BRUSSELS À JOUR

Green Deal and Antitrust: Less Red Tape for Green Cooperation?

Part Three of our Series on Competition Policy and the Green Deal

Markus Röhrig and Malcolm Tiffin-Richards report on the latest developments from the European capital of competition law.

Greening the economy under the Green Deal remains a major priority in competition policy in 2021, for which the Commission welcomes companies to play their part: *"We welcome it when companies decide to work together, to help them move even faster to go green. And our rules make sure those sustainability agreements are done in a way that doesn't undermine competition, and harm Europe's consumers."*[1] But what are the limits set by antitrust law for companies wishing to enter into such sustainability agreements and when does going green lead to consumer harm? Even fair trade may not be fair competition – as evidenced by the German Federal Cartel Office ("FCO") scrutinizing the Fairtrade-System in recent years.

This third installment of our four part series on EU competition law and sustainability provides an overview of the current EU competition law framework for sustainability agreements and the ongoing debate on how competition law can promote such initiatives. It coincides with the EU Commission's engaging Conference on Competition Policy Contributing to the European Green Deal held on 4 February 2021 as the culmination of its Call for Contributions on this topic.

Green cooperation in sustainability agreements

"Sustainability" has multiple facets and is not simply synonymous with environmental protection. The 2020 OECD report on sustainability and competition, for example, delineates between sustainability in environmental, social and economic terms.[2] Sustainable

1 See Executive Vice President Vestager, Speech of 22 September 2020, The Green Deal and Competition Policy.

2 OECD, Sustainability & Competition Law and Policy – Background Note, 1 December 2020.

development is then a development towards *"an economically, socially and environmentally sustainable future for our planet and for present and future generations"*.[3] Sustainable development is not framed as necessarily contradictory to economic growth, but rather that such growth be compatible with preserving the environment and fostering social equality.

Businesses wishing to improve their sustainability do so for example by reducing their environmental footprint and by improving labour standards. Companies in many sectors are ready and willing to make production processes along the supply chain more sustainable, often above and beyond compliance with regulatory requirements. Such efforts may benefit from co-operation between various market participants, including competitors, for example in the form of sustainability agreements. Participation in sustainability certifications or labels (such as Fairtrade), or joint ventures investing in green technologies (such as the development of green battery cells), are examples. Sustainability agreements can take various forms, ranging for example from the adoption of minimum sustainability standards, joint research and development projects in sustainable technologies, or as part of joint purchasing or production. These types of cooperation may however include anti-competitive elements to eliminate the first mover disadvantage and ensure a level playing field. Precisely these elements in sustainability agreements could clash with EU competition law.

Green washing anticompetitive behaviour

Clearly, the Commission will not give companies *"carte blanche"* to commit antitrust offences under the guise of green washing. Green washing could manifest itself in two ways, i) that the behaviour does not actually have a beneficial effect for sustainability, or ii) that sustainability serves merely as a smoke screen for the underlying anticompetitive effect of an agreement. A green narrative does not by itself justify antitrust abuse. Conversely, the Commission will take into account anticompetitive effects which have a detrimental effect on sustainability as part of traditional theories of harm. Examples for this would be agreements which have the aim of stifling or delaying innovation in green technologies.

Current legal framework

And yet the question remains – is there room for exceptions or justifications for sustainability agreements under EU antitrust law? Article 11 of the Treaty on the Functioning of the European Union ("**TFEU**") sets out the general principle of EU primary law that environmental protection requirements must be integrated into the implementation of the EU's policies, in particular to promote sustainable development. Sustainability must therefore also be integrated into EU competition policy. Exactly how, is another question. The Horizontal Guidelines provide guidance on cooperation between competitors in areas such as research and development, production, purchasing, standardisation and information exchange, but not specifically for the environment agreements. There is no specific exception for environmental protection or sustainable development in EU competition law. Under straightforward application of Article 101 (1) TFEU, anti-competitive sustain-

3 The future we want, UN Doc A/Res 66/288.

ability agreements between undertakings, which seek to set prices, or limit or control production or share markets or sources of supply are for example prohibited.

