



# *Review of Horizontal Antitrust Guidelines: Chapter 9 on sustainability agreements*

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# New Chapter 9 HGL – Sustainability agreements

- **Objectives**

- Respond to the public demand for clarity and guidance
- Explain how **genuine sustainability benefits** can be assessed under competition law
- Ensure that overall competition enforcement remains effective

- **Scope**

- Broad spectrum of sustainability objectives: economic, social and **environmental**
- Agreements between competitors pursuing sustainability objective(s)
- **Regulation** has primary role to address sustainability; complementary role for agreements

- **Process**

- Competition policy and the Green Deal (September 2020) and subsequent events
- Public consultation on draft revised HGL in spring 2022 – now review of submissions

# Sustainability standards under 101(1) TFEU

- Non-exhaustive list of agreements not affecting parameters of competition → outside 101(1)
- **Sustainability standards**
  - Have distinct features compared to traditional technical standards
  - Often positive effects, may need to assess appreciable negative effects on competition
- **Soft safe harbour:** If seven cumulative conditions are met → outside 101(1)
  - 1) Unlimited participation and transparent process of standard selection
  - 2) No obligation to participate in the standard or to comply with it
  - 3) Participating companies can adopt a higher sustainability standard
  - 4) No exchange of commercially sensitive information beyond what necessary for standard
  - 5) Effective and non-discriminatory access to the outcome of the standardisation process
  - 6) *No appreciable increase in price nor an appreciable reduction in choice of products*
  - 7) Mechanism or monitoring system in place ensuring compliance

# Efficiency assessment under 101(3) TFEU

- Agreements restricting competition can be exempted if **four cumulative conditions** are met
- First condition – **Efficiency gains**
  - Improve production/distribution of goods or promote technical/economic progress
  - Contribute to objective, concrete and verifiable efficiencies
- Third condition – **Indispensability**
  - Agreement is necessary for the benefits to materialize
  - If there is demand for sustainable products, the unrestricted market should deliver them
  - Demonstrate that the agreement is **necessary to overcome a market failure** (e.g. achieve economies of scale, nudge consumers, overcome a first-mover disadvantage...)
  - There are no less restrictive ways to achieve the benefits (e.g. regulation or policy)

# Efficiency assessment under 101(3) TFEU

- Second condition – **Benefits to consumers**

→ “Consumers receive a fair share of the benefits when the benefits deriving from the agreement **outweigh the harm** caused by the same agreement”

- 1) **Individual use value benefits** – improve consumers’ experience with/use of product – traditional efficiency assessment (improved quality/variety or price decrease)
- 2) **Individual non-use value benefits** – consumers value the positive impact on others (including outside the market) – similar to ordinary quality-enhancing benefits
- 3) **Collective benefits** – sustainability benefits that accrue to consumers in the relevant market (even if part of a wider group of beneficiaries) – the agreement allows to internalise externalities between consumers

- Fourth condition – **No elimination of competition**

- Some degree of residual competition will remain

# Measurement of sustainability efficiencies

- **Individual use and non-use value benefits**
  - Measurement similar to approach with traditional quality and cost efficiencies
  - Investigate consumers' willingness to pay, e.g. through customer surveys (no need to assess WTP of each and every consumer – representative fraction of all consumers)
  - Caution with biases in subjective evaluation techniques based on hypothetical questions
- **Collective benefits**
  - Current experience in measuring collective benefits scarce, no concrete guidance yet
  - Evidence based on reports by public authorities or recognised academic organizations
  - One question: How to break down global benefit measurements (e.g. CO2 damage cost estimations) to the consumers in the relevant market?

# Hypothetical example 1

## Reducing pollution or restricting output?

- Suppose there is an agreement between several producers (e.g. of cement)
  - They claim that the objective of the agreement is to limit their environmental footprint
  - For this, they **jointly set targets of maximum pollution for each producer**
  - Assume that the targets of maximum pollution correspond to certain output levels
- Possible assessment and questions
  - Pollution may be reduced, but **output is restricted** – similar effect as a cartel?
  - If the targets are in line with regulation, is the agreement really **indispensable**?
  - More generally, to what extent do pollution reductions **beyond regulation targets** (or earlier than required) “matter”?

