How private sustainable initiatives are limited by competition law

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The French bill to combat climate change and strengthen resilience to its effects, which passed its first reading before the French National Assembly on Tuesday 4 May 2021, is one of many echoes of the concern about global warming around the world.

At the European level, the European Commission (the 'Commission') launched in 2019 an ambitious project, the 'Green Deal', aimed at promoting an efficient use of resources through a clean and circular economy, and characterized by the disappearance of greenhouse gas and by the dissociation of economic growth from the use of natural resources[1]. Hence, the Green Deal aims at modifying the European economy as a whole, including "*the economy, industry, production and consumption, large-scale infrastructure, transport, food and agriculture, construction, taxation and social benefits*"[2]. In view of the importance of the task, the Commission requires that the objective of sustainability be integrated into all EU policies, including the competition policy[3].

Therefore, in October 2020, the Directorate General for Competition of the Commission launched a **call for contributions** on the way competition policy could contribute to achieve the objectives established by the Green Deal, notably as regard to the analysis of cooperation agreements between competitors. It has received nearly 200 contributions, available on its website, the summary of which should be published soon, and from which we are already taking up some essential elements.

Uncertainties regarding the qualification of an anticompetitive practice appear to hamper private initiatives.

A certain number of contributions from industrials to the Commission underline their reluctance to conclude horizontal agreements (between competitors) or vertical agreements (between different levels of the supply chain) with a sustainable objective, because of their fear for the concerned agreements to be found anticompetitive and, hence, be exposed to substantial fines[4].

The first question to be asked is whether or not all the national competition authorities and the Commission will adopt a homogeneous analysis on what does, or does not constitute an anticompetitive agreement with a sustainable objective. This question will not apply to agreements that display a sustainable development objective but in reality have an anti-

[1] Communication from the Commission to the European parliament, the European council, the council, the European economic and social committee and the committee of the regions, The European Green Deal, COM(2019) 640 final of 11th December 2019, p.2.
[2] Ibid, p.4.
[3] Ibid, p.18.
[4] Up to 10% of the global turnover of the author of the practice.

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competitive objective. For instance, the French competition authority fined in 2017 some floor covering manufacturers and their trade association for, among other things, establishing a joint environmental communication, by which the manufacturers limited the types of environmental data of the products on which they would communicate[5].

The second (but not the least important) issue is to understand to what extent a sustainable agreement restricting competition could benefit from the exemption established in Article 101(3) of the Treaty on the Functioning of European Union ('TFEU') and/or its national equivalent.

Following Article 101(3) of the TFEU, an agreement containing one or more competition law restrictions can benefit from an exemption if it "*contributes to improving the production or distribution of goods or to promoting technical or economic progress, while* ***allowing consumers a fair share of the resulting benefit***".

In the field of sustainable development, it can be a complex task to assess whether unquantifiable progress, such as the saving of animal species or the improvement of labour conditions for extra-European suppliers, could compensate for any economic damage caused by the agreement (e.g. higher prices). Moreover, the term "*consumers*", without any specific definition, leaves open the question as to whether only direct consumers in the relevant market should get a fair share of the benefit, or if it is possible to also include in the analysis indirect consumers in distinct markets, or even the society as a whole.

These uncertainties are problematic, and are not just theoretical. As a matter of fact, national competition authorities, as well as the Commission, have already fined parties to a sustainable agreement, finding that the sustainable benefits did not compensate for the economic harm to consumers, or that such benefits did not even have to be weighed in the balance with the economic harm caused.

For example, the Higher Regional Court of Düsseldorf widely confirmed the decision of the German competition authority, which refused to take into account the environmental benefits of the conduct of the Federal State of Baden-Württemberg aimed at selling and invoicing, on behalf of other forest owners, logs and at providing related services[6]. As a matter of fact, the Higher Regional Court of Düsseldorf found that the environmental benefits of the behaviour linked to the management of the forest park, the water balance and the air purity did not have to be taken into account by the competition authority in its analysis of the applicability of Article 101(3) of the TFEU.

In 2015, the Dutch competition authority (the 'ACM') found that a vertical agreement (between producers, processors and supermarkets) aimed at replacing chicken meat with meat from chickens raised in better conditions, was restricting competition as it resulted in price increases for consumers. This agreement did not qualify for the benefit of the national exemption

[5] Decision 17-D-20 of 18th October 2017 regarding practices put in place in the floor covering sector.
[6] *Round timber in Baden-Württemberg* (VI-Kart 10/15 (V)), §§327-328. This decision has been amended the 12th July 2018 by the German Federal Court of Justice for procedural reasons (KVR 38/17).

equivalent to Article 101(3) of the TFEU, even though the benefits for animal welfare were obvious. As a matter of fact, according to the ACM, the benefits for consumers did not match the damages resulting from the agreement, notably the price increase of €1.46/kilo of chicken filet, as the economic studies had established that the most consumers were willing to pay was limited to €0.86, and that less restrictive measures could have been implemented in order to obtain the same, or even better, results[7].

