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Climate Change and Competition Law – Note by Simon Holmes

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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Climate Change and Competition Law

By Simon HOLMES*

1. Introduction

1. Over the last year I have spoken and written about climate change, sustainability, and competition law. This note provides a high level overview of where my thinking has got to¹. Further details and citations etc can be found in my more formal published papers. These include:

- Climate Change, Sustainability and Competition Law published by the Oxford Journal of Antitrust (JAE) <https://academic.oup.com/antitrust/article/8/2/354/5819564?guestAccessKey=5ae0d011-fc1d-4ee8-9c37-13a328fe6cd7>;
and
- Climate Change and Sustainability under UK Competition Law published by the European Competition Law Review (ECLR) https://www.law.ox.ac.uk/sites/files/oxlaw/celp_working_paper_celp151.pdf

2. This note focusses on climate change and the environment for two principal reasons. First, we face a climate emergency and this has to be our number one priority. Secondly, while other concerns (e.g. worker's rights) are important, bringing wider concerns into the "sustainability" net risks diluting or delaying urgent action to help competition law accommodate the fight against climate change.

3. This note also focuses on cooperation between businesses rather than on mergers, abuse of dominant position, state aid or public procurement. All these areas are important and can play a role in combating climate change but my immediate concern is to show that competition law is inhibiting vital collaborative efforts to fight climate change – and that it need not do so.

2. The Problem

4. There is near universal acceptance that climate change is an existential threat and requires massive effort by government, the private sector and individuals to combat it.

5. In many (perhaps most) cases regulation is the appropriate policy tool (e.g. for clean air, prohibiting the use of unsustainable inputs etc.). However, regulation is often too slow to come through, too limited in geographic scope, or simply not ambitious enough.

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¹ In that sense it complements the excellent more detailed and technical background note prepared by Julian Nowag for this OECD Roundtable.

6. In other cases individual businesses can, and should, compete on the basis of the sustainability of their products (This can often be a competitive advantage).

7. However, in many cases it is necessary, or desirable, for them to cooperate with other businesses – often competitors. This may be necessary to achieve the necessary scale (to be economically viable or to make any real difference). It may also be necessary to overcome the “1st mover disadvantage“. If I am the only company buying fish from sustainable sources, or reducing the emissions from my factory beyond the legal maximum allowed, I may incur extra costs that I cannot recover from my customers putting me at a competitive disadvantage)².

8. The problem is that competition law (and even more the **fear** of competition law) inhibits much vital collaborative effort to tackle climate change. Indeed a recent survey suggested that some 60% of businesses had shied away from cooperation with competitors for fear of competition law.

9. This is also clear from submissions to the European Commission by companies such as Unilever. This sets out dozens of practical examples of cooperation between businesses on sustainability issues which could be inhibited by fear of competition law - but which should usually be OK (either because they are not caught at all or because they should be exempt) [perspective in a submission (PDF | 941KB)].

10. There are many reasons why the current approach to competition law is inhibiting vital collaborative action. These include:

1. Failure to start with the law itself (for example by looking at the wording of the first condition for an exemption under EU law – discussed below). Instead many start their analysis with a range of economic and socio-economic concepts which may, or may not, be helpful, but which are certainly not the correct starting point for that analysis;
2. Taking an unduly narrow view of the law and/or economic principles (e.g. the concept of a “fair share for consumers“, or a narrow, short term or over financial approach to the concept of “consumer welfare“);
3. Failure of the competition authorities to explain what businesses can do in this area without infringing competition law; and
4. Unduly conservative advice by advisors (both internal and external).

3. The Solution

11. Competition law is not the solution to climate change- or indeed to any environmental problem. However it can (and must) play a complementary role. As Commissioner Vestager has noted “everyone is called upon to make our contribution to the necessary change – including enforcers“.

