# Kluwer Competition Law Blog

## Sustainability and Antitrust – A Course Change for the EU?

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A February 4 conference on competition policy and the Green Deal sponsored by the European Commission's (the Commission's) Directorate-General for Competition (DG COMP) highlighted the divergences of opinions among antitrust officials and other stakeholders on how competition policy should support sustainability objectives. DG COMP aims to take a leading role on sustainability issues; its October-November 2020 consultation (the EU Consultation) received almost 200 responses, and DG COMP highlighted sustainability issues in its consultation on revisions to the Commission's antitrust assessment of vertical agreements (the VBER Consultation).

But DG COMP has so far been a sceptic on sustainability issues. The Bundeskartellamt has singled out DG COMP's guidance on the assessment of cooperative agreements as an obstacle to a more flexible antitrust assessment of sustainability agreements, agreements to promote sustainability objectives. The EU Consultation observed that "Competition policy is not in the lead when it comes to fighting climate change and protecting the environment. There are better, much more effective ways, such as regulation and taxation." The consultation noted that competition policy "can complement regulation and the question is how it could do that most effectively." DG COMP has offered no concrete suggestions on potential policy changes and did not participate in a December 2020 OECD roundtable on sustainability and competition (the OECD Roundtable).

The EU Consultation and OECD Roundtable offer a unique opportunity to compare antitrust authorities' views on the role of competition policy in promoting sustainability. Not surprisingly, there is widespread agreement on key points: the importance of sustainability objectives; the central role of regulatory and tax policy; the fact that many sustainability agreements raise no antitrust concerns; and the fact that traditional antitrust policy contributes to sustainability objectives by fostering competition, including innovation competition.

But the consensus on these basic principles obscures important differences as to whether changes are required in EU antitrust policy. These divergences in turn reflect different philosophies on the power of regulation alone to achieve sustainability objectives and the potential for private companies to contribute. Following the EU Consultation and conference, DG COMP faces important policy choices whose implications will play out in various workstreams, notably in the new block exemptions

on vertical and horizontal agreements and related guidelines, but also in merger control, abuse of dominance and State aid policies.

## Advocates, Skeptics and Technocrats

As noted, DG COMP has so far been a sceptic when it comes to taking sustainability benefits expressly into account in antitrust enforcement. DG COMP is not alone. The German OECD submission concludes that, "Where the goals of protecting competition and pursuing public interests come into conflict, it is primarily the task of the democratically elected lawmaker to strike a balance between the opposing interests" (para. 90). Several responses to the EU Consultation took a similar approach, including Austria's ("it is very doubtful whether efficiency gains also encompass a more sustainable production"); Czechia's ("the aim of the competition policy is to protect, promote and develop competition. . . There should be an exclusion of any regulatory measures following different aims"); France's ("although the environmental challenges may indeed be huge, they cannot guide the action of a competition authority, as the latter is only competent in the field of competition policy"); and Sweden's ("the beneficial effects that the limiting of negative externalities could have do not necessarily lead to benefits for the consumers of the goods and services in question, which is at the heart of the consumer welfare standard").

Other European authorities take very different approaches. At the far end of the spectrum is the Hellenic Competition Commission (the HCC), which advocates potentially far-reaching policy changes to promote sustainability goals across all areas of competition policy. The HCC's OECD submission noted that "In the face of a 'climate emergency' . . ., it is important to equip all public policies with the tools to accommodate and enhance sustainability initiatives from both the public and the private sector. . . [A] regulatory public intervention approach for the Green transition at the EU level may not be possible for political reasons, and the policy space that each national government has depends on a number of factors, in particular budgetary space.. . . Competition authorities should have a role in facilitating this transition to a Green economy. . . . they should make efforts to enforce competition law in a way that does not jeopardise private and public sustainability strategies" (paras. 51, 56 and 58-59). Another sustainability advocate is Spain, whose response to the EU Consultation noted that "competition policy can play a more active role in promoting sustainability. . . The CNMC plans to introduce sustainability objectives as one of the cornerstones of its new multi-annual Strategic Plan. .. the best way to end the current legal uncertainty would be by incorporating a specific regulation of such agreements into a Block exemption regulation".

