Foreword

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Environmental Sustainability and Competition Policy: Trends in European and national cases

ENVIRONMENT, FOREWORD, ENVIRONMENT PROTECTION, COOPERATION BETWEEN NCAS, COMPETITION POLICY, GENERAL ANTITRUST

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Competition law has never been out of flux. This is probably because the underlying idea, the very reason why we have competition law, connects intimately with the fundamental choice for a free market economy. And it is these fundamental choices that continue to elicit debate.

The choice for a free market economy is at odds with the desire to have sustainable economic growth. An economist can explain that this is because of the presence of externalities or transaction costs. As things are, most of the environmental pressure, or more generally, threats to sustainability, simply involve little to no cost for the entity causing that pressure on or reduction in sustainability. Whether this involves polluting the environment or overexploiting labour, the simple fact is that the majority of costs arising from this are not internalised in the economic process that sets prices and determines production and scarcity. This leads to an unsustainable trajectory, meaning that the competition and environment nexus will only become more relevant across the board.

This also means that the relation between competition law and environmental protection is relevant to competition law across the board. We find cases on anticompetitive practices, like the ones covered by Article 101 and 102 TFEU and their national equivalents. There are cases on state aids for environmental protection and there are cases that touch upon the state's role in regulating markets. This again highlights the fundamental nature of the competition and environment nexus; no provision of competition law is untouched. Still, most fascinating issues arise in relation to the law on anticompetitive practices.

When, for example, companies seek to make their production more sustainable, they will often incur more costs which in turn leads to higher prices. Many consumers, when confronted with the choice between a more expensive and sustainable product and the cheaper more polluting one, are unable or unwilling to buy the greener and more expensive product. This, in turn, means that on the whole consumption will not be sustainable, with only a few niche companies catering to the needs of the consumer who is willing and able to pay the higher price. I have always liked the analogy between competition and a race, with competition and races both bringing out the best in people and athletes and producers of sporting apparel in a way that eventually trickles down to all consumers. Obviously, there need to be rules of the game to prevent the athletes from cheating themselves to an unfair victory. This analogy also works nicely for the competition and environment debate. In a way, companies are racing to be

second in the market for sustainable production. It doesn't take much imagination to see how difficult it is to want to finish second in any race. In fact, it won't be much of any race at all. This is why at the fundamental level, the choice for a free market economy and competition will not work for sustainability. This is why we turn to the rules of the game. Isn't it for the state to set the rules of the game and ensure the sustainability of production? States most certainly have a major role to play in this regard and they do take that role. The result is a myriad of rules that seek to protect the environment and social conditions. The fact remains, unfortunately, that the legislator is overwhelmingly reactive, responding to the environmental threats that have already manifested themselves and thus reduced our chances of providing ourselves and our children with a sustainable future. Another fact is that states are as much in competition as the companies are. A quick glance at lobbying will reveal that dangers to national competitiveness are often cited whenever a government contemplates enacting a higher level of environmental protection.

One solution to this conundrum is cooperation. One of the reasons why the European Union has such relatively strong environmental rules is precisely because the cooperation between the Member States affords it the economic power to implement such rules. Even with this significant economic power, we find rules, in the European Union greenhouse gas emissions trading scheme designed to limit what is called carbon leakage [***1***]. Carbon leakage refers to the idea that production will exit the European Union when the carbon costs in the European Union rise too much. The effect of these rules is to reduce the carbon costs for companies that are exposed to greater international competition. However, this reduction of carbon costs also reduces the incentive for these companies to actually cut back on greenhouse gas emissions. This shows the fundamental nature of the clash involved between competition and sustainability.

How about cooperation between the companies involved? Such cooperation may well amount to an anticompetitive practice within the meaning of Article 101 TFEU or the equivalent thereof in the national systems of competition law. This is, for example, the experience of the organisations and companies involved in what is called the National Energy Deal in the Netherlands. The part of that agreement that involved the coordinated closure of the most polluting coal-fired power plants in the Netherlands was deemed to restrict competition with insufficient compensating elements to allow for the agreement to be declared compatible. [*2*] This case and the similar fate that befell another industry and stakeholder-led initiative to improve animal welfare triggered a debate in the Netherlands, and to a certain extent European Union, about the role of sustainability considerations in competition law [*3*]

