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Throwing down the gauntlet

Sustainability and competition law

by **Alec Burnside, Marjolein De Backer and Delphine Strohl**

Suddenly sustainability and competition law has become a trending topic for agencies and practitioners – belatedly, since the subject has been current for some time among academics and civil society groups. But 2020 seems to mark a turning point. We have seen the publication of draft guidelines on sustainability agreements by the Dutch competition authority (ACM);[1] a staff discussion paper by the Hellenic competition authority;[2] the inclusion of sustainability in the EC's consultation on the review of its horizontal guidelines;[3] and most recently, the announcement by Margrethe Vestager of an imminent "call for contributions on some fundamental questions about how competition rules and sustainability policies work together".[4] The UK Competition and Markets Authority has also announced that it plans to discuss with NGOs active in this field[5] and the OECD is set to hold a roundtable on the topic in December.

All credit to the ACM for being ahead of the game. It was the Netherlands, of course, which gave us the *Chicken of Tomorrow*[6] episode, with the learnings that it offers. This article focuses on the ACM's draft guidelines, which move already beyond debate and offer a roadmap for sustainability initiatives. Companies which brandish their attachment to ESG, while protesting that antitrust stands in the way of their doing what is needed, have now had their bluff called. The agencies are throwing down the gauntlet: bring us your sustainability proposals, and we will help you along.

Jumping ahead though to one fundamental: even with the benefit of more enlightened and encouraging official guidance, companies should not forget that a sustainability cooperation is first and foremost a coordination between undertakings. Invoking sustainability can never be a generalised shield from antitrust enquiry. Rather, cooperation in the name of sustainability must be planned and structured with the same care as any other contact with rivals. It is for legal departments as much as for their ESG (and corporate branding) colleagues.

A Dutch roadmap to sustainability

The Dutch draft guidelines are the first practical guidance provided to companies on how to assess sustainability agreements under competition law. This is a very significant step. Before offering some constructive criticism, we highlight the main advances which the draft guidelines offer.

A new type of Dutch courage

First and foremost, the draft guidelines adopt a broad definition of sustainability, based on the UN's sustainable development goals,[7] and including cooperation "aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people including their working conditions, animals, the environment, or nature".[8]

From a procedural standpoint, the ACM seems to understand that many companies are unsure as to what they can and cannot do. The guidelines eliminate some of this uncertainty by providing companies with a relative safe harbour for certain categories of "allowed sustainability agreements" – for example, environmentally or climate-conscious codes of conduct or agreements aiming to comply with national laws. Such agreements do not infringe at all. The same may also be true for agreements aiming to improve "product quality, while, at the same time, certain products or products that are produced in a less sustainable manner are no longer sold" and not appreciably affecting price and/or product diversity.[9]

Outside of this safe harbour, the ACM provides a roadmap for the assessment of the cooperation under Article 101(3) TFEU (and the equivalent under Dutch law). The first step in this assessment is to clarify what sustainability benefits can be included in the Article 101(3) TFEU benefits. The ACM takes a welcome broad approach. In a nutshell, as long as they are objective, any reduction of negative externalities would qualify as an Article 101(3) benefit. The ACM goes even further and clearly states that improvement to the process of production to treat social costs as part of operational costs by, for example, the

payment of a living wage, are to be viewed as benefits from a competition law standpoint.[10]

Finally, and this may be the most significant achievement of the draft guidelines, the ACM confirms that the users who must reap a "fair share" of the benefits do include indirect users, future users,[11] and even in certain circumstances society as a whole. This inclusion of longer-terms benefits will be key when assessing many sustainability agreements which inherently target longer term goals rather than short-term benefits.

However, and this is an area where the draft guidelines could be reconsidered, the benefits for society as a whole are – in the draft – to be taken into account only for a narrow category of environmental agreements. Furthermore, the way sustainability benefits – in particular non-environmental ones – need to be quantified does not properly account for the benefits accruing to, for example, future users.

