup> All in all there is little *a priori* certainty as to whether environmental protection can be said to rank among the objectives of the Netherlands competition rules and policy.<sup>19</sup> Matters are further complicated because the Competition act is applied by a separate, semi-independent authority that is incomparable to the collegiate body that the Commission is. The most obvious place to look for an answer to the question of whether environmental protection is one of the objectives of Dutch competition law and policy would seem to be the preparatory work concerning the Competition act.

The explanatory memorandum to the Competition act shows that the primary motive for a new Competition act was the wish to intensify competition policy.<sup>20</sup> Whereas the old competition act<sup>21</sup> was based on the abuse system, the Competition act prohibits cartels, signifying a departure from the partly positive attitude towards cooperation among competitors that formed the basis of the old competition act.<sup>22</sup> Furthermore, the wish to bring national competition law in line with European competition law can be named as a major reason for the Competition act.<sup>23</sup>

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<sup>16</sup> The *Mededingingswet* (Mw.), Stb. 1997, 242.

<sup>17</sup> Cf. Dhondt, Uylenburg 2000, p. 121.

<sup>18</sup> *Nationaal Milieubeleidsplan* (national environmental policy plan) 3, p. 45.

<sup>19</sup> Of course, the model of integration would not require this.

<sup>20</sup> *Memorie van Toelichting* (explanatory memorandum), TK 1995-1996, 24 707, nr. 3, p. 3 *et seq.*

<sup>21</sup> *Wet economische mededinging*, amended and republished, Stb. 1958, 413.

<sup>22</sup> Cf. Mok 1998, p. 67 *et seq.*

<sup>23</sup> *Memorie van Toelichting* (explanatory memorandum), TK II, 24 707, nr. 3, p. 3.

As regards the objectives of the Competition act, the explanatory memorandum states that the basic principle of the Act is that 'competition is good but that certain forms of cooperation between enterprises may lead to benefits to society'.<sup>24</sup> During the parliamentary debates, the Minister explained that the Act aimed at bringing about and protecting 'workable competition'.<sup>25</sup> All in all, the Act appears to have as a primary objective the maintenance of a certain degree or intensity of competition while simultaneously recognising that competition is not an end in itself. In this respect, the situation as regards the objectives of the Competition act is comparable to that of the European competition rules. Furthermore, during the parliamentary debates considerable attention was devoted to the role of so-called non-economic considerations in the Competition act. This attention was caused by a difference of opinion between the Council of State<sup>26</sup> and the Minister as regards the role of non-economic considerations. The Council of State concluded, on the basis of *inter alia* the Commission decision in *Exxon/Shell*, that the exemption clause (Article 81(3) EC) allowed the Commission to weigh non-economic considerations against the correct functioning of the market.<sup>27</sup> The Minister rejected this view and came to the conclusion that the Commission could take these non-economic goals into account in deciding on an exemption. Furthermore, according to him non-economic goals were not weighed against the correct functioning of the market mechanism.<sup>28</sup> The result of this difference of opinion and the opinion of the Minister was an amendment that proposed to add an extra paragraph to the exemption clause in the Competition act according to which the Minister could grant an exemption in cases where non-economic concerns were in play.<sup>29</sup> In the end this amendment was withdrawn when the Minister proposed a different solution to the problem of the role of non-economic concerns.<sup>30</sup> This solution was the introduction of Article 4(2) into the Competition act according to which the Minister can issue general recommendations as regards the way in which the Competition authority should take non-economic concerns into account when applying the exemption clause.

From all this, the conclusion may be drawn that environmental protection is one of the ancillary objectives that the Dutch competition act seeks to attain. If it is firstly recognized that competition is not an end in itself but rather serves

<sup>24</sup> Translated by the author, TK II, 24 707, nr. 3, p. 9

<sup>25</sup> TK II, 24 707, nr. 12, p. 24.

<sup>26</sup> The Council of State (*Raad van State*) is a high advisory body to the government.

