GCR NEWS

Sustainability and antitrust in Australia: an outlier or blueprint?

07 December 2020

As European competition authorities and international organisations like the OECD and ICN look to advance the debate on sustainability and antitrust, Baker McKenzie's global antitrust knowledge lawyer ***Grant Murray*** *and partner* ***Georgina Foster*** *explore the approach of the Australian Competition and Consumer Commission and ask if it can provide a blueprint for others to follow.*

The covid-19 pandemic has accelerated many things in 2020. Judging from the flurry of conferences, discussions and consultations, that includes the intensity of the debate on the relationship between sustainability initiatives and competition law – namely how the latter can support the former. Antitrust

authorities are asking themselves how to be part of the solution and not part the problem.

It is not surprising that covid-19 has set people thinking more deeply about climate change. The pandemic underlines the need for coordinated action but is simultaneously a reminder of how difficult it is to achieve a swift global consensus, or to rely on a set of prescriptive rules to address rapidly evolving circumstances.

The covid-19 crisis has also demonstrated that competition authorities can think and act on their feet. Despite an initial – and thankfully brief – period when some authorities optimistically declared it should be 'business as usual' for competition law, multiple agencies quickly introduced a range of solutions, from tailored guidelines to public interest exclusions. While interventions were temporary and narrow in scope, the rapid responses are proof that competition authorities can be a part of the solution without exposing themselves to accusations that they were bounced into serving vested interests.

Competition authorities should now be applauded for taking time to reflect on their role when it comes to climate change. It may be tempting to attack a strawman by claiming that sustainability considerations necessarily involve opening a Pandora's box of issues that go beyond any sensible and administrable consumer welfare standard. In fact – just as was the case with covid-19 – there are opportunities for competition authorities to explain where competition law will not apply and why, despite some restriction of conduct, it is nevertheless possible to acknowledge the quantitative and qualitative benefits that joint projects can bring.

Alive to change

So far, the debate on competition law and sustainability seems to be taking place in Europe. Draft guidelines produced by the Netherlands' Authority for Consumers and Markets are bold and progressive – at least conceptually. The Hellenic Competition Commission's recent paper is a thoughtful contribution with pragmatic suggestions such as the use of a regulatory sand box, where companies can experiment under the supervision of the competition authority

First published on the *Global Competition Review* website, December 2020

and would not be punished for things that might otherwise be violations of the law.

The UK's Competition and Markets Authority recently declared that supporting the transition to a low carbon economy was a strategic objective, while France's Competition Authority has said sustainable development is a core priority for 2020. In a number of cases, Germany's Federal Cartel Office has engaged with parties informally – such as in relation to animal welfare – and decided not to intervene.

The European Commission also seems alive to change. Comparing its 2019 speech to the recent much more upbeat call for contributions relating to its Green Deal, that change appears to already be underway.

But the conversation and solution needs to be broader. The countries with the largest greenhouse gas emissions are not in Europe, while the world's severest sustainability concerns materialise in developing countries, which may lack recycling and plastics waste collection. It is also true that climate change consequences hit hotter climates more than temperate ones.

Plus, sustainability projects are likely to have widespread effects. Price effects may be felt in countries where products are sourced as well as those in which consumers may need to pay more for them. Environmental benefits may be enjoyed by an even wider group. A patchwork of approaches and inconsistencies and unknowns – even before political interference – will prevent companies from collaborating in the wider public good. The competition law response to digital issues – multiple and staggered approaches that result in the same conduct being subject to many different laws and procedures – does not portend well in that respect.

Looking further afield

So what guidance is being provided and what signals are being sent as regards sustainability cooperation by competition authorities outside Europe?

