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**Competition Law and Policy and  
Sustainability**

*Presentation*

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# Competition law and policy and sustainability

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# Sustainable development

In broad terms, **sustainable development refers to the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs.**

**It encompasses activities that support economic, environmental and social (including labour and human rights) development.**

The notion of sustainability objective therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), eliminating pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutritious food, ensuring animal welfare, etc.

**Communication from the Commission – Approval of the content of a draft for a Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements C/2022/1159**

# Market and Government failures

5. **The cause of the climate crisis is market failure: The cost of pollution of air, water and land, and the damage wrought by GHG emissions today and in the future, are generally not included in the price of goods and services.** Because the market price of a polluting product excludes the social cost, production is higher than the social optimum, taking into account that consumption of natural resources now exceeds what the regenerative capacity of the Earth can sustain.
6. **Government action (State aid for sustainability innovation, regulation, taxation, carbon trading) is in theory the best response to market failures, but in reality we face a degree of Government failure:** there are very serious concerns that the policy measures currently enacted or proposed are not enough to achieve worldwide carbon neutrality by 2050 – let alone the negative carbon policy and permanent sequestration we need, especially to deal with the increasing natural emissions triggered by climate warming caused by human activities.

9. **In markets where consumers' willingness to pay for sustainability is sufficient to cover at least the "true price" of products and services** (including the market price plus the costs to undo past damage and avoid future damage to climate and environment), **special rules to enable cooperation in sustainability may not be needed, beyond (a) environmental standards and labels adequately informing consumers, combined with adequate monitoring and compliance to avoid greenwashing, and (b) arrangement needed to create a minimum efficient scale of operation, where elimination of negative externalities requires scale that firms cannot achieve individually.** Think collection schemes for recycling of food-grade plastic.

Sustainable Competition Law – Note by Maurits Dolmans, Hearing on Sustainability and Competition 1 st December 2020, OECD Competition Committee

# Competition and sustainability

# 1) Competition can promote sustainability

(We investigate) the joint effect of consumers' environmental concerns and product-market competition on firms' decisions whether to innovate “clean” or “dirty”.

We first develop a step-by-step innovation model to capture the basic intuition that **socially responsible consumers induce firms to escape competition by pursuing greener innovations.**

To test and quantify the theory, we bring together patent data, survey data on environmental values, and competition measures. Using a panel of 8,562 firms from the automobile sector that patented in 42 countries between 1998 and 2012, **we indeed find that greater exposure to environmental attitudes has a significant positive effect on the probability for a firm to innovate in the clean direction, and all the more so the higher the degree of product market competition.** Results suggest that the combination of historically realistic increases in prosocial attitudes and product market competition can have the same effect on green innovation as major increase in fuel prices.

Environmental Preferences And Technological Choices: Is Market Competition Clean Or Dirty? Philippe Aghion, Roland Bénabou, Ralf Martin, Alexandra Roulet Working Paper 26921 NATIONAL BUREAU OF ECONOMIC RESEARCH April 2020

## **2) Competition law enforcement can promote sustainability**

**544. Competition law enforcement contributes to sustainable development by ensuring effective competition, which spurs innovation, increases the quality and choice of products, ensures an efficient allocation of resources, reduces the costs of production, and thereby contributes to consumer welfare.**



### 3) Competition can impair sustainability

Unfortunately, although **most consumers** favour more sustainable products, they **do not always behave accordingly in the market**. They are in many cases not prepared to pay at all, or not prepared to pay enough, for clean or sustainable production. In such cases, market failures occur:

- **On the demand side, market failures include an unwillingness to pay for environmental or social costs unless all other consumers pay an equivalent amount, as well as hyperbolic discounting** (such as underestimating the importance of future environmental damage), **behavioural biases** (such as the status quo bias, which discourages consumers from trying new products or changing their behaviour), **and the lack of accessible and reliable information about future costs of unsustainable products; and**

