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SUSTAINABILITY AND ANTITRUST: CONFLICT, TRADE-OFF OR GOOD FRIENDS?

ABSTRACT. *How can competition law contribute to the promotion of sustainability? Should sustainability be an explicit goal for competition law? Are antitrust authorities equipped for the assessment of environmental effects that do not affect consumers in the market? And, if not, could they still have a significant role, without distorting their mission and their independence? This brief paper tries to provide some tentative answers to these challenging questions.*

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1. Preliminary remarks

«Sustainability has gone from being something we talk about, to a central goal of policies around the world. All of Europe's policies – including competition policy – have a role to play to get us there» (Margarethe Vestager, Conference on Sustainability and Competition Policy, 24 October 2019).

This brief paper tries to illustrate what kind of contribution can be provided by competition policy without distorting its original mission, either if we confine it to the improvement of the consumer welfare (whatever it means or however we would define it) or to the protection of the competitive process (and indirectly to the improvement of the consumer welfare).

The approaches privileged within the antitrust community are not uniform as far as the relationship between sustainability and competition is concerned. On one side there is the "purity team", i.e. those who view sustainability as a public interest outside the scope of competition law. On the other side of the spectrum there are those who would like to attribute to antitrust agencies multiple tasks concerning public interests like environmental and social sustainability, the fight against inequality, employment, privacy, etc… In other words, those who consider sustainability as an explicit goal of competition law.

A third group focuses its attention only on the potential conflict between competition and sustainability, arguing that antitrust law risks being a myopic obstacle against virtuous cooperation among competitors aimed at achieving sustainability goals. In other words, antitrust law rather than encouraging sustainability or at least rather than being neutral would discourage sustainable initiatives.

Lastly, we can identify an approach which is extremely sensitive to environmental issues but at the same time is conscious of the distinctive features of competition law and of the antitrust agencies. In other word, an approach that, on the one hand, applies sustainability considerations to concepts like quality, innovation, long term efficiency, and on the other hand, suggests embedding sustainability considerations in case prioritization. Public interests would not be included among the explicit goals of competition law but would be "just" conscious and virtuous externalities.

The paper is structured as follows. Section 2 sketches the relationships between competition and sustainability, clarifying that more often than generally perceived the improvement of the competitive process may be beneficial also for sustainability. Conflict between the two objectives may certainly emerge but can largely be solved within

an antitrust framework. If it cannot, appropriate public policies should provide the most adequate solution.

Section 3 deals with some of the issues concerning the application of article 101 (3) of the Treaty to sustainable agreements and with the opportunity of guidelines when the case law is still quite "thin". In the final section some tentative conclusions will be drawn.

2. Friends or Foes?

In the business community the opinion according to which competition quite often conflicts with sustainability and antitrust rules might discourage cooperation which is beneficial in an environmental perspective seems to be increasingly popular. Nevertheless, this opinion does not seem to be supported by sound evidence and at present it might look like an alibi aimed at softening the application of antitrust rules rather than an actual problem.

However, before coping directly with this argument, it is worth stressing that the severe application of antitrust rules rather than being an obstacle for initiative pro-sustainability may be part of a broader policy aimed at achieving a more sustainable world. Competition and sustainability go hand to hand whenever competition improves the efficiency of markets that are crucial for a better environment, as waste management, local public transport or electric mobility. Competition enforcement can increase sustainability when the anticompetitive conduct also harms the environment

It is even legitimate, wearing optimistic lens, to question the possibility for firms to survive in the long run without operating in a resource – and energy – efficient manner. Sustainability means quality, innovation… and firms compete also on quality and innovations.

It seems mandatory, at this point, to mention at least a couple of famous cases – *EU Car Emissions*[1] and *France Hard-wearing floor coverings.*[2] In this perspective the experience of the Italian Competition Authority seems also to be quite interesting.[3]

[1] EU Commission (2021), EU Car Emissions, 8 July 2021.

[2] Autorité de la cuncorrence (2017), *France Hard-wearing floor coverings*, 19 October 2017.

[3] See Elisabetta Iossa, and Francesca Mattonai, 'Il Contributo dell'AGCM allo Sviluppo della Sostenibilità', 2023, Working Paper.

In the last three years 7 investigations (both ex art. 102 and art. 101 of the Treaty) have been launched to foster the competitive process in markets whose efficiency may provide a significant positive contribution for environmental sustainability. 5 of them have been decided (2 with sanctions and 3 with commitments). 2 investigations are still ongoing (Table 1).