This leads to the question whether the application of Article 101 (1) TFEU can take public policy goals such as sustainability into account, or whether consumer protection is the overriding dogma. The current initiative of the Commission towards a greening of competition law seemingly presupposes the answer to the question, which is by no means novel. In its 2004 Horizontal Guidelines, the Commission was hesitant, stating therein that public policy considerations could only be taken into account to the extent they can be subsumed under efficiency gains under the conditions of Article 101 (3) TFEU.[4] Even two decades later, the FCO appears to remain cautious, to the extent that competition law should as far as possible be free of public policy and that companies cannot indeed refer to abstract public policy goals within the enforcement of Article 101 (1) TFEU, but would rather need to provide evidence that affected consumers are not disadvantaged.[5]

One fear is that inclusion of public policy consideration in an already multifaceted anti-trust assessment could in effect devolve into a complicated balancing act of public policies (rule of reason), thereby muddying the analysis of the economic effects. Critics point out that competition authorities may neither be optimally equipped nor legitimized to appropriately balance public policy goals and economic effects. Instead, for regulated industrial sectors, public policy goals may be better addressed by sector regulation and enforcement by the appropriate sector regulator. Setting such considerations aside, there are certainly multiple ways in which competition law can in theory take public policy goals, such as sustainability, into account under Article 101 (1) TFEU and which are discussed and already applied in practice. In particular, there are possible ways in which sustainability agreements could be either exempted or justified under the current framework.

Article 101 (1) TFEU – room for green exceptions?

The first possible method for taking public policy objectives into account is in the determination of the scope of Article 101 (1) TFEU. Is there room to argue that sustainability agreements, which are prima facie restrictive of competition, do not fall under from the scope of Article 101 (1) TFEU at all? *Wouters* and *Albany*[6] are often discussed in this context. In a nutshell, Wouters allowed for a restriction of competition on the basis of the protection of the proper practice of the legal profession and the justice system.[7] The European Court of Justice held that competition law was not applicable to the measure which was necessary to achieve a legitimate (public policy) objective. However, the Wouters exception has also been interpreted more narrowly as only applicable for restrictions which are "ancillary to a regulatory function".[8] The FCO in particular appears highly sceptical whether Wouters and Albany are useful in the context of sustainability agreements. The general principles set out in Article 11 TFEU are directed at the EU and

4 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5 February 2004 ("2004 Horizontal Guidelines"), para. 42.

5 FCO, Open markets and sustainable business – public policy objectives as a challenge for competition law practice, 1 October 2020, pg. 26.

6 General Court, judgement of 19 February 2002, Wouters, C-309/99 and General Court, judgement of 21 September 1999, Albany, C-67/96.

7 General Court, judgement of 19 February 2002, Wouters, C-309/99, para. 109 et seq.

8 R. Whish/D. Bailey, Competition Law, 8th edn. 2012, pp.131–133.

not private individuals, and could not therefore be viewed as justifying an exception for restrictions on competition by private persons and undertakings.[9] Notably, the Dutch Autoriteit Consument & Markt ("**ACM**") has not opted for this approach in its guidelines on sustainability and competition law.

Many types of sustainability agreements do not contain restrictions which would even fall under Article 101 (1) TFEU, for example if they relate to non-binding technical norms, quality marks or environmental standards. Additionally, agreements between undertakings could fall under existing exceptions to the scope of Article 101 TFEU, such as the ancillary restraints doctrine or the de minimis exception, if the respective requirements are fulfilled. However, these options may not provide a full solution for restrictive clauses, such as prohibiting the sales of conventional products in favour of sustainable alternatives.

Article 101 (3) TFEU – justifying green cooperation

A perhaps less controversial route for individual exemption for sustainability agreements is potentially opened by Article 101 (3) TFEU. Under Article 101 (3) TFEU, however, four requirements would need to be fulfilled in order for it to be individually exempted: i) the agreement must offer efficiency benefit, ii) while allowing consumers a fair share of the resulting benefit, iii) without imposing restrictions which are not indispensable and iv) without the possibility of eliminating competition. While the FCO has been more hesitant in practice in applying Article 101 (3) TFEU (or rather its German law equivalent) to cases concerning sustainability (such as the Fairtrade example), the ACM clearly sees this as a possibility in its guidelines.

Yet even the first criteria, i.e. efficiency benefits, is not necessarily easily fulfilled by sustainability agreements. Examples of efficiencies generated by sustainability agreements are reduction of emissions, increased innovation, higher quality, fair income guarantees, animal welfare, fair trading conditions with third world countries, reduction of packaging, and prevention of child labor to mention a few. These qualitative benefits which would need to be translated into efficiency gains within the meaning of Article 101 (3) TFEU (such as reduction of costs or improvement of the product, for example). The benefits of sustainability agreements are not efficiencies in the pure economic sense, rather they relate to future benefits for society as a whole through the reduction of negative externalities (i.e. the reduction of costs to society) in ways that are not easily quantifiable. It would therefore be necessary to determine a (hypothetical) monetary value for such benefits, as a market value does not exist.

