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CONCURRENCES LAW & ECONOMICS WEBINARS
Sustainability goals and antitrust: Finding the common ground

Webinar – 14 September 2020*

Webinar organised in partnership with Avisa Partners, Dechert and Linklaters, as part of Concurrences Law & Economics Webinar series.

Alec Burnside

Alec Burnside introduced the discussions by explaining that much has been written on the topic of competition and sustainability over the years, but that there was now a need for action. He added that the webinar would not be a technical discussion or theoretical debate but would focus on practical guidance. Mr Burnside stressed the definition of sustainability: it derives from the United Nations Sustainable Development Goals, and goes far further than just the protection of the environment, but includes for example also poverty and inequality. The debate must not be limited to environmental agreements but equally cover social agreements, e.g. living wage initiatives.

"AUTHORITIES SHOULD GIVE ROBUST GUIDANCE, BOTH GENERAL AND SPECIFIC; AND BUSINESSES SHOULD [...] TAKE ADVANTAGE OF THE READINESS OF THE AUTHORITIES TO GIVE GUIDANCE."
ALEC BURNSIDE

Alec Burnside then briefly laid out the various means available to assess sustainability agreements: (1) absence of restriction of competition; (2) "Albany" route; (3) ancillary restraints/objective necessity doctrine; (4) Article 101(3) TFEU exemption; and (5) standardisation agreements. The supporting slides contain hyperlinks to a wealth of supporting literature, for those wanting to read. But this webinar was, rather, a call to action: authorities should give robust guidance, both general and specific; and businesses should not use antitrust as an excuse for inaction, but take advantage of the readiness of the authorities to give guidance.

> SEE SPEAKERS' PRESENTATIONS, VIDEO AND TRANSCRIPT ON CONCURRENCES.COM WEBSITE (CONFERENCES > 14 SEPT. 2020)

Martijn Snoep

Martijn Snoep focused on the recently published ACM's draft guidelines on the compatibility of sustainability agreements with competition law. He explained that the Guidelines were needed to address two concerns.

On the one hand, the ACM and the business community were in a stalemate. The ACM considered that competition law had so far provided many opportunities for collaboration on sustainability initiatives. But the business community stressed that some sustainability-related projects were not developed out of concern that competition authorities would object to them.

On the other hand, the Dutch Supreme Court recently found that the Dutch State had not taken sufficient action under the European Convention of Human Rights to reduce greenhouse gas emissions.

"THE GUIDELINES AIM AT PROVIDING COMPANIES WITH PRACTICAL GUIDANCE RATHER THAN IMPLEMENTING A LEGAL FRAMEWORK."
MARTIJN SNOEP

The Guidelines aim at providing companies with practical guidance rather than implementing a legal framework. First, the Guidelines provide that sustainability agreements that do not affect competition are not anti-competitive, for instance, sector-specific non-binding codes of conduct on sustainability. Second, they stress that agreements falling within the scope of Article 101(1) TFEU could still be exempted under Article 101(3) if the pro-competitive effects outweigh the anti-competitive effects and a fair share of the efficiency gains accrues to consumers. Mr Snoep emphasised that, for the application of the exemption regime, quantitative assessments, based on economic evidence, are usually needed but under certain conditions specified in the Guidelines qualitative assessment will suffice. Furthermore, he explained that, for a specific category of agreements, the resulting benefits for society as a whole – and not only the benefits for the relevant market users – could outweigh the potential restriction of competition resulting from the agreement. This specific category includes agreements that contribute in an efficient manner to compliance with an international or national standard to reduce environmental damage to which the State is bound. Mr Snoep added that those agreements are not typically object infringements. He also stressed the assurance in the Guidelines that companies carrying out sustainability initiatives in line with the Guidelines and in good faith would not be fined if the agreement turned out to have an anticompetitive effect.

Mr Snoep clarified that the Dutch competition authority is not promoting relaxation of competition rules but seeks to provide legal certainty for sustainability initiatives within the framework of competition law.