Yet other authorities take a more technocratic approach. The Dutch Autoriteit Consument & Markt (ACM) submission to the OECD concludes, "Obviously, competition policy has only a modest role to play in reaching the world's sustainability goals. But, according to the ACM, at the very least, competition authorities could have an open mind when looking into private initiatives leading to agreements contributing to a more sustainable world. By giving clarity on how competition rules relate to horizontal sustainability agreements authorities could show that competition

and sustainability go hand in hand" (para. 23). Indeed, the ACM's draft guidelines (the ACM Guidelines) on the assessment of sustainability agreements provide the most complete and authoritative guidance so far on the application of traditional antitrust principles to sustainability benefits in horizontal cooperation agreements.

Based on their responses to the EU Consultation, other sustainability "technocrats" include Finland ("future benefits to consumers should appropriately be considered in the analysis. . .The timeline to assess efficiencies should also be reconsidered"), Ireland ("One option is to include sustainability agreements in the Horizontal Guidelines with detailed guidance"), and Poland ("the current competition framework should only be adjusted, instead of being radically changed in the light of Green Deal"), and Romania ("given that the field of sustainability agreements is relatively new, it raises a number of questions, . . .we consider important that the general lines might be laid down in a new legal initiative").

## Cooperative Agreements

There is broad agreement that many such agreements raise no antitrust issues, in particular when the agreements are non-binding. The EU Consultation notes, for example, that standards agreements going beyond the legal minimum can be beneficial provided that the companies put in place safeguards to ensure that standards are applied in a transparent and non-discriminatory manner accessible to all interested companies, and not allow for exchange of commercially sensitive information.

Examples from the ACM Guidelines include (i) non-binding agreements where individual undertakings determine their own contributions and the way in which they wish to realize them; (ii) codes of conduct promoting environmentally or climate-conscious practices, provided the participation criteria are transparent, access is granted on the basis of reasonable and non-discriminatory criteria, and it is possible to have alternative standards or certification labels of equal standing and to sell products that fall outside of such codes; (iii) agreements aimed at removing less sustainable products from the market, provided these do not appreciably affect price and/or product diversity; and (iv) agreements whose sole purpose is to help respect local law, provided they are not unnecessarily restrictive and do not involve sharing of competitively sensitive information.

Authorities' approaches begin to diverge in the treatment of sustainability benefits in agreements that would otherwise be considered restrictive. As mentioned, the EU Consultation offers no concrete suggestions in this respect. Rather, the Commission asked – somewhat defensively — for examples of desirable cooperation that could not be implemented due to EU antitrust risks and an explanation of why cooperation rather than competition between firms would lead to greener outcomes. Similarly, the VBER Consultation asked for input on the role of sustainability objectives in the assessment of agreements between suppliers and resellers, but (in contrast to the rest of the consultation) offered no concrete examples or policy options.

By contrast, sustainability advocates and technocrats propose a range of policy options. At the OECD Roundtable, advocate Greece argued that the application of Article 101(1) TFEU involves an "intuitive balancing test" that "may be conceived broadly enough to encompass sustainability concerns" (para. 30). Greece argues that agreements that would otherwise be restrictive may fall outside Article 101(1) TFEU in the sustainability context if they are ancillary or objectively necessary to a sustainability objective (para. 28) or if they are structured as standardization agreements (para. 29). Skeptic Germany examined these arguments in greater detail but was unconvinced (paras. 26-39).

Where an agreement is caught by Article 101(1) TFEU, all observers agree that sustainability agreements can in principle qualify for exemption under Article 101(3) TFEU. But differences emerge in how authorities understand the application of the four criteria of Article 101(3) TFEU: the agreement (i) contributes to improving the production or distribution of goods or to promoting technical or economic progress, (ii) while allowing consumers a fair share of the resulting benefits, without (iii) imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or (iv) affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. In the sustainability context, the debate mainly focuses on the second condition, that consumers receive a fair share of the benefits.

Which consumers, and which benefits? Greece argues that "it should not be necessary for the group of customers affected by the restriction and that group benefitting from the efficiency gains to be substantially the same as long as they at least overlap" (para. 35) and that the relevant consumers include future consumers as well as present customers (para. 36).

