

Competition policy supporting the Green Deal

In response to the call for consultation, I would like to make the following observations:

1. The scope of the Green Deal : putting people first

For a number of years, the word ‘sustainability’ has been in vogue. The question about its precise conceptual boundaries has spurred a lively academic debate, producing hundreds of papers and corresponding attempts to operationalize it.¹ Currently, complexity is increased by references to ‘resilience’ and the UN Sustainable Development Goals. The EU Commission discusses a ‘green deal’, but is unclear whether, or rather, to what extent, it overlaps with existing definitions.

In particular, there seems to be some consensus that sustainability refers to the triple bottom line: ‘people, planet, and profits’.² In short, sustainability seems to be about a win-win-win combination, in which we move forward without compromising fairness to people, to the environment, or to our standard of living/level of economic development. In the text of the consultation, however, the reference to people seems to be insignificant, if not entirely missing – there are primarily references to the scarce resources of our planet, energy efficiency, decarbonization, sustainable mobility, circular economy, zero pollution, clean technologies, greener products or production processes, environmentally friendly products and technologies. Although the Communication from the Commission on the Green Deal mentions consumer protection and workers’ rights,³ these seem to be entirely missing from the document ‘Competition policy supporting the Green Deal’. In fact, according to the Communication, the Green Deal will ‘put people first’,⁴ however, the people - the consumers, workers, small (independent) producers - seem to be missing from the present call for contributions.

A ‘thick’ analysis of sustainability would include whether the workers are compensated properly, whether they are educated so they can transition to another job in the case of automation, but might also require assurances that basic rights are observed (e.g. ensuring no child labour). It is true that there may be overlap between environmental and societal goals, as when workers suffer from exposure to harmful substances which also hurt the environment and biodiversity, but in many cases ‘people’ issues cannot be subsumed under ‘environmental’ issues. I believe the latter is self-explanatory in the case of a pandemic: certain practices may not be hurting the environment per se, but may expose workers to health risks.

If people are part of the green equation, what does competition law have to do with them? Consumers have been in the center of competition policy for some time now, but what about the workers? The latter is not a frequent topic of discussion in competition law circles; however, it is a

¹ S Seuring and M Müller, ‘From a literature review to a conceptual framework for sustainable supply chain management’ (2008) 16 Journal of Cleaner Production, 1699-1710.

² S Seuring and M Müller, ‘From a literature review to a conceptual framework for sustainable supply chain management’ (2008) 16 Journal of Cleaner Production, 1700.

³ European Commission, 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.

⁴ European Commission, 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, p.2.

relevant topic in the labour law literature. In this literature, the emphasis has been on the ways in which competition law acts as a sword – fighting concentrations of worker power, e.g. by prohibiting collective bargaining in sectors involving (false) self-employed workers. The latest example of the way in which competition law stands in the way of workers uniting in order to achieve better labour conditions comes from Denmark, where the competition authority essentially prohibited a collective bargaining agreement for minimum tariffs for self-employed cleaners and a platform.⁵ The development is puzzling given that said collective bargaining agreement was praised in, among others, the study prepared for the European Commission on working conditions for platform workers⁶ and also given the ongoing efforts of the European Commission to ease the possibilities of collective bargaining for self-employed workers. To be precise, half a year ago, the Commission announced a consultation regarding a possible exemption for collective bargaining by self-employed workers.⁷

The Commission is to be praised for making an effort to prevent competition law from being a barrier to workers⁸ exercising their fundamental rights. I do wonder to what extent competition law could play a more proactive role in this field.⁹ Recent evidence from the US and even the UK suggests serious employer concentration, nearing levels of monopsony;¹⁰ investigations by the US antitrust agencies have revealed anticompetitive conspiracies by employers which lead to division of markets, stagnant wage growth, and reduced labour mobility.¹¹ To what extent is this the case in the EU? And is it perhaps exacerbated in the context of the pandemic? I am curious if there are studies or plans to investigate the situation in the EU.

⁵ Danish Competition and Consumer Authority. (2020). Commitment decision on the use of a minimum hourly fee. Retrieved from <https://www.en.kfst.dk/nyheder/kfst/english/decisions/20200826-commitment-decision-on-the-use-of-a-minimum-hourly-fee-hilfr/>. According to the website, ‘The commitment decision has been, prior to the DCC’s decision, submitted for consultation before the European Commission’.

⁶ See CEPS, EFTHEIA, and HIVA-KU Leuven. (10 November 2019). *Study to gather evidence on the working conditions of platform workers, Final Report VT/2018/032* Report prepared for the European Commission.

⁷ European Commission. (30 June 2020). Press release IP/20/1237. Competition: The European Commission launches a process to address the issue of collective bargaining for the self-employed. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237.

⁸ The word ‘worker’ is used to refer not just for workers in an employment relationship, but also to include workers who are self-employed.

⁹ I have discussed this in, among others, Daskalova, V.I. (2018). Regulating the New Self-Employed in the Uber-Economy: What Role for EU Competition Law. *German Law Journal* 19, 461-508.