While the US agencies have not produced guidelines focusing specifically on sustainability agreements, there is of course a wealth of US case law dealing with many types of competitor collaboration, including standard setting. That case law helpfully shows that, even though the adoption of industry standards will not benefit all companies equally, antitrust issues are only likely to arise if standards are aimed at disadvantaging or boycotting particular entities, such as retailers, suppliers or other market participants. Courts have rejected refusal to deal claims that challenge industry association rules where they have been objectively and impartially applied. Therefore, both courts and the agencies look to ensure that there are meaningful safeguards that govern the way in which industry standards are developed and enforced.

Business review letters have also proven to be a useful way for companies to obtain guidance on when standard setting and related activities would fall outside the antitrust rules. For example, in 2000, the Department of Justice considered a proposal to create and adopt a workplace code of conduct. Companies could then advertise their compliance as well as monitor whether claims of compliance were accurate. The DOJ gave a number of reasons for not opposing this on antitrust grounds, observing that the aim of addressing public policy concerns was not typical of a cartel or other restrictive agreements. According to the DOJ, the code was not expected to have an obvious adverse effect on the prices paid by US consumers and might have a net pro-competitive effect.

In the same year, the DOJ issued a positive business review letter to the Akutan Catcher Vessel Association, which had proposed to sub-allocate a government-set fishing quota to different processors within a sector. Although this would eliminate competition between processors within a sector, who would otherwise have been able to catch fish that would now fall within the quotas of others, the DOJ saw no incremental anticompetitive effect since the harvesting agreement did not reduce the output of processed fish. The DOJ had in fact concluded that the previous ‘race’ system was likely to generate inefficient overinvestment in fishing and processing capacity. The DOJ also noted that, if the proposed agreement allowed for more efficient processing and reduced the inadvertent catching of other fish species whose preservation was also a matter of regulatory concern, it could have pro-competitive effects.

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It is arguable that more recent developments in the US relating to standards may have muddied the waters – specifically the DOJ's investigation into a group of car manufacturers. That probe followed soon after an announcement that the car makers had voluntarily adopted California's environmental standards, which are more stringent compared to the federal equivalent.

The case was intriguing for a number of reasons, including because it was not immediately obvious why the arrangement would fall foul of US antitrust, which in broad terms exempts state action and allows the joint petitioning of governments even where anticompetitive effects result from the government action.

Although the investigation was dropped by the DOJ, the precise reasons for doing so remain unclear. Plus, around the same time, the DOJ commented that "anticompetitive agreements among competitors – regardless of the purported beneficial goal – are outlawed because they reduce the incentives for companies to compete vigorously, which in turn can raise prices, reduce innovation and ultimately harm consumers." Although the DOJ's statement might be described as circular – anticompetitive agreements are outlawed because they restrict competition – it is hard to avoid the inference that cooperation with, and in, the private sector to achieve positive environmental changes may come into conflict with US antitrust laws.

Sustainability projects have also been connected with competition authorities elsewhere. According to press **reports**, Brazil's Administrative Council for Economic Defence was urged to investigate a soy-bean moratorium barring grain traders from buying oilseed from deforested areas in the Amazon. In 2016, Indonesia's Commission for the Supervision of Business Competition **reportedly** threatened to fine palm-oil traders that decided not to buy from farmers that engaged in illegal deforestation, giving in to political pressure after initially endorsing the initiative.

International organisations are also reacting. The Organisation for Economic Co-operation and Development's competition committee – which has an impressive track record for identifying and debating important and emerging competition law issues – is holding a hearing in December 2020. Experts and antitrust authorities will discuss whether there is a potential conflict between

competition and sustainability goals and whether any tools could be used by enforcers or other public bodies to enable them to take into account sustainability concerns. This will be an update and refresh as the OECD also held a roundtable back in 2010 on horizontal agreements in the environmental context.

