

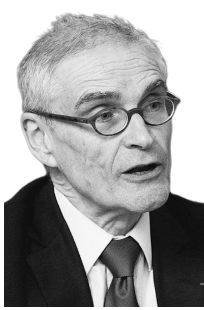
Gönenç Gürkaynak
Partner
ELIG Gürkaynak
Attorneys-at-Law
Istanbul



Simon Holmes
Judge
UK Competition Appeal
Tribunal
London



Patrick Hubert
Partner
Orrick
Paris



Stanislas Martin
General Rapporteur
Autorité de la concurrence
Paris



Dirk Middelschulte
Global General Counsel
Competition
Unilever
Brussels



Jorge Padilla
Head of Compass Lexecon
EMEA



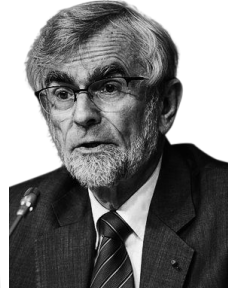
11TH NEW FRONTIERS OF ANTITRUST CONFERENCE

#4 Sustainable development: What role for competition law and policy?

Webinar - 6 November 2020*

Fourth webinar of the 11th New Frontiers of Antitrust Conference organised by Concurrences, in partnership with Compass Lexecon, Elig Gürkaynak Attorneys-at-Law and Orrick.

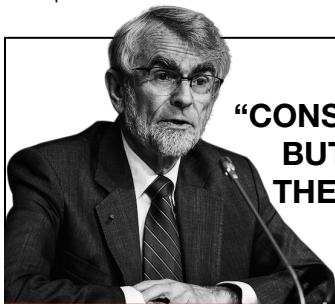
Chair: Frédéric Jenny
Chairman
OECD Competition Committee
Paris



Frédéric Jenny

Frédéric Jenny introduced the conference and recalled the wide scope of the notion of sustainability. Sustainability means meeting the needs of the present while not undermining the possibility for future generations to meet theirs. It has an economic, a social and an environmental dimension. So, even though, the concern about sustainability is frequently associated with the fight against climate change, it is in no way limited to this particular aspect.

The sustainability and competition issue raises three questions: whether achieving sustainability is relevant to the competition model? What role for competition in achieving sustainability? and what role for sustainability in competition law enforcement?



“CONSUMERS SEEM TO CARE ABOUT PRIVACY BUT WHEN IT COMES TO MAKING CHOICES, THEY DO NOT SEEM TO REWARD THE FIRMS THAT BEST PROTECT THEIR PRIVACY.”
FRÉDÉRIC JENNY

With respect to the first question, the goal of the competition is not sustainability but allocating whatever resources we have in the most efficient way whether today or tomorrow.

Future resources come explicitly in the competition discussion only in a limited way. To the extent competition promotes innovation and therefore increases our resources, it contributes to sustainability. However, if the prices of resources today reflected not only the current opportunity cost of these resources but also the social cost of the loss of opportunities to-morrow that their use today entails, we would be more careful about how we use them. In this case, there would be a closer link between competition and sustainability.

What the recent debate about the importance of sustainability points to is the fact that because the cost of the resources today does not reflect the cost of the losses of opportunities to-morrow that their use today entails, there may be a negative externality of the competitive market mechanism across time.

So why don't prices reflect the social cost of the loss of opportunities to-morrow that their use to-day entails? There are at least two hypotheses. It may be that consumers actually do not care about sustainability, or in other words, that sustainability does not enter their utility function. If this is the case, the fact that economic competition does not seem to be conducive to sustainability would not be a problem. But there is another hypothesis. There may be some kind of market failure (which could be explained by behavioural economics and various consumer biases) which explains why the competitive price of resources today do not reflect the opportunity cost of their depletion even if consumers are concerned about this depletion.

From this standpoint, it is interesting to draw a parallel with the issue of privacy. Consumers seem to care about privacy but when it comes to making choices, they do not seem to reward the firms that best protect their privacy. It may be that the same phenomenon is at work with respect to sustainability.

