

Sustainability Priorities and Competition Law Policies - A Meeting of Minds

By Peter Alexiadis & Alejandro Guerrero

The recurring weather anomalies that have struck the world in recent years, have focused minds on the importance of taking radical measures to protect the environment, with overarching importance being attributed to the pursuit of sustainable growth. To this end, the European Commission's much-awaited Green Deal was adopted in late December 2019. That document sets out the Commission's agenda in order that government bodies and private firms be able to achieve sustainable economic growth in light of pivotal environmental and social policy priorities. An integral part of realising the policy agenda reflected in the Green Deal is found in the so-called "Farm to Fork Strategy" on sustainable food, which applies to the entire food value chain. At the heart of that strategy is the importance attached by the Commission President von der Leyen to "preserv[ing] the vital work our farmers do to provide Europeans with nutritious, affordable and safe food. This is only possible if they can make a decent living for their families." Moreover, the Green Deal is seen as an "integral part of the Commission's strategy to implement the United Nations' 2030 Agenda", particularly the UN's sustainable development goals, which are 17 in number. Those goals were expressed by the UN in 2015 to be "integrated and indivisible, global in nature and universally applicable, taking into account different national realities, capacities and levels of development and respecting national policies and priorities."

The pursuit of sustainability goals under the Green Deal agenda has two relatively unique characteristics. One of these is that there is a truly international dimension to the pursuit of such goals and that the adoption of the usual narrow internal market perspective is not appropriate for those goals to be realised. In other words, whichever policies are adopted need to look further afield than merely European participants in the food value chain. The second of these is that the individual



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policies being pursued need to be understood in terms of their interaction and overall impact alongside other policies, by reference to what is loosely dubbed as the "circular economy" and which is seen to be synonymous with the idea of inclusive growth.

These two characteristics are critical for us to understand why and how traditional competition law practice needs to adapt in order to facilitate the achievement of such goals. Under traditional competition analysis, as the OECD Report of 2010 reminds us, an agreement between competitors that would pursue sustainability goals would only consider whether the agreement in question produces direct economic benefits typically recognised under local competition rules, rather than non-economic benefits related solely to the pursuit of sustainability policies. The new Green Deal, however, opens up the distinct possibility that a broader public interest test would allow the European Commission or National Competition Authorities to consider a wider range of benefits related to sustainability when considering the lawfulness of an agreements between competitors. The time to recalibrate the relationship between sustainability goals and competition rules in Europe is at hand, given that the Commission's so-called Horizontal Guidelines are due to be overhauled over the course of 2020, having been introduced in 2011.

In a speech delivered in Bruges in October 2019, Competition Commissioner Vestager foresaw that sustainability goals could be pursued successfully under the watchful eye of competition law, with the revisited Horizontal Guidelines providing the ideal platform through which DG Competition can explain how that relationship can be fostered. Although the Commissioner has made it clear that "a fair deal is not just about price", but also extends to quality and innovation, she is just as adamant that the efforts of the private sector

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to promote sustainability should not go to either antitrust extreme of producing cartel-like behaviour or by foreclosing competitive alternatives for consumers. While short on detail as to what this reconciliation of approaches would entail, the Commissioner emphasised the global nature of the sustainability issue and focused attention on the fact that the EU's recently signed trade deals with Canada, Japan and the Mercosur countries brought sustainability issues into sharp focus.

Recent competition law practice suggests that the time is ripe for a recalibration of the welfare analysis usually conducted by the Commission when assessing the legality of agreements entered into by competitors. To this end, relevant precedents can be found in a number of diverse sources, including:

- The European Commission's recent and current merger practice has already identified in *Arubis/Metallo* that the merger might lower the incentives for recyclers to collect and sort copper scrap, while due regard was had in *Novelis/Aleris* to the fact that the use of lighter materials facilitated the production of more fuel-efficient cars. Similarly, in *Demb/Mondelez/Charger Opco*, the Commission considered the substitutability of organic coffee products in its substitutability analysis, while the Portuguese Competition Authority in *Aviagen/Hubbard* considered the market importance of slow-growth chickens in light of sustainability concerns.

- The Dutch Competition Authority issued Guidelines in 2016 on sustainability agreements which focused, among other things, on the longer term benefits to society that might be generated by agreements between competitors. Moreover, it had assessed the compatibility with Dutch competition rules of actions such as the closing down of coal powered plants by competitors (2013) and the adoption of market-wide rules banning the sale of broiler chickens in supermarkets (2015). In doing so, it conducted a balancing exercise which weighed the longer term sustainability benefits of the practice in each case against the shorter term competition



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impact.

- Many of the broad derogations to competition rules available to producer organisations under the CAP provisions of the EU Treaties should by analogy be extended to non-EU producers that are similarly situated, at least if the global dimension of the sustainability cause is to have any meaning.

- The principle of social solidarity underpins the more accommodating approach of competition rules when applied to the rule-making of sporting bodies. In this sector, the immediate effects on short term competition can legitimately be offset by the need to preserve the long term attractiveness and sustainability of the sport in question. Given the context in which the Green Deal has been formulated, the extension of the solidarity principle into the realm of sustainability seems to be well founded.

- The unequal bargaining power of smaller producers in the food value chain, based on broader notions of fairness, has been recognised in recently

enacted EU regulation which seeks to protect smaller producers against the contractual demands of large buyers.

Just as the Commission has in the recent past widened the scope of its traditional antitrust analysis to capture “innovation markets” in the pharmaceutical space and potential competition in the digital services space, the time appears to be right for a re-set of the way in which it should be willing to offset short-term price competition against longer term social welfare which is measurable by reference to non-price factors. The Commission's desire to be a global thought leader on sustainability issues can begin with the upgrading of EU competition policy, consistent with the positions on sustainable development being developed by UNCTAD. This opportunity should not be lost, with the imminent revision of the Horizontal Guidelines providing the food industry and EU policymakers with the perfect opportunity to strike the balance that modern European society seems to be demanding.