**Competition Law Solutions for the Planet: EU competition policy should foster sustainability initiatives, not hinder them**

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On September 23 world leaders from politics and business, as well as a famous teenage activist from Sweden, gathered in New York for the 2019 UN Climate Action Summit. Their message was stark: the world is running out of time, urgent action to limit climate change is needed.

The thrust of that message is that “business as usual” is not a viable method of solving the crisis, and a rapid push toward sustainable development is required. Such a push will require greater cooperation between companies, which in turn raises the question whether EU competition law is fit for this purpose.

Article 11 of the Treaty for the Functioning of the European Union (‘TFEU’) states that “environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development”. The EU has also committed to implementing the UN’s 2030 Sustainable Development Goals (‘SDGs’) by weaving them into the Commission’s priorities.

However, the implementation of sustainability initiatives by EU businesses can give rise to potential antitrust concerns. These range from the more obvious pitfalls of state aid and cooperation among competitors, to vertical integration issues and even potential abuse of market power. The EU legal framework in this area is a piecemeal of precedents, Commission guidelines and individual exemptions that have been adopted over time, with little coherence either as a framework or as a policy statement.

A much more holistic approach to environmental and sustainability issues, spanning all aspects of EU competition law, is therefore urgently required to boost European efforts to address the climate crisis. Mere tweaks around the edges to existing regulations and guidelines risk perpetuating the status quo, which has a chilling effect on urgently required initiatives.

As suggested by the EU’s own SDGs platform, the Commission should issue overarching guidelines to clarify when private sector players (and sometimes state actors) can come together to collectively agree on increasing sustainability without breaching competition law.

EU competition policy’s primary focus on price, efficiency and consumer welfare tends to ignore concerns that are more extraneous to the relevant market. In fact, European antitrust assesses environmental issues in strict economic terms through an analysis of their costs and benefits to market competition. This approach can lead regulators to ignore the environmentally harmful effects of pro-competitive conduct, and instead focus on preventing anti-competitive conduct even if it has environmentally helpful effects.

When it comes to sustainability cooperation among competitors, EU law may have unintended consequences through the operation of the provision on anticompetitive agreements contained in Article 101 TFEU. When the Commission issued the current Horizontal Guidelines in 2011, it dispensed with the chapter on environmental agreements contained in the previous version. Instead, the current guidance simply states that environmental agreements are to be assessed from the point of view of any competition issue they give rise to. This approach negates the urgency of the climate crisis and the need for a single approach in assessing sustainability initiatives. It would also seem to attach insufficient attention to the EU’s environmental obligations under Article 11 TFEU.

Clearly, horizontal agreements are not always beneficial to the environment. As far as standardisation agreements are concerned, the Commission has provided guidance for the application of the Article 101(3) TFEU exemption on pro-sustainability grounds. In fact, the Horizontal Guidelines expressly mention non-economic and environmental concerns. However, such agreements can still be found anticompetitive, regardless of the pro-sustainability intention of the parties.  The devolved nature of EU competition law, which include national competition authorities and the Courts increases that risk.

Other types of sustainability agreements between competitors have historically been caught by the prohibition, and their assessment under the exemption is even more complex, cumbersome, and uncertain. Examples include collective pricing agreements to fund pro-sustainability investment, or to pass on some environmental costs to consumers; joint approaches on ancillary services in waste management systems; and qualitative restriction of supply, whereby competitors collectively decide not to offer certain products and/or offer alternatives to foster environmental protection or the sensible use of resources.

In 2013, Dutch poultry producers negotiated the aptly named “Chicken of Tomorrow” agreement, which aimed at increasing the sustainability of poultry production and consumption. The agreement regulated the chickens’ growth rate to curb health issues and reduce antibiotic use; it reduced the concentration of animals per square meter; it adopted measures to decrease animal injuries; it introduced sustainable feed; and it fostered sustainable energy use to reduce emissions and carbon footprint. Nonetheless, the Netherlands Authority for Consumers and Markets rejected the agreement because it found that the efficiencies would not outweigh its anticompetitive effects in a way that would benefit consumers. Effectively, the resulting purchase price increase of chicken was not justifiable in consumer welfare terms.

Even where an agreement is sponsored by an EU Member State, the “doctrine of state compulsion” will often be insufficient to protect the participants. In the absence of an explicit legal obligation mandated by a Member State in relation to specific conduct, firms engaging in anticompetitive agreements can be found in breach.  Again, this risk is increased by the devolved nature of EU competition law.

