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■ SPECIAL REPORT Q&A August 2022

# COMPETITION & ANTITRUST



**Q&A:****Competition law and sustainability**

FW discusses competition law and sustainability with Nadine Watson, Soledad Pereiras and Frédéric Palomino at Compass Lexecon.

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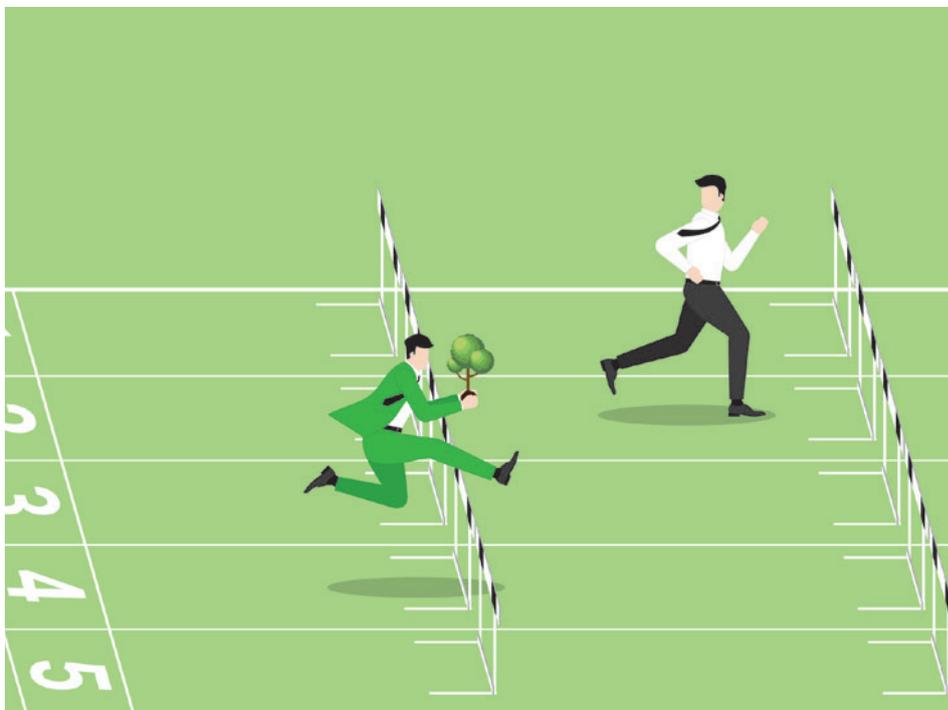
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**FW:** Could you provide an overview of the increasing relevance of sustainability initiatives in competition law? What key trends are emerging in this space?

**Pereiras:** Competition authorities are increasingly incorporating climate change and sustainability objectives into their agendas. The action of competition authorities in this respect has two main dimensions. First, authorities should provide guidance and legal certainty to companies regarding the assessment of sustainability initiatives. Second, authorities should consider how to integrate sustainability objectives into the substantive analysis of competition procedures. Related to the first point, the European Commission (EC) has incorporated a chapter on sustainability in the Horizontal Guidelines and released the Block Exemption Regulation for Research and Development and Specialization agreements pursuing sustainability objectives. However, the guidance is limited in relation to how sustainability and environmental issues can be integrated in the assessment of mergers and article 102 cases.

**Watson:** Climate change is a problem that requires the active involvement of all segments of society, including firms, regulators and competition authorities. Accordingly, antitrust authorities around the world are taking steps toward incorporating sustainability objectives and benefits into antitrust policy. In 2021, the Austrian Cartel Act was amended to include a sustainability-related exemption. In 2020 and 2021, the Dutch Authority for Consumers & Markets (ACM) published draft guidelines on the assessment of sustainability agreements. In March 2022, the UK Competition & Markets Authority (CMA) provided advice on how competition and consumer laws can help meet the UK's environmental goals. Also in March 2022, the EC published draft guidelines on the assessment of horizontal cooperation agreements including a chapter on sustainability which recognises that horizontal cooperation, particularly with respect to innovation, is essential for the green transition.



**Palomino:** The 2016 ‘Chicken for Tomorrow’ decision by the ACM marked a turning point in the consideration of sustainability in the analysis of agreements between companies. The purpose of this agreement was the growth and sale of chicken under enhanced animal welfare-friendly conditions, and the ACM considered the agreement to be anticompetitive. Since then, the debate on how to measure the benefits of sustainability and the willingness of consumers to pay for sustainability has continued to develop. In the context of merger reviews, the assessment of efficiencies is also debated when there are sustainability issues at stake, such as whether out-of-market efficiencies should be taken into account, and the timeframe of the assessment of efficiencies, such as five years rather than the current two-to-three-year timeframe.

**FW:** In what ways are competition authorities modifying their guidelines around the world? How severe are the penalties for non-compliance?