This debate involves many issues and viewpoints ranging from the constitutional and fundamental to the pragmatic. Some will engage in an exegesis of concepts such as 'consumer welfare', whereas others take to the European Union's constitutional texts and point to the European Union's duty to promote the well-being of its peoples. These debates, however important and interesting, should not detract us from the reality that competition law is an overwhelmingy executive and judicial matter. With this I mean to say that the majority of competition law is made and developed by executive authorities the judicial scrutiny of their actions and, occasionally, private parties bringing a competition law claim in civil proceedings. The reality is that legislatures are generally barely involved in competition law matters. In the European Union, for example, the Council and European Parliament, haven't been significantly involved in competition law for a good decade at least. The fact that the removal of the 'competition principle' in the shape of Article 3(1)(g) EC with the Treaty of Lisbon is the last significant involvement in the core European Union competition provisions, is indicative in this regard. This bestows an important role on the authorities involved in the administration of competition law. These are not only to apply the law, but also to deal with the impact that new developments mean for the application of that law. The obvious example to come to mind in this regard is the advent of digital markets [*4*] Another example of a similar sea-change is climate change.

It is simply impossible to ignore that this will affect all industries sooner or later and this means that competition authorities will be asked to apply competition law to the initiatives taken to mitigate climate change and other unsustainable practices.

When reviewing the practice to date we see essentially two types of cases. First, there are the cases that involve plain cartels that somehow involve environmental considerations. This could be because environmentally relevant industries are involved, such as recycling [*5*] Second, we find cases that involve cooperation that is genuinely driven by a desire to enhance sustainability. These are less prevalent, but they do show an interesting development that can also be connected to the constitutional setting within which Article 101 and 102 TFEU are to be applied. Since Regulation 1/2003, this application is no longer the sole dominion of the European Commission. Instead, these provisions are also applied by National Competition Authorities and these appear to be specialising and experimenting with the administration of competition law. In Europe notably the United Kingdom and the Netherlands competition authorities appear to be testing the water for a greater room for cooperation to enhance sustainability and greenhouse gas emissions reductions in particular. This national experimentation may well be a sign of things to come as regards the ways in which executive competition law deals with the changing environment within which it is applied.

As regards the judiciary, there is little specific under the sun. The Court of Justice has simply not ruled on the matter, but if cases like *APVE* (Case C-671/15) are anything to go by, the Court will be reluctant to depart very much from the established case law. [*6*] This obviously will also impact the room for experimentation by the competition authorities. That being said, it is most likely in relation to the cooperation that will be needed to come to more sustainable production and consumption that we will see the most interesting and challenging developments.

As regards the competition provisions dealing with abuses of dominance, like Article 102 TFEU, a different type of case has sprung up. These are the cases that involve energy companies that abuse their dominant position in relation to energy network management [*7*] Energy network management has become increasingly important as we seek to accommodate an ever-increasing amount of renewable energy, and notably electricity, in our energy system. Irrespective of the sustainability of renewable electricity, the fact remains that it is still intermittent. This denotes the fact that actual renewable electricity production at any given time is not exactly predictable and that actual production may differ from the predicted production that was taken into account to meet the demand for electrical energy at a given time. The resulting imbalance requires action by the network operator and it is fair to assume that, at least until smart energy systems are fully operational, such imbalances are only going to increase with increasing renewable energy production and increasing demand for electricity (e.g. electric mobility). This challenge is relevant to the practice of applying Article 102 to the actions of a network operator who may seek to advantage its own services over the more environmentally balancing services offered by other parties. It is also highly relevant to the application of the state aid rules; something we will pay closer attention to below.

As regards Merger Control, we mostly find cases that do not turn on the environment-competition nexus identified above. What we encounter are cases involving concentrations in environmental service industries where the most important concerns are the classic ones. Preventing foreclosure or the creation of market power is just as important in environmental services as it is in any other market. If anything, the importance of innovation may be slightly greater in environmental services, given the potential increase in demand for such services connected with the need to decrease the costs of such services. A possible connection with digital markets may present itself when the circular economy really takes off and plethora of platforms may be needed to connect the users of products and enable the change from a linear to a circular economy.

The bottom line is that much of the competition law dealing with cooperation for sustainability is underdeveloped and hampered by unclarity. This raises the question to what extent this uncertainty has a chilling effect on competition *for* the environment? Interestingly, this chilling effect is often put forward by the people arguing against a more stringent application of competition law to, for example, digital markets. The above makes me wonder about the chilling effect on the cooperation that is required to create the conditions for a market in which companies compete for the environment? A market in which consumption is not directed solely by the lowest possible price, but also by companies trying to outcompete each other by having ever greener products.