Table 1 – SUSTAINABILITY AND ANTITRUST. THE ENFORCMENT EXPERIENCE OF THE ITALIAN COMPETITION AUTHORITY (2025-2023)

- Agcm (2015), A476. Conai. Gestione Rifiuti da Imballaggi in Plastica, 03/09/2015, bullettin n. 33/2015 – Committments.
- Agcm (2020), A531. Riciclo Imballaggi Primari/Condotte Abusive Corepla, 27/10/2020, bullettin n. 45/2020 – Sanction.
- Agcm (2021), I838 – Restrizioni nell'acquisto degli accumulatori al piombo esausti, 15/6/2021, bullettin n.27/2021 – Committments.
- Agcm (2022), A545. Consorzio Polieco/Condotte Anticoncorrenziali, – Committments.
- Agcm (2021), A544. Erion Weee/Condotte Anticoncorrenziali – Committments.
- Agcm (2021), A529. Google/Compatibilità App EnelX Italia con Sistema Android Auto, 27/04/2021, bullettin n. 20/2021 – Sanction.
- Agcm (2023), EnelX Way EdWiva- Condotte abusive nel mercato della ricarica elettrica – 04/04/2023, bullettin n. 15/2023 – ongoing.
- Agcm (2023), A569, Consorzio Olii usati Conou – Condotte restrittive nel settore della rigenerazione, 2/10/2023, buttettin n. 39/2023 – ongoing.

Source: AGCM.

But regardless their outcome, what is remarkable is that all of them are self-evident examples of the positive relationship between competition and sustainability.

The case A531 - *Riciclo Imballaggi Primari/Condotte Abusive Corepla* is representative of how the lack of competition may quite often determine harms in terms of sustainability. In October 2020, the Italian Competition Authority fined COREPLA, the dominant consortium, euro 27 million euro for preventing a rival consortium of plastic bottle manufacturers, CORIPET, from competing on a level-playing field in the plastic waste recycling. Competing systems for collection and recycling of waste can

foster innovation with solutions that are not only efficient but also better performing from an environmental perspective. The abusive conduct had prevented the implementation of an innovative environmental project (the CORIPET project), which would have resulted in an increase in the collection and recycling of separate waste, especially in geographical areas with lower environmental performance.

In the same perspective should be mentioned at least two other recent cases concerning the development of electrical mobility (more specifically the quantitative and qualitative improvement of the infrastructures and innovative services related to the recharging of electric vehicles),[4] all the cases concerning local public transport[5] and all the advocacy interventions concerning waste management and, again, local public transport.

3. When the conflict emerges…

When we talk of sustainability optimism is very welcome (too often we risk being seduced by catastrophism) but we all know that market and competition are not enough. Markets fail both because prices do not necessarily take account of the social costs of not-sustainable products and because investment in more sustainable technologies or products may be discouraged since competitors might benefit from that investment without paying the costs. Above all, markets fail since not all consumers are willing to pay for higher «quality», more innovation, more sustainability. This is especially true when all the benefits will be enjoyed by others or by next generations.

Then, what can antitrust law do when "pure" competitive behaviour conflicts with sustainability? Is the traditional antitrust toolkit adequate to cope with this new challenge? And are distributional issues really a new challenge for antitrust?

"Virtuous" restrictions of competition are generally dealt with through the application of article 101 (3) of the Treaty. The requirements for the authorization of a re-

[4] Agcm (2021), A529. Google/Compatibilità App EnelX Italia con Sistema Android Auto, 27/04/2021, Bullettin n. 20/2021 and. Agcm (2023), EnelX Way EdWiva- Condotte abusive nel mercato della ricarica elettrica – 04/04/2023, Bullettin n. 15/2023 (ongoing)

[5] For example, Agcm (2017), A495 – Gara TPL Padova, 11/5/2017, Bullettin n. 20/2017; Agcm (2019), A516 - Gara Affidamento Servizi TPL Bolzano, 10/4/2019, Bullettin n, 17/2019; Agcm (2022), Regione Toscana. Gara per l'Affidamento del servizio di TPL, 21/6/2022, Bullettin n. 27/2022.

strictive but somehow beneficial agreement are well known.[6] Nevertheless, given the particular relevance of the Green Deal, the Commission dedicated a significant section of the new Guidelines for Horizontal Agreements (from now on the new EU Guidelines for Horizontal Agreements) to Sustainability Agreements providing numerous examples of agreements that generally fall out of the scope of art. 101(1) TFEU, showing a high degree of flexibility in the application of Art. 101(3), but still focusing on the impact of the agreements on the competitive process and on the consumers in the market.[7]

The application of the "fair share of benefits to consumers" condition when assessing whether the benefits of a sustainability agreement are such that the agreement may be exempted from antitrust rules has been widely debated.