<sup>27</sup> TK II, 24 707 A, p. 8. 'Hierbij kan worden gedacht aan de afweging van niet-economische belangen, zoals belangen op het gebied van het milieu (...) tegen de belangen van een goede marktwerking'.

<sup>28</sup> TK II, 24 707 A, p. 9

<sup>29</sup> Amendment proposed by De Jong and Van der Ploeg, TK II, 24 707 nr. 29.

<sup>30</sup> We will take a closer look at these events in paragraph 10.5.2 *infra*.

the benefit of society and, secondly, environmental concerns can partly justify an exemption, the conclusion should be that these environmental concerns form an ancillary goal of Dutch competition policy.

The Competition act is primarily applied by the Director-General (*Directeur-Generaal*) of the Dutch Competition authority (*Nederlandse Mededingingsautoriteit* or *NMa*).<sup>31</sup> This holds true in particular with regard to the application of the exemption clause and exceptions to the rule in general. Several general norms such as the central prohibitions may also be invoked in civil procedures and can consequently be applied by a judge. At this moment the Competition authority is hierarchically subject to the Minister of Economic Affairs yet functions autonomously in that it has certain powers which flow from the Competition act.<sup>32</sup> This hybrid construction makes the Competition authority an administrative organ (*bestuursorgaan*) and therefore subject to the General act on administrative law.<sup>33</sup>

As such, with regard to the possibility for the authority to take environmental concerns into account, it is bound by, *inter alia*, the prohibition of so-called *détournement de pouvoir*. Article 3:3 of the General act on administrative law states that an administrative body shall not use its decision making powers for objectives different from that for which the powers were granted. The first paragraph of Article 3:4 of the General act states that an administrative organ shall weigh all the concerns that are directly involved insofar as this is not limited by a statutory provision or by the nature of the powers that are to be exercised. Whereas it may appear that the concerns thus to be taken into account are fairly broadly defined, a limitation to the diversity of concerns that can be taken into account is imposed by the so-called speciality principle. In many respects, this principle is enshrined in the abovementioned Article 3:3 of the General act.

It is therefore important to have an idea of the objectives for the attainment of which the decision-making powers were granted to the Competition authority. As it has turned out in paragraph 4.2.2.1 the Competition act, and therewith the powers flowing from this act, primarily aim at achieving and maintaining effective or workable competition. This in itself already shows that the degree or intensity of competition is not an end in itself but rather serves the benefit of the society. As a healthy environment also benefits the society, the conclusion would have to be that environmental concerns would have to be taken into account alongside the objectives in the competitive sphere.

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<sup>31</sup> Hereafter it will simply be referred to the (Netherlands) Competition authority even though formally it is the Director-General who applies section 17 and other provisions of the Competition act.

<sup>32</sup> There are, however, plans to make the Competition authority into a completely independent body, *cf.* Proposal for an amendment of the Competition act, TK 27 639, nr. 1, 2.

<sup>33</sup> *Algemene wet bestuursrecht* (Awb), Stb. 1992, 315, amended since.

As regards the relation between European law and Dutch competition law, it may be interesting to take into account the explicit wish to attune the Competition act to European competition law. As a result of this, the Dutch Competition authority has in many of its decisions explicitly referred to the fact that European competition law functions as a guideline for interpreting the provisions of the Competition act. This intended parallelism was recognized to have its limits as regards certain concepts that were considered unique to the Community setting.<sup>34</sup> The explanatory memorandum shows that, in this respect, the Minister appears to consider primarily those concepts and criteria that depend on the European market with regard to which the European competition rules apply.<sup>35</sup> The exclusion of these, jurisdiction-based, criteria and concepts seems only logical. A different matter, however, is the question whether other specifically European elements that play a role in interpreting European competition law can also play a role in interpreting the analogue provision in the Competition act. It is particularly interesting to consider the integration principle as an example of such a specifically European element.

