Competition and sustainability – is it a match?

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Reducing harmful effects on global climate and the environment, protecting human rights in global supply chains and ensuring good working conditions have taken the political scene as overarching goals in the third millennium. Consumer and investor choices are increasingly based not only on cost but also on sustainability considerations. But are "green business models" reconcilable with competition law?

The dilemma of businesses

There is an increasing sense of urgency that some areas where sustainability goals and competition law inevitably clash need to be addressed by regulators. At the heart of the debate is to what extent companies may join forces under the common goal of sustainable economic growth and cooperate for the better good. As sustainability often comes at higher costs, companies considering "green business models" may be deterred by first-mover-disadvantages or free-rider concerns. Conversely, if competitors cooperate to achieve sustainability goals collectively, they may run the risk of competition law infringements and potentially even incurring fines.

The EU Commission took action by hosting a conference last week on "*Competition policy contributing to the EU Green Deal*". Current developments and proposals were discussed among various stakeholders, including competition authorities, businesses, and NGOs. Overall, panellists agreed on the urgent need for guidance, but cautioned against softening the competition regime itself because "competition and green innovation go hand in hand".

Current proposals on the table

The Netherlands are the frontrunners at the moment: the Dutch competition authority (*ACM*) was first to issue a detailed and far-reaching guidance paper to encourage "green business cooperation" and provide more legal certainty. The British competition authority also published guidelines, albeit limited to the applicability of existing competition law rules; it has indicated, though, that it will consider whether further steps are needed during its ongoing public consultation.

Sustainability and competition law

Specifically, when assessing joint sustainability initiatives of several companies under competition law, the question is whether they can have detrimental effects on competition under Article 101 (1) TFEU. The answer may be "no", if the companies involved are

not competitors or the cooperation has no direct effect on product prices but instead merely enhances sustainable production and handling of resources.

Even if a cooperation does restrict competition it may still be permitted under Article 101 (3) TFEU provided its pro-competitive effects eventually prevail. Agreements on production standards, for example, may lead to economies of scale and the launch of innovative, more sustainable products, which eventually increase consumer choice. The principle test is whether cooperation agreements eventually promote technical or economic progress, and whether consumers get a fair share of the benefit.

But when are these standards satisfied? Which options for coordination with competitors and authorities exist, and which standards of documentation need to be fulfilled? How to evaluate costs and benefits of a given cooperation? How to determine whether consumers benefit from it sufficiently? Are long-term benefits of future generations also taken into account? How to ensure a non-discriminatory, transparent involvement of stakeholders and consumers?

The ACM proposal: Defining conditions

The ACM clearly states that it will not fine good faith initiatives that combat the climate crisis and pursue other sustainability goals during the ongoing public consultation period if they comply with its guidance; the authority is open to consult with companies considering such agreements. It also defines "safe-harbour"-types of initiatives, which will typically not be considered anticompetitive, as they are presumed to improve the quality and range of products without foreclosing competitors:

- Non-binding sustainability-aimed cooperation agreements allowing businesses to freely determine their contribution;
- Codes of conduct encouraging environment and climate-friendly behaviour (quality labels, standards of production etc.);
- Agreements to improve product quality while renouncing less sustainable products (e.g. agreements on the efficient use of packaging materials);
- Initiatives aimed at developing new products or markets, requiring to join forces with regard to production capacities or know-how;
- Agreements stipulating a commitment to legal standards, particularly in countries outside Europe (e.g. fair trade, production conditions, environmental standards).

It also clarifies that sustainability benefits are considered efficiency gains and cooperation agreements can be exempted under Art. 101 (3) TFEU in light of "benefits to society as a whole". The ACM provides helpful guidance on how such efficiencies – which need

not be generated within the Netherlands – may be demonstrated in practice. In particular, 'environmental damage agreements' can benefit from a more relaxed legal test as end-users need not be fully compensated for the harm caused by the competition restriction.

Towards a "more sustainable economic approach"?

The calls to replace the European Commission's "more economic approach" with a "more sustainable economic approach" have certainly become louder in recent years. The current competition law regime already provides for possibilities to produce sustainably and to achieve green goals. However, what is missing, from an industry perspective, is clear guidance on a pan-European level on how to use these possibilities in a compliant way. The guidance that the Dutch and the British competition authorities have put on the table so far are certainly a helpful beginning. But companies will need model cases and a certain level of comfort as clear incentives to really engage in sustainability-aimed initiatives.

The competition law debate ties into discussions on more comprehensive legislative proposals, such as the Swiss corporate responsible business initiative ("*Konzernverantwortungsinitiative*"), a proposal to introduce due diligence obligations for Swiss companies and possible liability for human rights and environmental abuses abroad. It was eventually voted against in a public referendum in November 2020 because it was considered to go too far; however, the counter-proposal that came into effect still results in increased reporting and due diligence implications for Swiss based multinationals. In Germany, a similar debate revolves around the planned supply-chain-act ("*Lieferkettengesetz*"), i.e. to what extent and down to which supply chain level can companies be legally obliged to comply with sustainability standards abroad, which may be out of their direct control. In light of the ongoing pandemic, which is already hard on many businesses and the imminent end of the current government's term, it is unclear when an agreement on the legislative proposal can be reached. Still, it is clear that at least increased monitoring and reporting obligations are ahead for German companies as well.

In order to meet stricter legal obligations, which certainly have goals we can all subscribe to but which place a considerable burden on the companies concerned, it would certainly be incentivizing to find ways to share the costs and efforts needed to achieve these goals. The message of the European Commission is pretty clear, however: For now, companies should not rely on relaxed competition law standards in this respect. Whether more national competition authorities will come forward with guidance on their own enforcement approach remains to be closely watched.

BLOMSTEIN will continue to monitor developments regarding sustainability initiatives and competition law. If you have any questions on the topic, Anna Blume Huttenlauch and the entire competition law team will be happy to advise you.