Olivier Guersent

Olivier Guersent's intervention related to sustainability in the DG COMP's agenda. Ms. Vestager stated in October 2019 that "businesses have a vital role, in helping to create markets that are sustainable in many different ways. And competition policy should support them in doing that." According to Mr Guersent, sustainability goals are better pursued and achieved through regulations rather than company initiatives. Adopting and implementing the appropriate regulatory framework leads companies to act in the right direction, and companies should be encouraged to design joint sustainability initiatives in a manner compatible with competition law.

"SUSTAINABILITY GOALS ARE BETTER PURSUED AND ACHIEVED THROUGH REGULATIONS RATHER THAN COMPANY INITIATIVES."
OLIVIER GUERSENT

Mr Guersent observed coordinated actions that would not raise any concern with respect to competition do not materialise due to the fear of intervention by competition authorities. More guidance may be provided in cases without reverting to a quasi-notification system. Also, coordinated actions that have anticompetitive effects can be exempted under Article 101(3) of the Treaty on the Functioning of the European Union. More action may therefore be needed. The Horizontal Guidelines could, for example, be revised to take into consideration that the victims of the anticompetitive effects and the beneficiaries of the environmental impact of agreements may be the same constituencies.

All twenty-seven authorities and the DG COMP do not share similar views on the issue of sustainability agreements. Consistency should be promoted as it benefits firms. According to Olivier Guersent, exchange and appropriation of

ideas and policies must be fostered. He stressed that many types of agreements do not have anticompetitive effects, such as agreements establishing labels, agreements setting technical parameters, agreements that are limited to sectoral targets, etc. However, the parties to sustainability agreements should not use this argument to cover up for cartels. Mr Guersent noted that recent case law of the European Court of Justice confirms that the notion of restriction by object must be interpreted restrictively and that the economic environment in which the companies operate must be taken into account to determine whether agreements consist in restrictions by object or by effect. These rulings are read by Mr Guersent mutatis mutandis as supporting sustainability initiatives. Finally, he mentioned that the exemption option may be unfair as a small benefit may accrue while a wide number of people suffer from the related negative externalities.

Nicole Kar

Nicole Kar started with the broad picture, stressing that nothing has bigger externalities on society than climate change. Climate change raises a classic tragedy of the commons dilemma: users of environmentally unfriendly production methods reap the benefits of those activities, without paying the full cost and as such impose a cost on society as a whole. That cost on society as a whole must be considered when weighing against efficiencies via for example more environmentally friendly methods of production which result in higher prices for consumers. Ms. Kar mentioned that doing these kinds of cost-benefit analyses is not an uncommon area in regulation more generally and in better regulation initiatives. The other challenge with climate change is that there are intergenerational issues (the interests of consumers today versus consumers in the future) as well as issues of equity across countries. For companies, there is also a first-mover disadvantage: producing a green product; at a higher cost and price may make a company uncompetitive relative to their peers. Furthermore, she emphasised the need for sustainability to be a democratic process, ideally backed by national parliaments. Legislative legitimacy is needed to pursue sustainability initiatives that might in the short term financially impact citizens.

“LEGISLATIVE LEGITIMACY IS NEEDED TO PURSUE SUSTAINABILITY INITIATIVES THAT MIGHT IN THE SHORT TERM FINANCIALLY IMPACT CITIZENS.”
NICOLE KAR

Ms. Kar also stressed many sustainability initiatives do not fall within the scope of Article 101(1) TFEU. The stumbling block is that the Horizontal Guidelines only provide for the inclusion of benefits accruing to the customers of the agreement rather than to society as a whole.

Ms. Kar noted also that the initiatives most likely to make a real difference would often of necessity involve a whole industry – scale was important. Mr Burnside strongly supported, saying that the authorities needed to reach higher than the low-hanging fruit in approving sustainability agreements. Ambitious projects were the most in need of clear supportive guidance.

