

**FTAO COMPETITION LAW AND SUSTAINABILITY INITIATIVE
DISCUSSION PAPER AND ACTION PLAN
(6 December Event)**

In recent years the antitrust community has been debating whether the focus of EU competition law is limited to consumer surplus and consumer welfare; or there are other values like fairness and social welfare that need to form part of the authorities' analysis. The Fair Trade Advocacy Office (FTAO) advocates that "sustainability" should be recognized as one of these goals and should be given due weight in any competition law assessment.

The forum to be held on 6 December in Brussels is intended as brainstorming opportunity among people supporting FTAO, from their respective disciplines. The present discussion paper seeks to prepare the way for that brainstorming. The paper aims to identify (a) potential routes for further action in establishing sustainability as a factor in the agencies' competitive analysis, and (b) an action plan for practical implementation.

Routes for injecting sustainability into the goals of EU competition law

- a) *A broader interpretation of Article 101 (3) TFEU* is the most obvious route through which sustainability benefits can be factored in the competitive analysis. As a practical example, the European Commission cleared under then Article 81(3) EC Treaty the so-called CECED agreement among leading domestic appliance manufacturers for the progressive introduction of more eco-efficient domestic washing machines. Although price increases were likely, the European Commission found the individual economic and the collective environmental benefits to be sufficient for Article 81(3) to apply. When applying Article 101 (3) TFEU it should be noted that the term "*improving the production or distribution of goods or to promoting technical or economic progress*" does not necessarily require the existence of economic benefits.
- b) *Or perhaps Article 101(1) does not apply at all because:*
 - *Anti-competitive effects are de minimis.* The Fairtrade system has been considered to be outside the application of Article 101(1) because neither EU competition law nor any known national competition law regime bans such "minimum purchase price" imposition as a *per se* violation of the competition rules. Moreover the Fairtrade system purchasing agreements represented a very small share of the overall supply market, did not provide for exclusivity and set minimum prices which in practice are often lower than the world market price for Fairtrade products
 - *The Ancillary Restraints Doctrine.* The ancillary restraints doctrine holds that a subsidiary clause which is restrictive of competition, but necessary and proportionate to the broader agreement, is not caught by Article 101 (1) TFEU.
 - *The Wouters doctrine.* The European Courts have held that Article 101 is not applicable to restrictive practices that ensure the proper practice of the

legal/pharmaceutical profession (*Wouters/Ordre national des pharmaciens*)¹; safeguard the integrity of sports (anti-doping rules in *Meca-Medina*)²; ensure the quality of accountancy services (restrictions on entry in the market for professional training in *OTOC*)³; and provide guarantees to consumers about the services they receive (price control by an association of geologists in *Consiglio nazionale dei geologi*).⁴ The Court's general approach in these case was to discuss whether there is a "legitimate objective" being pursued.

c) Sustainability in Article 102 and State Aid

While Article 101 appears to be the most immediate hurdle affecting coordinated conduct, Article 102 and state aid disciplines have their roles as well. Dominant companies may wish to pursue sustainability goals and need to consider whether relevant steps might expose them to attack under Article 102. Conversely, Article 102 may provide the basis for restraining conduct that offends against societal values (see further below in relation to Facebook).

As to state aid, governments wishing to promote sustainability goals financially, e.g. by tax incentives, will need comfort that they are acting within the rules.

d) Sustainability as part of the protection of consumer well-being and the notion of fairness

- The promotion of **consumer well-being** and the prevention of consumer harm have long been established as the prime goals of competition law. As noted by the General Court "[t]he ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers."⁵
- Authorities have used established theories of harm to **protect a consumer right** which is considered to overlap with the area of competition law. The most current and prominent example is the German competition authority, the FCO, which is close to completing an investigation for abuse of dominance in the practices of Facebook because of excessive harvesting of personal data and degradation of privacy.
- **Fairness.** Article 101(3) expressly refers to the concept of "fair share" while Article 102 provides that a dominant firm may be abusing its position by imposing unfair purchase or selling prices, as well as by other unfair trading conditions. Fairness considerations have triggered intervention, alongside the consumer welfare value,

¹ Conseil National de l'Ordre national des pharmaciens v Commission (CNOP) (T-23/09) EU:T:2014:1049; [2013].

² Meca-Medina v Commission (C-519/04 P) EU:C:2006:492; [2006] 5 C.M.L.R. 18 at [45].

³ Ordem dos Técnicos Oficiais de Contas (OTOC) v Autoridade da Concorrência (C-1/12) EU:C:2013:127; [2013], at [94]–[95].

⁴ In Consiglio nazionale dei geologi v Autorita Garante della Concorrenza e del Mercato (C-136/12) EU:C:2013:489; [2013] 5 C.M.L.R. 40

⁵ Joined Cases T-213/01 and T-214/01 Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission [2006] ECR II-1601, para 115.

in some cases involving exploitative prices imposed on consumers⁶ and margin squeeze.

e) Quantifying sustainability

Any advocacy to competition agencies, about the broadening of the notion of benefits to the consumer, likely needs to be accompanied by a suggestion on how to demonstrate (and measure?) such benefits.