- On **the supply side** also, “collective action problems” (or “**coordination problems**”) appear. When producing, investing or innovating, **firms tend to make independent choices designed to maximise their profits individually in the short run, based on perceived conflicting interests between them, where cooperation would have been better for everyone**. This leaves everyone worse off. For example, an investment in expensive clean technology or a decision to source raw materials more responsibly may raise a producer’s costs, exposing it to the risk of being undercut by rivals relying on cheap and dirty technology or raw materials, leading everyone to stay away from investing in the better alternative. That fear of first-mover disadvantage may deprive the firm from the economy of scale or scope necessary to lower average fixed costs of the sustainable alternative to a manageable level.

### 3) Competition can impair sustainability

A coordination problem may arise if a sustainable product brings with it higher production costs, and, as a result thereof, higher prices.

**Undertakings would be confronted with a ‘first mover disadvantage’ if too many customers wished to switch to non-sustainable products. In such cases, the market may be unable to create sufficient incentives to help implement sustainable production. A joint approach could be successful in such cases.**

This can be demonstrated using the (...) example of overfishing. An individual fisherman who, on his own, adopts a fishing quota cannot solve the bigger problem, and may price himself out of the market. This means that individual fishermen do not have any incentive for conservative fishing, unless other fishermen do the same. Only a joint initiative might solve the problem.

**Therefore, making arrangements may offer a solution in order to correct market failures.** The welfare increase, in such cases, is the avoided welfare costs resulting from the market failure. The solutions, however, may be imperfect and/or involve additional costs themselves (such as transaction costs). In addition, the assessment and weighing of the interests involved will not always be straightforward in

### 3) Competition can impair sustainability

The results from our interviews show that first mover disadvantage is very real in the minds of market actors in the UK grocery sector.

**All 18 interviewees believed that first mover disadvantage was an obstacle to successful unilateral initiatives on pricing.**

***Retailers and brands interviewed all cited the fierce competition between retailers for market share, and the perceived need by retailers to cut their costs to retain their position in the market.*** This competition means brands and retailers may be reluctant to pay higher prices and to make courageous sustainability commitments, even where they see a compelling sustainability case.

On Law and Sustainability A study OF I, 2020 | Industry attitudes towards multi-stakeholder collaboration in the UK grocery sector, Fair Trade Foundation

## 4) Using green initiatives to enter into an anticompetitive agreement

Yet, the efforts by the private sector as part of the sustainability agenda have not been without criticism.

It often concerns the sincerity of the businesses with **accusations that private businesses have co-opted the concept of sustainability simply to improve the public image of their companies, in other words 'greenwashing'** (Portney, 2015, p. 117[5]).

Moreover, from the sustainability angle companies have been criticised for a lack for real motivation to contribute to sustainable development. Such **companies would be 'using' sustainability as a means of streamlining processes ensuring more cost-effective business strategies and increased profit margins** (Portney, 2015, p. 118[5]).

**Does competition law stand in the way of sustainability agreements?**

# Does competition law stand in the way of sustainability ?

Imagine a company that wants to build a new production plant and decommission the older “dirty plant” to combat climate change. Given the significant investment this requires, the company may need to increase its prices and risks being at a competitive disadvantage vis-a-vis its competitors: a dilemma also described as the “first-mover disadvantage”.

To avoid this problem, the company agrees with its two main competitors that they will also modernize their respective plants.

From a sustainability point of view, such co-operation prima facie seems to be welcome. From the perspective of competition law enforcers, this type of co-operation rings alarm bells, and, as has been pointed out by Olivier Guersent, Director General for Competition at the EU Commission, among others, could constitute a prohibited cartel

# Is first mover disadvantage a rare phenomenon ?

A term that is often used in this context is ‘first-mover disadvantage’: **no single firm would be able to make investments in sustainability** because they come with cost increases that necessitate price increases, and consumers would not be willing to pay such price increases. **Unilateral initiatives would (temporarily) worsen a firm’s competitive position and profitability.** This is seen as an obstacle that only the whole sector could manage to overcome together with coordinated sustainability investments.