# Hypothetical example case 2

## Residual market failure / fair share of benefits

- Suppose there is an agreement to market jointly a decarbonisation service
  - The 2 parties claim that the objective of the agreement is to **kick-start the technology** that will be necessary in the long-term to decrease CO2 emissions
  - To do this, they **jointly set the decarbonisation service price marketed to emitters** and allocate volume between them, arguing that
    - The agreement lowers operational risk and increases economies of scale, guaranteeing a **minimum level of profitability** so the project is implemented as-soon-as-possible
    - Without the agreement, none of the companies would realise the project on its own
    - The **infrastructure built will be accessible** to other providers of this decarbonisation service
  - Emitters place bids for **State support** on the basis of the decarbonisation service price
    - These bids for decarbonisation compete with other types of services / technologies (e.g. RES)
    - If selected, State support covers the difference between business as usual and the new decarbonisation service



# Hypothetical example case 2 (cont'd)

- Is there a **residual market failure**?
  - The decarbonisation service will indirectly **compete with other decarbonisation solutions**
    - **Other decarbonisation solutions** will be aided if the service with joint marketing isn't *or*
    - **Intrinsic value** not accounted for by the auctioneer?
  - **No EU regulation** yet on this type of infrastructure
    - Agreement needed to mimic a **natural monopoly** *or*
    - Early market sharing **detrimental to future competition**?
- What is the **fair share of CO2 benefits**?
  - To whom should the fair share be accruing since **affected consumers (emitters) are not final consumers**
  - **Geographical coverage** of beneficiaries of CO2 abatement? Is CO2 reduction a collective benefit we can accommodate even if stemming from anticompetitive agreements?

# Public consultation fault lines

- Stakeholders overwhelmingly welcome inclusion of a sustainability chapter in Horizontal GL
- NCAs
  - *“Private self-regulation cannot be readily assumed to pursue **the common good**”*
  - *“we particularly welcome that [...] the European Commission does not lose sight of the question of **an appropriate consumer benefit**, ensuring that competition law protects the competitive process and consumers while supporting sustainability concerns.”*
  - *“**Quantification** should not always be preferred to qualitative analysis.”*
  - *“Collective benefits that accrue to parties that are not (also) consumers within the relevant market can count towards the **fair share** for consumers”*
  - *“**Future-generation costs and benefits** of sustainability agreements should be taken into account”*

# Public consultation fault lines (cont'd)

- Economic contributions
  - *“Measures that bring prices closer to **true costs** should not be seen as imposing harm that must be compensated. It is a false equivalence to believe that lower prices are always an indication of competition working better”*
  - *“In our work we expressed serious reservations against such **an extension of the consumer welfare paradigm**, which blurs or even transcends the boundaries between what individual choices in the market should deliver and what collective choices through notably the political process should achieve.”*
  - *“Competition remains the stronger driver of sustainability – and sustainability agreements the weakest. [...] the core problem with sustainability agreements amongst competitors is that they **eliminate sustainability as a dimension of competition** ”*
  - *“Demonstrating that the “fair share” condition for exemption under Article 101(3) is satisfied on the basis of **consumer WTP could simultaneously raise the prospect that the “indispensability” condition is not met.**”*

# Challenges / questions

- Residual market failure
  - How to analyse the interplay between regulation and private agreements **without putting existing regulation into question**? To what extent can sustainability benefits beyond (or earlier than required by) regulation targets be taken into account by competition authorities?
- Fair share of benefits
  - Is **full compensation** necessary, and if so, to whom? Should we consider future benefits of consumers today, and/or of future consumer generations?
  - How to **quantify benefit** and balance it against harm, in particular when benefits (e.g. GHG reductions) are diffuse?
- Political and societal pressure especially on climate change but potential spill-over effects on competition enforcement

# Discussion

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Thank you