The risks therefore exist and are likely to discourage private initiatives.

Thus, a global chocolate company explained that one of its competitors, which was sourcing from the same supplier, had liaised with it to find a coordinated approach to increase benefits to their supplier, from a fair and sustainable trade perspective. This initiative was discouraged by the legal department of the witness because of the risk of being classified as an anticompetitive agreement[8].

Similarly, the issue of prices is particularly sensitive in the banana industry, where producers are under such a pressure that selling prices are below production costs. In view of this situation, some major market players are unhappy with the prohibition imposed by anticompetitive practices law to agree a common price solution, where the main objective is to remunerate producers more fairly[9].

In addition to risks related to prices, boycott issues have arisen. In the UK, some large suppliers of one species of fish have been discussing with retailers the possibility of buying only fish caught under sustainable conditions. However, one of the larger retailers refused, fearing that the U.K. competition authority would categorise the practice as an anticompetitive boycott against 'unsustainable' fishermen[10].

Should non-environmental sustainability objectives be treated differently?

Two different approaches of competition policy have emerged on the issue of analysing a sustainable agreement through the lens of Article 101(3) of the TFEU or its national equivalent.

Some competition authorities, such as the French authority, find that it is not appropriate to create a dichotomy between environmental objectives on the one hand, and other sustainable objectives, such as the respect for human rights, on the other hand[11]. Conversely, other authorities, such as the ACM, intend to adopt a specific approach to environmental agreements. In the view of the former, a differentiated analysis should be adopted when applying Article 101(3) of the TFEU to the agreement depending on whether it has a pro-environmental

[7] "*ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'* " ACM/DM/2014/206028.
[8] "*Competition law and sustainability: a study of industry attitudes towards multi-stakeholder collaboration in the UK grocery sector"*, Fairtrade Foundation, April 2019, p.15
[9] Ibid, p. 9.
[10] "*Competition policy supporting the green deal*", Simon Holmes, Concurrences Competition Law Reviews, n°1/2021.
[11] "*Réponse à la consultation de la Commission européenne dans le cadre du* « Pacte vert européen » ", French competition authority, 27 November 2020, p. 3.

objective or a broader sustainable development objective. Thus, the ACM explained in its draft guidelines on sustainable agreements[12] that it would analyse the potential benefits of an agreement aimed at protecting the environment by taking into account the society as a whole, whereas for agreements with other sustainable objectives, their benefits would be restricted to the users concerned. This dichotomy will necessarily favour environmental agreements.

In the context of its call for contributions, the Commission asked, "*How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?"*[13]. Through this question, some contributors fear that the Commission will adopt the same approach as the ACM.

Yet, such approach appears questionable for many reasons.

Although the fight against global warming is fundamental, other sustainable objectives, such as fair remuneration at the different levels of the supply chain, or the eradication of slavery and forced child labour, are just as important. Indeed, such societal issues are, according to some studies, even more complex to overcome than those related to global warming.

Moreover, it seems somewhat inconsistent to favour an initiative with a limited environmental objective over a particularly innovative cooperation aimed at the protection of human rights.

Finally, the United Nations, in its resolution 66/288 of 2012[14], established three equal dimensions of sustainability: economic, social and environmental. This approach was taken up by resolution 70/1 of 25 September 2015, which sets out the seventeen Sustainable Development Goals to be achieved by 2030 (the '2030 Agenda')[15]. Therefore, not only would such a dichotomy prove to be intellectually artificial, it would also be a new source of legal uncertainty for private parties.

A practical approach seems necessary.

In view of the existing uncertainties, it seems essential that all EU competition authorities reach a consensus and provide consistent guidance on which agreements are permissible or not under EU and national competition laws. Adoption of the following suggestions would be appreciated by the private sector.

First, some agreements should simply escape the application of Article 101 of the TFEU or its national equivalent.

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[12] "*Second Draft Guidelines on Sustainability Agreements*", Authority for Consumers and Markets, 26 January 2021, §39.
[13] "*Competition Policy supporting the Green Deal _ Call for contributions*", European Commission, Directorate General for Competition, 13 October 2020, p.4.
[14] "*Resolution adopted by the General Assembly on 27 July 2012 66/288 "*The future we want"", 11 September 2012, §1.
[15] "*Resolution adopted by the General Assembly on 25 September 2015 70/11 "*Transforming our world: the 2030 Agenda for Sustainable Development" 21 October 2015.

This is the case of ***de minimis* agreements**[16], i.e. agreements covering only a limited part of the relevant markets[17], provided that they do not have the object of restricting competition (e.g. directly or indirectly fixing prices, limiting or controlling production, or allocating markets or sources of supply between the parties).

