



## Hand in hand

### EU competition policy embracing (environmental) sustainability

by Alec Burnside, Marjolein De Backer and Delphine Strohl

Sustainability and competition law are no longer strangers to each other. Several national competition authorities (NCAs) have organised conferences or published discussion papers. The Dutch Authority for Consumers & Markets (ACM) has been leading the pack and issued final guidelines on its approach to sustainability agreements in January 2021: *Guidelines on Sustainability Agreements – Opportunities in Competition Law*.<sup>1</sup> But the NCAs – supported by industry – have been encouraging the European Commission to do more and to publish appropriate guidelines. The ACM's press release in fact openly positioned its sustainability guidelines as a platform for further discussions about sustainability and competition rules in the European Union (EU). The press release also explicitly mentioned the importance of EU-level guidelines reflecting comments from businesses to the ACM.

So sustainability and competition law will only go hand in hand once DG COMP truly embraces the topic as part of its policy making. The good news is that there are ever more signs that DG COMP is moving in that direction, in particular with the recently published Competition Policy Brief on “Competition Policy in Support of Europe's Green Ambition”. This article discusses that Policy Brief and its main findings.

#### Competition Policy Brief – September 2021

On 10 September 2021 Inge Bernaerts, on behalf of Executive Vice-President Vestager, focused her keynote speech at the 25<sup>th</sup> IBA Competition Conference on competition policy and the Green Deal.<sup>2</sup> At the same time DG COMP published a policy brief on “Competition Policy in Support of Europe's Green Ambition”. Importantly these two documents indicated, for the first time, concrete EU competition law reforms across the different competition instruments – state aid, antitrust, and merger control – so that competition policy can effectively complement environmental and climate policies.

Until now DG COMP has been mainly in “listening mode”, organising a call for contributions in September 2020

seeking views as to how competition rules and sustainability policies can work together and collecting views on how to include sustainability in the upcoming revamped antitrust regulation and guidelines. A conference organised in February 2021 then looked at how EU competition rules could support environmental and climate policies. The contributions and conference have seemingly confirmed to DG COMP that competition policy has an important role to play in delivering the Green Deal objectives. Based on the Policy Brief, the key issues raised by stakeholders were:

- Antitrust – a need for more clarity on which type of sustainability cooperation agreements fall outside Article 101(1) TFEU and, if an agreement is within, how the exemption criteria under Article 101(3) TFEU can be met.
- State aid – the key role of state aid policy to support Green Deal objectives by assessing the environmental impact of state support; and enhancing the possibility for R&D and innovation support because it is innovation that supports the green transition.
- Mergers – the need to take into account consumer preferences for sustainable products/services as a differentiating factor in general but in particular for purposes of market definition; the risk of “loss of green innovation” through killer acquisitions of an undertaking developing more eco-friendly alternatives; the need to consider a longer time horizon for all social efficiency claims; and the obligation for DG COMP to accept the greenest remedy.

On the basis of this stakeholder feedback, the Policy Brief sets out a number of policy proposals for each area. We discuss these below.

#### Antitrust

DG COMP recognises the request for more guidance about the boundaries of competition-law-compliant joint sustainability initiatives. DG COMP's intention is to provide such guidance in the guidelines on Horizontal Cooperation Agreements (the horizontal guidelines) and the Vertical

Restraints Guidelines (the vertical guidelines), which are both currently undergoing their periodic review. As recognised in a recent Communication on “A competition policy fit for new challenges” such guidelines should enable companies to cooperate to pursue genuinely green initiatives while preventing “greenwashing” that would harm consumers.<sup>3</sup>

DG COMP foresees that guidance will be provided on the following aspects:

- **Some sustainability cooperation agreements will fall outside of the cartel prohibition.** For example, certain types of joint production or joint purchasing agreements, or standard setting cooperation. These are typical agreements which may already fall outside of the remit of Article 101(1) TFEU and for which guidance already exists. *Comment:* for many initiatives, such as agreed minimum wage standards, it would be constructive for DG COMP to state its position as to when the *Wouters* doctrine or the ancillary restraints principles would keep a joint sustainability initiative outside of cartel territory. This unfortunately seems – at present – to be a bridge further than competition authorities are willing to tread. Indeed, the sustainability guidelines issued by the ACM indicated that it was not in a position to provide guidance on the applicability of the *Wouters* doctrine, for want of sufficient case law authority. This seems to be a missed opportunity, however. Perhaps a national authority may hesitate, but DG COMP (with the collective NCAs) is surely able to state a policy position – and give comfort that it will not act adversely to initiatives making bona fide use of identified safe harbours.
- **The assessment of sustainability efficiencies, and how they may outweigh any negative effects, will take further aspects into account beyond the traditional assessment under Article 101(3) TFEU.** The Article 101(3) TFEU conditions require further explanation in a sustainability context, according to the Policy Brief. For example, qualitative efficiencies should be taken into account such as: “replacing a non-sustainable product with a sustainable one may result in an increased quality or longevity of that product such as replacing plastic with wood toys or using recycled materials for clothing.” DG COMP also refers to possible indirect, related efficiencies and provides the example of agreements seeking to reduce plastic packaging or condense plastic bottles which may reduce the cost for materials, transport and storage and outweigh the cost increase related to production within modern condensing technology. DG COMP also explicitly states that sustainability benefits do not need to be direct or immediate: “as long as the users of the product concerned appreciate the sustainability benefits related to the way the products are produced or distributed, and are ready to pay a higher price for this reason alone, such benefits can be taken into account in the assessment.” Examples given are consumers preferring fair trade coffee because it is a sustainable product, not because it tastes better; or

the use of more sustainable washing products because they are better for the environment, not because they clean better. This allows for inclusion of longer-term benefits which are essential in a sustainability context; there is however still a pre-requisite that such benefits be valued by present days consumers.

Normally consumer benefits are assessed within a particular relevant market, but DG COMP recognises that out-of-market efficiencies may be more relevant for sustainability agreements. DG COMP believes that it is possible to take such benefits into account if the share of the benefit accruing to wider society that can be apportioned to the harmed consumers is sufficient to fully compensate the harm they suffer. This is a step in the right direction, but our view is that it is still too narrow. DG COMP could learn from its Dutch colleagues and acknowledge – as they did<sup>4</sup> – that the harmed consumers do not necessarily need to be fully compensated if their consumption is the source of the negative externalities that are being addressed by the sustainability agreement. As indicated by the ACM, there is an easy analogy with the polluter-pays principle, a key feature of the European Green Deal.

In relation to indispensability, DG COMP recognises that due to market failures and the first mover disadvantage, companies may need to collaborate and to encourage customers to purchase more sustainable – but also more expensive – products. DG COMP, however, notes that existing – and multiplying – environmental regulation may limit the need for companies to cooperate; it remains to be seen whether this signals a divergence from the ACM statement that agreements between companies solely aiming to ensure that participants comply with national or international rules fall outside the scope of the cartel prohibition.

All of these are welcome clarifications and serve as a good first indication of how DG COMP is likely to assess joint sustainability initiatives under Article 101(3) TFEU. As always, companies should be vigilant to comply and organise their sustainability collaborations with the same antitrust compliance vigour as any other initiative with other industry players: sustainability cannot greenwash antitrust infringements.

- Finally, it is worth noting that DG COMP calls out the special relationship between competition law and agricultural policy. Under the new Common Agricultural Policy for 2023–2027, which was agreed in June 2021, certain sustainability agreements concluded between producers and/or other actors in the food value chain are exempted from Article 101(1) TFEU, at least in as far as the restrictions are indispensable.

