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Sustainable Competition Law – Note by Maurits Dolmans

Hearing on Sustainability and Competition

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/sustainability-and-competition.htm>

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Sustainable Competition Law

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1. The OECD's willingness to consider how competition policy could support a sustainable world is much appreciated. This is a matter of huge importance.
2. For a more detailed paper on the topic, please see [here](#)¹ and [here](#).² Summarized:

1. Background

3. The climate crisis has become an emergency. Carbon neutrality by 2050 is not enough, even if implemented worldwide. To have a chance of keeping global warming to 1.5 degrees, we need to *lower* greenhouse gases ("GHG") in the atmosphere back to the levels prevailing before the sudden leap of carbon emissions in the 1950s.³
4. That means recapturing and permanently storing not just GHG from more than 50 years of human activities and going forward, but also the methane that is increasing being emitted by melting arctic tundras, and the CO₂ emissions from wildfires and drying and dying forests that are turning from carbon sinks into carbon emitters – natural GHG emissions triggered by climate warming caused by human activities, and that cannot be controlled by merely reducing or even eliminating GHG emissions from those human action.
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.

¹ The published version is Dolmans, "*Sustainable Competition Policy*", CLPD Competition Law and Policy Debate Vol 5, Issue 4 and Vol 6 issue 1 March 2020. Further thoughts in Dolmans, "The Polluter pays principle as a Basis for Sustainable Competition Policy", *Concurrences*, forthcoming (Dec 2020). Those who prefer to listen rather than to read, see "Sustainable Competition Policy" webinar, *Concorrenze*, May 28, 2020, https://www.youtube.com/watch?v=0IG8_oSIOPY (about 40 minutes) or a 5 minute presentation to the Greek Competition authority .

² Dolmans, "*The "Polluter Pays" principle as a basis for Sustainable Competition Policy*", draft, October 2020.

³ Prof Myles Allen, Oxford Environmental Change Institute, "Achieving Net Zero – Challenges for Business and Investors", AEBA, 30th June 2020. IPCC Special Report on the impacts of global warming, 2018, p. 17, "*All pathways that limit global warming to 1.5°C with limited or no overshoot project the use of carbon dioxide removal (CDR) on the order of 100–1000 GtCO₂ over the 21st century*", at https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf See also, for instance, Gasser et al., "Negative emissions physically needed to keep global warming below 2 °C", 2015, <https://www.nature.com/articles/ncomms8958>, and materials listed in Nature, "Permafrost collapse is accelerating carbon release", 2019, <https://www.nature.com/articles/d41586-019-01313-4>, Energy & Climate Intelligence Unit, "Negative emissions: why, what, how?", <https://eciu.net/analysis/briefings/net-zero/negative-emissions-why-what-how>

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.

7. **Technological solutions** may yet solve the problem. But we cannot just hope for engineers to come up with a *deus ex machina* to save us. So long as we are not certain that a fully effective combination of technological solutions is found, and scaled up in time, we need to apply all available tools, including competition policy. We need a coherent and consistent program of regulation, innovation, taxation, education, reforestation, and private cooperation.

8. The last element (private cooperation) should be enabled, not hampered, by competition law.

2. Antitrust

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.

10. Where these conditions are not met, cooperation can be effective to help fight climate change, serious pollution, and loss of biodiversity – to counter market failures, create scale and scope, and to place the responsibility for the costs where it should be: with the GHG emitting producers and the consumers who buy from them. Antitrust authorities should **enable and indeed encourage effective private cooperation** (while taking action against "overspill"), including by enabling, for instance, agreements reflecting the "polluter pays" principle.

11. **Legal certainty** is key. Given the chilling effect of uncertainty on companies faced with the risk of potentially high antitrust fines, antitrust authorities should strive to maximize predictability with respect to sustainability objectives. Guidelines for horizontal agreements and precedents would play an important role.

12. In addition, antitrust authorities should consider issuing findings of non-infringement, business review letters, and guidance letters offering informal advice on whether specific projects are considered likely to violate antitrust. Considering the size of investments and legal risks involved in environmental initiatives on the one hand, and the scarcity of precedents related to sustainability initiatives on the other hand, the informal advice stemming from guidance letters (combined with conditional immunity from fines as the Dutch ACM is proposing) could offer the minimum necessary comfort for industrial cooperation. Dedicated mailboxes could be maintained in the future as a channel for guidance on sustainability initiatives, as was done for Covid.

