

LIDC Questionnaire 2022 – Sustainability and Competition Law

Deadline for the national reports: 15. July 2022

Background:

While the last years have been dominated by Covid-19 and now the war in Ukraine, there have been numerous ongoing tragedies. The last few decades have seen a dramatic increase in freak weather events caused by climate change, biodiversity loss, and general environmental degradation. These problems are part of a broader sustainability challenge faced by humankind. As such, sustainability— defined as “[development that meets the needs of the present without compromising the ability of future generations to meet their own needs](#)” by the UN in 1987—has been on the agenda of international organizations and countries for many years.

The concept of sustainability is also increasingly embraced by [the business community](#), and we can observe [a drive for more sustainable business activity](#). It is thus not surprising that competition authorities around the world [are expecting](#) to be faced more frequently with questions around sustainability and competition.

Some agencies such as the [Dutch](#), [Greek](#), [German](#), [UK](#), and [EU](#) authorities have already become active. Similarly, the OECD’s Competition Division has [discussed the issue](#) and followed up with discussions about [environmental protections](#) and [antitrust and the measurement of environmental benefits for antitrust](#).

Against this background LIDC has proposed the following overall topic for the LIDC Congress on the 20-22 Oct 2022.

What role could/should sustainability goals play in competition policy and enforcement and how are competition authorities addressing this?

Scope

In terms of scope, the focus should be on Articles 101 and 102 TFEU (and their national equivalents) and merger control rules.

Background/Context:

With governments, businesses and individuals across the globe being called upon to take action for a sustainable future, questions have arisen about the interplay between competition and sustainability, for example:

Consideration of potential conflicts between competition policy and enforcement and sustainability goals?

How any potential conflicts could/should be assessed and addressed within the existing analytical framework/using existing tools or are new policies and/or tools required to assess cases that present sustainability issues?

Questions and guidance on answering:

Given that this is a new and emerging topic it is expected that many jurisdictions will not have pre-existing cases or significant experience with the subject.

With this and the questions of the LIDC in mind, I as the international rapporteur would like to break the issue further down along the questions below.

For answering the questions, please be advised that where no cases exist, you are invited to provide your view on what you would expect in this regard based on your experience of the jurisdiction and any publicly available information (e.g. statements) from the relevant authorities.

The following questions are meant to guide the national rapporteurs in responding to the questions raised by the LIDC. Thus, where a different structure to address the issues seems appropriate that would be fine.

Please provide a short description of the relevant legal framework/cases with the relevant references/authorities.

1. General framework:
 - a. In the following when you answer the questions, what do you understand as sustainability?
 - b. According to local laws what can be said about the role of sustainability in competition law. Should it play a role? Can it play a role? Is that up to the competition authority to decide?
 - c. Are there specific laws/rules that address to questions of sustainability and competition or that can be important for the intersection between sustainability and competition law?
2. Specific interaction/cases:
 - a. In your jurisdictions, have there been cases (cooperation/cartel, abuse/monopolization, mergers) where sustainability played a role in the enforcement of competition law in form of a '*sword*'? In other words, did the agency/courts become active using the competition rules protecting competition and this competition in turn was expected to be beneficial to sustainability (for example protecting competition in industries crucial sustainability). One can equally ask whether and to what extent it is possible to use competition law to address unsustainable business practices such as abuses of monopoly power?
 - b. In your jurisdictions, have there been cases (cooperation/cartel, abuse/monopolization, mergers) where sustainability played a role in the enforcement of competition law in form of a '*shield*'? In other words, were companies that took action to foster sustainability able to rely on that fact before competition authorities? In this regard, please distinguish between cases
 - i. where the agency/courts found that competition law was not infringed in the first place (for example because the relevant entities/activities were not subject to competition law or because competition was not restricted, or any other reason).
 - ii. where the agency/courts used a balancing test to examine the restriction of competition/price increase vs the benefits?
 - c. In your jurisdiction, have there been cases of illegal anticompetitive conduct that occurred in the context of sustainability initiatives?

- i. To what extent have there been cases of green washing? In other words, are there case where companies gave the (false) impression of pursuing a sustainability initiative when in reality it serves as a cover anticompetitive behaviour.
 - ii. Have there been cases of genuine sustainability initiatives that served as a springboard for other anti-competitive behaviour. For example, there were meetings between companies to discuss sustainability matters but these contacts gave the companies the opportunity to get together which was subsequently resulted in e.g. illegal price fixing between the parties of these meetings.
3. Agencies/legislature
 - a. Beyond specific cases, have the agencies become active in the area, for example by setting out priorities, guidelines, working papers, individual guidance, strengthening of capacity? Or in any other form that you think is relevant.
 - b. Has the legislature or specific committees of the legislature become active in the area? If so, how?

Should you have any questions, do not hesitate to contact me:

Kind regards

assoc Prof Julian Nowag

Julian.Nowag@jur.lu.se