

## Sustainability and EU competition law

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'All of Europe's policies — including competition policy — will have their role to play in helping [Europe's move towards sustainability][...]to succeed, everyone in Europe will have to play their part — every individual, every business, every public authority. And that includes competition enforcers'

Margrethe Vestager

The European Commission (Commission) has launched an ambitious roadmap – the European Green Deal – intended to make Europe the first climate-neutral continent. While the Commission views EU competition law as part of the solution, it has struck a cautious note. Launching a recent call for contributions on competition policy, the Commission stated 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.*'

*References:*

*Commission's call for contributions*

Not all share this view, however. Other proponents argue that competition law should be in the vanguard. This article summarises the ongoing debate around the use of competition law to promote sustainable business practices.

### The discussion to date—four key themes

Despite the Commission's caution, sections of the business community have advocated strongly in favour of competition law playing a greater role to facilitate collaboration on sustainability matters. 189 stakeholders contributed views on the Commission's Directorate General for Competition (DG COMP) call for contributions. Many of the submissions are rich with illustrative examples of how competition law has discouraged environmentally beneficial business practices.

Unilever, for instance, submitted a paper to the Commission setting out diverse practical examples of cooperation between businesses on sustainability issues – collective work on labour laws to protect farm workers, deforestation legislation or industry commitments to use safer plastics materials – which companies may have been reluctant to advance for fear of infringing competition laws.

*References:*

*Unilever's submission to the Commission*

As the anecdotal evidence has grown, policymakers, competition lawyers, and economists have explored how competition law and policy could or should be reshaped to facilitate the transition towards greener commercial practices. The discussion has coalesced around four principal questions.

*References:*

*Simon Holmes, "Climate change, sustainability, and competition law", Journal of Antitrust Enforcement, Volume 8, Issue 2, 2020*

*Jordan Ellison, "A Fair Share: Time for the Carbon Defence?", 2020*

*Suzanne Kingston, "Competition Law in an Environmental Crisis", Journal of European Competition Law & Practice, Volume 10, Number 9, 2019*

*Maurits Dolmans, "Sustainable competition policy", Competition Law and Policy Debate, Volume 6, Issue 1, 2020*

*Michael Ristaniemi and Maria Wasastjerna, "Sustainability and competition: unlocking the potential", Concurrences N°4-2020*

## **Is there a legal basis for using competition law to promote environmentally sustainable business practices?**

The first area of discussion has centred around whether there is an adequate legal basis for using EU competition law to promote environmentally sustainable ends.

A number of antitrust regimes worldwide endow the relevant competition authority with the ability to take into account public interest concerns, outside 'pure' considerations of economic efficiency. For example, in South Africa, the Competition Act requires the Competition Commission or Tribunal (as applicable) to consider the effect that a reportable concentration will have on, inter alia, employment, black economic empowerment, or the ability of national industries to compete internationally. The public interest test operates distinctly from the competition test but necessarily bears on the outcome of the competition analysis.

Article 21(4) of the EU Merger Regulation allows EU Member States to take appropriate measures to protect legitimate non-competition interests (ie public security, media plurality, and prudential supervision). In addition, several national competition regimes across the EU permit the consideration of public interest considerations in exceptional circumstances. However, EU competition law does not entail a public interest analysis as a matter of course. The question has arisen whether the EU Treaties provide an adequate legal basis to use competition law to promote environmentally sustainable business practices.

Simon Holmes has argued that such a legal basis does exist, focusing on Articles 3(1)(3) and (5) TEU and Articles 7, 9 and 11 TFEU. In particular, he argues that Article 11 TFEU requires that "[e]nvironmental protection requirements" be 'integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development' without limitation as to policy area. Thus, in Holmes' view, the Commission and Courts must take into account environmental protection when applying all provisions on competition law (see Protocol (No 27) on the internal market and competition; however, this should not be overestimated since non-distorted competition is also mentioned in other Treaty provisions such as Article 119 TFEU).

References:

Simon Holmes, "Climate change, sustainability, and competition law", *Journal of Antitrust Enforcement*, Volume 8, Issue 2, 2020

## **Is sustainability primarily a concern for the rules on horizontal agreements?**

The large majority of third party contributions to the Commission's consultation – and most of the academic writing to date – has focused on the use of Article 101 TFEU (or national equivalents) to promote sustainable business practices.

By comparison, the Commission's consultation paper is cautious in extending the discussion of reform to the rules on dominance and merger control. The Commission's consultation paper refers to Article 102 TFEU only briefly, with illustrative examples of how the rules on abuse of dominance could 'contribute to the Green Deal objectives' by prohibiting 'restrictions in the development or roll-out of clean technologies or foreclosing access to essential infrastructure, such as [for] the roll-out of off-shore wind parks and other renewable energy sources'. "Enforcement action relating to transport" is also mentioned.

