Susceptibility to Sustainability:

On the Possible Shades of Green Instrumentalism

Submission to the 'Competition Policy supporting the Green Deal' call

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Dr Oles Andriychuk | @oandriychuk1
Senior Lecturer in (Competition and Internet) Law
Co-Director, Strathclyde Centre for Internet Law and Policy (SCILP)
Member, Strathclyde Centre for Antitrust and Empirical Study (SCALES)[1]
University of Strathclyde, Glasgow UK
oles.andriychuk@strath.ac.uk

This note reflects upon a theoretical context within which the Commission aims to review its approach to EU competition rules, testing their eventual compatibility with the objectives and instruments of the European Green Deal (EGD).

The paramount problem, which has to be addressed for enabling effective, systematic, transparent and predictable application of EU competition rules in light

[1] In accordance with the ASCOLA transparency rules, I confirm no conflict of interest. This note represents my personal academic opinion and should not be attributed to the position of the Centres I am affiliated with.

of the EGD agenda is inseparably linked to the question of the goals of European competition law. I begin by deconstructing the discourse of consumer welfare-centred approach to competition policy, I then explain why it is important for the purposes of conceptually consistent implementation of the interests of the EGD into the discourse of competition policy to make such a disentanglement of competition from welfare.

There was no consensus on the goals even in the much more stable times, the times of the prevalence of the more economic approach – a theory encapsulating two fundamental (consumer) welfare-centric propositions: normative and methodological. The normative proposition is embedded into the idea of consumer welfare as the Alpha & Omega of competition policy: 'we protect competition because it delivers the best results to consumers'. The methodological proposition implies that the only reliable metrics for measuring competition-relevant practices is the neoclassical microeconomic price theory. Both propositions have gradually diverted competition policy from its core meaning and mission.

The former evaporated the idea of economic rivalry as an autonomous objective of public economic policy. The latter reduced the complex multidimensional societal phenomenon to the common denominator of excessively mathematised, scientised, purist price theory. The vocabulary of the former and the vocabulary of the latter refer to consumers and their welfare, but they imply different things as the terms are used for different purposes. For a long time, their conceptual coincidence was nothing but a matter of contingency. They both are wrong, but each for its own reason. Over the last decade or so a number of independent but mutually-invigorating events have crash-tested the illusionary

idyll of consumer welfare-centred competition policy, and the theory which was never fully satisfactory before becomes even more unreliable today.

This is the first layer of the problem: when we say 'competition' we mean 'consumer welfare', which is fundamentally incorrect.

The second dimension concerns not the internal characteristics of the phenomenon of economic competition, but its external interactions with other legitimate societal values, as reflected inter alia in the EU Treaties. This is the dimension, which is most relevant for the purposes of this call. In my view, the only meaningful avenue for incorporating the values and interests of the EGD into the metrics (and matrix) of competition policy is external. It would be plain wrong trying to commit the fallacy of consumer welfare by simply changing variables and instead of saying 'competition = welfare' to say something along the lines of 'we say competition – we mean EGD'.

All three areas of EU competition law, which the Commission intends to explore in terms of their eventual "susceptibility to sustainability" can indeed be synchronised with the EGD, but all three should be synchronised differently. I will not be addressing the widely discussed issues related to interpretation of the provisions of Arts 101(1), 101(3) & 102 TFEU, agreeing in principle that theoretically arguing for a broader and greener scope of these provisions is possible, while recognising also that such a proactive interpretation of the provisions of Art 11 TFEU can and will raise a number of meritorious objections.

My main substantive focus is the area of State Aid. The argument I put forward could in principle be extrapolated mutatis mutandis to the merger control

and traditional antitrust. But such an extrapolation is difficult for mergers and even more difficult for antitrust.

The EGD strategy represents a legitimate and timely political priority of the EU. This set of values and interests becomes more important internally, as well as it begins playing higher role in EU external relations. But it is important to implement the EGD correctly, and a way of doing so is to apply a narrow approach to economic competition, disentangling it from all other external societal values.