The International Competition Network has also shown an interest in the area, although the topic appears to have been allocated to its Cartels Working Group for consideration. That is very likely to be an institutional issue – since there is no working group dedicated to wider horizontal cooperation agreements – but it would be disappointing if this reflected general scepticism about the objectives being pursued by joint sustainability initiatives. It would be a missed opportunity if the focus were placed on the doubtless small number of cartels that are "greenwashed" as sustainability projects to the exclusion of fully transparent and well-meaning joint arrangements that raise important questions about the boundaries of competition law and evidence.

The Australian approach

While safe harbours are being considered in some countries, developments in other parts of the world hint at unpredictable undercurrents and possible scepticism towards the benefits of sustainability arrangements. But the route chartered by the Australian Competition and Consumer Commission may be one that others could follow.

Australia has a long-established process by which the ACCC can grant an authorisation for conduct that might otherwise breach the country's competition rules – including the cartel provisions. The ACCC will grant an authorisation if it is satisfied that the proposed conduct would not lead to a significant lessening of competition or if the public benefits outweigh the public detriments. It is for the parties seeking authorisation to show on the balance of probabilities that the benefit to the public is likely and sufficient to outweigh any likely anticompetitive detriment.

'Public benefit' is not defined by law but the courts have clarified that the term includes anything of value to the community generally, namely any

contribution to the aims pursued by society including the achievement of the economic goals of efficiency and progress.

While the focus of public benefits is often on efficiencies, environmental benefits are fully recognised as being relevant. And yet this does not lead to a 'black box' approach since often the benefit will come from addressing an identified environmental externality.

The ACCC also follows a rigorous process when assessing benefit. There must be evidence in support of the claimed benefits, which must flow from the proposed conduct, and the conduct must be likely to bring about the public benefit claimed. While the benefits must not be speculative, they do not have to be explicitly quantifiable in all instances.

A number of authorisation cases show how the ACCC is able to strike a balance between looking at short-run price effects and wider, long term benefits. The string of 'stewardship cases' are the most eye-catching. In these cases – which, for example, have related to batteries, chemical containers and tyres – the ACCC gave the green light to sectoral agreements that fixed levies on consumers in order to fund programs for the collection and disposal of waste or end-of-life products.

The authorisation granted by the ACCC in September this year for the **Battery Stewardship Council** is a good example and deserves closer examination. The ACCC granted a five-year authorisation for a voluntary, industry-led scheme designed to enable responsible disposal of used batteries.

Through the scheme, competitors agreed to a fixed surcharge on batteries imported by members of the program, which would be passed through the supply chain to the consumer as a visible fee. Rebates would then be paid to recyclers to help offset the cost of collecting, sorting and processing expired batteries. To prevent free riding, members of the scheme were required to agree to only deal with other members along the supply chain. Each member would also need to sign up to a number of other commitments – relating to branding and auditing for example – according to its role in the supply chain, such as government agency, supplier, retailer, collector or processor.

First published on the *Global Competition Review* website, December 2020

Before granting the authorisation, the ACCC conducted a thorough consultation, which invited submissions from a range of interested parties including major industry associations, manufacturers, retailers, recyclers, consumer groups and state and federal government representatives. It received submissions both for and against the scheme.

Despite the 'public interest' regime, the analysis involves elements and a process that will be totally familiar to a competition authority conducting an 'effects' or 'rule of reason' analysis:

- Affected markets: the ACCC assessed the impact on competition in all relevant areas, which involved considering the wholesale, retail, collection, sorting and processing of batteries.

- Impact on prices: the ACCC acknowledged that the scheme involved an agreement between competitors to charge and pass on to consumers a uniform fee, which would be less competitive than independent pricing. But, while the ACCC calculated that the scheme could result in an increase of up to 6% in the price of certain batteries, it considered that, if consumers paid closer to the full cost of the use and disposal of batteries, the price increase that might occur due to the levy was likely to signal a more (rather than less) efficient allocation of resources in the economy.

- Environmental benefits: the ACCC accepted that the scheme sought to avoid significant environmental harm to land and water resources and the need for costly remediation, which was not reflected in the price of batteries. The levy and rebate system was therefore likely to better align the price of batteries with the cost of their responsible disposal and increase the incentive for businesses to facilitate their recycling.

