THE DIFFICULTY OF CONVERSATIONS ABOUT SUSTAINABILITY AND EUROPEAN COMPETITION LAW

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I. INTRODUCTION

Though it has been brought forward that European competition law is hindering sustainability-focused cooperation between companies, and that, therefore, competition law should change, there is much to unpack in such a statement. Some of the legal intricacies of this unpacking is the focus of section 3 of this article (and other contributions in this CPI Antitrust Chronicle). However, I will also try to understand why a conversation on "competition law and sustainability" is often difficult (with section 2 touching upon some of the fundamental difficulties). I am focusing on the specifics *European* competition law, though similar questions might arise in other competition systems.

To start, here is a conversation, imaginary of course, between two fairly reasonable persons, who share background-knowledge of (European) competition law's intricacies. Perhaps I'll kick off the conversation with this statement:

"European competition law should acknowledge the wider range of sustainability benefits of collaborative efforts of companies. These benefits can currently only be included in the weighing of pros and cons with difficulty, if at all: it's all too much focused on a quantified analysis of effects on consumer welfare."

"Well," you answer mildly, "but competition law *is*, actually, aimed at protecting consumer welfare, you know."

I reply: "True. It is *now*. But that has not always been the case: look at its history and its older cases. The efficiencies & consumer-welfare focus, and the way that shapes the balancing exercise of Article 101(3) TFEU is the result of a choice made more than a decade or two ago."

But you counter: "But don't you agree that it is *good* that we have a well-identified focus now? Remember the Tinbergen-principle? Remember how vague the standard used to be? You, Anna, were also involved in competition law at that time."

"I am not so sure about the validity of Tinbergen's principle in our current situation. Perhaps trying to bring about a sustainable society is too important to keep stuck on it? But yes, I do remember…"

(We go off on a non-relevant tangent, reminiscing about competition law adventures twenty years ago.)

Back to the topic at hand: "Surely you must admit that using economics has served us well. It has given us predictability. I do not see why we need to change or why you would want to go back to being 'fools and knaves'…"

"I am relieved to know that it is not just me mixing in USA-based references in a European competition law discussion! And yes, it has given us a more unitary way of measuring what is *good*, even though it is couched in more neutral terms of "negative or positive effects on consumer welfare." But! I would argue that perhaps change is necessary because the current competition analyses can be callously indifferent to some very real issues: what about protection of fundamental rights, what about child labor, what about the freedom of association, what about long term ecological equilibrium?"

"Tsk!," you sputter, "I am not denying their importance, but much of this is protected in the EU. We have treaties, we have laws, and if we do not have them, we should make them!"

"Yes, yes, but not everywhere: what about treating workers at the point of origin in international supply chains well? Paying them a living wage?" Before I plunge into a longer exposé, you stop me:

"But then, what is the alternative? I see the need for a sustainable society but aren't you opening the door for political decisions? Moving onto a slippery slope? Perhaps this is not a problem for competition law to solve?"

"I agree that (some of) these are valid points: how *much* consumer welfare loss would be acceptable for a *little* sustainability gain? Should a competition authority decide on that? But on the other hand, I am not certain about the slipperiness- argument: why not explore how sustain-ability-benefits can be woven better into a competition analysis?"

The conversation can now veer off in different directions: perhaps a philosophical, moral, political one (section 2 explores a bit of this) or into a more legal discussion (section 3 has an overview). Section 4 provides some final remarks on the question of why "sustainability" should also be recognized as a (European) competition law problem.

II. A FEW FUNDAMENTALS TO COMPLICATE LEGAL MATTERS

There are some who deny climate change. Apparently, there are also some who do not so much deny its existence but deny it political attention, which we might call the "après nous, le deluge" – people. I am assuming that among the CPI readers there will be, at most, only a few so cynical and that many will agree that one of the most important complexities besetting our society today is, indeed, climate change. Climate change has far reaching effects, but it is set within the wider notion of *sustainability*. A look at the United Nations' Sustainable Development Goals makes the vastness of this notion clear: sustainability has a social connotation as well, and means, at least, living in ecologically sound, environmentally respectful, fair, equal, democratic, societies.

Importantly (also for competition law and sustainability conversations), the notion of and discourse on sustainability is aim-driven. It gives an overarching direction for movement: *towards* a sustainable planet, in which people live sustainably and (hopefully) also comfortably. That means that a "more" sustainable society is a society in which the sustainable developments goals are being reached. The elusive end-point of a stable sustainable society does have a touch of the utopian: we might not reach it, but it is worth our current efforts (and in this sense, one might argue, it shares a feature with some strands of economics). To realize that the endpoint is perhaps unreachable, but that moving towards it is the only viable option for humankind (unless we develop space flight fully), might lead to confusion as to what to *now* focus on. Also, I have come to suspect that this imprecision and uncertainty inherent in the notion of "sustainability," especially when contrasted with the (presumed) (mathematical) precision of economic analyses within its modelling of reality, makes the contemplation of moving away from the rationality of competition economics difficult or daunting for quite a few competition lawyers and economists.