Chicago school critics of the progressive views advanced have constantly stressed the absence of evidence to support what they describe as “public interest” claims. There can be legitimate debate as to the over-arching policy issues. But quantification and evidence must on any basis be vital tools in winning arguments on the ground.

- **Use of behavioural economics.** Behavioural economics can explain a competition policy which recognises that consumers’ well-being may mean a choice for them to purchase from firms which align with their ethical and moral values. Most important, behavioural economics acknowledges that the consumer surplus is not always equivalent to the consumer well-being which can be a powerful partner in the FTAO’s pursuit for more sustainability-oriented competition law.
- **Use of a willingness to pay survey.** Such survey was used in the “Chicken of Tomorrow” case.

f) Is consumer welfare the right standard?

A point for debate is whether we need to go beyond consumer welfare; or whether the understanding of consumer welfare can be broadened to accomplish what is needed. Indeed, some argue that it is already broader – if so, how can we breathe practical application into that theoretical position?

Some advocate to go further, arguing that competition law is part of a broader regulatory environment. Sustainability should not on this view be measured from the point of view of consumer welfare, but (as environmental law does) from the point of view of “collective environmental benefits”. Competition law would then be applied not “in a vacuum” but in accordance with a broader regulatory environment.

- **New guidelines on Article 101(3).** One possible way of injecting sustainability into competition law analysis is to advocate the issuing of new guidelines on Article 101(3) which clarify the scope of “*passing benefits to the consumers*” and allow for a broader range of benefits. An ideal scenario will have the revised guidelines also clarifying how to take into account benefits that accrue to future consumers.

⁶ Case 26/75 General Motors Continental v Commission [1975] ECR 1367; Case 27/76 United Brands v Commission [1978] ECR 207; Case C-177/16 Autortiesību un komunikēšanās konsultāciju aģentūra (AKKA)/Latvijas Autoru apvienība (LAA) [2017] ECLI; Deutsche Post AG (Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L331/40.

- **Clarify competition rules regarding agreements among competitors on minimum purchasing prices.** In October 2018, the SDG Multi-Stakeholder Platform recommended that the “*European Union should reform its competition law by issuing general guidelines to clarify under which conditions the private sector can come together to agree on collectively increasing sustainability in a sector without breaching competition law (the EU could thereby prevent the chilling effects on multi-stakeholder initiatives); mandating that mergers be tested for their impacts on sustainability, including their impacts on workers and producers in developing countries; reassessing the definition of dominant market positions, considering maximum market shares and as a last resort breaking up conglomerates that have become too large.*”⁷
- **Requiring conduct by legislation.** In the Netherlands, the Dutch Minister of Economic Affairs has suggested that when market participants come forward with an idea for sustainability-aimed cooperation, they can refer their initiative to the Minister. The Minister will perform a public interest test and can decide to regulate the issue by legislative decree. In the UK, a recent amendment to the Companies Act imposes a duty on directors to have regard to the impact of the company’s operations on the community and the environment. How does this inter-act with antitrust?
- **The international context.** Some countries have competition law regimes that explicitly invoke other public interests, such as employment, economic stability, the protection of the environment. At recent hearings held by the US Federal Trade Commission one of the Commissioners argued that concerns about competition and consumer protection no longer exist in isolation.
- **Institutional structure.** What are the implications for the design of our institutions applying the antitrust rules? If our agencies are to weigh societal values, what is needed in order for them to enjoy democratic legitimacy?

ACTION PLAN

a) Building climate of opinion

- **Educate the public about FTAO’s aims.** We should consider the appropriate ways to utilise the report produced by Dr. Tomaso Ferrando and Dr. Claudio Lombardi. Further, the outcomes of the 6 December event will feed into the preparation of a larger conference in spring 2019 which should target the European Commission officials, the European institutions generally, national competition authorities, academics and current students and the media outlets.
- **Assistance from communications experts.**
- **Partner with corporates.** It will be of great value to FTAO’s initiative to partner with corporates who are willing to implement agreements with sustainability goals as this will present the practical side of the academic debate.

⁷ See: https://ec.europa.eu/info/sites/info/files/sdg_multi-stakeholder_platform_input_to_reflection_paper_sustainable_europe2.pdf.

b) Promoting legislative action

The FTAO and its partners need to focus on developing realistic policy recommendations and an accompanying explanation of how they can become operable. Such recommendations can then be advocated to the European Commission, the European Parliament, the OECD, UNCTAD, etc.

More internationally the OECD and the International Competition Network (“ICN”) provide forum for policy discussions among antitrust agencies globally: promoting this topic to their agendas would be an excellent platform.

c) Advocacy and test cases at Member States level

The European Commission cooperates and aligns closely with the EU’s national competition agencies (“NCAs”). Often an NCA is well-placed to take a lead in advancing new thinking: notably the German FCO is at the cutting edge with its Facebook investigation (relating to privacy). There is a track record already of engagement with the Dutch, French, German and UK agencies. These are providing alternative/cumulative channels.

e) Cooperation with other policy areas

There are other policy areas and legislative frameworks which can assist in the promotion of sustainable development. The FTAO can reach out to other DGs which can promote sustainability in their respective portfolios. A good example is the recent cooperation between DG Competition and DG Agriculture in producing a report on the applicability of EU competition rules in the agricultural sector.