**Watson:** Competition authorities are making significant advances in recognising

sustainability as a potential source of efficiencies. However, how exactly these efficiencies will be measured, what standard of proof will be required, how possible short-term harms will be balanced against future efficiencies, and whether consumer harm will have to be fully offset by the sustainability benefits remains unclear. Penalties for non-compliance may arise if firms are found to agree to delay the rollout of innovations that have a positive impact on the environment. Such was the case of Ad Blue, where the EC found that car manufacturers avoided competing on the reduction of harmful emissions beyond what was legally required under EU emission standards even though they had the technology to do so. Moreover, private enforcement in such cases may further increase the severity of the penalty.

**Palomino:** As part of the EU Green Deal, the EC has pledged to factor sustainability objectives into competition rules. In its draft revised guidelines on horizontal agreements, the EC has included a chapter on sustainability agreements which aims to clarify the assessment of these types of agreements under EU competition law. Some national competition authorities,

such as the AMC and the Greek Hellenic Competition Commission (HCC), have also issued guidelines specifically addressing sustainability. However, these guidelines only provide principles. The case law is scarce at this stage, and it remains to be seen how these principles will be applied, and which consumers will be considered when estimating the benefits of sustainability, such as consumers in the relevant markets as opposed to consumers out of the relevant market.

**FW: To what extent can competition rules impact companies' ability to achieve their sustainability goals?**

**Palomino:** Two types of agreements should be distinguished. First, there are agreements that may lead to the production and offering of sustainable products that co-exist with non-sustainable products in the same relevant market. Second, other types of agreements may aim to set a minimum level of quality, and therefore may lead to the withdrawal of products currently available to consumers. Agreements falling within the first category should be considered as pro-competitive in general, as the offering of products available for consumers increases, and the new sustainable products can exert a price pressure on existing low-quality products. Agreements falling within the

second category call for a cost-benefit assessment. When these agreements lead to the withdrawal of products currently available to consumers, competition rules may prevent some firms from achieving their sustainability objectives.

**Watson:** Competition rules can be seen as a barrier to sustainability to the extent that they dissuade companies from pursuing agreements that might boost sustainability. Businesses are urged to contribute to the EU's sustainability objectives, yet without clear precedents or safe harbours, they face the risk of fines. This is particularly true for the most ambitious initiatives that can have the greatest impact on climate change because benefits accrue to consumers and non-consumers alike. Competition rules may need to be adapted to ensure that not only agreements that are local in nature or limited in scope, both in terms of the harm and the benefit, are put forth by firms reluctant to bear the cost of antitrust scrutiny.

**Pereiras:** In a context where consumers share environmental concerns, and certain economic circumstances, such as an increase in energy prices, would favour more efficient companies, there is no contradiction between a strong policy against anti-competitive practices and promoting sustainability efforts. On

the contrary, competition can encourage innovation, the introduction of energy efficient policies, and the development of more sustainable products and services. Maintaining strong competition policy enforcement can effectively contribute to promoting more sustainable business practices. However, some sustainability goals can only be achieved if companies in the same market are allowed to cooperate and agree on certain standards. In this context, competition authorities should accompany the different stakeholders to ensure that this cooperation raises no antitrust issues and provide guidance to understand in which circumstances these agreements will be exempted under article 101(3).

**FW: Is regulation the only way to address the negative externalities imposed by the consumption of unsustainable goods, or can competition authorities consider the benefits to out-of-market customers?**

**Pereiras:** The debate about whether or not out-of-market customers should be considered in the application of competition policy restraints is still open. The EC has been very cautious about considering sustainability-related benefits to out-of-market consumers when assessing potentially anticompetitive conduct, and these benefits will only be taken into account in cases where direct customers are also beneficiaries. Other authorities have been more open to incorporating public welfare considerations. There is no clear-cut approach and in certain cases, considering environmental benefits may involve a long-term perspective that also includes future customers, potential customers or customers in related markets.

**Watson:** When dealing with sustainability benefits that have a broad impact, it is necessary to consider the willingness to pay (WTP) of consumers and non-consumers, even if out-of-market efficiencies are not directly used in the balancing exercise. Acknowledging and estimating the size of the out-of-market benefits will provide the necessary context for well-informed decisions. Moreover, in many cases,

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a proper assessment of the WTP that accounts for non-use values using standard methods in environmental economics, will reveal that consumers do value sustainability. In these cases, the apparent discrepancy between consumers' priorities and consumers' choices is the result of a lack of information.

**Palomino:** An important factor for the estimation of consumers' benefits is the set of consumers considered to quantify the benefits. In this regard, the ACM guidelines on sustainability distinguish between "environmental-damage agreements", for which it will consider benefits for society as a whole as part of the cost-benefit analysis, and other types of agreements, for which it will only assess the impact of an agreement on consumers. The approach of the EC appears to be slightly different to that of the Dutch ACM, as in its draft revised guidelines on horizontal agreements it requires a significant overlap between the consumers and users of the sustainable product, who pay a higher price because of the sustainability agreement, and the beneficiaries of the agreement. Only under these circumstances will the EC consider any benefits of the agreement on non-users.