12. My central plea is that competition law should not stand in the way of vital action by the private sector.

13. This note focuses on EU law. This is partly because I have spent the last 40 years working and advising in this area. It is also because it is applicable across most of Europe

² This is in no way giving any defence for “green washing“. If companies step outside the cooperation necessary to achieve the environmental objective then the full force of competition law must apply (eg agreeing to pass costs on to customers; agreeing prices; or agreeing not to compete on environmental criteria).

and most countries in Europe have national competition laws which are either identical (or very similar) to it – and that includes the UK despite its recent departure from the EU (on this see further my UK paper referred to in the introduction).

14. My principal paper on Climate Change, Sustainability and Competition Law in the Oxford Journal of Antitrust (see the introduction) identifies five ways in which cooperation agreements to fight climate change may escape the prohibition on anti-competitive agreements contained in Article 101 of the TFEU. I comment briefly on each of these below (particularly on the exemption possibilities contained in Article 101(3)).³

15. Before doing so it is both necessary and helpful to consider the legal context in which the specific competition provisions of the TFEU must be considered. This is the constitutional provisions of the EU treaties which explain what the treaties are all about. Of particular relevance are articles 3(1) (3) and (5) of the Treaty on European Union and article 7, article 9 and article 11 of the TFEU. In particular, article 11 says: “environmental protection requirements **MUST** be integrated into the definition of the union policies and activities, in particular with a view to promoting sustainable development“(emphasis added). Nowhere does it say that this does not apply when applying the Union’s policies on competition. We must take into account environmental protection when applying **ALL** the competition provisions. This should be borne in mind when considering the five ways in which an agreement designed to fight climate change (or otherwise improve the environment) might not infringe Article 101.

3.1. No restriction of competition

16. As competition specialists we should never lose sight of the fact that the vast majority of commercial agreements are **not** caught by competition law at all (i.e. they have no appreciable effect on competition). It is also worth recalling that the European Commission’s 2001 Horizontal Guidelines showed how some sustainability agreements would not infringe article 101.

3.2. The Albany route

17. In the Albany case the European Court held that EU competition provisions did not apply to collective-bargaining at all when the competition provisions were properly interpreted in the light of the constitutional provisions referred to above. If the European Court could take this (essentially policy driven) view in relation to collective-bargaining, then, in principle, I see no reason why it could not take a similar policy approach faced with the climate change imperative.

3.3. Ancillary restraints/objective necessity doctrine

18. Without going into this complicated legal doctrine here (based on cases like Albany, Wouters, and Meca- Medina) this principle can be used to say that sustainability agreements, which only contain proportionate restrictions, without which the agreement would not have been concluded, or where such restrictions are necessary to carry out an environmental regulatory task, would fall outside article 101(1) entirely.

³ Article 101(1) of the Treaty on the Functioning of the EU (TFEU) prohibits anti-competitive agreements. Article 101(3) TFEU exempts them if they meet each of the 4 (cumulative) conditions discussed in this note (and in more detail in my JAE article referred to in the introduction).

3.4. . Standardisation agreements.

19. Many agreements to fight climate change will (or could) take the form of standardisation agreements. In many cases, these will not be caught by article 101(1) at all. Indeed, the European Commission’s 2010 Horizontal Guidelines contain helpful paragraphs to this effect.

3.5. The exemption route (Article 101(3)TFEU).

20. Under Article 101(3) TFEU an agreement will be exempt from the prohibition on anti-competitive agreements in Article 101(1) TFEU if each of four **cumulative conditions** are met:

1. The agreement “contributes to improving the production OR distribution of goods OR to promoting technical OR economic progress” (emphasis added);
2. Consumers get a “fair share of the resulting benefit“;
3. The agreement is no more restrictive than necessary; and
4. There is no elimination of competition.

21. In the circumstances under discussion there will very rarely be an elimination of competition. However, the third condition is important in that cooperation between competitors will not be justifiable if they could achieve the objective sought unilaterally (for example they could develop a more sustainable product and sell that at scale and on a profitable basis – perhaps enjoying a competitive advantage).

22. However, it is important to look carefully at the first two of these four conditions.

Condition 1.

