

Moderators

**Sophie Moonen**

Head of the Antitrust Cas Support and Policy Unit  
DG COMP  
Brussels



**Siún O'Keeffe**

Acting Team Manager Legal Affairs Department  
Netherlands Authority for Consumers and Markets  
The Hague



**Kai-Uwe Kühn**

Academic Advisor  
The Brattle Group  
Brussels



**Dirk Middelschulte**

VP Global General Counsel  
Competition  
Unilever  
Brussels



**Paul Lugard**

Partner  
Baker Botts  
Brussels



**Taylor Owings**

Partner  
Baker Botts  
Washington D.C.



---

## 9<sup>th</sup> Global Antitrust Hot Topics EU, US & Global Perspectives

---

# #2 Competitor Collaboration in a New Antitrust Era: a Focus on Sustainability and Data Sharing

Webinar - 22 September 2021\*

“

One wants to ensure that consumers in the wider sense obtain a fair share of the benefits then this may create more room for sustainable initiatives.”

Paul Lugard



---

### Paul Lugard

Paul Lugard moderated the first part of the discussion on sustainability. The audience, replying to an online poll, thought that competition enforcers should do more than only look at immediate price-adjusted effects when weighing the effects of anticompetitive agreements that pursue a sustainable goal. Commenting on the poll, Paul suggested that if one wants to ensure that consumers in the wider sense obtain a fair share of the benefits then this may create more room for sustainable initiatives, but that the question of quantification remains because

the sustainability efficiencies should outweigh any negative effects. The idea is that we should allow more efficiencies to be shared or go to non-direct customers. Moreover, it is important to underline that whatever the Commission is willing to allow in the field of sustainability cannot be isolated from the rest. Indeed, if out-of-market efficiencies in relation to sustainability initiatives should count, it appears difficult to argue that it should not be possible to take them into account for instance in non-sustainable joint venture situations.

“

The FTC is also interested in greenwashing and is looking into whether ESG claims are verifiable.”

Taylor Owings



## Taylor Owings

Taylor Owings moderated the second part of the webinar on data. She also brought the US perspective in the sustainability debate. First, she explained that the US is skeptical of the notion that corporations should do social work, and that traditional antitrust analysis assumes that companies want to maximize profits and have related obligations to their shareholders. She also referred to President Biden’s Executive Order on competition from July 2021, which makes little mention of the environment or sustainability, but which did ask the Secretary of Agriculture to prepare a report on ways in which transparency and standard setting initiatives can help consumers choose

agricultural products that are more sustainable. The FTC is also interested in greenwashing and is looking into whether ESG claims are verifiable. In other words, the US is trying to make sure that direct consumers can get what they want but is less in the mode of asking antitrust enforcers to measure and take into account economy-wide benefits.

Taylor noted that in relation to data, there is also a desire for competition enforcers to consider broader themes of what makes consumers well off. However, it should be noted that privacy is a little bit more individualized than some of the sustainability goals.

“

The consumer welfare standard could take out of market efficiencies into account.”

Kai-Uwe Kühn



## Kai-Uwe Kühn

Kai-Uwe Kühn approached the topics from an economic point of view. He disagreed with FTC Commissioner Christine Wilson’s positions because she assumes that everything that has to do with sustainability has to do with customers of that product, but externalities also exist. The real question is whether we want to accept out of market efficiencies. One issue in that respect are the standards of proof, which are so high that they will hardly be met. At the same time, firms need guidance, perhaps in the form of comfort letters. Mr Kühn noted that the consumer welfare standard could take out of market efficiencies into account. For example, in *UPS/TNT*, efficiencies that came from the optimizing of flight schedules were considered, but other efficiencies were not

considered because the data on which they were based was inadequate. In some circumstances, you just cannot recognize these efficiencies because you do not have the means of evaluating them.

In relation to data, Mr Kühn noted that someone else using your data does not diminish the value of your data. Nevertheless, we still need the right incentives to invest in data sets. We need to distinguish between firms that have a lot of data and firms that have structured data. Being forced to share would be bad for incentives, but there is also the question of whether it can be done, because of privacy rules. Can we create essential data sets, like SEPs? This is a developing area.

“

There is a special approach for agreements to reduce environmental damage where the government has set targets for reductions levels.”