Both the EU and the UK privileged a flexible approach – though with some minor differences concerning the so-called "climate change agreements"– according to which the condition may be satisfied when it is the entire population *and* the "relevant consumers" to be affected by the beneficial effects of the agreement.

Other antitrust authorities, as the US, have adopted a stricter view, limiting the evaluation to the consumers of the products or services related to the agreement.

On the other hand, a few European authorities, as the Dutch Competition Authority, adopted a broader approach, including "future users" and "indirect users" among the "relevant consumers", arguing that the approach recently followed with the new EU Guidelines for Horizontal Agreements would not be sufficient and that sustainability considerations should be explicitly incorporated in the antitrust framework for assessing cooperative agreements.

Given that competition law in each jurisdiction is part of a political and social construct which stems from the domestic foundations and values of society, and changes to reflect their development,[8] the explicit inclusion of sustainability in the competition provisions or in their interpretation is not without controversy.

More directly, such a "broader" approach does not seem particularly convincing

[6] i) the agreements should offer efficiency gains, improvements of quality, including sustainability benefits; ii) consumers of the products in question (i.e. consumers in the market) are allowed a fair share of the benefits; iii) the restriction of competition should be indispensable or "proportionate"; iv) competition is not eliminated in respect to a substantial part of the market.

[7] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023) 146-166.

[8] See Ariel Ezrachi, 'Sponge' [2016] volume 49 Journal of Antitrust Enforcement 5.

for the following reasons.[9]

The expertise of Antitrust agencies lies in the assessment of the competition process not in addressing environmental effects. Sustainability harm and efficiencies can be generally recognised under the consumer welfare standard which should not be stuck to price and quantity but can easily consider innovation and qualitative factors as sustainability.[10] The evaluation of agreements along ethical or political dimensions is not comfortable for independent authorities. The expansion of their mission to the political domain (for instance the assessment of the intergenerational impact of a sustainable agreement) is questionable if we consider that their decisions are not filtered by a "democratic" process…

Not less important is that the attribution of multiple missions to the same authority may weaken her accountability and undermine the effectiveness of her interventions. In other word the possibility that the risk of "grasping all, losing all" seems quite serious.

Last but not least, the inclusion of sustainability among the explicit goals of antitrust enforcement would imply that decisions based on competition law might overlap with the mission of other regulatory bodies or of the ministry of environment itself. As Jean Tirole wisely argues "*having many agencies in charge for a given policy may imply that no-one is really accountable…too many cooks spoil the broth*".[11]

Therefore, when the assessment of a sustainable agreement (and in particular the application of the "fair share of benefits to consumers" condition) implies a mainly political evaluation concerning the achievement of public interests, and legitimately underestimates or even does not take into consideration the effects on consumers in the market, regulation or public policy provisions seem much more appropriate. Above all, the special contribution of antitrust authorities is to evaluate if the agreements might be a cover for price collusion or if environmental standards can strategically be used to raise entry barriers. Rephrasing the title of an old movie[12] we might say that antitrust

[9] See, among others. Jean Tirole, 'Socially Responsible Agencies' (contribution to the DG Comp Conference 'Making Markets Work for the People', November 2022).

[10] If sustainability efficiencies are to be taken account, appropriate techniques may need to be adjusted or further developed, also drawing insights from environmental economics.

[11] Tirole (n 10)

[12] See *How Green Was My Valley*, 1941 directed by John Ford and inspired by the book with the same title, written by Richard Llewellyn and published in 1939

main task is not to evaluate "how green is my cartel" but to verify if behind the greenish surface of the agreement there are unjustified and disproportionate restrictions.[13] If a fair share of the environmental benefits accrues to the relevant consumers (or to the whole society and *also* to the relevant consumers) the framework provided by art. 101 (3) TFEU seem adequate, and antitrust authorities can assess if the competition restrictions are proportionate. Otherwise, public policies and State intervention may be more desirable.