When we look at the competition rules addressed at the Member States, we see a far clearer framework. The Commission has set clear rules on the state aids that the Member States may provide in this regard. These rules are clear and elaborate and thus provide a very significant amount of guidance to the parties involved: the Member State, recipient undertakings and their competitors. If there is any unclarity, it involves the question whether there is state aid in the first place. In this regard, the matter of selectivity continues to rear its ugly head. The cases that pop up mostly boil down to the question whether and to what extent state aid rules can be used to challenge the nationally set conditions for eligibility for a subsidy scheme or the national conditions set for exemptions from eco-taxes. We see that the Court of Justice is generally reluctant to review such national schemes all too pervasively, providing the Member States with considerable leeway. This in fact means that the Member States can assume a more significant role in setting the rules of the game mentioned above [***8***] In this case, the rules aren't set as such, but rather taxation can be used to create the financial incentives that set the rules of the game.

Beyond the cases that involve sustainability matters in relation to the scope of state aid supervision, we find cases that deal with national subsidies for indigenous coal production and subsidy schemes for renewable energy production as well as capacity mechanisms. [***9***] The latter refers to schemes that seek to subsidise companies so that they will have sufficient generation capacity online to deal with the increasing amount of intermittent renewable electricity. One of the major challenges in this regard is in dealing with the need to ensure that such 'back up 'generation capacity is actually sustainable in and of itself. Here again the constitutional framework matters. In relation to energy, the European Union only has a shared competence and the Member States retain sovereignty in relation to the choice and structure of their energy supply (Article 192(2)(c) TFEU). This Member State-centric framework sits uneasy with the Commission's exclusive right to review state aids for their compatibility with the internal market.

However, this constitutional tension has not kept the Commission from developing its policy that places a clear emphasis on market integration and greening the energy sector. The myriad decisions on the approval of national subsidies for renewables as well as the body of decisions that deal with such capacity mechanisms, all show that the Commission is serious about greening the energy market and allowing Member States to subsidise in order to overcome market failures. The framework that the Commission has developed and continues to develop in this regard has not only become clearer, it has also become more sceptical of the need of such subsidies. Under the State Aid Modernisation, the Commission has enacted the three-step approach and now asks for clear evidence of, firstly, a market failure before any subsidies can be considered compatible with the internal market. In this regard it is telling that the Commission increasingly finds that renewable energy production has changed to such an extent that market failures are less likely. It further finds that such green electricity must be fed into the grid under the same circumstances and subject to the same network management rules that apply to conventional electricity. Finally, the Hinkley Point C judgment makes it abundantly clear that the Commission cannot allow for state aid for activities that violate EU environmental rules [***10***]

When we take stock of the competition law in this special issue, several things come to mind. Firstly, the striking difference in treatment between the competition rules addressed at undertakings and those addressed at the Member States. Why isn't there more clarity for companies that seek to cooperate in order to enhance sustainability? Yes, such cooperation may restrict competition in the short term and even result in increased prices. However, in the longer term, price-based competition may not be that important in the first place as competition may have focussed on the (environmental) quality. This pragmatic approach to the application of competition law isn't much more futuristic than one dealing with the risks of killer acquisitions or the importance of competition in innovation spaces. It requires no fundamental reorientation of the competition rules or another reading of the Treaty framework within which the European Union competition rules are situated (bearing in mind that many national schemes of competition law do not function in a similar constitutional setting), even when such a reading could be beneficial to a greater role for longer-term sustainability considerations in the application of the competition rules.

Second, the Commission's central role in setting, executing and developing policy in relation to state aid for environmental protection contrasts with the lack of Commission guidance and concomitant decentral experimentation on the part of the national competition authorities. This national experimentation signals a different mode of competition governance, one where policies are set, executed and developed nationally in one or more focal points and may consequently be taken over by other competition authorities. If the experiences with the spontaneous harmonisation of not just substantive competition law, but also competition procedure across Europe are anything to go by, this method may prove to be successful in not only taking competition law enforcement to a higher level, but also making competition law more sustainable.

The cases and other developments covered in this special issue of Concurrences serve as a useful inventory of the many interesting and challenging issues and questions that arise when dealing with the interface between competition law and environmental protection. They show the practical solutions developed by the market, competition authorities and governments to address the environmental challenges we face today and will face tomorrow. If I am allowed to end with a more fundamental musing, I would like to conclude this foreword with a quote from my PhD thesis 'In the end we must ask ourselves what undistorted competition is worth if there is nothing left to compete for'. This indeed is a question that everyone, including competition lawyers, should be asking.

