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”? 

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