Still, antitrust authorities (who do not operate ignoring the broader social context) could and should play a significant role. Given the positive relationship that – more often than generally perceived – exists between sustainability and competition, antitrust enforcement may be used strategically as a complementary instrument, in a manner that could emphasize its effect on sustainability. To put it simply, enforcement action may target – more or less consciously – anticompetitive conducts in industries or markets which are particularly relevant in an environmental perspective: waste management, public transport, electrical mobility, recycled products, gas and electricity, just to mention some of them. The positive effects may be incidental by-products or the external effects of antitrust enforcement could be consciously used as a complementary tool to promote sustainability, embedding sustainability considerations in case prioritization.[14] It is evident that including sustainability in prioritization considerations may be a consequence of political judgements but – and this is the crucial point – does not affect the assessment of the anti-competitive conduct. It seems an approach fully consistent with Vestager's quotation that opens this article and that, thanks to a "virtuous hypocrisy"[15] keeps roughly untouched the "purity" (whatever it means) of the antitrust assessment.

[13] See Andrea Pezzoli, 'Come era verde il mio cartello', (2022) Analisi Giuridica dell'Economia 327-335

[14] See, in a different context, Ariel Ezrachi and Carol Decker, 'The Effects of Competition Law on Inequality – Incidental By-Product or a Path for Societal Change?' [2021] SSRN Electronic Journal, 1-27.

[15] See, Nadia Urbinati, *L'Ipocrisia Virtuosa* (Il Mulino, Bologna, 2023)

4. Concluding Remarks

Let's conclude by stressing a few points.

Market is not necessarily "immoral" and competition may be a powerful and complementary tool to promote sustainability. It seems reductive to confine the relationship between sustainability and competition just to a conflictual one and it seems unfair to look at competition law as an obstacle to virtuous cooperation among competitors that could achieve sustainability goals.

Competition and sustainability more often than perceived go hand in hand. The toolkit at disposal of the antitrust authorities (more or less "traditional") as recently enriched by the new EU Guidelines for Horizontal Agreements may be an important improvement to cope even with the more complex trade-off between competition and sustainability.

Some challenges cannot be denied. Firstly, antitrust authorities must determine which and to what extent environmental effects may be considered. Secondly, they have to decide if it is possible to take into consideration the environmental efficiencies that benefit consumers other than those directly affected by the anticompetitive conduct (e.g. future consumers). Thirdly and strictly connected with the previous point, the timeframe within which the environmental effects must be evaluated has to be designed. Lastly, the comparison and the balance between environmental effects and other economic harms or efficiencies require quantifying efforts which are not that easy.

When the assessment requires distributional evaluations (e.g. harm and benefits between different generations) the antitrust lens prove to be inadequate, the independent nature of antitrust agencies is a feature that should not be forgotten and State intervention is more appropriate not last because of its higher political accountability.

In order to explain that competition law does not hinder pro-environment initiatives, guidelines might be useful. We have already mentioned the new EU Guidelines for Horizontal Agreements and, in particular, the chapter addressing Sustainability agreements aimed at clarifying that antitrust rules do not stand in the way of agreements among competitors that pursue sustainability objectives. The Dutch Competition Authority and the Consumer and Market Authority have recently published two documents with the same objective (regardless the differences in the approaches). In particular the Dutch Competition Authority rephrased the art. 101 (3) TFEU criteria, weakening the connection between the environmental benefits and the relevant consumers. The Hellenic Competition Commission published a working paper in 2020

promising new guidelines on sustainability collaboration, following, more or less, the same approach.[16] The Austrian legislator modified art. 2(1) of the Austrian Cartel Act, which is materially identical to art. 101 (3) TFEU, supplementing a paragraph that allows the possibility of wider considerations of sustainability effects that emanate from cooperation between competitors. Other authorities have privileged informal cooperation with the business community having in mind that proper guidelines would be written only when there will be a sufficiently sound case law.[17]

[16] HCC (2020), Competition Law and Sustainability: Draft Staff Discussion Paper on Sustainability Issues and Competition Law, Athens.

[17] Useful insights on these points could be found in OECD (2021), Sustainability and Competition, Paris; OECD (2021), Environmental-Considerations in Competition Enforcement, Paris; OECD (2023) Pro-competitive Policies for a Sustainable Economy, Discussion Paper, Paris.