There are other examples in the EU's decisional practice of Article 102 TFEU investigations considering commercial practices relevant to the circular economy, or technical development to meet higher environmental standards.

References:

Case C-385/07 *Der Grüne Punkt - Duales System Deutschland GmbH v Commission*

Case AT.39822 *Refrigerants*

Marios C. Iacovides & Christos Vrettos "Falling Through the Cracks no More? Article 102 TFEU and Sustainability I – the Nexus Between Dominance, Environmental Degradation, and Social Injustice", *Faculty of Law, Stockholm University Research Paper No. 79*

Similarly, while the EU Merger Regulation does not envisage the pursuit of public interest concerns, the analysis of qualifying transactions remains anchored in the fundamental objectives of the Treaty, including Article 11 TFEU.

References:

There has nevertheless been relatively little consideration of whether sustainability considerations should become a routine part of the merger control analysis. The Commission's consultation instead focuses on the role of merger control in maintaining and promoting innovation, with potential '*sustainability or environmental improvements*'.

It remains to be seen whether competition policy reform in this area will stay focused on cooperative agreements or evolve to encompass all areas of the Commission's enforcement toolkit.

**Does Article 101 TFEU enable the promotion of environmentally sustainable business practices and if not, what reforms would be needed to permit this?**

Within the area of cooperative agreements, the primary focus to date has been on the application of Article 101(3) TFEU, ie whether the legal exception could serve to disapply the prohibition on restrictive agreements in respect of business collaboration on environmentally sustainable initiatives. In particular, since environmental benefits are diffuse by nature, it has been argued that the requirement under Article 101(3) TFEU for a restrictive agreement to allow '*consumers a fair share of the resulting benefit*' may not provide sufficient room to consider benefits to society at large.

Yet there is some support in the decisional practice for a more expansive reading of Article 101(3) TFEU. In *CECED*, the Commission considered an agreement between members of a trade association comprising manufacturers of domestic appliances. CECED notified to the Commission an agreement regarding domestic washing machines according to which the parties agreed to gradually cease producing and importing into the EU the least energy-efficient machines, as identified in the Directive on energy labelling of household washing machines. Having identified initial competition concerns arising from reduced product availability and increased production costs, the Commission gave careful consideration to environmental issues under Article 101(3) TFEU:

References:

Case AT.36718 *CECED*

- First, when assessing whether the agreement '*contributes to improving the production or distribution of goods or to promoting technical or economic progress*', the Commission observed that '*reduced electricity consumption indirectly leads to reduced pollution from electricity generations*'. In other words, having the same number of washing machines on the market, benefiting from the same service, but creating less indirect pollution, is more economically efficient.

References:

Case AT.36718 *CECED*, para 48

- Second, when assessing whether the agreement allowed '*consumers a fair share of the resulting benefit*', the Commission analysed both individual and collective benefits. Moreover, the Commission took account of potential hypothetical future benefits from more efficient technology, and observed that more efficient washing machines allow for savings on electricity bills and contemplated the hypothetical future benefits of more efficient washing machines that might become available in the future.
- Moreover, the Commission considered the possible trade-off of collective and individual benefits for consumers, noting that the reduction of harmful carbon dioxide and sulphur dioxide emissions '*appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines*'. Such benefits might adequately allow consumers a fair share of the benefits, '*even if no benefits accrue to individual purchasers of machines*'.

References:

Case AT.36718 *CECED*, para 56

However, stakeholder responses to the Commission's consultation suggest that two decades on, *CECED* has not provided sufficient encouragement or predictability for businesses to engage in sustainability initiatives with peers.

The question therefore arises whether bespoke reform or soft guidance is necessary or desirable to provide clarity. The Dutch Competition Authority (ACM) has published revised draft guidance for the assessment of cooperative agreements that envisages formalising the extension of Article 101(3) TFEU to consider indirect consumers. For example, an agreement reducing environmental damage will generate an efficiency gain, not just for the users of the product in question but also society as a whole. The ACM *'believes that, with regard to such collaborations, a different interpretation than usual can be used for the requirement that the users are allowed a fair share of the benefits of an agreement'*. Accordingly, the parties should be able to demonstrate more easily that the benefits of the agreement outweigh its disadvantages. The ACM is an important voice in the discussion, with a longstanding interest in reform of national competition law to promote environmental sustainability.

References:

*ACM draft guidelines on sustainability agreements opportunities within competition law*

More ambitiously, some commentators have proposed a bespoke 'carbon defence' that would enable competitors to justify an *'agreement [that] resulted in higher prices for consumers (for example, because reducing emissions is likely to result in higher production costs)'* where the *'price rise is less than the economic saving to society achieved by the emissions reduction'*.