With respect to the second question, there are clearly cases where achieving sustainability may require, on the one hand, the coordination of firms either in the same industry or in related industries, and, on the other hand, a government commitment to help the adoption of sustainable technologies (in other words: an industrial policy).

There may also be cases in which the promotion of a pro-competitive practice or remedy could have a negative impact on sustainability. For example, prohibiting on competitive grounds a merger between two competitors, one of them a heavy polluter and the other one a clean producer, may mean that the highly polluting facility of one party will not be closed down because the polluting party will not be able to compensate the related loss of production by a higher level of production in another plant. Thus, there can be a contradiction between the goal of promoting competition and the goal of ensuring sustainability.

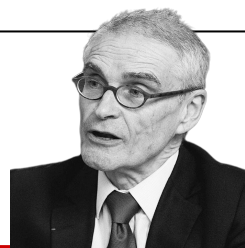
With respect to the role of sustainability in competition law, one can question whether sustainability should be treated as a public interest goal, as a parameter of competition, or as an efficiency. These questions are very similar to the one we ask for the digital sector in relation to privacy.

Patrick Hubert

Patrick Hubert started his presentation with an assumption: those who advocate for the environment would prefer less output and higher prices to deter consumption. This may sound contrary to the purpose of competition law. However, the interplay between competition and sustainability is more complex. For instance, coping with climate change challenges supposes a lot of innovation, which is promoted by competition. And of course, low prices are good for the social aspect of sustainable development. The first and simplistic approach may remind of the *Albany* case (Case C-67/96) where the Court of Justice excluded collective bargaining from competition law enforcement.

“IN FACT, FROM A PURELY THEORETICAL POINT OF VIEW, PRINCIPLES OF COMPETITION LAW ARE COMPLIANT WITH SUSTAINABILITY GOALS.”

PATRICK HUBERT



Although much applauded in some circles, this exclusionary approach has many downsides, like the fact that the *Albany* solutions allow employers (i.e., the strongest side) to pool

their strengths when discussing with employees (the weakest side). Consequently, it seems more appropriate if the antitrust policy could accommodate and account for concepts broader than prices and consumer welfare. There are other reasons to advocate such an inclusionary vision, for instance, the fact that environmental policy is more and more based on market-based instruments and even voluntary agreements are encouraged by public authorities like Ms Vestager.

In fact, from a purely theoretical point of view, principles of competition law are compliant with sustainability goals. First, constitutional law and EU Treaties acknowledge social and environmental objectives that must be complied with when enforcing all policies, including antitrust (see article 11 of TFEU). Second, the consumer welfare approach can be interpreted broadly and include at least some sustainable development aspects.

Third, a number of concepts and instruments can be used to include sustainable developments aspects; an environmental goal could be enough to consider an anticompetitive agreement as a per effect, and not as a per object restriction; objective justifications under Article 102 TFEU and exemptions under 101 (3) TFEU could be invoked. Fourth, the Commission has already accepted that environmental and social goals have a role to play in competition law.

Nevertheless, in practice, there are not many cases relating to these issues and the track record is not impressive. We have seen cases where an agreement between competitors to only produce energy-efficient washing machines was considered by the Commission as a per object restriction; and if it was finally cleared on the basis of Article 101.3, it was with a lot of circumvolutions.

The energy efficiency was just one argument among others and moreover, the Commission “translated it” into a traditional “price-cost” argument by twisting it twice: firstly, by limiting its positive impact to the traditional “consumers”, i.e., the buyers of the washing machine while the whole mankind would benefit from the decrease of carbon emission, and secondly by translating the energy saving into a cost-saving benefit for those narrowly defined consumers.

Therefore, it is not easy for us, lawyers, to reassure our clients that, yes, competition authorities are ready to take sustainable development goals and technique into account, and all the more given that, since 2004, the European Commission no longer reviews draft agreements: companies must take their risks.

As a result, uncertainty should be cleared. Opening a dialogue between competition authorities and companies would be useful and formal guidelines could be of value. This has happened for COVID-related agreements: why not for environmental or social-related ones: even if they “look” less urgent, they are certainly as important than the former ones.