13. Guidelines could analyse sustainability agreements on the basis of a proportionality principle, recognizing that sustainability agreements should be permissible if the following cumulative criteria are met:

1. **Legitimate goals:** they should pursue abatement of GHGs or other serious forms of pollution, or revival of biodiversity. Guidelines should explicitly discuss sustainability agreements, and clarify that cooperation to undo past damage and avoid future damage to climate and environment contribute[s] to improving the production or distribution of goods or to promoting technical or economic progress;
2. **Effectiveness:** they should be adequate to achieve these goals;
3. **Necessity:** there should be no less restrictive and equally efficient forms of cooperation available to meet these goals; and
4. **Balance of interest:** the cooperation meets the balance of interest test, in that consumers receive a fair share of the benefit. There should be no requirement that consumers be fully compensated by in-market countervailing benefits. Instead, it should be enough if consumers get “a fair share of the resulting benefit”. To determine this, benefits to all consumers should be counted. Appreciable improvements of environment and effective contributions to abatement of climate change should be found to provide a “fair share to consumers” on the ground that
 - consumers benefit from these even if they relate to non-market goods or out-of-market goods, taking into account that if the climate crisis intensifies, the damage could threaten lives and livelihoods, with dramatic consequences (as recent floods, extreme weather events, and wildfires on all populated continents demonstrate.
 - consumers enjoy “a fair share” even if they are not fully compensated with in-market countervailing benefits, so long as the arrangements eliminate costs imposed on others (negative externalities) in accordance with the “polluter pays” principle, or otherwise reduce environmental or climate change harm to all consumers.

14. Indeed, it would not be “fair” for consumers to obtain all the benefits of consumption while imposing the costs on the community.

15. The Dutch ACM proposes to count benefits to others only if “*the agreement ... contribute[s] to a policy objective that has been laid down in an international or national standard to which the ... government is bound. ... In other cases ... users still need to be fully compensated.... Think of product standards or environmental standards that are more ambitious than the existing, binding standard for the government.*”⁴ But this falls in the trap of the “government failure” discussed above. It is precisely where Government targets are too low or not effective, or where the Government fails to set targets at all, that private initiative is needed

3. Merger Control

16. A **consistent approach** should apply to all aspects of antitrust policy, including cooperation, unilateral conduct, State aid policy, and merger control. For instance, merger

⁴ ACM Draft Guidelines, para 41.

control should take account of non-market externalities – not instead of, but as part of, the consumer welfare standard.

17. Antitrust authorities could and should find a **significant impediment of effective competition** (“SIEC”) if an acquirer plans, or has the ability and incentive, to shut down a target’s cleaner production facilities post-acquisition – a killer acquisition. Depending on the overall circumstances they could also find a SIEC if a merger can demonstrably be expected to increase carbon emissions appreciably (and leads to a net “true price” increase to all consumers for the product in question), and if that increase of emissions is not constrained by effective competition from greener competitors, by opposition from consumers, or by Government regulation. This could be the case if the merged firm gains market power as a result of the transaction and is expected to increase output or gain market share at the expense of cleaner rivals – for instance, a rival who has just made significant investment in clean production, and needs to recover the associated sunk costs.

18. In assessing the situation, the net “true price” per unit produced should be considered, taking into account both the market price and the social cost of emissions (externalities).

19. A predictable, evidence-based analysis of the social costs on consumers is possible – pollution and emissions can be assigned a value, and the social cost of GHG emissions can be calculated, as is done for health and safety law.

20. If a deal lowers polluting output or reduces the environmental cost to society per unit produced, such that the net “true price” (including social cost) decreases, that could be a reason to allow a transaction even if it raises the immediate market prices in monetary terms, and proportionality criteria are met (see above). This could be the case if a firm acquires a rival with green technology in order to adopt that technology for all of its production post-merger, or if a firm acquires a rival in order to apply its cleaner technology to the target’s production.

21. Note even if it is proposed to take account of climate change, serious pollution, and degradation of biodiversity, that need not (and should not) require taking into account other objectives, or industrial policy (e.g., support for industrial champions). Dealing with this particular issue is a matter of survival, and of a worldwide magnitude very different from other goals and political interests.

22. Similarly to antitrust, legal certainty in the form of clear guidance is key with respect to merger enforcement as well. Guidelines on the assessment of horizontal mergers should be adjusted to reflect the importance of environmental progress, in a manner consistent with the standards mentioned above.