On a more abstract level however, if it is agreed that moving towards a sustainable society is necessary, it is not difficult (though not necessarily so!) to agree that one of the many instruments to use, is law. In a democratic society legislating as a means to bring about a public interest can be seen as the "regal route." But focusing on law-as-an-instrument also means identifying where existing laws hinder reaching the sustainability endpoint and where, by way of de-hindering, existing doctrines might be helpful to move beyond that obstacle.

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III. COMPETITION LAW'S DEHINDERING FOCAL POINTS (OR: THE MOST LEGAL SECTION IN THIS PIECE)

The most visible anchor point in the European competition law and sustainability debate is Article 101 TFEU. Above, the conversation focused directly on Article 101(3) TFEU, but when looking at de-hindering options it is useful to take the route of a systematic competition analysis of any agreement or collaboration. Along the way there might be some "outs," before we even get to the obstacle that Article 101(3) TFEU represents.

A. Outside the Reach of Article 101 TFEU

A first question should be whether entering into an agreement containing anti-competitive elements is the only option to reach the intended sustainability goals. Though "necessity" is also relevant in the Article 101(3) TFEU-analysis, this question should be also considered *ex ante*. Can standard-setting supply-chain agreements with independent third-party monitoring deliver the same results? Is it possible or feasible to "go at it alone" and still reach the desired outcome within the desired timeframe and with the desired scope?

Another way of staying outside the reach of Article 101 TFEU is by keeping it small: staying within the boundaries of non-appreciability. Though, to be effective in reaching the intended sustainability goals often a certain *heft* seems logical, in some instances small is feasible: local farmers agreeing to mow their pastures later in the season to give nesting birds a chance or agreeing to collectively house their seasonal workers comfortably instead of in dismal conditions, for example. Another angle is that of "Pavlov"-appreciability, which has been used to argue that though the (international) agreement might, indeed, lead to raising costs at the primary production location, the supply chain being as long as it is means that this will inevitably have a negligible effect on consumer prices.

B. Anti-Competitive, but no Infringement

A next "out" is relying on the Wouters-doctrine (or: inherent restraints doctrine, regulatory ancilliarity). The general idea of this Court-developed doctrine is not that difficult to grasp. Yes, there is restrictive agreement, but (as the Court literally notes): not all restrictive agreements are caught by the prohibition, this being so where the restriction is inherently necessary in the protection of a public interest. However, the practical usefulness – for example for concrete advice on a clients' sustainability initiative – seems more tricky. Though theoretically there are good arguments for applying "Wouters" in the realm of sustainability initiatives (it would be difficult to argue that bringing about a more sustainable planet would not be in the public interest), there is uncertainty (e.g. as to the role of government in the arrangement), also because there are not many examples to argue from. Legal development might greatly benefit by an actual sustainability case reaching the Court of Justice.

There is also "normal" ancilliarity, in which an anti-competitive clause is accepted as part of an overall non-competitive agreement. As far as I am aware, there are no published cases where this argument has been tried in a sustainability setting, but – in a certain precise setting of a concrete sustainability initiative – it might make a lot of sense.

Fitting here is also the idea of building upon case-law on the notion of solidarity and the (related) exception for collective labor agreements. I have written about this more extensively elsewhere, as have others, so I refer the reader to those.

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C. Anti-Competitive, but Allowed

As mentioned already, Article 101(3) TFEU is the ground on which the sustainability & competition law conversation has mostly focused. By now quite a bit has been written on the analysis of costs and benefits in relation to sustainability initiatives. There is a bit of superfluous nagging. So, to clarify some points to get them out of the way: we do not have to discuss obvious "green washing" cases. Clearly these fall foul an Article 101(3) TFEU argument. There is also no difficulty when the "normal" routine of taking into account the benefits of a sustainability agreement leads to concluding that ultimately there is no welfare loss: especially environmental benefits can sometimes be subsumed under an Article 101(3) TFEU analysis, using generally accepted methods. This might then lead to a positive outcome with pros outweighing cons. It is outside of these cases (but including those where subsuming does not lead to benefits outweighing negative effects), that Article 101(3) TFEU may present an obstacle for sustainability initiatives. Contentious questions, mostly in relation to the first two limbs of the exception, arise. For example, as to which improvements "count," or on the certainty of benefits arising. Discussions may focus on the notion the consumer; if (and how) to account for benefits that are difficult to quantify, benefits that might accrue to future citizens, and what the notion of a "fair share" actually might mean. All of these questions can, of course, be easily answered by sticking to the "European competition law is aimed at enhancing consumer welfare"-line, but that seems to become less tenable, specifically in light of, for example, climate change mitigation's urgency. From a legal point of view, tied to these application-on-a-case questions are questions as to the meaning of past cases and judgments.