Environment: the tree that hides the sustainability forest

Although the ACM takes a significant step forward by widening the notion of a "fair share" to include benefits accruing to society as a whole for certain categories of agreements, those categories are unduly narrow. They are limited to agreements aiming to "prevent or limit any obvious *environmental damage*" while helping to "comply with an international or national standard to prevent *environmental damage* to which the government is bound" (emphasis added).[12] While environmental concerns are rightly front of mind, that is no reason to exclude agreements addressing other recognised branches of sustainability – many of which equally rest on binding international or national standards.

The ACM has made it clear that the rationale for this exception was a Dutch Supreme Court ruling that focused solely on environmental agreements.[13] And we understand and respect the concern of the ACM not to set itself up as arbiter of social goals, when it does not have direct democratic legitimacy. But that should not impede it from recognising other democratically agreed policy objectives, going beyond climate change and the environment, which are the subject of binding national or international rules.

Without even reaching for the UN Universal Declaration on Human Rights, the European Union treaties do mandate the Union to promote "free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child".[14] Furthermore, trade agreements between the EU and third countries include provisions relating to sustainable development, in broad terms,[15] and some even include commitments to encourage mechanisms contributing to coherence between trade practices and the objectives of sustainable development.[16]

By limiting this provision to environmental agreements, the ACM creates an unnecessary hierarchy within internationally recognised sustainability goals, which we submit should be avoided.

How to not underestimate benefits of a sustainability initiative

The draft guidelines provide for two different ways to assess the benefits of sustainability initiatives: *quantification* or *no quantification*.

The ACM identifies two types of agreements where no quantification is necessary. These include agreements between parties whose combined market share does not exceed 30 per cent; and agreements where "the harm to competition is obviously smaller than the benefit of the agreement".[17] If the first type of agreement is relatively easy to identify, the second category would benefit from additional explanation if companies are to rely with confidence on this provision. And we are concerned that most non-environmental agreements would be viewed as falling outside these categories, and so require quantification.

Turning then to agreements requiring quantification of benefits, the only tool mentioned in the guidelines in relation to non-environmental agreements are willingness-to-pay studies. Although these studies can be an effective tool in some circumstances, they may have significant limitations as regards sustainability initiatives.

First, it is unclear how a willingness-to-pay study carried out for *current* consumers could take into account benefits accruing to *future* users of the product. This is particularly problematic since sustainability initiatives tend to produce long-term benefits rather than short-term ones.

Furthermore, behavioural economics have highlighted a more fundamental flaw of willingness-to-pay studies: they do not accurately reflect the value that consumers attach to sustainable development. Indeed, as outlined in the Hellenic competition authority staff discussion paper, there is an inherent contradiction between the way a consumer behaves in the market place and in the political sphere, ie as a citizen.[18] Exclusively relying on willingness-to-pay studies risks underestimating the actual benefit for users stemming from an initiative.

Freedom from fines

And a final word of commendation for the ACM, whose draft guidelines state boldly that it will not fine companies who take their lead from the guidance, even if ultimately an infringement is identified. Cartelists beware, there is no camouflage here for skulduggery behind a green mask. But good faith efforts to do the right thing will not be taken to task.

Reaching higher than the low-hanging fruit

Some of the world's greatest challenges require industry-wide cooperation. For these, generalised guidance around codes of conduct, non-mandatory standards, or market share caps, will never suffice. So, we move from the need for general guidance, to the availability of individual guidance. The EC has largely foresworn that, since leaving Form A/Bs and Regulation 17 behind.[19] But the signs are promising.

To take a paltry example, the *Chicken of Tomorrow* case included an arrangement for Dutch supermarkets to

remove yesterday's unwholesome chicken meat from their shelves. Such a direct elimination of consumer choice is of course striking. But it is often such ambitious projects which require the involvement of the entire industry or even industries. A bolder example would address, for example, eradicating child labour by ensuring a minimum price to cocoa or coffee growers – who could then send their children to school and not into the fields. Here, one must confront international markets, with multiple stakeholders – growers, buyers who source directly, commodity buyers/traders, their industrial customers, wholesalers, retailers – and consumers. Absent specific regulation/legislation, how can industry proceed?