As its very wording shows, the integration principle does not address the member states or any particular actor for that matter. The principle is defined only in that it requires the integration of environmental concerns into – put shortly – Community law and policy. Moreover, the judgment in *Concordia Bus* shows that the integration principle will allow member states to take into account environmental considerations in their own policies based on European legislation.<sup>36</sup> In that sense, the integration principle stops just short of conferring upon the member state authorities the right or even duty to take environmental concerns into account in their own policies.<sup>37</sup>

However, even though the integration principle does not address the member states (or any other particular actor for that matter) and furthermore does not oblige them to an integration of environmental concerns, the wish to align Netherlands competition law with Community competition law may bring with it an interesting indirect effect the integration principle. If, for example, the integration principle results in a particular interpretation of Community competition law, the explicit wish to achieve and maintain parallelism between the Competition act and Community law could result in a similar interpretation of the Competition act.

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<sup>34</sup> TK II, 24 707 A, p. 10.

<sup>35</sup> TK II, 24 707, nr. 3, p. 10.

<sup>36</sup> Case C-513/99, *Concordia Bus*, [2002] ECR I-7213. This case concerned a public tender that allegedly contravened the provisions of one of the public procurement directives.

<sup>37</sup> Although a combination of the duty of loyalty to the Community (art. 10 EC) and the integration principle may indeed result in an obligation on the part of the member states to integrate environmental concerns in the other policy areas for which they are responsible. See further: Dhondt 2003, p. 48 *et seq.*

Whether or not this analogous application should or even could take place without the Competition authority sidestepping the mandate conferred upon it by the Competition act and the General administrative law act, essentially depends which one is the stronger: the wish to have parallelism or the *communautaire* character of the integration principle. On the one hand, the legislator explicitly wanted Dutch competition law to be and remain in line with the Community's competition rules as they stood and evolved. On the other hand, if such an evolution takes place with an explicit recourse to Article 6 EC, it must be recognised that Article 6 is unique to the EC Treaty and probably has been included because of the particular nature of the European Community. Moreover, as we have seen above, the duty to integrate is explicitly limited to the Community legal context. In this respect it should also be recalled that the European Community is an entity that has numerous competences with regard to a number of policy areas that do differ in their scope, exclusiveness and the degree to which they can be said to be of a 'Community nature'.<sup>38</sup> It is therefore concluded that the integration principle contained in Article 6 EC is of a *communautaire* nature. As a result, an application or interpretation of the competition rules of the EC that is founded this provision does not lend itself for application outside the context of the EC Treaty and its implementing legislation.

In some respects the use of the integration principle in the application of Community competition law can thus be said to lead to unexpected negative consequences. The same holds true for other interpretations of European competition law that are specific for the legal context in which European competition law functions. An example of such an interpretation is the *Albany* exception *ratione materiae* which the Court has based on the place of the competition provisions in the overarching whole of the EC Treaty.<sup>39</sup> It makes no sense to transpose this holistic interpretation of a Treaty in its entirety to the situation where one national law is interpreted. This, however, has not kept the Competition authority from doing just that.<sup>40</sup>

Again, it should be kept in mind that this should not obstruct the application of the model of integration since it is by no means confined to EC competition law. Moreover, the structure of the provisions in the Competition act, that closely resemble those of the EC, effectively points to the conclusion that was

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<sup>38</sup> Environmental protection, for example, is a Community competence where the member states have the – albeit clausulated – power to apply more stringent measures (Article 176 EC). Other policy areas, however, consist of little more than a coordination of the national policies of the member states coupled to an explicit prohibition for the Community to harmonise the legislation of the member states in that field.

<sup>39</sup> ECJ Case C-67/96, *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* (Albany), [1999] ECR, I-5751. See chapter 3, paragraph 3.2 *infra* on this exception.

<sup>40</sup> Case 1012, *Van Eck Havenservice*, para. 36.

reached with regard to the Community's competition rules: competition is not an end in itself but rather serves more general goals among which environmental protection can certainly function.