- Qualitative benefits: there was a concern that the scheme might put participating businesses at a disadvantage when selling goods that consumers could purchase directly from overseas suppliers. But on balance, the ACCC considered that any loss of sales faced by participating businesses due to higher prices incorporating the levy was likely to be offset by the ability for businesses to signal their environmental credentials by participating in the scheme.

- R&D and innovation: the ACCC also considered that the scheme was likely to support increased levels of innovation and research and development activities concerning end of life batteries.

- Indispensability and residual competition: the ACCC acknowledged first mover disadvantage. Battery importers would not have an incentive to act unilaterally to impose a levy to fund the collection of end of use batteries. Therefore, to achieve the public benefits identified, the ACCC saw the need for importers to reach an agreement to impose a levy, which is clearly signalled to consumers. At the same time, the ACCC did not believe that the scheme would increase the likelihood of co-ordination among importers, wholesalers and retailers on price and other areas in which they currently compete.

- No requirement for arithmetic or mathematical balancing: while the assessment of benefits and detriments must be complete and they must be weighed, this is not necessarily an arithmetical or accounting process. As the Australian Competition Tribunal has previously noted, it may involve "an instinctive synthesis of otherwise incommensurable factors".

A possible blueprint?

At a time when competition authorities in some regions are grappling with whether and how to address sustainability goals, the ACCC's could be a useful blueprint.

Instead of being quick to summarily condemn competitor agreements as problematic – for example, by taking an expansive approach to what amounts to a per se or hard-core restriction of competition – the ACCC considers factors and evidence that competition authorities of all stripes are accustomed to assessing.

That includes likely impact on price; qualitative benefits (such as environmental credentials that may form part of a product's value proposition), improvements to R&D and innovation; indispensability and proportionality.

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Although the ACCC will look carefully for the claimed benefits, they do not have to be explicitly quantifiable and mathematically calibrated in all cases. That is not radical. Even the exemption criteria under Article 101(3) of the Treaty on the Functioning of the European Union look beyond the exclusively 'economic' to include three other elements: improving production; improving distribution; and promoting technical progress. So there is no need to resort to the intellectual gymnastics to add so-called 'non-economic' factors into the 'economic' category. Most questions in competition law will require the decision maker to weigh up quantitative and qualitative evidence and reach a judgement based upon that evidence.

The ACCC's process also helps ensure that the right decision is reached. Its procedure is pragmatic and measured. Authorisations are only granted after a thorough and public multi-stakeholder consultation and, like the useful interventions of authorities in the covid-19 pandemic, can be limited in time. If the parties seek longer-term protection, then they can apply for a new authorisation – at which point the ACCC can actually verify whether the claimed benefits materialised. This was the case for example in relation to CFC refrigerant **authorisations**, where the parties were actually able to provide evidence as to how much emissions had been reduced.

Equally, the ACCC retains the power to claw back authorisations where claimed benefits do not materialise. That it rarely uses these powers is perhaps testament to its robust processes and legitimacy. It may also indicate its appropriateness to serve as a guide for other competition authorities grappling with this area.

Taken as a whole, the ACCC's approach certainly offers a practicable framework within which competitors can work and obtain some certainty when they seek to achieve positive societal goals together.

It is true that public policy considerations are expressly mandated by Australian law – something that European and other enforcers might say they are lacking. However, the EU treaties do contain a number of sustainability-related provisions.

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In any event, even if the ACCC does apply a different test to that of many competition authorities looking at competitor collaboration, an examination of its principles and methodology suggests it is not the outlier which it first appears.

Attention now turns to the OECD and ICN and the important role they have to play in coordinating the approaches of different national governments and authorities. On the plus side, these authorities may have more in common than they first thought.

First published on the *Global Competition Review* website, December 2020