Editorial

How to Green-Light Sustainability Agreements?

Several competition authorities are currently reflecting on how they could foster industry-led collaborative efforts to achieve sustainable development goals. In July 2020, the Dutch competition authority published for consultation new draft guidelines, which set out how it intends to apply Article 101 TFEU (and its national equivalent) to sustainability agreements.¹ The Hellenic Competition Commission organised a conference and issued an elaborate discussion paper exploring ways to give weight to sustainability considerations under the EU antitrust rules.² Also the German competition authority released a background paper on the topic.³ And mid-October, the European Commission published a call for contributions on how EU antitrust enforcement (as well as State aid and merger control) could better contribute to the overarching objectives of the European Green Deal.

The Commission's call for contributions certainly asks the right questions. First and foremost, it invites stakeholders to provide concrete examples of legitimate sustainability cooperation that could not be implemented for fear of antitrust liability. Several public interest groups and trade associations assert that competition law acts as an obstacle.⁴ Yet it remains difficult to gauge the true nature and magnitude of the alleged problem. To be sure, a growing number of companies sincerely implement strategies to make their businesses more sustainable and many such initiatives could be scaled up. To what extent there is a desire to collaborate with competitors is, however, less evident. It would therefore be helpful to learn about envisaged collaborative sustainability initiatives that were suppressed by actual or perceived competition law concerns (and not, for instance, by a lack of trust or competitive self-interest).

Second, the Commission queries whether current enforcement practice sufficiently allows for sustainability benefits to outbalance restrictions of competition. Boom. Just like that, a longstanding debate about the role of broader public interest considerations under Article 101 TFEU rekindles. In its 2004 guidelines, the Commission makes no reference to the *Wouters* case law and advocates a narrow interpretation of Article 101(3) TFEU that only accepts direct efficiency gains as currency. The Commission considered this to be expedient in view of the modernisation and decentralisation of

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- 1 Authority for Consumers & Markets, 'Draft Guidelines Sustainability Agreements' (9 July 2020) <<https://www.acm.nl/en/publications/acm-opens-more-opportunities-businesses-collaborate-achieve-climate-goals>>
- 2 Hellenic Competition Commission, 'Staff Discussion Paper on Sustainability Issues and Competition Law' (17 September 2020) <<https://www.epant.gr/en/enimerosi/competition-law-sustainability.html>>
- 3 Bundeskartellamt, 'Offene Märkte und nachhaltiges Wirtschaften - Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis' (1 October 2020) <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.html?nn=3591568>
- 4 See e.g. Fair Trade Advocacy Office, 'FTAO position paper EU Competition Law and Cooperation Agreements for Sustainability' (18 June 2020) <https://fairtrade-advocacy.org/wp-content/uploads/2020/06/Policy-position-paper_EU-Competition-Law_final.pdf>

EU antitrust enforcement. It is on this front that, most notably, the Dutch competition authority (Authority for Consumers and Markets or ACM) has been pushing for a more liberal approach. The authority's current draft guidelines propose that for certain sustainability agreements ('environmental-damage agreements') it should be possible to consider benefits for society as a whole. Their contribution to a legal requirement to which the State is bound – such as the reduction of greenhouse gas emissions – would warrant a deviation from the basic principle that consumers of the product in question must be fully compensated for increased prices or reduced choice. In addition, the ACM suggests that it would not be necessary to quantify the alleged benefits when they 'obviously' outweigh the harm to competition. A 'light test' may then suffice.⁵ It should be noted that the ACM adopts a broad notion of sustainable development that not only includes environmental and climate performance, but also public health, animal welfare, and working conditions. The corresponding benefits are far more difficult, if not impossible, to express in monetary terms. In so far as we wish to account for them, a more qualitative and holistic assessment – quite common in the application of the free movement and State aid rules – is inevitable. The problem is that embracing such an (old) approach to Article 101(3) TFEU would have ripple effects beyond sustainability agreements, however broadly defined. In its call for contributions, the European Commission rightly asks: how can we differentiate the pursuit of the Green Deal objectives from the pursuit of other important policy objectives? We arguably cannot. It would be inconsistent to hold claims about sustainability benefits to a different standard than similar claims about wider public interest benefits such as the promotion or protection of employment, cultural diversity, media plurality or even innovation.