Simon Holmes

Simon Holmes took the view that competition law is very relevant to sustainability. First, climate change is an existential crisis and time is short. All policies should be mobilised including antitrust. Commissioner Vestager as well as Director-General Olivier Guersent mentioned that everyone has to take part in the Green Deal. It is true that antitrust is not the cornerstone of environmental policy, it has nevertheless a role to play.

The private sector needs to go further than regulation. The issue is that developing sustainable solutions may incur rising costs. It, therefore, makes sense for companies to cooperate to achieve better results. Competition law should not stand in the way of these agreements. It is all the more important since antitrust rules may have a chilling effect on companies afraid of possible sanctions. In any case, sustainability is relevant within competition law. First, the constitutional provisions of the EU Treaties require environmental protection to be taken into account when applying all EU policies, including competition policy. Second, sustainability relates to quality or innovation and is therefore integral TO competition law assessments.

“CLIMATE CHANGE IS AN EXISTENTIAL CRISIS AND TIME IS SHORT. ALL POLICIES SHOULD BE MOBILISED INCLUDING ANTITRUST.”

SIMON HOLMES



The wording of the law helps in this respect. The first condition of exemption laid down in Article 101 (3) TFEU is that the agreement improves the production or distribution of goods or promotes technical or economic progress. This is general enough to include the development of more sustainable products.

Dirk Middelschulte

Dirk Middelschulte shared the view that cooperation can play an important part to achieve sustainability. In a market economy, firms want to differentiate. Sustainability may be a factor of differentiation. At the same time, individual actions alone do not lead to all desired sustainability improvements.

“IT WOULD BE PARTICULARLY USEFUL TO RECEIVE GUIDANCE AS TO WHETHER REDUCTIONS OF NEGATIVE EXTERNALITIES COULD BE CONSIDERED AS OFFSETTING RESTRICTING EFFECTS.”

DIRK MIDDELSCHULTE



Companies may want to cooperate. By way of example, companies may want to agree to out phase unsustainable products, they may want to agree on more sustainable production standards or combine scale to drive the development and supply of more environmentally friendly packaging materials.

However, there is a lack of clarity due to a lack of case law. *Albany* and *Meca-Medina* (C-519/04 P) show that some agreements may escape Article 101 TFEU based on public interest. Within Art. 101 (3) TFEU, conditions relating to quality, innovation and improvement of production might be met. There is still doubt as to the exact scope of consumers welfare and the fair share, they should receive. It would be particularly useful to receive guidance as to whether reductions of negative externalities could be considered as offsetting restricting effects. In that regard, Australian enforcers have put forward interesting precedents.

Gönenç Gürkaynak

Gönenç Gürkaynak considered that sustainability is not just like any other extra-economic goal. It is already at the heart of what competition law already does and embedded in competition law analysis and jurisprudence seen so far. It targets economic efficiencies, unlike other social objectives. It is true that from an individual utility perspective, sustainability seems non-economic. But it is very relevant when we address the issue of total welfare. Similar to how competition law should be viewed not in terms of an isolated scene, but rather a continuum of the time period, we should look at sustainability goals from a process perspective, not a snapshot. Individual consumers may not think over the long run; however, policymakers could and should do this. They need to go beyond the sum of individual objectives. Companies as well can address the issue.

“IF LEADING AUTHORITIES WAIT FOR DETAILED CASE LAW BEFORE ISSUING GUIDELINES, THEY WILL LOSE CRUCIAL TIME.”

GÖNEÇ GÜRKAYNAK



A broader social welfare approach is necessary for competition law enforcement: sustainability goal should be a systematic underlying factor, just like innovation, which over time is helping the human beings' welfare function, having a time effect as well.

From an enforcement perspective, we need to integrate sustainability goals more candidly. Agencies need to provide foreseeability and leadership. If leading authorities wait for detailed case law before issuing guidelines, they will lose crucial time. Indeed, we know from practice that many ideas die from fear of transaction costs and legal risks. If we want companies to be innovative and proactive in the area, we shall provide them with a clear landscape (i.e., guidelines and foreseeability on what can be and cannot be done).