References:

*Ellison, Jordan, A Fair Share: Time for the Carbon Defence? (21 February 2020)*

### **Consumer welfare, dynamic effects, and the economic underpinning for reform**

While legal analysis of the interplay between EU competition law and sustainability has advanced relatively quickly, a shortage of quantitative work remains. Environmental economics is a well-developed discipline, albeit the pricing of externalities (eg the social cost of pollution, expressed in a certain currency per kilogram of pollutant) may be too unsophisticated to serve as inputs for economic modelling in antitrust analysis.

There is also significant, celebrated economic literature examining how competitors' independent profit maximization can result in depletion of the 'commons'.

References:

*Elinor Ostrom and others, "Revisiting the Commons: Local Lessons, Global Challenges", Science, 9 April 1999, Volume 284, Issue 5412, pages 278-282*

*B. Yandle, "Antitrust and the Commons: Cooperation or Collusion?", The Independent Review, 1998, Volume 3, No. 1, pages 37-52*

*Pierre Régibeau, "Sustainable development and competition law: Towards a Green Growth regulatory osmosis"*

*Hellenic Competition Commission, 28 September 2020, online event: companies should expect EU officials to look at "out-of-market efficiencies" to consider whether mergers that threaten to push up prices might lead to environmental benefits*

However, there is comparatively little modern economic literature by specialist competition economists in the area of sustainability and competition policy.

References:

*Cento Veljanovski, "Collusion as Environmental Protection - An Economic Assessment", 2020*

The economic analysis of such issues is challenging, raising three foundational questions:

- First, whether competition law should apply the established 'consumer welfare' standard or whether a 'total welfare' standard would be more appropriate. The former is generally viewed as more administrable, allowing competition law to focus on variables that are well-understood and valued by consumers, such as price. A total welfare standard, on the other hand, approximates more effectively to social welfare and does not force value judgments between benefits to suppliers versus consumers. As a matter of economics, therefore, a total welfare standard might allow more flexibility to consider, for example, implications of downstream market conduct on smaller producers and the quality and strength of supply chains. But departing from the tried-and-tested consumer welfare standard risks upending decades of precedents. Environmental sustainability is not the only area in which application of the two economic standards could yield different case outcomes.
- Second, whether competition enforcement is unduly weighted towards static (price) effects rather than the analysis of dynamic effects. Appraising sustainability would require competition policymakers to consider the longer-term implications of cooperative agreements, unilateral conduct, and acquisitions. However, for all the discussion of dynamic effects in competition authorities' enforcement practice,

competition enforcement remains largely geared around more easily measurable static (predominantly, price) effects and ‘status quo’ counterfactuals. Again, any shift in emphasis might not be easily contained to competition law cases concerning environmental sustainability.

- Third, the Commission has indicated that ‘*regulation and taxation*’ are ‘*better... more effective ways*’ of pursuing a sustainable environment policy than competition policy. At the same time, the Commission had sought to expand its enforcement toolkit to include a ‘New Competition Tool’ capable of addressing perceived market failures that would have allowed the Commission to bypass certain of the well-established legal and evidentiary requirements of Articles 101 and 102 TFEU. Economists are continuing to assess whether regulations and novel competition tools are necessary or appropriate to address potential market failures that have traditionally been the preserve of the rules on cooperative agreements, unilateral conduct, and/or concentrations.

References:

*Commission page on competition policy contributing to the European Green Deal*

Perhaps recognising this shortfall in evidence, Pierre Régibeau, DG COMP’s Chief Competition Economist, has stated that his unit is already working on techniques for taking non-competition criteria such as environmental benefits into account in its assessment, if it were called to do so in the future.

References:

*Advanced EU Competition Law, Informa Connect, 24 November 2020, online event*

## **The authorities’ response and what’s next in Europe**

The above discussion demonstrates that there is a lively and quickly developing body of literature and analysis on sustainability and competition policy. Further policy developments are likely in the near-term, as the Commission and national competition authorities in Europe advance their work in the following areas.

### European Union

At the EU level, the Commission launched with great flourish its call for contributions on 13 October 2020 with a deadline of 20 November 2020. The Commission has published non-confidential versions of nearly 189 submissions. Alongside reform of the State aid rules, the Commission will likely explore various avenues for reform, including ‘soft’ guidance on the interpretation of Article 101(3) TFEU in the context of sustainability agreements, eg detailing how to interpret ‘customers’, perhaps as part of recast horizontal guidelines. The Commission has also indicated a willingness to consider using ‘comfort letters’, revitalised as an enforcement tool during the first months of the COVID-19 pandemic and extend it to issues of green cooperation. This is a noteworthy change of policy given that, prior to the pandemic, the Commission had not issued a comfort letter in almost two decades, having consistently expressed the view that such letters were no longer part of its enforcement toolkit (during the pandemic, the Commission issued a comfort letter in April 2020 in order to allow coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients).