There is another way in which the current debate about sustainability could have ramifications for EU antitrust enforcement more generally. And it also brings back memories from the pre-modernisation era.

While we might see a re-introduction of a chapter on environmental agreements in a revised version of the Horizontal Co-operation Guidelines, Commissioner Vestager has proclaimed that the European Commission also stands ready to give informal guidance in individual cases. Until recently, the Commission has been reluctant to give individualised opinions. Fearful of any return to the former notification and authorisation system, it never issued guidance letters or adopted decisions on finding of inapplicability pursuant to Article 10 of Regulation 1/2003. It was only in the context of COVID-19 that the Commission recognized that undertakings might need specific antitrust guidance on cooperation initiatives 'to facilitate their self-assessment'.⁶ Last April, it issued its first comfort letter in nearly 20 years, providing assurances – albeit non-binding and subject to conditions – to pharmaceutical producers that their cooperation project aimed at avoiding shortages of vital medicines did not raise concerns un-

5 Authority for Consumers & Markets, 'Draft Guidelines Sustainability Agreements' (9 July 2020) <<https://www.acm.nl/en/publications/acm-opens-more-opportunities-businesses-collaborate-achieve-climate-goals>>

6 EC, 'Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak' (Communication) [2020] OJ C 116/7.

der Article 101 TFEU. Various national competition authorities followed suit and gave ad hoc comfort on the legality of specific temporary collaborative initiatives. This appeared to be an exceptional measure to address emergency situations in exceptional circumstances. It is therefore remarkable that the European Commission now considers to extend this option to sustainability cooperation.

Undertakings seeking to collaborate with competitors to identify and implement sustainability solutions would evidently benefit from obtaining informal guidance. Even better if the Commission would adopt a non-infringement decision or if their cooperation can take place under continued supervision of a competition authority, as the Hellenic Competition Commission is proposing with its idea of a 'sustainability sandbox'. After all, general guidelines can only be so helpful, in particular when the antitrust stakes are high. And ever since the entry into force of Regulation 1/2003, and the unfortunate *Tele2Polska* judgment of the Court of Justice, formal decisions accepting an Article 101(3) TFEU defence have all but disappeared. The question that once again arises, however, is whether we can justify extending the exceptional guidance given to business cooperation during COVID-19 (and the resources this requires) only to one other type of horizontal cooperation. Are only collaborative sustainability initiatives worthy of enhanced legal certainty? Because if not, the current efforts of competition authorities to green-light such initiatives may well trigger changes to EU antitrust enforcement that are far more wide-reaching and profound.

The dawn of a new, post-post-modernisation era?

In this fourth and last issue of 2020, Leander Stähler and Mariolina Eliantonio also discuss the importance of the guidance that competition authorities give to undertakings to self-assess their compliance with competition law. In *The Legal Effects of EU Competition Soft Law in the Decisions of National Competition Authorities*, they examine, both from a quantitative and qualitative perspective, the legal effect of EU soft law instruments in antitrust enforcement - using the decisions of the Bundeskartellamt as a case study. And in *Right(s) of Defence, Access to the File and Fairness in Competition Procedures*, Inês Neves and Kim Steffens revisit the case law of the Court of Justice on an undertakings' right to prior hearing and the right of access to the file in EU antitrust proceedings, in view of the recent judgment in *NKT Verwaltung and NKT v Commission*.

As always, the Reports section keeps you abreast of important competition law and regulatory law developments at the national level – in this edition, with updates from Bulgaria, Poland, Romania, Slovenia, Switzerland, and the Netherlands. We also have two case notes, commenting on competition law judgments of the Union courts that are of great interest (Case C-39/18, *P Commission v ICAP and Others*; and Case T-758/14 *RENV Infineon Technologies v Commission*). Finally, this issue includes a review of Miguel Sousa Ferro's most excellent book *Market Definition in EU Competition Law*.

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