23. In relation to condition 1 two mistakes are often made.

24. First, people focus exclusively on the “economic” element here. While this element is very important it this is only one of the **four elements** in this condition. We should also use the other 3 elements:

- It refers to “improving production” (agreements to use fewer or more sustainable resources?);
- It refers to” improving distribution” (sharing distribution logistics reducing transport energy and pollution?); and
- It refers to promoting technical progress (agreements to develop new greener technologies?).

25. Doing so avoids intellectual gymnastics to get so-called “non-economic“ factors into the “economic“ box, or consideration of vague concepts like “public interest“. Such gymnastics are totally unnecessary .In fact, the four elements of the first condition of article 101 (3) are broad and flexible and capable of covering a wide range of agreements intended to help fight climate change and combat other environmental harms.

26. A second common mistake (which I used to make myself) is to summarise the exemption provision as applying where the “pro-competitive“ factors in 101(3) outweigh the “anti-competitive effects“ caught by Article 101(1). However this is not what Article 101 says; is a lazy summary; and will often lead to the wrong conclusions. One should look

at the actual provisions of the treaty itself (set out above) and apply them to the specific agreement in question.

Condition 2.

27. The second condition raises difficult issues and it is important that there is a constructive dialogue in relation to it (I amended an early draft of my JAE paper after discussions with various competition officials and it now contains some six or seven pages on this issue – including what I hope are some practical and constructive suggestions).

28. A particular difficulty is to decide which “consumers” must get the “fair share of the resulting benefits?”. At times it is suggested that this means just the immediate purchasers of a particular widget. However, this cannot be right for a number of reasons (set out in my papers). In particular a much wider group of citizens benefit from environmental improvements flowing from an agreement than just the particular purchasers of an individual product (and environmental benefits have been recognised as “benefits” in the sense of condition 1 in a number of cases – most notably the European Commission’s excellent decision in the “washing machine” or CECED case). It is essential that we give proper weight to what really matters. If we do not we will ask the right questions but get the wrong answers. What weight should we put on a product (which perhaps we do not need at all) costing one cent less? And what weight do we put on having clean air to breathe or leaving our grandchildren a planet worth living on?

29. In this context I would strongly commend the draft guidelines on sustainability agreements recently published by the Dutch competition authority (ACM)[ACM opens up more opportunities for businesses to collaborate to achieve climate goals] In particular it makes three excellent observations/innovations:

1. It makes a brave attempt to single out “environmental damage agreements” for a more flexible treatment when it comes to the question of a “fair share for consumers” (Paras 38 to 39);
2. It recognises that consumers are responsible for the environmental damage which their products cause– and that it is therefore fair if they are not fully compensated for any price increase that might result from an agreement designed to mitigate that environmental damage (para 41); and
3. It recognises that we do not need to quantify everything in life (Paras 45 to 48). In my view economics is a very valuable tool and it can often be helpful to use all available data. However, ultimately most questions in competition law (and law more generally) are a matter of weighing up all the quantitative and qualitative evidence and coming to a judgement based upon that evidence.

30. Not all agreements will be lawful under Article 101 even if they have laudable aims to fight climate change or promote other environmental goals. However, my strong conclusion is that vital collaboration to fight climate change and other environmental harms is possible under the law as it stands – and in many more circumstances than is often felt to be the case. We should cease being over fearful of competition law and provide practical and robust advice in this area.

31. However, some claiming to be sympathetic to the above protest that “It’s all too difficult”. Be that as it may, we must apply the law as it is written. We must focus on what is important and not simply on what is easy. If we fail to do this competition law risks being seen as irrelevant (as has sometimes been suggested in recent years in the US). In any case the old-fashioned “narrow” approach is not easy. As a judge faced with hundreds of pages of conflicting econometric evidence, I can certainly attest to that. Balancing different

factors and evidence, both qualitative and quantitative, is what competition authorities and courts are trained to do (and they are increasingly well equipped to do this). Furthermore, this is very much an “economic approach”. In some ways it is a “more economic approach” if we look to quantify so-called “externalities” or calculate a “true price” and make the best possible use of the latest developments in environmental economics.