In order to see how the EGD can engage with EU competition policy, it is necessary to put forward three propositions:

- There is a plethora of legitimate EU values, rights and interests. Their scope is impossible to reduce to a universal subsumption. Each attempt to establish a taxonomic hierarchy of these values, rights and interests will only multiply the conflicts between the proponents of different views. The lack of clear taxonomy of all legitimate EU values, rights and interests is not a pathological situation. They conflict, and such a conflict is normal as cumulatively they are much broader than any regulator can meaningfully satisfy. Such a pluralism implies a constant contest between these approaches aiming to be prioritised by the decision-makers; The choice is context-dependent. Any other time the constellation of values, interests and rights can be different, and the value prioritised in the situation A will not be prioritised in situations B, C and D (as in a paper-scissors-rock model);
- The current political momentum increases the rate of the sustainability-related values, rights and interests, which implies that the provisions of

competition law, which were not interpreted in a green fashion before, are more likely to be interpreted in this way today and tomorrow. This situation does not require a fundamental reassessment of the very phenomenon of economic competition, but only a revision of the exchange rate between these important EU values: between the value of economic competition and the value of sustainable development. Nor does this situation undermine legal certainty inasmuch as formally, the avenues for the green(er) interpretation of the provisions of EU competition law are available (and the majority of the submissions elaborate the legal technicalities of such approximation);

- Not all provisions of EU competition law concern competition sensu stricto. Some concern the interaction between the societal value of the competitive process and other legitimate societal values (such as inter alia the value of the sustainable development). The clearest example is the provision of Art 101(3) TFEU, which re-legitimises otherwise anticompetitive agreements. The consumer-welfare oriented approach commits a conceptual fallacy by assuming that the provisions of Art 101(3) TFEU concern competition (as explained at the beginning of this submission, both the normative and methodological consumer welfare-centred approaches do see the provisions of Art 101(3) TFEU as competition-related provisions inasmuch as for them competition means welfare). For the consumer welfare-centred vision any application of Art 101(3) TFEU implies that the procompetitive elements of the agreement outweigh its anticompetitive elements. In reality however the provisions of Art 101(3) TFEU are proxies for balancing the

value of the competitive process with other legitimate societal values, and the fact that sustainability is seldom articulated in this balancing mechanics may be perfectly a problem from the perspective of legal certainty and continuity, but it is certainly not a problem for competition-centred approach. In other words, if anticompetitive agreements could be exempted from sanctions for a number of legitimate societal reasons, none of which concerns competition sensu stricto, the fact that the list of these interests is expanded or amended ('welfare + sustainability' or 'sustainability as welfare') does not make the situation with competition sensu stricto any better or worse. The provisions of Art 101(3) TFEU do not envisage procompetitive context of the agreements, which mitigates the severity of the harm to competition (with a tiny exception to proportionality requirement). They envisage the legitimate external economic and social context the benefits of which outweigh the harm for competition. The harm for competition caused by a hypothetical member of cartel exempted from the sanctions under the rationale of 101 (3) TFEU (or leniency for this matter) does not become smaller by the fact that the agreement simultaneously contributes to other legitimate societal objectives. And of course, this situation is not problematic. Trade-offs in this context are not pathological, and if the trade-offs would replace welfare-oriented external values with sustainability-oriented external value, this fact alone does not create any fundamental difference for the value of the competitive process (it does for legal certainty, but this is beyond the scope of these considerations).

Reverting to State Aid. While the wording of Arts 101 & 107 TFEU both refer to the actions restricting competition and declare these actions to be incompatible with the internal market, I submit that the ontology of the institution of State Aid – unlike the ontology of the institution of prohibition of anticompetitive agreements – concerns competition only peripherally. The main ontology, the main essence and the main mission of State Aid control is protection and promotion of the Internal Market, making it more homogeneous and centralised. The interest of protecting competition is used mainly as a convenient proxy.