#### State aid

The Policy Brief’s discussion focuses on two instruments. First, how the upcoming Climate, Energy and Environment Aid Guidelines – foreseen to enter into force in early 2022 – and the revision of the related sections of the General Block

Exemption Regulation – are consistent with the Green Deal and how they can support environmental sustainability. This issue arises because these revised instruments will widen the scope of potential state support to new areas such as clean mobility, circularity, biodiversity, hydrogen, etc. At the same time, the revised guidelines discourage aid to environmentally unfriendly projects – for example, those involving most polluting fossil fuels such as oil, lignite and coal.

Second, DG COMP also makes reference to the state aid rules on Important Projects of Common European Interest which promote collaborations between several member states and industry to, for example, enable significant environmental improvements where the market alone would not deliver such as decarbonisation or a clean and circular economy. These rules are under revision. But DG COMP has already approved two sustainability projects under the existing rules, both in relation to more sustainable batteries. The first project concerns the development of highly innovative and sustainable technologies for longer lasting, shorter charging lithium-ion batteries. The second is a project covering the entire value chain from refining of raw materials, design and manufacturing, to recovery and recycling of the raw materials.

In the meantime, the recent sixth amendment of the State Aid Temporary Framework allows for investment support towards a sustainable recovery (for example, investments in equipment needed to improve circular economy or recycling, or sustainable access to resources) until 31 December 2022.<sup>5</sup>

### Mergers

The DG COMP Policy Brief refers to the ongoing revision of the market definition notice which examines issues related to consumer preferences and how this may affect market definition which, as the Policy Brief correctly points out, is already part of DG COMP's merger assessment practice.<sup>6</sup> The Policy Brief also suggests that the revamped Article 22 of the European Merger Control Regulation (EUMR) could be used by member states to request DG COMP to review acquisitions which fall outside of the EU and the referring member states' merger control powers, but which cause significant competition concerns because the purchaser would acquire – and “kill competition” from – a new “green innovator”.

While both of these approaches seem feasible, the authors share the view expressed in the Policy Brief that DG COMP's mandate is limited to preserving undistorted competition, and that DG COMP cannot block a merger for the sole reason of environmental or broader sustainability concerns. However, this does not account for the possibility of the member states invoking a legitimate interest under the EUMR to impose conditions, or even block, a transaction. It remains to be seen though whether there would ever be a proposed merger so threatening to a sustainability concern that there would be an overriding interest from one member state – or several – to block the transaction or impose conditions. It is difficult to define this in the

abstract – especially because the conditions for member states to invoke the legitimate interest procedure are strict<sup>7</sup> and the provision is therefore rarely used.

Finally, contrary to antitrust, DG COMP takes the view that in order for sustainability benefits to take be taken into account as efficiencies, these benefits must arise within the markets where competition concerns are raised. In addition, for remedies, sustainability benefits can only be relevant where environmental/sustainability aspects are an important parameter of competition. The authors agree with these positions: any other approach would require an adaptation of the EUMR.

### What's next?

The main policy developments are to be expected in the field of antitrust rather than mergers or state aid. In this area, DG COMP first aims to provide sufficient clarity in the new vertical and horizontal guidelines so that companies can make confident self-assessments.

The proposed revised vertical guidelines issued on 9 July 2021 do not mention sustainability, although this may change following the consultation which ended on 17 September 2021. In this context, it is worth noting that the UK Competition and Markets Authority (CMA)'s proposal for the successor of the EU's Vertical Guidelines, now that the UK has left the EU, recommends addressing sustainability. In particular the CMA identifies the relevance to the criteria for admission to selective distribution systems with a focus on environmental sustainability. This recommendation is based on feedback from stakeholders during the preceding consultation.

The European Commission's staff working document in relation to the review of the Horizontal Block Exemption Regulation and the horizontal guidelines, published on 6 May 2021, mentions sustainability no fewer than 55 times. Sustainability is indeed identified as one of the main areas where respondents to earlier consultations expressed a need for further guidance. The consultation which began on 13 July 2021, and which is intended to assist DG COMP in gathering the necessary data and facts to propose a new Horizontal Block Exemption Regulation and accompanying horizontal guidelines, included several questions on how to improve guidance in relation to sustainability. The consultation closed on 5 October and proposals are expected in February 2022.