[1] See ***Brigitta Renner-Loquenz***, *The EU Parliament and Council adopt a Directive establishing a scheme for greenhouse gas emission allowance trading addressing State aid aspects, 13 October 2003, e-Competitions Environment and competition policy, Art. N° 36870.*

[2] See ***Hans Vedder***, *The Dutch Competition Authority declares that a deal over closing down coal power plant is harmful to the consumer, 26 September 2013, e-Competitions Environment and competition policy, Art. N° 57504.*

[3] See ***Hellenic Competition Authority***, *The Hellenic Competition Authority launches a dialogue in relation to sustainable development in the context of effective competition, 17 September 2020, e-Competitions September 2020, Art. N° 97078.*

[4] See ***Salomé Cisnal De Ugarte, Raphael Fleischer, Matthew Giles***, *The EU Commission publishes a report on competition policy for the digital sector, 4 April 2019, e-*

Competitions April 2019, Art. N° 90398; ***Peter Broadhurst, Satyen Dhana, Nathdwarawala Shachi***, *The EU Commission publishes a report on competition policy for the digital era, 4 April 2019, e-Competitions April 2019, Art. N° 90078*; ***Jay Modrall***, *The EU Commission publishes a report on competition policy for the digital era, 4 April 2019, e-Competitions April 2019, Art. N° 90700.*

[***5***] See ***Richard Burton***, *The EU Commission fines €68 million undertakings in a car battery recycling cartel case (Campine / Eco-Bat Technologies / Recylex), 8 February 2017, e-Competitions Environment and competition policy, Art. N° 83598.*

[***6***] See ***Richard Burton***, *The EU Court of Justice provides guidance to French Court on the relationship between EU Common Agricultural Policy and Competition Law (APVE), 14 November 2017, e-Competitions November 2017, Art. N° 85455*; ***Jan Blockx***, *The EU Court of Justice issues a ruling assimilating farmer cooperatives to undertakings under EU competition law (APVE), 14 November 2017, e-Competitions November 2017, Art. N° 85305*; ***Luis A. Gomez, Rachel Cuff***, *The EU Court of Justice confirms that not all practices by agricultural producer organisations and their associations are automatically excluded from the application of competition rules (APVE), 14 November 2017, e-Competitions November 2017, Art. N° 85382.*

[*7*] See ***Karoly Nagy, Philippe Chauve, Martin Godfried, Stefan Siebert, Gregor Langus, Kristóf Kovács***, *The EU Commission approves structural remedies offered by German electricity operator to remove suspected infringements of EU Article 102 concerns in the German electricity wholesale and balancing markets (E.ON), 26 November 2008, e-Competitions November 2008, Art. N° 35136.*

[***8***] See ***Markus Wellinger***, *The EU Court of Justice provides further guidance on the selectivity assessment of environmental taxes in the framework of autonomous communities (UNESA), 7 November 2019, e-Competitions November 2019, Art. N° 92586*; ***Phedon Nicolaides***, *The EU Court of Justice provides a preliminary ruling relating to a dispute between several electricity and hydroelectricity producers concerning a tax on the use of inland waters for the production of electricity (UNESA), 7 November 2019, e-Competitions November 2019, Art. N° 92735.*

[***9***] For example, see ***European Commission***, *The EU Commission approves a scheme to support electricity production from renewable sources in Ireland, 20 July 2020, e-Competitions Environment and competition policy, Art. N° 95893*; ***European Commission***, *The EU Commission approves under EU State aid rules the support for the production of electricity from renewable sources in Italy, 14 June 2019, e-Competitions Environment and competition policy, Art. N° 90851*; ***European Commission***, *The EU Commission approves under EU State aid rules a €385 million support for the production of electricity from renewable sources in Lithuania, 23 April 2019, e-Competitions Environment and competition policy, Art. N° 90385.*

[***10***] See ***Dr. Corinne Rüchardt***, *The EU Court of Justice confirms the Commission's approval of State aid for a nuclear energy plant (Hinkley Point C), 22 September 2020, e-Competitions September 2020, Art. N° 96931*; ***European Court of Justice***, *The EU Court of Justice confirms the Commission decision approving UK aid for a nuclear power station (Hinkley Point C), 22 September 2020, e-Competitions September 2020, Art. N° 96834*; ***Markus Wellinger, Francesco Pili***, *The EU Court of Justice clarifies the scope for State aid rules in the nuclear energy sector covered by the Euratom Treaty, as well as their relationship with the general principles of environmental law (Hinkley Point C), 22 September 2020, e-Competitions September 2020, Art. N° 97170.*