¹⁰ S Naidu, EA Posner and G Weyl (2018), “Antitrust Remedies for Labor Market Power”, *Harvard Law Review*, vol 132, https://harvardlawreview.org/wp-content/uploads/2018/12/536-601_Online.pdf; J Azar, I Marinescu, MI Steinbaum and B Taska, “Concentration in US Labor Markets: Evidence from Online Vacancy Data” (2018) *IZA Institute of Labor Economics, Discussion Paper Series No. 11379*, 1-27, <http://ftp.iza.org/dp11379.pdf>; A Dube, J Jacobs, S Naidu and S Suri, “Monopsony in Online Labor Markets” (2020) *American Economic Review: Insights*, 2(1), 33-46; Abel, W., Tenreyro, S., Thwaites, G. (2019). Monopsony in the UK. *CEPR Policy Portal*, <https://voxeu.org/article/monopsony-uk>.

¹¹ US Council of Economic Advisers. (October, 2016). *Issue Brief: Labor Market Monopsony: Trends, Consequences, and Policy Responses*. Retrieved from: https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf; US Department of Justice and US Fair Trade Commission. (2016). *Antitrust Guidance for Human Resource Professionals*. Retrieved from <https://www.justice.gov/atr/file/903511/download>; US Department of the Treasury. (2016). *Non-compete Contracts: Economic Effects and Policy Implications*. Report retrieved from <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>; US White House. (2016). *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*. Report retrieved from https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf.

EU competition law could be used as a shield for worker's interests in these markets in order to protect competition among employers by fighting anticompetitive restraints and fighting abusive practices by monopsonistic employers. And what about merger control, as in when mergers lead to a concentration of power vis-à-vis workers? It is possible that questions about this more proactive application of competition law have been avoided because, as the argument goes, these are 'labour' matters and are thus better regulated by other fields of law, such as labour law and other tools of regulation, e.g. collective bargaining. However, I am curious as to whether this assumption holds true in reality, especially in the case of self-employed workers who often 'fall through the cracks' of labour and social security legislation. This brings me to the next point.

2. The interplay between competition law and other fields of regulation – competition law in a vacuum?

The consultation notes that '[c]ompetition policy is not in the lead when it comes to fighting climate change and protecting the environment. There are better, much more effective ways, such as regulation and taxation.' Such a statement raises some questions as a matter of regulation. One has to do with goals and impacts, the other one – with effectiveness.

This statement relies on the view that competition law – because it is about 'competition' and not about labour rights or the environment – is not able to impact the outcomes for labour or the outcomes for the environment. Drawing this conclusion is challenging as a matter of logic because it seems to confuse 'goals' with 'impacts'. The goal of competition law may not be concerned with environment or labour. This does not mean that its application does not impact – in a substantial, significant way – to outcomes for the environment or for workers. To deny this is to deny the impact that markets have on the environment and labour. Markets are sometimes the primary ways of allocating resources and opportunities in society; thereby they necessarily impact the environment and workers. They set the boundaries, and to certain extent the expectations, about what is acceptable market conduct.

To put the above in concrete light, it is akin to claiming that housing policy cannot possibly impact health because it is about 'housing', and not about health per se; or that energy policy cannot be relevant to health outcomes because it is about 'energy', and not about health. Health scientists would firmly reject such statements; in fact, access to energy, housing and education can have a tremendous impact on health outcomes and can help explain outcomes which are not explainable in light of differences in health policy.¹²

Competition law – in shaping markets – defines consumption and work opportunities. It may not aim to do so, but it does do that, whether it wills this outcome or not. Given this very basic observation, it seems to be naïve to insist on the strict separation between competition policy and other policy fields because competition policy via its impact on markets already shapes outcomes for consumers, workers, and the environment whether it intends to do that or not.

Apart from this this observation, it is worth also asking whether such a separation is effective. How effective are subsidies when the party receiving them is subject to unfair trading practices and monopsony or monopoly power? How effective is regulation when the regulatees face different

¹² See e.g. S Friel, 'Governance, regulation and health equity' (Chapter 33) in P Drahos (ed.), *Regulatory Theory: Foundations and Applications* (Australian National University Press 2017), 573-584 (available online at <https://press.anu.edu.au/publications/regulatory-theory>).

incentives coming from the market? Can we say that payments to support farmers primarily benefit farmers when these farmers face powerful purchasers and suppliers?¹³

3. Concluding Remarks

In conclusion, I would like to emphasize that I appreciate the initiative taken by the European Commission. I believe this is a tremendous opportunity to embark on a path of a green transformation. At the same time, I would like to highlight the need for critical self-reflection. I acknowledge that it is not easy to integrate a variety of concerns into competition law analysis, but it is also worth appreciating the costs of keeping competition law separated from other policy fields.

Kind regards,

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(This submission is in a personal capacity and does not necessarily reflect the views of the University).

¹³ I discuss this in among others, V Daskalova, 'Regulating Unfair Trading Practices in the EU Agri-food Supply Chain: a Case of Counterproductive Regulation?' (2020) 13(21) Yearbook of Antitrust and Regulation Studies.