



# Sustainability agreements under EU competition law: Draft revised Guidelines on horizontal cooperation agreements

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*Disclaimer: all views are personal*

# Background

- European Green Deal announced by the Commission
- Revision of the 2011 Guidelines on horizontal cooperation agreements (HGL) } end of 2019
  - Evaluation – demand for guidance on the assessment of sustainability agreements
  - Nostalgia for the chapter on environmental agreements in the 2001 Guidelines
- Draft guidelines published by the Dutch competition authority (June 2020/Jan. 2021)
- Broad public consultation on the interplay between competition policy (antitrust, mergers & state aid) and the Green Deal objectives (October 2020)
- Publication *Competition Policy Brief* on Competition Policy in Support of Europe's Green Ambition (September 2021)
- Launch public consultation on draft revised HGL (1 March 2022) including new chapter on agreements pursuing sustainability objectives

# Feedback from the public consultation

- Businesses fear that the antitrust rules stand in the way of green initiatives
  - Easy to be caught by Article 101(1) TFEU
  - Difficult to satisfy exemption conditions of Article 101(3) TFEU
- Demand for more guidance
- But few real-life cases
- Competition should remain a strong incentive for investment in green technologies
- Greenwashing should be avoided
- Regulation takes care of market failures

# The problem and the propositions made

- The problem:
  - Competition law assessment is made within a market
  - Consumers are defined as users of the product covered by the agreement
  - Consumers are considered to receive a fair share when compensated for the harm caused by the agreement
  - Sustainability benefits often occur outside relevant market and not necessarily benefit consumers in the market, or not necessarily to a sufficient extent to compensate them
- Propositions animating the public debate:
  - Expand Article 101(3) TFEU to take into account benefits that accrue to society, reconsider the notions of “consumers” and/or “fair share“
  - Create exception from the application of Article 101(1) TFEU on public policy grounds ( $\approx$  Wouters ruling)
  - Special status of environmental protection (Art. 11 TFEU, Art. 37 of the EU Charter)

# Risks related to the propositions made

- Conceptual: do we really want a new (citizen) welfare standard?
- Legal:
  - does the case law allow for a broad interpretation of Article 101(3) TFEU (ECJ judgments in cases C- 382/12 P MasterCard, para. 242; C-238/05 *Asnef-Equifax*, para.72)
  - does the Treaty allow for a broad exception from the application of the competition rules?
- Practical: are competition authorities well equipped to analyse and balance all sorts of externalities?
- What about the speed and effectiveness of enforcement?
- Will companies be able to self-assess?

# Overview of the new sustainability chapter

- What does the concept of sustainability cover?
- Sustainability agreements outside the scope of Article 101 TFEU
- Assessment of sustainability agreements under Article 101(1)TFEU
- Assessment of sustainability agreements under Article 101(3)TFEU – four cumulative conditions
- Involvement of public authorities

# What does sustainability cover?



- Generally defined as ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs
- UN Resolution 66/288 and 2030 UN Agenda for Sustainable Development (17 Sustainable Development Goals and 169 targets)
- **Article 3 TEU:** “...[The Union] shall work for the **sustainable development of Europe** based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment...”
- Economic, social and environmental aspects

# Interaction sustainability and competition law

- Role for competition law to contribute to sustainable development
- Public policy/regulation is primary tool for addressing negative externalities/market failures
- Complementary role for cooperation agreements
- Sustainability agreements defined as agreements between competitors that pursue one or more sustainability objectives



# Agreements not affecting parameters of competition fall outside Article 101 TFEU

## Non-exhaustive list of examples

- Agreements to create database containing information about sustainable suppliers or distributors without requiring the parties to necessarily purchase from, or sell to them
- Agreements relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness
- Agreements that do not concern the economic activity of competitors, but their internal corporate conduct

# Assessment under Article 101(1) TFEU

- Pursuit of sustainability objectives relevant for determining whether by object or by effect:
  - Genuine sustainability aim or cover up of price fixing/market sharing/output limitation etc?
  - If price fixing etc. (by object) and no real sustainability aim: prohibited/contrary to Article 101(1)
  - If genuine sustainability aim: need to assess effects and whether appreciable
- Sustainability agreements assessed under Article 101(1) TFEU in line with chapter of Horizontal Guidelines specifically dealing with type of cooperation agreement concerned
- Sustainability chapter focusses on agreements setting sustainability standards:
  - Sustainability standards have distinct features (compared to traditional technical standards)
  - Often positive effects on competition and allowing consumers to make informed decisions

# Assessment of Sustainability Standardisation Agreements under Article 101(1) TFEU

- Need to assess if sustainability standardisation agreement has appreciable negative effects on competition contrary to Article 101(1) TFEU
- Soft safe harbor: if 7 cumulative conditions met - outside Article 101(1) TFEU:
  - a) unlimited participation in and transparent process leading to the selection of the standard
  - b) no obligation to participate in the standard or to comply with it
  - c) participating companies can adopt a higher sustainability standard for themselves
  - d) no exchange of commercially sensitive information beyond what is necessary for the standard
  - e) effective and non-discriminatory access to the outcome of the standardisation process
  - f) no appreciable increase in price nor an appreciable reduction in choice of products
  - g) mechanism or monitoring system in place ensuring compliance
- No presumption of illegality if one of these conditions are not met but need to assess whether appreciable negative effects on competition and comes under Article 101(1) TFEU

# Assessment under Article 101(3) TFEU

- Sustainability agreements restricting competition can still be exempted under Article 101(3) TFEU if four cumulative conditions are met
- First condition – improving production/distribution of goods or promoting technical or economic progress:
  - Broad concept covering sustainability benefits both in terms of qualitative efficiencies as well as cost-savings
- Second condition – consumers receiving fair share of benefits
  - a) Individual use value benefits/traditional efficiency assessment (improved quality/variety or price decrease) – improve consumers' experience with/use of product
  - b) Individual non-use value benefits (indirect qualitative benefits) – no direct improvement of consumers' experience with product but consumers willing to pay for the beneficial impact on others

# Assessment under Article 101(3) TFEU

- Second condition (continued) – consumers receiving fair share of benefits
  - c) Collective benefits from collective action (instead of individual consumer's perspective) – positive externalities/benefits accruing objectively to consumers – apportioning of benefits (if part of wider group of beneficiaries) – significant coverage
  - d) Any combination of these types of benefits
- Third condition – indispensability: agreement necessary to cure market failures (overcome first mover disadvantage; achieve economies of scale; nudge consumer preferences)
- Fourth condition – no elimination of competition: some degree of residual competition left – even if agreement covers entire industry, parties continue to compete vigorously on at least one important aspect of competition (price, quantity, quality, variety & innovation)

# Involvement of public authorities

- Involvement of public authorities in process of sustainability agreements, or knowledge by those authorities of existence of agreements, not in itself reason to regard them as compatible with EU competition rules
- Parties to sustainability agreement restricting competition not held liable if:
  - a) compelled or required by public authorities to conclude agreement, or
  - b) public authorities reinforce effect of agreement, or
  - c) public authorities delegate own responsibilities to market operators thereby depriving their own acts of official character

# Thank you



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