Jorge Padilla

Jorge Padilla explained that increasing production benefits consumer surplus, just like lowering prices. However, some elements of consumer surplus, like willingness to pay, depending on subjective factors. Individual satisfaction may indeed not be related to the actual impact of a product, as it is the case for cigarettes. Agreements that increase the price, lower quality or production are usually perceived negatively because they reduce consumer surplus.

“HOWEVER, OTHER ASPECTS OF THESE AGREEMENTS MAY RELATE TO SUSTAINABILITY AND COULD NOT BE PERCEIVED AT AN INDIVIDUAL LEVEL. TRADITIONAL ECONOMIC TOOLS FAIL TO CAPTURE ALTRUISTIC PURPOSES.”

JORGE PADILLA



However, other aspects of these agreements may relate to sustainability and could not be perceived at an individual level. Traditional economic tools fail to capture altruistic purposes. Assessing the impact of an agreement on factors that do not relate to individual consumers or that relate to a future consumer is more difficult. Competition authorities will face challenges and they will have to perform cross-generational cost-effect analysis.

When we face a restrictive agreement, the harm is usually presumed. However, consumers negatively affected by the restriction of competition may benefit from sustainability efficiencies to some extent. Likewise, consumers may suffer from unsustainable products. In that case, how do we account for their subjective perceptions? One may simply not be informed, another may refuse objective facts about climate change, and another one may simply enjoy the negative effects of his or her consumption decisions. Should we respect his or her preferences or do we need to adopt a paternalistic approach?

In any case, competition policy is just one of many instruments to fight climate change. A single tool is not appropriate to solve that many problems. Regulation and taxation may be more relevant and competition law can be used in a subsidiary way.

Stanislas Martin

Stanislas Martin considered that from a theoretical point of view, competition authorities are relevant to tackle the issue because sustainability is now a business parameter. It is therefore potentially a competition parameter, with an economic value. Consequently, companies may compete or collude on this parameter. In the flooring sector, some companies had agreed not to communicate on the environmental performance of their products. In other cases, companies may collude to prevent the development of more environmentally friendly products. In these cases,

competition law enforcement does not substantially change. It simply adapts its assessment to the sustainability parameter. In fact, when authorities can economically assess environmental issues in relation to consumer welfare, they may act as they traditionally do. It does not imply any substantial change in the DNA of competition policy. Such enforcement is not an essential element to act on global issues like climate change. Yet, it is the duty of competition authorities to act when they can legally do it.

Stanislas Martin shared the French Competition Authority's ("FCA") view that it is yet too early to draft dedicated guidelines. More detailed and abundant case law would first be needed. The FCA created a dedicated group which began to discuss and think of a framework for sustainability. In particular, the FCA is open to discuss with companies in order to provide informal guidance. However, it has not been contacted for that matter yet. Recently, the FCA considered an agreement among candy makers not to use a specific chemical product in their candies. The FCA decided not to even investigate this agreement which was objectively justified under health concerns.

"WE CANNOT TAKE AN OVERLY RESTRICTIVE APPROACH, BUT COMPETITION LAW SHOULD NOT TURN INTO A POLITICAL STATEMENT."
STANISLAS MARTIN



From a theoretical perspective, competition authorities have all the necessary tools, and no adjustment is needed from that point of view. Nevertheless, some tricky questions remain to be discussed in the context of sustainability agreements. Under Article 101 (3) TFEU exemption, it is necessary to precisely what the requirement to transfer of a fair share of benefit to consumer means. Some questions arise in merger control regarding the assessment of efficiencies and non-economic gains. In particular, the temporality of sustainability benefits is uncertain since they materialise in the long run.

Regarding the consumer welfare standard, the right balance remains to be found. We cannot take an overly restrictive approach, but competition law should not turn into a political statement. In that respect, consumer welfare is not citizen welfare. ■