

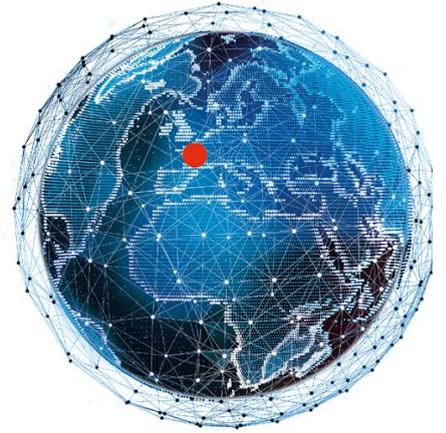
NEW FRONTIERS OF ANTITRUST

DEMAIN LA CONCURRENCE

11th ANNUAL INTERNATIONAL CONFERENCE OF CONCURRENCES REVIEW

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French Ministry for the Economy and Finance - Pierre Mendès France Conference Center



Sustainable development: What role for competition law and policy?

French Ministry for the Economy and Finance, 19 June 2020

*Interview with Simon Holmes (Competition Appeal Tribunal)
by Gönenç Gürkaynak (ELIG Gürkaynak Attorneys-at-Law)*



Simon Holmes (Ordinary Member, Competition Appeal Tribunal) has been interviewed by Gönenç Gürkaynak (Partner, ELIG Gürkaynak Attorneys-at-law) in anticipation of the 11th New Frontiers of Antitrust Conference, to be held at the French Ministry for the Economy and Finance on 19 June 2020.

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Gönenç Gürkaynak: Until today competition law measures have in general have more often served the purpose of preserving economic interests rather than those of non-economic, such as environmental sustainability and effectively tackling climate change. On that note, what do you consider as measures that are imperative and should be concretely taken in order to reconcile competition law and our moral duty to preserve the environment and build measures concerning the climate change?

Simon Holmes: I would make 3 points in response to this:

First, there is nothing in the EU Treaties that limits competition law to purely “economic” interests. This is clear from what I call the “constitutional” provisions of the treaties (the key articles setting out the goals of the EU). For example, Article 11 TFEU says environmental protection “MUST” be taken into account when applying all the EU’s policies and activities (particularly “with a view to promoting sustainable development”).

It is also clear from the competition provisions themselves. For example, “economic” progress is only one of 4 separate ways in which an agreement may meet the first condition for an exemption under Article 101(3) TFEU.

Secondly, in many (or even most) cases measures to tackle climate change or do things on a more sustainable basis will be of an economic nature. For example, if an agreement results in the production of an engine that emits half the green house gases of previous engines (at similar prices), is that not economic progress? (and it is certainly technical progress).

Thirdly, the key thing we need is a change in the way that competition law and economics are applied. We need to look at the EU treaties afresh (both the constitutional and competition provisions), think what they are really about, and apply them. That said some concrete steps would help with this and I mention some of these in response to your 3rd question below.

Competition policy ultimately aims at maximizing the total consumer welfare, of any kind. Could you elaborate on what you would consider as "welfare"? Would you consider that the concept has been tackled in a narrow manner under competition law policies by predominantly focusing on financial considerations and in particular short-term price effects? What are the consequences of such approach?

Again, I would make 3 points in response to this:

First, as mentioned above, if we want to see what competition policy is about, we should look first and foremost at what the relevant provisions of the treaties actually say and interpret/ apply these, rather than start with some academic imported concept such as consumer welfare-words which appear nowhere in the treaties (or, indeed, other competition /antitrust laws that I am aware of).

Secondly, if, notwithstanding this, we were to pretend that consumer welfare was the standard written into the law, it need not be a bad one. Look up “welfare” and you see it’s about “the

health, happiness and futures of a person or group“ Among other things, it is about “well-being and good health”. As such it is capable of encompassing concerns such as having enough food to eat, clean air to breath and producing goods using fewer resources. It is certainly not just about narrow financial considerations or short term price effects.

Thirdly, the consequences of focussing predominantly on the latter are serious. It risks turning us into what one commentator called “economic sociopaths” or, as Oscar Wilde might say, people who “know the price of everything and the value of nothing”. In practical terms, it means much needed collaboration to fight climate change and build a sustainable future is not happening for fear of the competition law consequences.

What kind of regulatory framework would be efficient to tackle issues related to climate change under competition law? Do you consider that further clarifications to the existing framework, such as issuing new guidance on how to interpret enforcement priorities or principles would be sufficient? Or do you consider that the existing regulatory framework should be amended in order to encompass environmental sustainability provisions?

As mentioned in response to question one we shouldn't need to change the regulatory framework. We already have the necessary legal tools, we just need to apply them. That said, we live in a conservative, risk-averse culture, and it is necessary to “nudge” the establishment in the right direction. In my paper “ Competition Law, Sustainability and Competition Law” (to be published shortly by the Oxford Journal of Antitrust Enforcement) I set out 8 proposals to do this. Top of my list is more positive statements from the competition authorities (in both concrete cases and in terms of their approach to sustainability and enforcement priorities). One obvious opportunity for this is the current revision of the Commission's 2010 Horizontal Guidelines. Only if such measures prove to be insufficient to get urgent collaborative to fight climate change going need we consider things such as a new block exemption covering environmental protection and climate change issues. If the changes I suggest are made then competition law can cease to be “part of the problem” and become “part of the solution”.

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