And bigger questions loom, too. Fundamentally – but, I would submit, necessarily – one might end up thinking not just about the role of economics in a legal framework, but also about ethics and morality, and politics and motives, and suddenly we are drifting away from the bare competition metrics that are (seemingly) devoid of normativity into much more uncharted territory. It is not surprising that a disconnect occurs between agreeing that yes, yes, of course sustainability is important, and the "how to" of a competition law analysis of such a sustainability initiative under Article 101(3) TFEU. The "slippery slope" argument is brought in here, as well, as is the related argument of the (non) legitimacy of competition authorities to engage in a (qualitative) weighing of pros and cons under the Article 101(3) limb. Making the conversation at this point of the analysis even more difficult is that, in contrast to (e.g.) the Wouters-doctrine, in an Article 101(3) TFEU analysis there is either no seal of a government-approved public interest initiative, or there *is* government involvement, but that fact is irrelevant. That private parties could act towards the public interest is not easily placed in the system of a competition law analysis either. At very least for competition authorities this must be an uncomfortable place to be. However, though these fundamental questions are ultimately important, I will, in section 4, try to bring the problem back to more manageable proportions.

D. Reasoning by way of Constitutional Approaches

The European constitutional setting provides a thread below all of the above, but can also be discussed more explicitly. In that, (at least) three strands appear. Firstly, there is discussion about the meaning (for competition law) of the context of the EU-Treaties, which include both competition and sustainability, about what might be inferred from the Court of Justice's case-law, and – taking that into account – what competition law's role *should* be. Early attention has been given to the integration clauses (specifically Article 11 TFEU), but also "older" discussions have been reopened on the aims of the European Union and on the, possibly, less clear-cut position of the Court of Justice on consumer welfare. Secondly, there is a younger strand that touches upon the discussions on the interplay between *international* obligations and European competition law. The Dutch might point to possible lessons from its Supreme Court *Urgenda* ruling, in which the government was held to act on its (international law based) obligations towards cutting emissions, in a setting of liability law. Where the EU is party to international agreements, and companies move forward towards reaching these goals, what then is the space for European competition law to hinder these initiatives? Thirdly, a relatively new idea is to go back to the royal route, but in an adapted fashion: in the Netherlands the legislator is trying to reconcile competition law with sustainability initiatives. It considers the option of a non-specific Act, making it possible to present societally supported companies' initiatives to the minister of Economic Affairs. After a public interest test, in which the competition authority is heard, the initiative can be made binding for all actors in that sector. Admittedly, the useful effect doctrine is casting its possible shadow, and, obviously, the legislation is geographically limited, *and* the Dutch Council of State has warned against placing too much regulatory responsibility in the hands of societal and economic actors, but: this legislation does provide a legally embedded possible way out of our conundrum, at least for some initiatives, by placing the weighing of competition concerns against sustainability concerns in the hands of a politically accountable actor.

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IV. FINAL REMARKS

The conversation started in the introduction might be continued by throwing in some thoughts about the Common Agricultural Policy, the difference between state aid and antitrust perspectives, the role of technology (how about that space flight!), or on feminist perspectives on climate change (and competition law). We can discuss optimism, (too much) faith in humanity and the role of law more generally. It is very probable that we veer into something completely different and end up discussing how West Wing was really the best political (and hopeful!) TV-series ever.

Two points remain, however. First, as to sustainability-as-aim and the hesitation towards opening up a competition law analysis to the apparent non-rational, open-ended murkiness of values, perhaps it is useful to point out that none of the *above* entails throwing aboard economics, or even a focus on consumer welfare, in a standard competition law analysis. Taking sustainability seriously in a competition law framework, means that in *some cases* the analysis might (have to) be broadened. Second, this question remains: Even though we agree that it is the legislator who is best placed to weight different public interests against each other (at least in a democratic society based on the rule of law), why is sustainability a problem for competition law and (therefore) for me (and for you), as competition lawyer/economist? I have found this a vexing question, but here is my answer: Because – a little by happenstance, then by choice, then by academic inclination – I am an actor in competition law. This is my field of play. Adding to that: If the move to a sustainable society is indeed urgent, the legislator – of a Member State or the EU – is one of the many necessary actors. But not the only one, because if there are sincere sustainability-aimed initiatives between companies, and if that cooperation leads to a possible competition law issue, it follows that competition law as an institution, and those involved in its practice, *are* actors already. So, from both these angles, it seems unavoidably necessary to conclude that sustainability is an issue, also for European competition law.

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