#### 5.4 German competition law – the special case of the fear of *Instrumentalisierung*

Above, we have seen that the Ordoliberal tradition can to a large extent be said to have stood at the cradle of the German Act Against Restrictions of Competition.<sup>41</sup> This fact explains the legal structure of the Act. Section 1 of the Act contains a widely construed prohibition of restrictions of competition that reminds one of the prohibition to be found in Article 81(1) EC. This prohibition is immediately followed by several possibilities for an exemption from the prohibition (Sections 2-8 GWB). The exemption clauses contained in Sections 2-7 are to be applied by the Federal Cartel Office,<sup>42</sup> whereas Section 8 allows for a ministerial exemption when an agreement cannot be exempted on the grounds listed in Sections 2-7. A comparison of the wording of the exemptions clauses with that of Article 81(3) quickly reveals a difference. Whereas Article 81(3) is a general exemption clause that may in principle be used to exempt any practice from the prohibition, Sections 2-7 of the Act are formulated much more restrictively as regards their scope. This is the so-called *Enumerationsprinzip* according to which an exemption can only be granted on the basis of the law and not on the basis of a necessarily uncertain interpretation of a vaguely formulated general exemption clause. Closely connected to this principle is the discussion about the objectives of competition policy. A general exemption clause that uses open wording is liable to being used for political purposes whereas the *Enumerationsprinzip* is seen as a means to prevent such a *politische Instrumentalisierung*, a term used to describe that competition law is made subject to other considerations than just that of maintaining competition.<sup>43</sup> This, of course, reflects the Ordoliberal belief in the juridification of the process of applying the competition laws. This belief, the fear of an *Instrumentalisierung* and the relinquishing of competition as the sole objective of competition law, are still very much core concerns of the Federal Cartel Office.<sup>44</sup> One notable exception to the *Enumerationprinzip* can be found in Section 7 of the Act. At first sight this provision appears to be a transposition of Article 81(3) to the German Act. A closer look, however, reveals that Section 7 is still drenched with the desire to have only clearly and

<sup>41</sup> The *Gesetz gegen Wettbewerbsbeschränkungen*, abbreviated as GWB.

<sup>42</sup> The *Bundeskartellamt*.

<sup>43</sup> See more extensively, Immenga 1976 and Schaub 1998, p. 124.

<sup>44</sup> Cf. statements by then president of the Federal Cartel Office, Wolf, in Ehlermann & Laudati 1998, p. 24.

conclusively formulated exemption clauses. For one, Section 7 is drafted in more precise language than its European counterpart. For example, Section 7 expressly provides for the possibility to exempt agreements 'which contribute to improving the (...) taking back or disposal of goods or services' and fulfil a number of other criteria. This provision was introduced to allow the exemption of certain cartels on environmental grounds.<sup>45</sup> The opinion of the Monopolies Commission (*Monopolkommission*) provides further proof for this view of these changes effected by the Sixth Act.<sup>46</sup> Similarly, the then President of the Federal Cartel Office, Wolf, has referred to this as a *Systemwechsel* or a complete change of the system.<sup>47</sup>

Thus, with the *Enumerationsprinzip* partly done away with, the Federal Cartel Office must now apply a provision that, unlike any other provision that it has to apply, is couched in vague terminology. As a result, a margin of discretion is conferred upon the Federal Cartel Office and this in turn raises fears over an *Instrumentalisierung* of the competition laws. These fears basically follow from the idea that competition must remain effective and may not be subjected to the possibility of politically induced distortions or restrictions. These fears are aptly embodied by statements by the Federal Cartel Office with regard to the European Commission's decision to exempt the *CECED* agreement on energy efficiency.<sup>48</sup> According to the Federal Cartel Office the exemption was granted on environmental grounds. It then stated that:

*'The Federal Cartel Office is sceptical of this policy because it introduces non-competition criteria into the appraisal on the basis of competition law in certain cases.'*

In the view of the Federal Cartel Office, competition law is only about achieving and maintaining competition.<sup>49</sup> An argument often heard in this connection is that competition has no lobby and is thus only protected by competition law. This, it is respectfully submitted, does not recognise that even if it is looked

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<sup>45</sup> Cf. the explanatory memorandum (*Begründung*) to the Sixth Act, BT Drucksache 13/1920, paragraph 2 (ee).