Companies must invest the necessary resources in working out the mechanics and terms of their scheme in an antitrust-compliant way, as with any other commercial project. This includes defining the scope of the project, identifying the least restrictive approach, implementing measures to avoid spill-over effects, adopting compliance guidelines, preventing undue information exchange, etc. The initiative may originate with a company's ESG champions, but the legal department must co-own it, shaping the collaboration in such a way that both the sustainability purpose and the applicable competition law rules are respected.

And then, an approach to the agencies – and it may be multiple, for agreements of international or even global ambition. The ACM and EC[20] have declared themselves open for business. Guidance when given must be public, formal and reasoned, in a way which to provide not just legal certainty for the particular project, but to create a body of precedent to inspire others.

Picking up the gauntlet – down with greenwashing

The time is now, for businesses which have declared their green credentials, but not yet found the means to make a difference by their individual action. Actions will speak louder than words. And that holds true equally for the agencies who now declare their readiness to assist.

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Endnotes

1. ACM, Draft Guidelines on sustainability agreements, published for consultation on 9 July 2020, https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.
2. Hellenic Competition Authority, Staff discussion paper on sustainability issues and competition law, 2020, https://www.epant.gr/en/enimerosi/competition-law-sustainability.html.
3. European Commission, EU competition rules on horizontal agreements between companies – evaluation, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11886-Evaluation-of-EU-competition-rules-on-horizontal-agreements.
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7. UN Resolution adopted by the General Assembly on 27 July 2012, The future we want, A/RES/66/288, https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E
8. ACM, Draft Guidelines on sustainability agreements, at para 9.
9. Ibid, at paras 19 etc.
10. Ibid, at para 35.
11. Ibid, at para 30.
12. Ibid, at para 38.
13. ECLI:NL:2019:2006 Supreme Court of the Netherlands 19/00135 dated 20 December 2019, *State of the Netherlands v Urgenda Foundation*.
14. Article 3(5) of the Treaty on the European Union.
15. See eg EU-Vietnam Free Trade Agreement, Chapter 13; EU-South Korea Free Trade Agreement, Chapter 13.
16. See eg Trade Agreement between the EU and its member states, of the one part, and Colombia and Peru, of the other part, 26 June 2012, Article 271(4): "The Parties recognise that flexible, voluntary, and incentive-based mechanisms can contribute to coherence between trade practices and the objectives of sustainable development. In this regard, and in accordance with its respective laws and policies, each Party will encourage the development and use of such mechanisms."
17. ACM, Draft guidelines on sustainability agreements, at para 48.
18. Hellenic Competition Authority, Staff discussion paper on sustainability issues and competition law, 2020, at para 25: "It is however also important to acknowledge the difficulties of a [willingness-to-pay] framework. It has been argued that "[o]ne of the implicit assumptions of revealed preferences theory is that the behaviour of the agent is consistent when exercising her/his choice in the marketplace", this assumption "been largely questioned by recent work in behavioural economics", but, also "work noting the 'conflicting preference maps' that most of us have, when acting as consumers in the marketplace, and as citizens in the political sphere". Hence, "[e]nvironmental economists have long noted the tension between the 'utilitarian preference based' approach used by the price-based revealed preferences approach and contingent valuation analyses, which focus on consumer wants as utility maximisers, and the 'Kantian (principle-based)' approach on what 'we ought to do as a society'."
19. Burnside, A, De Backer, M and Strohl, D, "Time for fresh guidance? The return of the exemption decision", *Competition Law Insight*, March 2020, https://www.competitionlawinsight.com/regulatory/time-for-fresh-guidance-140705.htm.
20. ACM, Draft guidelines on sustainability agreements, at para 61: "If undertakings are unsure about the reliability of their self-assessments, they are invited to contact ACM and to discuss their agreements, preferably at an early stage. ACM will then indicate what concerns it may have, and it will help find possible solutions."; Vestager, M, "Sustainability and Competition Policy: Bridging two Worlds to Enable a Fairer Economy", GCLC/FTAO/EU COR/EESC Conference, October 2019, "We will be more than happy to give specific advice, if companies come to us and say 'this is what we want to do', we will be happy to look at it and we will also be happy to tell about the results after looking at it to give specific guidance".