**FW: In your opinion, how can regulators and enforcement authorities strike a balance between promoting sustainability efforts and restricting anti-competitive practices?**

**Watson:** Climate change is a problem generated by products or production processes that benefit few but impose costs on the majority, for example by polluting the air, land or water, that have not enjoyed the benefits of consuming those products, such as non-consumers and future generations. Traditionally, those negative externalities have been dealt with through regulations, such as cap and trade, or taxes and subsidies, with tax on electricity consumption and subsidies for solar panels as two examples. Competition authorities can complement regulation by ensuring that antitrust does not curtail cooperative agreements that will allow sustainability goals to be achieved more quickly.

## “THE INCORPORATION OF A SUSTAINABILITY PERSPECTIVE IN COMPETITION CASES BRINGS SEVERAL CHALLENGES.”

SOLEDAD PEREIRAS

Compass Lexecon

**Palomino:** Some consumers are more price sensitive than quality sensitive. These consumers are likely to prefer cheaper, unsustainable products relative to more expensive, sustainable ones. For example, regarding cars, if pollutant emission standards had been set by car manufacturers rather than by the EC, it is difficult to say how the EC would have assessed such an agreement. Therefore, regulation may be useful when the goal is to set a minimum level of quality and this regulation will lead to the withdrawal of some products from the market.

**Pereiras:** This is probably one of the main challenges when assessing potentially anticompetitive agreements. Quantifying environmental effects and sustainability benefits is complex, as they may be subjective and difficult to translate into economic terms. In addition, this balancing exercise requires comparing costs and benefits of very different natures that would need to be converted into monetary amounts, usually trying to estimate the WTP for them. Consumer surveys and choice modelling are solid tools to perform this assessment. That said, they should be adapted to consider that certain cognitive biases may be exacerbated when the survey refers to sustainability or environmental topics, the information that the consumer has about the actual impact of their actions

is probably limited, and the behaviour of each individual may be different, depending on what other individuals do.

**FW: What advice would you give to companies on how to assess their sustainability efforts in terms of potential harms and benefits to competition?**

**Watson:** First, explain the rationale of the agreement and the expected benefits in terms of environmental and sustainability goals. Second, assess how much informed consumers would be willing to pay for the sustainable product or service and how much informed non-consumers would be willing to forgo to get rid of the detrimental effects of the unsustainable product or service. An initial assessment on a limited representative sample of individuals can provide strong insights on the relative size of consumer and non-consumer benefits for a self-assessment. Third, conduct the balancing exercise under different scenarios in terms of the potential harms and the potential benefits. Construct the scenarios considering different time horizons and allowing the inclusion of different shares of out-of-market benefits. Such an analysis can provide sufficient evidence that an agreement is unlikely to result in anticompetitive effects. If not, it will provide a clear roadmap on where likely effects may arise and where more in-depth

analysis and discussions with the antitrust authority may be needed.

**Palomino:** When considering a cooperation agreement, firms should perform a cost-benefit analysis in the context of article 101(3) on the Treaty of the Functioning of the European Union. A metric must be used to measure the benefits. One often considered is the WTP of consumers, which will then be compared to the price increase that the cooperation agreement may generate. The issue then becomes how to accurately estimate consumers' WTP. This estimation usually results from the econometric analysis of surveys conducted on consumers. The way surveys are framed and conducted plays a crucial role in the estimation of the WTP. A poorly designed survey can result in a poor measure of consumers' WTP. Respondents should be fully informed about the context of the survey, and the questions should take into account biases in responses, for example due to social norms or cognitive biases.

**FW: Looking ahead, what are your predictions for the competitive assessment of agreements in relation to sustainability efforts over the coming years?**

**Pereiras:** The incorporation of a sustainability perspective in competition cases, both to evaluate the potential efficiencies of certain agreements but also to consider how certain practices may be detrimental for the environment, brings several challenges. Some of the main developments in this respect will be focused on how to quantify the environmental impact and measure sustainability benefits beyond the immediate impact on current consumers. A better understanding of potential market failures in the fight against climate change and of how cooperation between companies translates into the achievement of concrete sustainability goals will help to make better-informed decisions when assessing the potential antitrust concerns of sustainability agreements.

**Watson:** Increased interaction between antitrust and environmental economics may facilitate the recognition of WTP measures designed to incorporate non-use values as a useful way to assess collective benefits outside the consumer market, to calculate the compensation for harming others, and to consider the impact on future consumers through the lens of current consumers and non-consumers. ■

“COMPETITION AUTHORITIES CAN COMPLEMENT REGULATION BY ENSURING THAT ANTITRUST DOES NOT CURTAIL COOPERATIVE AGREEMENTS THAT WILL ALLOW SUSTAINABILITY GOALS TO BE ACHIEVED MORE QUICKLY.”

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