References:

*Commission page on competition policy contributing to the European Green Deal*

However, at this stage, all signals indicate that reform at the EU level will be cautious. Olivier Guersent, DG COMP’s director general, acknowledged that ‘*maybe there are adjustments to be made*’ and that there is room for greater clarity.

References:

*Sustainable development and competition law: Towards a Green Growth regulatory osmosis, Hellenic Competition Commission, 28 September 2020, online event*

Alexander Winterstein, head of unit at DG COMP overseeing the consultation process on the role of competition policy in support of the Green Deal, confirmed that EU competition rules will see a ‘reboot’ rather than a ‘revolution’.

References:

*Competition policy: burden or support to the EU Green Deal? Politico, 7 December 2020, online event.*

Some DG COMP officials – speaking in their personal capacity – have even questioned whether the debate is anything more than purely theoretical. Hanna Anttilainen, then head of unit responsible for mergers in the energy sector, also declared that regulators should

beware of approving anticompetitive mergers based on non-competition goals such as the protection of the environment.

References:

*Collaboration for sustainability — what of competition law? Mannheimer Swartling, 3 December 2020, online event*

*1st International Mergers Conference, Concurrences and University College London, 19 February 2020*

## The Netherlands

As mentioned above, the ACM is among the most innovative authorities in this field, issuing revised draft guidelines targeting sustainability agreements, the only authority to have done so thus far.

References:

*ACM draft guidelines on sustainability agreements opportunities within competition law*

## Greece

The Greek Competition Authority (HCC) announced a public consultation on how competition law rules might be adapted to promote more sustainable business practices.

The HCC published a Staff Discussion Paper and held a digital conference to launch the consultation. The exploratory proposals outlined a number of novel concepts, including: (i) the creation of a competition law sustainability ‘sandbox’ in which market participants could team up to work on sustainable business projects with some measure of protection from competition rules, and (ii) the establishment of an ‘Advice Unit’ comprising experts from different regulatory authorities who could provide informal advice on sustainability-related initiatives. The proposals also envisage the publication of general guidelines defining the contours of legitimate cooperation between rivals on sustainability projects.

References:

*HCC Staff Discussion Paper*

Following the public consultation, the HCC and ACM published a technical report on competition and sustainability detailing how efficiencies arising from sustainability agreements can be better quantified and taken into account in a competition law assessment.

References:

*HCC and ACM technical report on competition and sustainability*

## United Kingdom

The UK Competition and Markets Authority (CMA) also indicated in its proposed annual plan for 2020/2021 that *‘we have actively engaged with a wide range of stakeholders, including businesses, non-governmental organisations (NGOs) and other competition authorities to develop our understanding of what could prevent businesses and NGOs from engaging in sustainability agreements. As an interim step, we are working on high level materials to help them navigate the existing framework. We are also looking at any substantive issues with the way we currently apply competition law and possible solutions to ensure that competition law does not act as an unnecessary obstacle to sustainability agreements’*.

References:

*CMA proposed 2020/21 annual plan*

The CMA has also published an information document setting out the key points that businesses and trade associations should consider when making sustainability agreements. The document does not go as far as the Dutch guidelines and does not seek to re-interpret the UK competition rules to better accommodate sustainability claims.

References:

*CMA guidance on environmental sustainability agreements and competition law*

## France

In France, eight French regulators, including the French Competition Authority, have published a working paper on their role and tools in the face of climate change.

References:

*Press release on working paper on climate change*

## Conclusion

The Commission’s call for contributions and its conference are important steps towards further EU-level harmonisation of these various initiatives around a set of common principles. It is also consistent with the EU’s broader policy goals.

However, it is noteworthy that not all major global competition authorities appear to share the Commission's enthusiasm for extensive consultation and reflection. By way of example, in its joint submission to the OECD on the issue of sustainability and competition, Australia and New Zealand stated that *'competition law is not the primary policy tool for promoting sustainability in New Zealand or Australia. There are good reasons for this to remain the case. [...] Altering the objectives of competition law to consider sustainability factors would create several issues because competition enforcement interests may not align with sustainability. [...] Additionally, sustainability considerations may raise difficult trade-offs with other community goals, not just competition'*.

References:

*Sustainability and Competition – Note by Australia and New Zealand, OECD, 1 December 2020*

The discussion and debate looks set to continue in the years ahead.



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