



The Green Deal and competition policy

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The EU Green Deal

- **Objectives**

- Climate neutrality by 2050 for the entire economy
- Transformation into a circular economy
- Enhanced biodiversity

- **Means**

- Ambitious legislative package
- Investment Plan (at least €1 trillion)
- Contribution by all EU policies
- Efforts from all segments of the economy

“Our goal is to reconcile the economy with our planet, to reconcile the way we produce and the way we consume with our planet and to make it work for our people”. (President von der Leyen)

“All of Europe’s policies – including competition policy – will have their role to play to get us there” (Executive Vice - President Vestager)

Competition policy & sustainability goals

- The primary goal of competition policy is to promote and protect competitive markets, and hence deliver efficient outcomes
- By contributing to efficient and competitive market outcomes, competition policy reduces the overall social cost of achieving a given environmental target
- Competition policy complements but does not substitute environmental or other EU policies

“Competition policy is by no means the main tool to reach our green goals. There are more direct instruments to make our economy greener – such as environmental regulation, taxation, and green investment” (Executive Vice - President Vestager)

Regulation

- Regulation is the first best solution to internalise potential external effects
- There is already a comprehensive and ambitious legislative framework on climate action in place, by way of example:
 - the EU ETS already covers around 45% of the EU's GHG emissions
 - EU Climate law will turn the political commitment in the Green Deal into binding obligations for the EU institutions and Member States

Can competition policy do more?


- Competition policy already supports the Green Deal objectives but
“...as the Green Deal shifts our ambitions into a higher gear, we need to see if competition policy could do more” (Executive Vice-President Vestager)
- Revision of the Energy and Environmental Aid Guidelines and relevant GBER provisions
- Revision of BERs and guidelines on horizontal and vertical agreements
- Public call for contributions and a public debate on how competition policy can contribute to the European Green Deal
 - around 200 responses, from governments, NCAs, businesses from all sectors of the economy, NGOs, consumer and professional associations, academics, individuals

The antitrust issues

- Are the existing rules an obstacle and/or what scope for improvement?
- Issues addressed by DG Olivier Guersent in his concluding remarks
 - all sectors of the economy concerned
 - competition remains a strong incentive for investment in green technologies
 - examples of sustainability practices raising competition concerns are limited but fears/concerns remain
 - businesses need clear rules and legal certainty
 - how deep and close the cooperation can go (e.g. standard setting, information exchange)
 - what benefits and which beneficiaries to look at under Article 101(3) TFEU
- in what form to provide clarifications and guidance

Follow up

- A report on the learnings from the consultation process and all the input to the debate before the summer
- Feed into on-going reviews
 - vertical and horizontal block exemption regulations and guidelines
 - state aid for energy and the environment
- Opportunities to provide guidance through guidance letters or Article 10 (Reg. 1/2003) decisions



Competition law and environmental
sustainability

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Introduction

NEED FOR A CHANGE, BUT WHAT CHANGE ?

There is consensus that competition law enforcers must « do more » for environment protection and « take their part » in the Green Deal. Controversy starts when it comes to deciding how.

This raises three questions :

1. How is sustainability taken into account under the EU Commission's current analytical framework ?
2. Is it possible to give more weight to sustainability under the current framework ?
3. What else could be done in competition law to help meet the Green Deal objectives ?

Article 101

Sustainability under the current framework

ARTICLE 101

- Competition law is a **tool to fight unsustainable economic activity** (e.g. investigation in emission-cleaning systems for cars, IP/19/2008).
- Environmental initiatives **not necessarily a matter for competition law** :
 - Because they are not carried out by undertakings (*Germany v. Commission*, T-347/09 ; *Porto di Genova*, C-343/95).
 - Because of State compulsion (if no margin let to undertakings).
 - Because restrictions of competition may be balanced with public interest: see e.g. *Wouters* or *Albany* (no precedent in environmental space yet).

Sustainability under the current framework

ARTICLE 101

- Environmental co-operation may simply **not restrict competition**
 - e.g. **standardization agreements** meeting certain requirements (§ 280 Horizontal Guidelines)
 - Certain forms of **patent pools**
 - Agreements not affecting consumers' **purchasing criteria** (CEMEP, IP/00/508 : reduction of power consumption of low voltage electric motors).
 - Setting **environmental targets** whilst leaving parties free as to the means to achieve them (COMP/37.231 ACEA, 37.634 JAMA, 37.612 KAMA, CEMEP).
 - COMP/34.493, DSD (Grüne Punkte) : commitment decision on a countrywide system for the **collection and recovery of sales packaging**
 - EUCAR (IV/35.742) : joint **research programme** with a sustainability component.