My argument in support of this proposition is twofold:

(i) No other jurisdiction – however diverse, autonomous and heterogeneous its different regions may be – operates an established mechanism of protecting its undertaking from anticompetitive regional aid. Arguably such a regional aid may be as harmful for competition as the aid granted by the EU Member States to the domestic undertakings. Evidently, it is never anticompetitive enough to trigger the adoption of federal state aid rules. The situation in EU (qua primarily economic polity) is fundamentally different, as the main objective of the mechanism of State Aid control is protection and cementing of the Internal Market (with protection of competition as a positive but adjacent effect). In other words, it is fundamentally different because of the overarching objective of market integration, not because European undertakings benefit and suffer from State Aid more than undertakings in other jurisdictions. By disentangling conceptually the mechanism of State Aid from the

protection of economic competition, and bringing it closer to the Internal Market, it becomes easier to connect and synchronise this interest with the EGD, as both values become external to competition policy sensu stricto.

(ii) The second aspect of my argument is apagogical: if the overarching rationale of State Aid were indeed the protection of competition, the values and interests of the EGD would harm competition, as they would provide disproportionate advantage to sectors, countries and regions with higher green awareness and pedigree, increasing thereby the technological gap between the greener and the redder territories. It is correct that such an approach also harms the integrity of the Internal Market, but this is conceptually not inconsistent: if the main rationale of State Aid is market integration rather than competition, it is logically acceptable to shift the priority from the objective of homogeneity (market integration) to the qualitative features of the Internal Market (market greening). This trade-off would be much more difficult to explain and justify should the overarching objective of State Aid control be in fact protection of competition rather than market integration.

If this proposition is correct (and in direct correlation to the level of its correctness), the mechanism of State Aid becomes more open to factoring in the values, rights and interests of the EGD than the mechanism of Arts 101 & 102 TFEU. For the provisions of Art 101 TFEU to be interpreted in the EGD terms, it is necessary to undertake a conceptual separation and disentanglement of the societal value of the competitive process from the societal value of consumer

welfare (to separate and keep separate all the way through). Merger control is positioned in-between: on one hand it is a mechanism aiming not only at (and used not only for) protecting competition but also promoting it, and as such it is much more flexible and instrumental than the provisions of Arts 101 & 102 TFEU. On the other hand, while allowing various incarnations of public interest considerations, merger control is yet an established and universally (qua internationally) applied competition-focused mechanism – unlike the mechanism of State Aid – which is chiefly EU phenomenon.

This short note explains that there are two possible avenues for the conceptual implementation of the values, rights and interests of the EGD into the EU competition policy: an internal and an external. I am sceptical about the former and endorse the latter. The algorithm of the former is an interpretation of the value of competition in terms and vocabulary of the EGD; it is an attempt to copy the way how the value of competition has been interpreted in consumer welfare terms. The EGD values would simply replace the consumer welfare-centred narrative (and as such would be doomed to be caught in the same conceptual traps as the consumer welfare-centred approach).

The latter approach is fundamentally different. It does not interpret or perceive competition through the prism of the EGD. Instead it acknowledges that both competition and sustainability are legitimate societal values, which may in some cases reinforce each other, in others be neutral to each other, and yet in some may be in conflict with each other. The first two scenarios are unproblematic and automatically enforceable. The instances of the inter-value conflict (the third scenario, or 'hard cases') are the only relevant to the discussion.

The theoretical framework sketched out in this note implies that the conflict between values in hard cases is productive, unavoidable and volatile. The 'exchange rate' of value in each hard case adjudication is subject to an abundance of erogenous factors, which every time create a unique, ad hoc balancing constellation. Some of the coupling points for meaningful communication and exchange between the value of competition and all other legitimate societal values are available in the provisions of what we call competition law; others are places externally (e.g. in Art 11 TFEU).