32. Finally, it is sometimes suggested that it is a “slippery slope”, if we take into account climate change/environmental factors. What of other important policies to be found within the EU in the treaties? (e.g. social and employment issues)? My answer to this is twofold. First, climate change is an existential threat to humanity and if we are going to single out any one area for particular consideration, it must be the fight against climate change. Secondly, other (important) issues must stand or fall on their own merits when assessed under competition law-but we must not let any difficulties which arise undermine the correct assessment of agreements to fighting climate change under competition law.

4. The Benefits of this Approach

33. Given the scale and the urgency of the fight against climate change we need to harness all available resources. Where appropriate, businesses collaborating in this fight has a number of advantages:

1. Regulation cannot do everything. Nor can public investment (much as I favour increased public investment for a “green recovery”). We must harness the resources of the private sector as well.
2. For business, collaboration in this area has vast potential for new and profitable business (see, for example, some of the examples set out in Unilever’s paper referred to above).
3. All of us, as citizens and consumers, will benefit from more sustainable products and healthier lifestyles – whether it’s products made using fewer, or more sustainable, materials; having warmer and better insulated houses; or having clean air to breathe.

5. The Need for Action.

34. While my papers make some suggestions for small changes in the law (e.g. in my UK paper), generally we already have good legal tools. What is needed is a change in our approach and use of those tools. My papers set out a number of proposals for action which I would summarise as follows:

5.1. Competition Authorities.

35. We call on the competition authorities to make more positive statements as to what business can do in this area (business hears – quite rightly – what it **cannot** do, but rarely hears what it **can** do). We are starting to see changes here with, for example, Commissioner Vestager calling on business to take to them practical examples of collaboration in this area on which they would like some comfort.

36. We also want to see the authorities updating their guidelines and notices on their approach to both the substantive law and their administrative or enforcement priorities. Again, there are some encouraging signs here. For example, the Commission is updating its Horizontal Guidelines and it is almost certain that these will now include guidance on

sustainability agreements in some way. Furthermore, the European Commission is consulting on sustainability agreements and competition law. In addition, we have seen movement by a number of member states-notably the Dutch publishing their draft guidelines on sustainability agreements and the Greeks publishing an excellent discussion paper on this. In addition we have seen the U.K.'s CMA include as a "strategic priority" in its annual plan for 2020 "climate change" and "supporting the transition to a low carbon economy". These are all initiatives upon which we can build.

5.2. Government.

37. Governments could give the competition authorities high-level guidance as to their desire to see the fight against climate change factored into the authorities' analysis of competition law issues. For example in the UK this could be included in the annual "strategic steer" from the UK government to the CMA.

5.3. Advisers.

38. Advisers (whether in-house or external, and whether lawyers or economists) need to give more robust and realistic advice in this area. It would also be helpful, where client confidentiality permits, if they were to publish opinions given to clients in this area (For example an opinion given to the Fair Wear Foundation on living wages was published).

5.4. Business.

39. Business needs to explain the problems it is facing and provide practical examples of the sort of things which need to be done on a collaborative basis but which may not happen for fear of competition law (As Unilever and others have done). It also needs to take concrete cases to the authorities and press them for a view (hopefully positive and something which can be made public in a short press release).

5.5. Civil Society.

40. Civil society needs to keep up the pressure on the authorities to address this area and provide real life examples of the problems from which the environment and citizens are suffering (and organisations like BEUC, the European consumers association, and the Fair Trade Advocacy Office in Brussels have been doing good work in this area).

5.6. OECD and others.

41. International organisations (such as the OECD or ICN) need to engage with this topic and help coordinate the approach of different national governments and authorities.

6. Conclusion

42. Competition law need not be a barrier to vital collaborative action by business to help fight climate change. We have good and workable legal tools. However, my papers set out a number of practical proposals to make this clearer and to make it easier for business to play its part without fear of competition law. I call upon everyone in the competition law community to engage with this and to play their part as a matter of urgency.