Sustainability under the current framework

ARTICLE 101

- Not surprisingly, [Article 101 \(3\)](#) is a more complex issue.
- Guidelines on Art. 101 (3) : *"Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81(3)"* (§42).
- Positive environmental effects can be source of direct efficiencies under §3 :
 - CECED (IV/F.1./36.718) : agreement to cease production/import of least energy-efficient washing machines. *"Washing machines which, other factors being constant, consume less electricity are objectively more technically efficient"* (§ 48).
 - EACEM (IP/98/346) : agreement to limit [power consumption](#) of TVs and VCRs in "stand by" mode.
 - Exxon/Shell (VI/33.640) : joint production of linear low density polyethylene : *« This would result in a reduction of customers' use of raw materials, their costs and the volume of plastic wastes"* (§ 67).

Sustainability under the current framework

ARTICLE 101

- Wider environmental benefits are sometimes referred to...
 - Exxon/Shell : « (...) *the reduction in the use of raw materials and of plastic waste and the avoidance of environmental risks involved in the transport of ethylene will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern*” (§71).
 - CECED : “*CECED estimates the pollution avoided at 3,5 million tons of carbon dioxide, 17 000 tons of sulphur dioxide and 6 000 tons of nitrous oxide per year in 2010, working on the basis of average emission values. Although such emissions are more efficiently tackled at the stage of electricity generation, the agreement is likely to deliver both individual and collective benefits for users and consumers*”.
 - Philip/Osram (IV/34.252) : “*The use of cleaner facilities will result in less air pollution, and consequently in direct and indirect benefits for consumers from reduced negative externalities*” (§27).
- ... but no precedent where such benefits prevailed where the agreement did not bring about any direct efficiencies.

Sustainability under the current framework

ARTICLE 101

- Is sticking to direct consumer benefits **detrimental to sustainability agreements** ?
- Dutch *Chicken for Tomorrow* case (2015)
 - Suppliers/retailers agreement to improve living standards of chicken and to replace « traditional » chicken by more sustainable – and expensive – ones in the shelves.
 - NMA : thorough assessment of how consumers would value the initiative, as compared to its additional costs.
 - Initiative held anti-competitive because valuation < costs
- A wider conception of consumer benefits may have resulted in a different outcome -> how to give more weight to sustainability without changing current framework ?

Giving more weight to sustainability

ARTICLE 101

- What about defining “by object” externalities ?
 - Standard externalities which, given their magnitude and based on experience, economic theory, national or international standards, necessarily result in direct consumer benefits
 - E.g. drastic reduction of parties’ carbon emissions ; energy or water consumption, etc.
 - Would also play in the absence of more classical forms of direct consumer benefits.

Giving more weight to sustainability

ARTICLE 101

- Illustration : Dutch Deal over closing down of coal power plants (2013)
 - Agreement between energy supplier for the early closing down of coal power plants. Would have resulted in increasing cost of electricity for consumers.
 - NMA balanced this with the reduction of CO2 emissions.
 - In this case, reduction was not significant enough to offset the price increase : *"In the current proposal, this claim is cancelled out by the fact that these emission rights can be used elsewhere on the European market for CO2 emission rights. Emissions are thus not reduced but are merely transferred elsewhere"* (NMA press release).

Giving more weight to sustainability

ARTICLE 101

- Another area of improvement may consist to develop new measurement methods for consumer preference in view of enlarging the components of consumer welfare
 - Surveys may go beyond measuring consumer's immediate preference for lower prices.
- See also NMA's draft Guidelines on Sustainability agreements. Hellenic Competition Commission and CMA have also made proposals.

What else can be done ?

CHANGE CURRENT ANALYTICAL FRAMEWORK ?

Pros	Cons
Sustainability as a goal of the Union (Art 3 TUE, Art. 11 TFEU, Art. 37 EU Charter on Fund. Rights) that competition policy must integrate.	If other goals of the Union should be included in the competitive assessment, why limit them to sustainability ? Risk is to dilute, hence lessen efficiency of competition law enforcement
Concept of consumer welfare not included in competition rules, should be possible to adapt it without changing rules	Competition authorities are not well placed to deal with sustainability. Neither are undertakings which have to self-assess their co-operations.
Some positive (environmental) externalities may be quantified (see the Dutch coal case) They do not necessarily have to be quantified (see CECED)	Environmental externalities impossible to quantify accurately ; when quantified, impossible to be precisely weighted against competitive restraints (even worse if not quantified)
Climate emergency	Regulation more efficient than competition policy to deal with sustainability

What else can be done ?