Siún O’Keeffe



## Siún O’Keeffe

Siún O’Keeffe explained that the ACM has dealt with sustainability cases in the past years. She explained that some cases in the past led to perceptions that cooperation in this area was not allowed, notably the *‘Chicken of Tomorrow’* case, where an agreement between producers and retailers to establish minimum welfare standards was held to be anticompetitive because consumers found the proposed improvements in chicken welfare were too low compared to the price increase for consumers. Another case related to an agreement between energy companies to coordinate the closure of coal-fired power plants, which would have led to a 10% reduction in capacity and resulting increases in price for consumers. She

explained that the ACM has in the meantime come up with guidelines for sustainability initiatives, which contain four solutions. First, the guidelines explain which agreements do not fall under the cartel prohibition. Second, there is a special approach for agreements to reduce environmental damage where the government has set targets for reductions levels, where a fair share of the benefits need to go to a broader group than just consumers who are immediately affected. Third, there are some considerations related to market shares, and fourth, the ACM is open to talking to companies about their proposals without fear of fining. The ACM would very much support EU-level guidance in this area.

---

## Sophie Moonen

Sophie Moonen mentioned that sustainability is at the top of the Commission's agenda. There has been an evaluation of the existing rules for cooperation between companies, and many contributions raised sustainability as an issue. Many respondents pointed to the unprecedented need for businesses to come together and work on sustainability, but there is a lack of guidance. As mentioned by the Commissioner in her speech in Florence and the Competition Policy Brief published by the Commission, competition and sustainability might not always work in opposite directions. In some way, competition enforcement can contribute to sustainability because it can mean an efficient allocation of resources, and competition on innovation. However, the Commission recognizes there is a need for more guidance. For those reasons, the revised horizontal guidelines will consider these situations and will give examples of practices that do not restrict competition, for instance the setting of standards for sustainable production methods.

The recent emissions technology cartel has attracted a lot of attention, but Ms Moonen said she believed that there can be legitimate cooperation, and that it can accelerate the coming to the market of

sustainable and innovative products. Many sustainability efficiencies can already be considered under the current rules and may be translated into quality improvements. The Commission is also willing to consider benefits that occur outside the relevant market, to society, to the extent that they accrue to the harmed consumers. However, she observed that if the Commission opens the door to considering pure out-of-market efficiencies, it may risk opening Pandora's box, and competition enforcers might not be equipped to do this balancing and to weigh in all these externalities.

In relation to data, Ms Moonen noted that its competitive importance and significance has increased, that there is also a need for guidance and that this issue is at the center of the Commission's attention. Data sharing is a tool for companies to be able to develop new products and innovative services. This can be pro-competitive. However, there is still a risk regarding the sharing and pooling of information that is sensitive from a competition point of view. Indeed, it may allow competitors to know too much about the strategy of their competitors. Right now, the Commission is focusing on two angles: the collusion risk angle and the risk of foreclosure.

---

## Dirk Middelschulte

Dirk Middelschulte underlined that the market is driving companies towards sustainability, as it has become a differentiating factor. However, there are areas where the risk may make companies' initiatives not economically viable. The first risk is the often-cited first-mover disadvantage where one company makes a huge investment and cannot recoup its costs because consumers are not willing to pay the extra price. The second risk is that even major companies often lack in scale to make a difference, and therefore cooperation may be required. In many areas cooperation will be unproblematic, but we need to carve out better where cooperation can take place, even though we have some guidance related to industry commitments and R&D cooperation.

The more difficult cases are those where companies agree on mandatory standards, as these do not fall under the current guidelines. Dirk noted the example of the famous CECED case of the Commission, relating to the phasing out of less environmentally friendly washing machines. Companies should be

given a chance to join forces to e.g., encourage the establishment of better collection infrastructures and more recycling plants.

Mr Middelschulte noted that the core of the discussion is about aligning out-of-market benefits with the concept of fair share in 101(3) TFEU. It would be an option to say that everybody who benefits from the reduction of negative externalities, like carbon emissions, is a relevant individual when looking at the benefits that need to be accounted for. The Commission's policy requires full compensation of the individual user. However, it seems difficult to reconcile this with the idea of considering environmental benefits. For example, the Dutch position on the issue is that the direct consumer should receive a fair share of the benefits, but not all of them.

Finally, in relation to data sharing, Mr Middelschulte noted that additional guidance would be welcome, and suggested that the current rules are perhaps too restrictive. ■

---

“

**Competition enforcement can contribute to sustainability because it can mean an efficient allocation of resources, and competition on innovation.”**

Sophie Moonen



---

“

**The core of the discussion is about aligning out-of-market benefits with the concept of fair share in 101(3) TFEU.”**

Dirk Middelschulte