Although Germany agrees that sustainability benefits may qualify as efficiency gains for purposes of the first Article 101(3) TFEU criterion, it notes that such gains must be valued and observes that "it may be challenging for legal practitioners to assess the value of improvements relating to public interests" (para. 45). Germany devotes relatively less attention to the "benefit to consumers" test, arguing that the groups of consumers affected by the restriction and benefitting from the gains must be substantially the same and future benefits must be discounted (para. 57). Worse, to the extent sustainability benefits are "not fully reflected in the material form of the relevant product" they represent "public interest objectives" that are "externalities" that may not qualify as benefits at all (paras. 57-58).

Germany concludes that "The condition of allowing consumers a fair share of the benefit is likely to greatly limit the extent to which general welfare advantages can be taken into account since they often benefit not only the consumers on the relevant market but mainly society as a whole" (para. 60). On the other hand, Germany recognizes that its arguments largely draw on Commission guidance, not Article 101(3) TFEU itself or European court precedents. National competition authorities could interpret Article 101(3) TFEU requirements in a more flexible manner if they wish (para. 58).

Indeed, technocrat the Netherlands does exactly that. The Dutch submission agrees

that "A traditional fair-share-to-consumers condition . . . would not work well . . . where the main resulting benefits are not confined to the consumers of the products in question. . . .Therefore, a new feature of the ACM sustainability guidelines is the way in which the benefits of agreements reducing environmental damage are weighed against the disadvantages, the trade-off is different: the benefits for society as a whole must be equal to or greater than the disadvantages for users. . . . A qualitative assessment of the fair-share-to-consumers condition can suffice in some cases. For example, when it is obvious that the total benefits are much larger than the costs. The fair-share assessment of most environmental damage agreements, however, is expected to be quantitative, for example through environmental cost-benefit analyses that make use of shadow prices to monetize reductions of emissions of environmentally damaging substances" (paras. 16-17 and 19). The ACM Guidelines discuss these issues in considerable detail, clarifying how the ACM intends to apply Article 101(3) TFEU (and Dutch law) to sustainability agreements (paras. 24 et seq.).

Continuing in this practical vein, the Netherlands calls on competition authorities to publish general guidance on agreements that will not be considered restrictive and the conditions on which restrictive agreements may be allowed. The Netherlands also supports giving individual guidance on a case-by-case basis. In the ACM Guidelines, the ACM commits not to impose fines where an agreement has been made public, and the ACM's guidelines have been followed in good faith as much as possible, even if the agreement later turns out to violate Dutch competition law.

**Merger Review**

The antitrust assessment of sustainability concerns has received much less attention in the merger review context. The EU Consultation notes the elimination of pressure between firms to innovate on sustainability where consumer preferences for environmentally friendly and sustainable products are an important competitive factor that would be relevant in EU merger review. The Commission asked for input on situations when a merger between firms could harm consumers by reducing their choice of environmentally friendly products and/or technologies and ways merger enforcement could better contribute to Green Deal objectives. The Commission, therefore, focuses on possible sustainability harms. Surprisingly, the EU Consultation does not address the question of how sustainability benefits can be included in the assessment of efficiency benefits that may counterbalance competitive harms and lead to approval of otherwise anti-competitive mergers.

In its OECD submission, Greece observes that there are at least four ways to address sustainability issues in the EU merger review context:

- sustainability benefits can be considered as potential efficiencies;
- negative externalities can be taken into account in the remedy context;
- national authorities may have the power to object to mergers on sustainability grounds even if the Commission has approved them under the EU Merger Regulation; and
- sustainability considerations may be considered as part of a transaction's effect on

innovation competition (paras. 47-50).

Germany's discussion of sustainability in this context seems to assume that sustainability is a "public interest" and that "it could hardly be justified to take into account non-competition related interests opposing the clearance of a merger project in the scope of the competition authority's merger assessment" (para 88).

Neither the Dutch OECD submission nor the ACM Guidelines discuss sustainability considerations in the merger control context.