Second, companies are also encouraged to come forward with initiatives and request individual guidance letters if the cooperation raises novel issues. The Policy Brief even leaves the option open that DG COMP could adopt a formal decision that a certain sustainability agreement does not fall within Article 101(1) TFEU by utilising a dormant provision allowing it to issue clearance decisions (Article 10 of Regulation 1/2003).<sup>8</sup>

Finally, DG COMP also plans to issue specific guidance on the exemption that applies to sustainability agreements concluded in the agricultural sector. Patience is however

warranted as DG COMP guidance should not be expected before 2024.

## Conclusion

The ever more tangible convergence of sustainability and competition law must be applauded. And companies may be encouraged by the guidance that is being provided.

At conferences, competition enforcers sometimes mention that there are a number of sustainability initiatives which they have examined and (informally encouraged). But these all seem to be smaller initiatives which therefore likely raise lesser concerns. Greater challenges may lie ahead when important players in a given industry wish to collaborate in relation to commonly used products and where consumer prices may potentially – and independently – be raised. The goal of guidelines and “test cases” must be that they provide sufficient guidance also for these more challenging collaboration initiatives, that seek some form of paradigm shift in product offerings. In the same way, industry players may contemplate bold action in relation to potentially more difficult questions that require giving weight to different policy goals recognised in the EU Treaties.

In order to see real initiatives flourish, authorities should be bold and apply existing principles and case law so as to exclude certain agreements from Article 101(1) TFEU altogether. At present the conversation tends to default to exemptibility, but that need not be so.

It is also regrettable that the conversation largely focuses on the “E” in ESG, neglecting the “S” – in other words, the Social dimension. This is not to belittle the important progress as regards the environment. But the United Nation’s Sustainable Development Goals, which the European Union is committed to implementing, recognise many other aspects of sustainability. And Article 3 of the Treaty on European Union itself states that “The Union .... shall work for the sustainable development of Europe based on ... a highly competitive social market economy, aiming at full employment and social progress ....” Let us hope that the broader definition of sustainability used by DG COMP in its

horizontal consultation – referring to the economic, social and environmental goals set out in Article 3 – will set the “standard” for future guidance.

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## Endnotes

1. <https://www.acm.nl/en/publications/guidelines-sustainability-agreements-are-ready-further-european-coordination>; see also Burnside, A, De Backer, M and Strohl, D, “Throwing down the gauntlet”, *Competition Law Insight*, September 2020, Volume 19 Issue 9, <https://www.competitionlawinsight.com/corporate-issues/throwing-down-the-gauntlet-144269.htm>.
2. [https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal\\_en](https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/competition-policy-support-green-deal_en).
3. Communication from the European Commission, the European Parliament and the European Economic and Social Committee and the Committee of the Regions, 18 November 2021.
4. ACM Legal Memo, 27 September 2021, “What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?”, <https://www.acm.nl/sites/default/files/documents/acm-fair-share-for-consumers-in-a-sustainability-context.pdf>.
5. See Communication from the Commission on the Temporary framework for State aid measures to support the economy in the current Covid-19 outbreak, as amended by Communication C(2021) 8442 of 18 November 2021.
6. See eg M.7510 *Olam/ADM Cocoa Business*.
7. For a more in-depth assessment, see Burnside, A, De Backer, M, and Strohl, D, “Can Environmental Interests Trump an EUMR Decision”, in Holmes, S, Middelschulte, D, Snoep, M, *Competition Law, Climate Change & Environmental Sustainability*, Concurrences.
8. Burnside, A, De Backer, M, and Strohl, D, “Time for fresh guidance? The return of the exemption decision”, *Competition Law Insight*, March 2020, Volume 19 Issue 3, <https://www.competitionlawinsight.com/regulatory/time-for-fresh-guidance-140705.htm>.

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