However, such agreements quickly reach their limits. Indeed, many companies are reluctant to act because of the "*first mover disadvantage*" theory, according to which a company would find only marginal benefits in innovating for sustainable production because it would be particularly costly and would confer only a limited competitive advantage. In many cases, only a broad agreement between economic operators can induce companies to act towards more sustainable production processes.

Furthermore, some sustainable agreements may relate to essential parameters of competition (such as the price of bananas, in our previous example) and would therefore not qualify for the *de minimis* exception, as their very purpose would be to restrict competition by fixing prices.

Agreements "*defining the environmental performance of products or processes which* ***do not significantly affect the diversity of products and production on the relevant market, or which have only a minor impact on the purchasing decision***"[18] should also be considered lawful. This was the case in the Guidelines of 2001 from the Commission on Horizontal Cooperation Agreements and has, unfortunately, been abandoned in the 2011 Guidelines, thereby creating legal uncertainty. For example, the ACM has had the opportunity to validate agreements between several organisations favouring the use of anaesthesia in the castration of pigs, as long as slaughterhouses remained free to buy pigs castrated without anaesthesia[19].

Agreements which do not impose **any specific individual obligations** on the parties or which commit them in a non-binding way to the achievement of a sector-wide sustainable objective should also clearly be regarded as unlikely to be subject to Article 101 of the TFEU. Again, this was explicitly provided for in the Commission's 2001 guidelines[20] and was unfortunately abandoned in the 2011 guidelines. For example, the Commission had to analyse the validity of an agreement of a trade association to reduce CO2 emissions to an average level of 140 grams per new passenger car. The Commission validated the agreement, stressing that the association had, at no time, imposed individual targets on members, and that the latter remained free to be more or less ambitious than the association's target, as long as the average target was met[21].

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[16] Notice from the Commission on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*de minimis* notice) (2014/C 291/01).
[17] 10% for horizontal agreements, 15 % for vertical agreements (2014/C 291/01).
[18] Guidelines of the Commission on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 6 January 2001, p.27, §186.
[19] "*NMA: no objections against agreements on the castration of boars with the use of anaesthesia*", Authority for Consumers and Markets, 27 October 2008.
[20] Guidelines of the Commission on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 6 January 2001, p.27, §185.
[21] "*Commitment by European Car Manufacturers to reduce CO2 emissions from passenger cars complies with EU Competition rules"*, European Commission, 6 October 1998, IP/98/865.

Finally, agreements leading to **genuine market creation** (e.g. recycling agreements) should clearly be lawful, as long as the parties are not able to create the concerned market separately and that there exists no other alternative or competitor. This was again foreseen by the guidelines of the Commission in 2001[22].

Secondly, the analysis of the exemption under Article 101(3) of the TFEU (or its national equivalent) should be clarified.

For the record, in order to be eligible, an agreement must fulfil the following four conditions: (i) it must contribute to improving the production or distribution of products or to promoting technical or economic progress, (ii) it must allow consumers a fair share of the resulting benefit, (iii) it must not be more restrictive of competition than necessary, and (iv) it must not allow undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Sustainable agreements mainly raise difficulties in assessing the cost-benefit balance of points (i) and (ii). The ACM has tried to tailor such assessment in its draft guidelines on sustainable agreements[23].

From these draft guidelines and in light of the issues presented in this article, several paths can be envisaged:

(i) Establish a "*safe harbour*" for agreements where the parties represent a market share of less than 30% and where the benefits are demonstrable and proportionate to the restriction on competition;

(ii) Authorise agreements where the damage to the economy is, on the basis of a rough estimate, obviously inferior to the benefits provided;

(iii) For other agreements, develop the use of economic studies on the willingness to pay of users ("*Willing-to-pay studies*");

(iv) Allow agreements whose main effects occur in third countries (e.g. harmonised purchasing conditions in developing countries in the context of fair trade), as long as these agreements have only a limited impact on the competition within the European Union[24].

[22] Guidelines of the Commission on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 6 January 2001, p.27, §187.
[23] "*Second Draft Guidelines on Sustainability Agreements"*, Authority for Consumers and Markets, 26 January 2021, §§ 30-63.
[24] The French Competition Authority recognised in its opinion n°06-A-07 of 22 March 2006 on the examination, in the light of competition rules, of the operating methods of the fair trade sector in France, that harmonised purchasing conditions outside Europe for raw materials (coffee, bananas, tea) representing only between 7% and 21% of the final price of the product sold in Europe only lead to restrictions of competition in third countries and thus escape the application of Community and French competition law (cf. §§53 and 54 of the Opinion).

However, given the uncertainties that will continue to accompany the implementation of agreements with sustainable objectives until the adoption of a common guidance in Europe, or even of a decisional practice in this area, companies wishing to implement joint sustainable initiatives will have a strong interest in approaching the relevant competition authorities beforehand in order to check the lawfulness of their agreements with respect to competition law. Several authorities have already opened this possibility, including the ACM and the French competition authority.

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