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Position Paper on Competition Policy supporting the Green Deal

Rotterdam, 20 November 2020

Dear Ms. Vestager,

Mid October, you have asked everyone with a stake in how to ensure that EU competition policy plays its part in supporting the Green Deal to consider a number of questions regarding state aid control, antitrust rules and merger control. This contribution focuses on one particular question regarding antitrust:

“3) Are there circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice? If so, please explain how the current enforcement practice could be developed to accommodate such agreements (i.e. which Green Deal objectives would warrant a specific treatment of restrictive agreements? How can the pursuit of Green Deal objectives be differentiated from other important policy objectives such as job creation or other social objectives?).”

The short answer is that there are no circumstances in which the pursuit of Green Deal objectives would justify restrictive agreements beyond the current enforcement practice. Also, it is advisable to tighten rather than to mitigate current enforcement practice.

I substantiate the above answers below. The first section addresses the conceptual misperceptions underlying the demand for green antitrust. The second section discusses the institutional facts that define the part competition policy must play to support the Green Deal. The third section proposes changes that make current enforcement practice more effective.

For a detailed reasoning on this matter, I refer to my publication ‘Strict Competition Enforcement and Welfare: A Constitutional Perspective Based On Article 101 TFEU and Sustainability’ that can be retrieved through the following link:

<http://www.kluwerlawonline.com/abstract.php?area=Journals&id=COLA2019102>

1. Conceptual misperceptions

The case for special, green antitrust is based on two conceptual misperceptions regarding the role of competition and competition law. The first misperception is that cooperation and competition are conflicting mechanisms when it comes to promoting green production. In reality, cooperation and competition are interdependent institutions, which together ensure that the market plays its part in the green transition. Markets are based on competition which at heart concerns devolved decision-making that unleashes private organization potential. Cooperation is useful in this process as long as it does not lead to significant market power (hereafter ‘market power’). If it does, cooperation poses a problem as market power debilitates the efficiency drive of devolved decision-making: alternative choice. Protecting competition is thus essential for cooperation to deliver green results.

The second misperception is that protecting competition and promoting non-competition considerations like sustainability are conflicting goals in antitrust. They are not. The consumer welfare approach enables competition agencies to integrate sustainability considerations in the competition protection regime. But, since it is competition that pushes market actors to actually deliver green results, the promotion of sustainability considerations cannot trump the protection of competition in antitrust.

In short, the case for special, green antitrust is largely overstated. The competition norms are well-designed to play their proper part in complementing the Green Deal: enforce competition in a manner that pushes market actors to promote green products.

This slims the debate down to one particular subset of agreements: industry-wide agreements that address situations where manufacturers of more sustainable products suffer from a so-called ‘first mover disadvantage’ insofar as consumers can opt for cheaper, less-sustainable products.

2. Institutional facts

The key questions thus are (i) what constitutes effective competition policy according to the existing constitutional framework and (ii) does it include self-regulation that corrects for under-regulation.

The answer to the first question is pretty straightforward. The institutional expectation is that objective competition enforcement ensures effective competition policy. Two basic institutional facts determine the extent and nature of objective competition enforcement.

The role of competition law is to protect competition in order to ensure that markets play their proper part in ensuring a green economy. Markets inherently rely on competition as it is in voluntary interaction to yield efficient results given the existing regulatory context. For competition enforcement to play its proper part it must therefore focus on protecting that mechanism. Where voluntary agreements are insufficient to address negative externalities, the regulatory state is designated to take over and readjust the regulatory context. Why? Readjustment of the regulatory context takes political decision-making.

Competition policy on the other hand is an inherently apolitical exercise. Competition agencies are law enforcement bodies that must enforce the competition rules objectively. Objective law enforcement does not allow competition agencies to recalibrate the balance between market competition and state regulation to promote sustainability. Instead, agencies are expected to stick to the evidentiary roadmaps the competition norms provide. This yields effective competition policy because the consumer welfare approach aptly connects the competition norms to the reason why the regulatory state opted for the market instrument in the first place: efficient use of scarce resources.

Based on the above, the answer to the second question is also pretty straightforward. Competition agencies cannot make allowances for industry-wide arrangements that substitute for under-regulation. Where negative externalities require coercion to be corrected, state regulation is the *single best* course of action. From a legitimacy point of view because the legislature is the only institution that is legitimized to use coercion in market societies based on the rule of law. From an efficiency point of view because state regulation and taxation are more effective.

3. Changes to current enforcement policy

The existing constitutional framework stipulates that, even though market competition is only a means to promote welfare, the protection of competition is a goal in itself within the context of competition law enforcement. Hence, the competition rules protect ‘competition on the merits’ and ‘consumer sovereignty’ in order for the market to work as an ‘invisible hand’. This suggests a competition policy

that allows individual consumers to guard their own consumer surplus rather than administrative agencies deciding on their behalf. Such competition policy translates as follows in the competition conditions of Article 101(3) TFEU. The residual competition condition must not only protect dynamic efficiency as in ongoing innovation, but also safeguard democratically legitimized consumer choice within the market conditions set by the regulatory state. The indispensability condition should focus on verifying whether the claimed benefit can be realized by means of another less restrictive alternative. This condition is not meant to accommodate first mover disadvantage, which is already taken into account under the first condition of Article 101(3) TFEU.

Current enforcement policy does not always seem to meet these requirements. More specifically, this concerns the Commission Decision in *CECED* (case IV.F.1/36.718), which reverberates in paragraph 329 on Environmental standards in the existing Commission Guidelines on horizontal co-operation agreements (OJ 2011, C 11/1), and the Commission's support of Dutch competition policy, which excepts industry-wide arrangements, provided that a quantitative cost-benefit analysis evidences net welfare gain.^{1,2}

If indeed, competition enforcement is meant to complement regulation rather than substitute for under-regulation, it might be an option to reconsider the above positions.

Please do not hesitate to contact me, should you have further questions.

Yours sincerely,

Edith Loozen

¹ DG COMP, Letter of 26 Feb. 2016 by DG Laitenberger to SG Camps of the Dutch Ministry of Economic Affairs, *Kamerstukken II*, 2015/16, 30196, 463.

² Authority for Consumers & Markets, Vision document on competition and sustainability, May 2014.