CHANGE CURRENT ANALYTICAL FRAMEWORK ?

- Change would be needed in case there would be a **conflict** between competition law and sustainability goals :
 - Does competition law prevent undertakings from being more sustainable ?
 - Would undertakings be actually more eco-friendly if competition rules were relaxed ?
 - Does competition law facilitate unsustainable conducts/mergers ?
- OECD Discussion Paper, Sustainability and Competition (2020) : **lack of economic evidence of how competition interacts with sustainability.**
- No clear evidence of conflict in decisional practice (e.g. has NMA explored all possibilities offered by competition law in Chicken of tomorrow ?)

What else can be done ?

MORE TRANSPARENCY AND GUIDANCE UNDER 101

- The concerns expressed by stakeholders rather pertain to a **lack of transparency or guidance**, especially under 101 and the self-assessment mechanism.
- To be efficient, sustainability initiatives must rely on co-operation :
 - Put sufficient means in common to achieve the goals
 - Overcome the “first mover” disadvantage.
- “Competition threat” liable to deter collective initiatives.
- Competition authority may be reluctant to incentivize undertakings as there are precedents where environmental initiatives were used to structure cartel activities (See *Consumer Detergents*, COMP/39579)
- **More transparency/guidance** may help to overcome this

What else can be done ?

MORE TRANSPARENCY AND GUIDANCE UNDER 101

- There are many types of eco-friendly cooperations which would deserve **more guidance** hence **legal certainty** (see AFEC's response to Commission's call for contributions) :
 - Information exchange.
 - Certification agreements.
 - Competition functioning of markets for CO2 emission allowances.
 - Exclusive rights granted by Member States to eco-organisms.
 - Standardisation agreements.
 - Joint purchase schemes intended to ensure procurement of more sustainable raw materials.

What else can be done ?

MORE TRANSPARENCY AND GUIDANCE UNDER 101

- The need for more **certainty** may be addressed in a number of ways:
 - Comfort letters
 - Safe harbours
 - Guidelines
 - « Greener » horizontal package
 - Environmental guidelines ?
 - Regulatory sandboxes (see by analogy Medicines for Europe, 08/04/20)
- Art. 10 of Regulation 1/2003.
- Enhancing regulators' capacity to grasp sustainability issues e.g. through co-operation with other regulators.

Merger control

Sustainability under the current framework

MERGER CONTROL

- Very little economic literature on environmental impact of mergers. No clear cut correlation between concentration and more (or less) environmental efficiency.
- Bayer/Monsanto (M.8084) : "(...) *the Merger Regulation does **not** empower the Commission to intervene against a merger on grounds **other than the protection of competition***" (§3017).
- Environmental benefits **may translate into technical or economic progress** to the benefit of consumers, in accordance with Article 2 (1) (b) of Regulation 139/2004.
- Otherwise, **difficult to measure environmental efficiency** (or inefficiency) of a merger. Even more difficult to balance them with consumer welfare.
- Clearly **not in the spirit** of the EU merger control to engage in such an assessment.

Giving more weight to sustainability

MERGER CONTROL

- **Improve understanding** of environmental policies and their economic impact (proposed by Greek competition authority).
- Include elements on sustainability in **guidance** on the submission of economic studies.
- Proactive approach of **remedies** : may provide opportunities to develop more sustainable practices

What else can be done ?

MERGER CONTROL

- Recourse to [Article 21](#) by Member States in order to e.g. prohibit a merger damaging the environment.
- Carry out an [environmental assessment](#) (by a specialist body) in parallel to a competitive assessment, which results would be factored in the decision (e.g. to negotiate commitments) ?
- Additional, more “political” layer of merger control as it is the case in France, Germany or Spain ? Would raise many questions. AFEC does not support this.

CONCLUSION

- There are precedents showing that the Commission may use current analytical tools to include sustainability in its competition law assessment
- A more proactive approach is possible without changing the current framework
- To achieve this in the context of their self-assessment under 101, undertakings need guidance.

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