State-sanctioned sustainability policies can also attract antitrust scrutiny when they are caught by the prohibition on state aid contained in Article 107 TFEU. This may be the case when governments provide financial support to private firms’ environmental initiatives. A set of Commission guidelines on state aid in the context of environmental protection and carbon emissions simplify the assessment criteria. They help member states and firms to navigate the issue in relation to energy infrastructure; renewable resources; carbon capture; and waste management, among others.

However, the guidelines only cover a limited list of projects. The overarching principle underpinning lawful state aid remains the “need for state intervention” which is firmly grounded in the concept of market failure. This translates into aid being lawful only where the market is incapable of addressing an environmental issue because the benefit of doing so, or the cost of doing the opposite, does not incentivise relevant firm(s). However, environmental issues do not readily translate into market externalities for the relevant firm(s), as the environmental chain of cause and effect can span continents and markets. This firm-centric approach denies the global and trans-species nature of the climate crisis.

Solving the climate crisis requires the involvement of governments. If it could be left to the market alone, the Paris Agreement on greenhouse-gas emissions could have been signed by corporations, not nations. To that end, government involvement should not be confined to regulatory oversight or direct action, especially when many small and medium enterprises cannot afford to make the required investment. The concept of lawful state aid should be extended to public interventions for the greater good. That includes pro-sustainability and climate-related initiatives.

EU competition law also prevents firms in a supply chain from collaborating on price, as regulators seek to protect consumers from artificially high purchasing costs. However, the individual exemption in Article 101(3) TFEU permits vertical collaboration to promote technical and economic progress resulting in consumer benefit. Research by the UK Fairtrade Foundation highlighted that players at different levels of the international cocoa supply chain remain unclear as per how apply the exemption when collaborating on issues such as farm-gate prices; income; and wages for sustainability purposes. This problem is likely to exist in other areas.

We should also comment on Article 102 TFEU – abuse of dominance.  In the mid-90s, Calì, an Italian petrochemical transportation company operating in the oil port of Genoa used a subcontractor, SPEG, for the loading and unloading of product. At the end of the contract period, SPEG invoiced Calì for antipollution services performed on its behalf. Calì had not requested the service, and brought action against SPEG for abuse of dominance. The ECJ recognised that the “anti-pollution surveillance for which SPEG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the state as regards protection of the environment in maritime areas,” suggesting that conduct in the public interest might not be abusive. However, the Court left the question open, as it ultimately found that Article 102 did not apply, as SPEG was exercising these functions on behalf of the public authority and its fees had been approved by a government body.

Some conclusions….

EU competition policy is focussed on market efficiency, price and consumer welfare and can (in its present form) ignore other public policy concerns. Environmental concerns are at a particular disadvantage, because they do not readily form part of the “efficiency equation” unless they can be factored in the cost-benefit analysis for the economic welfare of consumers.

The Commission’s guidance on the application of Article 101(3) states that an anticompetitive agreement between undertakings will be exempted only “when the pro-competitive effects […]outweigh its anticompetitive effects”. That is to say, a loss of biodiversity, for example, would first have to be translated into price and innovation effects in order to weigh it against the anticompetitive impact of an agreement aimed at preventing extinction. If the EU is serious about fighting climate change, this stance cannot be deemed satisfactory.

Competition Commissioner Margrethe Vestager described fairness as the social rationale underpinning EU antitrust principles. Yet, she stressed that fairness should not inform enforcement in individual cases. “It doesn’t mean that just because something is unfair, it’s automatically also against the competition rules,” she said in 2018.  This was consistent with previous interventions, in which Ms Vestager maintained that only impartial “competition enforcement […] can help us to achieve a stronger, fairer, greener economy”.

The fight against climate change cannot be won by sitting back as an impartial adjudicator.

On October 24, Ms Vestager will deliver the keynote address at an EU-sponsored conference on sustainability and competition, with a view to bridging the two disciplines for a “fairer economy”. We have argued in this article that the concept of sustainability should not be limited to the economics of fair trade, but should be considered in its wider connotation of “balanced maintenance” and “conservation” of the global ecosystem.

To that end, for competition policy not to hinder pro-sustainability initiatives, a holistic approach should be devised to tackle climate and environmental issues in accordance with the EU’s obligations under Article 11 TFEU. This approach should be comprehensive and internally coherent in order to redress the current patchwork of competition law precedents and guidance. Competition policy should champion the view that climate change and the environment are a public interest consideration which should be assessed in their own right, rather being stated in economic terms. The pro-sustainability effects of any agreement or conduct should be weighed directly against its anti-competitive effects in addition to, and not as part of, its pro-competitive effects.

Having a balanced and well-functioning market will be of little use to Europe if its economy, and the lives of its citizens, have been upended by climate change. There would be little left worth competing for.