<sup>46</sup> XIIth Main Opinion (*Hauptgutachten*) of the Monopolies Commission. BT Drucksache 13/11291, paragraph 94.

<sup>47</sup> Wolf 1997, p. 2.

<sup>48</sup> Federal Cartel Office, Activity Report (*Tätigkeitsbericht*) 1999/2000, BT Drucksache 14/6300, p. 66.

Translated from: 'Das Bundeskartellamt steht diese Politik skeptisch gegenüber, da sie nicht-wettbewerbliche Kriterien in die Wettbewerbliche Beurteilung von Einzelfällen einführt.'

<sup>49</sup> Cf. the statement by the then President of the Federal Cartel Office, Wolf, in Ehlermann & Laudati 1998, p. 24.

at from a purely economic welfare-oriented perspective, competition is only a means to an end.

The balancing of competition with non-competition objectives is, again according to the Federal Cartel Office, a political decision that needs thus to be taken at the political level. Thus, before Section 7 was included, the possibility of a ministerial exemption according to Section 8 GWB was considered by academia to be the only way to legalize cooperation on environmental grounds.<sup>50</sup> Even though Section 8 has never actually been used on environmental grounds, the fact that the possibility exists, shows that even prior to the amendments by the Sixth Act certain general concerns were considered to override the so-called *Wettbewerbsprinzip*. It may, however, be doubted to what extent the inclusion of Section 8 has actually detracted from the *Enumerationsprinzip* and indeed provides proof of the fact that the *Instrumentalisierung* was already envisaged by the Act itself. The fact that the Federal Cartel Office explicitly placed the process of weighing these concerns outside the context of the normal application of the Act shows that it was considered more a political than a legal appreciation of a competitive situation.

The fact remains that even in the presence of fears surrounding the *instrumentalisierung*, the application of the model of integration does not involve introducing non-competition considerations into the framework of competition law. As was said above, the model of integration requires only that a longer-term perspective on competition is adopted.

### 5.5 The model of integration and its application

In the preceding paragraphs it was shown that there are no legal objections that stand in the way of an application of the model of integration to the competition laws of the EC, Netherlands and Germany. It was concluded that the application of the model of integration is greatly facilitated if environmental protection is one of the objectives of a system of competition law. An environmental objective is, however, not a prerequisite for the application of the model of integration as was shown by the German Act Against Restrictions of Competition.

As far as the competition policy on the basis of the EC Treaty is concerned, it is recognised that the competition rules are only instrumental to the attainment of the objectives listed in Article 2 EC. In the Netherlands, the place of the competition rules and the function that they serve is quite similar. The fact that the maintenance of competition is not the ultimate objective of these systems of competition law will facilitate the application of the model of integration. With

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<sup>50</sup> Cf. Paschke 1997, p. 58, Ehle 1996, p. 119 *et seq.*, Friedrich 1977, p. 201 *et seq.*

regard to German competition law, an application of the model of integration should not be impossible either. Even though the exceptions in the GWB are much more restrictively formulated, the fact remains that the Federal Cartel Office can grant exemptions from the prohibition to restrict competition. One such exemption may be granted for specialisation agreements. Of course the whole idea behind a specialisation agreement is that parties are allowed to swap production in order to produce more efficiently and thus increase welfare while at the same time be able to compete more effectively.<sup>51</sup> If such an agreement is allowed despite the obvious restrictions of competition, the application of the model of integration should be unproblematic as well. This for the simple reason that the model of integration requires only a temporary restriction of competition whereas a specialisation agreement could in theory be exempted and legally restrict competition for as long as the companies will keep on manufacturing the product for which they have decided to specialise. Essentially, the model of integration requires little more than the adoption of a longer-term perspective on competition law.

Ultimately, applying the model of integration will only lead to a more level playing field and the introduction of a new factor with regard to which competition is actually occurring. As a result, competition and the environment will both be better off.

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<sup>51</sup> Cf. the preamble to the relevant group exemption regulation 2658/2000, OJ 2000 L 304/3.