We note that the first-mover disadvantage **argument assumes that either (potential) consumers have no willingness to pay for sustainable products, that consumers fully free ride on the sustainable consumption of others, or that firms cannot credibly signal that their products are sustainable – or a combination of such conditions.**

As the empirical literature shows, however, firms can differentiate their products as more sustainable, and consumers do, in general and increasingly, have a willingness to pay for them that is great enough to make unilateral sustainability investments profitable. **The first-mover disadvantage therefore seems a rather special case.**

# Does competition law stand in the way of collaborative efforts to tackle climate change ?

**A recent survey suggested that some 60% of businesses had shied away from cooperation with competitors for fear of competition law.**

This is also clear from submissions to the European Commission by companies such as Unilever.

This sets out **dozens of practical examples of cooperation between businesses on sustainability issues which could be inhibited by fear of competition law** - but which should usually be OK (either because they are not caught at all or because they should be exempt).



# Why is the current competition approach inhibiting vital collaborative approaches?

10. There are many reasons(...) . These include:

1. Failure to start with the law itself (for example by looking at the wording of the first condition for an exemption under EU law). Instead many start their analysis with a range of economic and socio-economic concepts which may, or may not, be helpful, but which are certainly not the correct starting point for that analysis;
2. Taking an unduly narrow view of the law and/or economic principles (e.g. the concept of a “fair share for consumers“, or a narrow, short term or over financial approach to the concept of “consumer welfare“)
1. Failure of the competition authorities to explain what businesses can do in this area without infringing competition law; and
4. Unduly conservative advice by advisors (both internal and external)

**Are there cases?**

# Dutch cases: Collaboration in the storage of CO2

- On 27 June 2022, the ACM issued an **opinion authorising Shell and TotalEnergies to collaborate in the storage of CO2 in empty natural-gas fields in the North Sea.**<sup>3</sup>

- **The CO2 storage plan initiative**

**TotalEnergies, Shell and two State owned companies** (Gasunie and Energie Beheer Nederland) (together, "**the Parties**") **plan to use empty offshore gas fields** (under the Dutch part of the continental shelf of the North Sea) **in order to provide carbon capture and storage ("CCS") services to emitters of CO2 based in the Netherlands.**

The Parties will build an on-shore terminal, a high-capacity pipeline, and a compressor that will transport the CO2 to the empty gas fields.

To reduce their own risk, **Shell and TotalEnergies propose an initiative to jointly market a volume of five million tonnes per annum CO2 for CCS ("MTPA"), which represents 20% of the capacity of the pipeline to be constructed ("JMI"). A joint tariff will be offered for 15 years by the Parties for the CCS services until the five MTPA is fully booked.** Over and above the five MTPA, **the remaining capacity of the pipeline will be used by the Parties and third parties to supply CCS services in competition with each other.**

# Dutch cases: Collaboration in the storage of CO2

The ACM considered that **a new market was created**, namely, the **market for CO2 storage in empty gas fields**, and that **about 20.4% would be covered by the joint selling**.

- Given the scope of the restrictions (joint setting of prices, capacity and quality as well as the 15 year duration of the arrangements), the ACM considered that it **could not exclude that the arrangements may appreciably restrict competition in the provision of CCS services**. The ACM considered that the Specialisation Block Exemption could not apply because the market shares exceed 20% and the uncertainty of the market share due to the nascent market. The **ACM therefore considered whether the arrangements could qualify for an exemption under Article 6 para 3 Dutch Competition Act ("Mw") and Article 101(3) Treaty on the Functioning of the European Union ("TFEU")**.