**Unilateral Conduct by Dominant Companies**

Sustainability issues have received even less attention in the abuse-of-dominance context than in the merger control context. None of the EU Consultation or the German or Dutch submissions for the OECD roundtable separately address this area.

By contrast, Greece discusses ways in which sustainability considerations can apply in the abuse-of-dominance context as either a shield or a sword. Greece notes that sustainability considerations could justify otherwise illegal foreclosure on the basis of efficiencies or objective necessity, or more broadly based on the Article 11 TFEU requirement that environmental protection is integrated into all EU policies (paras. 42-43).

Greece also suggests that Article 102 TFEU could be used as a sword, based on case law indicating that restrictions of competition that also impact regulatory objectives may amount to an abuse of dominance. Similarly, a broader interpretation of the Article 102 TFEU prohibition of "unfair purchase or selling prices or other unfair trading conditions" could encompass practices with negative sustainability impacts, such as dominant buyers paying excessively low purchase prices for inputs.

**State aid**

Perhaps not surprisingly, the EU Consultation focused first on State aid control, which is an exclusive Commission competence under EU law, while this area is not discussed in the German, Greek or Dutch OECD submissions.

The EU Consultation notes that many public investments for environmental projects have been approved under EU State aid rules and that these are already being updated to help public authorities contribute to the transition to a green economy. The Commission asked for additional input on changes needed in the State aid rulebook, such as lowering the levels of State aid or approving fewer State aid measures for activities with a negative environmental impact, or building mitigating measures into aid approvals for such projects.

Alternatively, the Commission asked whether the EU should allow more State aid to support environmental objectives, for example by allowing aid on easier terms for

environmentally beneficial projects than for comparable projects which do not bring the same benefits ("green bonus"). If so, how should this green bonus, and environmental benefits more generally, be defined?

## Conclusion

Although promoting sustainability is a top EU priority, DG COMP has so far seemed sceptical that any competition policy changes are required, with the possible exception of State aid review. In other areas, the premise of DG COMP and other sceptics seems to be that sustainability objectives should be set by legislation and enforced by regulators. In this view, DG COMP contributes by enforcing robust competition among private companies, including innovation competition, but should not facilitate private agreements that may go beyond legal sustainability requirements.

Underlying these sceptics' views is a high degree of confidence in the ability of legislators and regulators to agree on and enforce high sustainability standards, on the one hand, and suspicion that any cooperation among private companies to go beyond those standards represents "self-regulation" or, worse, "greenwashing," on the other. Sustainability advocates like Greece and Spain stress the risk of political failure and budget limitations. Is it a coincidence that the authorities with the greatest confidence in the power of regulation tend to come from Northern Europe, while the greatest advocates of a more sustainable competition policy are Southern European?

Which camp is right about the power of regulation remains to be seen. Meanwhile, however, refusing to countenance well-documented sustainability benefits that can be achieved by the private sector seems short-sighted. The ACM has demonstrated that a rigorous analysis of consumer benefits from sustainability agreements, combined with a willingness to consult informally and provide guidance to business, can lead to significant changes compared to DG COMP's past practice. But sustainability is a global issue, and the ACM's creativity will not be enough on its own.

Following its conference and consultation, the Commission has an opportunity to take a more proactive approach to promote sustainability through EU competition policy, not only through State aid policy but also in the assessment of cooperative agreements, both horizontal (like the ACM) and vertical. DG COMP's ongoing review of its vertical and horizontal block exemptions are a perfect framework for this exercise. But DG COMP should not stop there; similar issues arise in merger control and abuses of dominant positions. DG COMP could expand the previously announced 2021 review of merger control policy to include the assessment of sustainability benefits in the merger control context, which should be aligned with the revised guidance on horizontal and non-horizontal merger assessment.

Still, finalizing new formal block exemptions, guidelines and notices take time. Meanwhile, the Commission would do well to follow the ACM's advice to provide informal guidance on a case-by-case basis and to adapt its enforcement policies

accordingly. There's no time to waste.

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This entry was posted on Monday, February 15th, 2021 at 9:20 pm and is filed under Anticompetitive agreements, Competition policy, European Commission, European Union, Germany, Greece, Green Deal, Merger control, Netherlands, OECD, State aid, Sustainability
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