Ms. Kar described the results of a Linklaters survey of 200 ESG leaders within companies that showed that 93% of businesses want to work closely with their peers to pursue sustainability goals and that collaboration would allow them to come up with better solutions. The areas which would benefit the most from cooperation are the reduction of CO2 emissions and of overall pollution, green innovation, and the protection of natural resources. However, 57% of the surveyed companies said that they have not pursued sustainability projects because they viewed the competition risk as too high. These statistics are compelling: competition law is viewed as a barrier to progress in relation to sustainability initiatives.

So the question is: is it a perception problem? Or the actual reality of how the rules apply? There is indeed a fear that companies are using competition law as an excuse, but whether that is right or wrong there is a need for greater guidance. Ms. Kar explained that the Covid-19 crisis had brought back comfort letters, 15 years after the modernisation regulation had largely done away with them. This had also shown that authorities can be flexible and are willing to balance competition concerns against other urgent public policy concerns. Unfortunately, the crisis had also revealed some degree of misunderstanding by companies surrounding the application of competition rules.

Ms. Kar added that there is also a debate about who pays the high cost of sustainable products, i.e. is this a tax on European citizens, and that it cannot be assumed that consumers want to buy sustainable products; there is a need for evidence. Ms. Kar’s plea was that practitioners should be bolder when advising on sustainability, to encourage their clients to come forward with their initiatives and push the authorities for guidance.

Andrea Collart

Andrea Collart expressed scepticism about the notion that competition law deters companies from pursuing sustainable goals. It may only be a perception issue. Action is necessary to educate industry. Given the magnitude of the EU sustainable goals, action must be undertaken at the European level. Some steps have already been taken: DG COMP has already authorised agreements and approved schemes to pursue sustainable goals. It is only a matter of interpretation, and in Mr Collart's view, the courts would support sustainable agreements. The Covid-19 crisis had shown that sustainability goals are already taken into account by national competition authorities. And the European Commission had also provided rules for collaboration between self-employed individuals. In terms of action plan, Mr Collart emphasised the need to define sustainability. The European Commission published the Taxonomy Regulation; the question was whether we should go further than that. Then, another question is whether this should be limited to certain sectors, as has been done for the EU recovery plan. Policy integration and the involvement of stakeholders were then keys to the adoption of proper policies. Furthermore, guidance from the authorities was needed for the industry to discard the idea that competition is the impediment to cooperation towards sustainable goals.

"ACTION IS NECESSARY TO EDUCATE INDUSTRY."
ANDREA COLLART

Questions & Answers

Asked whether DG COMP cooperates with non-EU antitrust authorities on sustainability, Mr Guersent noted the lack of international initiatives but observed that similar issues have been discussed in different jurisdictions. It can be expected that sustainability agreements will be discussed within the ICN soon. Mr Burnside mentioned an unfortunate experience in the United States: in California, car manufacturers agreed to maintain a certain level of environmental protection after the withdrawal of the relevant federal regulation; despite support from the Californian State, the Department of Justice initially challenged this, asserting that the initiative was depriving consumers of cheaper cars. Ms. Kar mentioned other cases in Indonesia and Brazil.

Asked about the methodology and available tools to measure long-term sustainability goals for the purpose of applying Article 101(3) TFEU, Mr Snoep explained that those goals can be quantified using shadow prices to determine the costs for society.

Mr Burnside emphasised that any sustainability collaboration must be constructed with the same care as any joint venture or collaboration with competitors: defining scope, with measures to avoid spill-over, compliance guidelines, prevention of information exchange, etc. This was the type of sustainability initiatives that competition authorities were calling for. The legal department in companies should take ownership of sustainability cooperations: the ESG departments are of course vital too, but in-house (and external) counsel should be central in evaluating feasibility. Failure to apply themselves seriously to the antitrust dimension would leave companies open to the accusation of greenwashing – wanting the brand image but not investing the real effort needed. Mr Collart added as practical advice to include trade organisations in the dialogue between regulators and companies.