- 1. Improvement of production or distribution of goods or promotion of technical or economic progress

- The ACM noted that the proposed arrangements:

- lead to the creation of a new market, and significant benefits for third parties, which will be able to connect with the infrastructure and provide CCS services in competition with TotalEnergies and Shell;**

- allow for cost savings because TotalEnergies and Shell do not have to duplicate infrastructure;** and

- introduce a new CO2 reduction technology**, which will provide emitters with a new, alternative option to reduce their CO2 emissions, thus contributing to achieving legally binding climate goals.

# Dutch cases: Collaboration in the storage of CO2

- With respect to joint price setting, the ACM noted that, **due to the availability of Emission Trading System (ETS) rights as a substitute for carbon capture and storage (CCS), the joint CCS price setting will be subject to cost control.** In addition, the ACM noted that **the excess of five MPTA of CCS will be accessible by third parties competing with TotalEnergies and Shell, thus leading to market based prices for CCS services.**

- 2. Fair share for consumers

When assessing the fair share criterion, the ACM underlined that **the pipe line to be constructed (JMI ) will introduce a new technique for reduction of CO2 emissions — providing emitters with alternative solution to deal with their emissions, without affecting the currently available options, in terms of both choice and price. The ACM considered the counterfactual (where the new technique was not offered), and concluded that the proposed arrangements were likely to be beneficial for all consumers (emitters) within the relevant market.**

- The ACM considered that the proposed arrangements qualify as "an **environmental damage agreement, leading to cleaner air and less CO2 pollution for society**". Whilst the ACM considered that the proposed arrangements benefit all consumers (emitters), the ACM went on to state that **"... even if the Emitters would have been worse off ... it is likely that, based on a rough estimate ... the benefits for the consumers and society would outweigh the negative effects for the consumers."**

# Dutch cases: Collaboration in the storage of CO2

- 3. Indispensability

- The ACM noted the **need for emitters to have certainty that CCS and transport services can be offered without interruption, and considered that the operational and financial resilience required to provide this service, in such an innovative, novel and technically untested area, could not be offered by either Party acting on their own.**

- The ACM concluded that **in order to allay emitters' concerns and give them confidence to commit to the JMI, and mitigate potential first mover disadvantage, the companies need to join their developing and marketing competencies and experience.** The ACM also considered that the joint pricing mechanism minimised restrictions of competition in several ways. Therefore, the ACM found the cooperation agreement to be indispensable for the sustainable goals proposed.

# US Automobile case ( September 2019)

In September 2019, the Department of Justice announced an investigation into four major car manufacturers, BMW AG, Ford Motor Company, Honda Motor Company and Volkswagen Group.

The manufacturers had entered into a voluntary agreement with the State of California to meet certain fuel efficiency standards. In public statements at the time, **the Head of the Antitrust Division of the Department of Justice warned of consumer harm in the form of higher prices that would result from the deal, which effectively committed the four manufacturers to produce cars with a higher average fuel efficiency than required by US national standards.**

Under US antitrust law, it would not be unlawful for each manufacturer to commit to the State of California to adhere to the efficiency standards. However, if the manufacturers had discussed the efficiency standards among themselves and agreed to implement them, in addition to agreement to do so with California, this would arguably satisfy the requirement under Section 1 of the Sherman Act that there be a contract, combination, or conspiracy in restraint of trade (subject to a complex set of issues under the Noerr-Pennington doctrine and, potentially, the Act of State doctrine, which immunises from antitrust scrutiny actions taken by government or compelled by law). The investigation ended without further action in 2020.

Nevertheless, the investigation may have had the effect of increasing the perception in industry of antitrust's related risk arising from potential collaborations on sustainability

# Conclusion

- 1) Regulation is in general a better instrument than competition law enforcement to deal with a market failure (advocacy role of competition authorities)
- 2) Necessity for competition authorities to be transparent and to offer guidance on how they will deal with the issue of sustainability agreements
- 3) Public interest
- 4) Time frame of the competition analysis
- 5) Conditions for exemptions (should out of market efficiencies be considered)
- 6) Necessity for competition authorities to be alert to possible greenwashing