The second criteria then raises further issues: the affected consumers of the products in question must be allowed a fair share of the sustainability benefits. According to the Horizontal Guidelines, the affected consumers or users must be compensated for the harm caused by the restriction of competition. However, where an agreement seeks to prevent harm to society as a whole, adequate compensation of the affected consumer may not be fulfilled. How would a fair share be determined? The benefit for society in terms of sustainably is not connected to the objective or subjective willingness of consumers to pay

9 FCO, Open markets and sustainable business – public policy objectives as a challenge for competition law practice, 1 October 2020, pg. 18 et seq.

for this societal benefit. Further, the average consumer's willingness to pay for sustainable products may not necessarily be very high.

A key question is whether and how sustainability benefits can be quantified and balanced with economic factors in order to justify restrictions of competition. In theory, the translation of public policy concerns into monetary terms is possible. However, such translation into monetary terms will entail some level of approximation and uncertainty. Another option is to determine the monetary value consumers would be willing to pay for a sustainability benefit. Several factors make this a difficult exercise, however: the benefits affect society as a whole, they do not have a monetary value, customers may be willing to pay more if others are also willing to do so (reciprocity) and the benefit is uncertain and relates to the future. Further, at least two methods of calculation are conceivable, namely estimating the costs that consumers would be willing to pay for the benefit to the environment, or secondly the amount that consumers would be willing to pay to prevent further degradation of the environment.

Given these uncertainties involved in the application of Article 101 (3) TFEU, companies bearing the burden of proof may find it a difficult exercise to successfully argue that the sustainability agreement results in overriding benefits for consumers outweighing any existing anticompetitive effect.

Current state of reform

The Commission has completed its consultation on the complementary nature of competition policies and the Green Deal, which elicited almost 200 responses, indicating a high level of interest. The Commission plans to publish a report on its learnings from the consultation process before the summer. Further, the Commission is reviewing some of the broad instruments in antitrust law, such as the Horizontal Guidelines. The scope of review is broader than the issue of sustainability, yet the feedback from respondents shows that specific guidance on sustainability agreements is necessary. Such guidance could, for example, be included in the section on standardisation of the Horizontal Guidelines. Respondents do not view the Green Deal initiative and sustainability and environmental issues as being taken into account in the Horizontal Guidelines.

Meanwhile, the ACM (and further authorities) made a flying start out of the blocks by publishing a concrete draft proposal for guidelines ("**ACM Guidelines**") for inter alia sustainability agreements.[10] The ACM Guidelines set out that balancing sustainability benefits with consumer harm is possible, in particular by deviating from the traditional test of whether affected consumers receive a fair share of the benefit. The guidelines are aimed at providing greater legal certainty for companies who follow them in "good faith". For such companies, sustainability agreements should not result in fines, according to the ACM, though sustainability agreements may be scrutinized and require amendment as a measure of first recourse. The ACM Guidelines also include certain safe harbours, such as low combined market shares of less than 30%, and in cases where the benefits for sustainability clearly outweigh the disadvantages to competition.

10 Further information are available at: https://www.acm.nl/en/publications/draft-guidelines-sustainability-agreements .

In our next newsletter in this series we will explore in greater detail the interplay between the sustainability goals of the European Green Deal and merger control. Until then please feel free to browse our previous editions of Brussels à Jour under www.hengeler.com/en/brussels-a-jour-newsletter

Outlook – more guidance in 2021?

For undertakings and stake holders affected by the implementation of the Green Deal in EU antitrust law, greater legal certainty across the EU would be highly valuable. The Commission will want to seize the opportunity to use the convergence in timing of the Green Deal and the outcomes of the review of the Horizontal Guidelines to provide this clarity. In order to do so, the Commission is actively consulting with national competition authorities ("**NCAs**"). However, divergence between NCAs does not appear unlikely, which may make the pursuit of sustainability agreements for companies operating throughout the EU more difficult. In order to avoid such differences, guidance on EU-level would be helpful for market participants.

Given the uncertainties in the application of Article 101 TFEU and the lack of guidelines and safe harbours in block exemptions, companies may opt to be risk averse when it comes to sustainability agreements which raise potential antitrust issues. A block exemption for certain types of sustainability could offer greater legal certainty for companies wary of the uncertainties of fulfilling the requirements of individual exemption. The Commission will be conscious of this and has mentioned comfort letters or even decisions as a potential way of providing selective guidance. At the same time the Commission will unlikely want to be swamped with enquiries. The ACM's draft guidelines, by providing certain safe harbour options and by showing willingness to provide guidance before resorting to prohibitive measures, are a welcome first step to greater legal certainty.

Contact

Markus Röhrig
Partner
T +32 2 7885 525
markus.roehrig@hengeler.com

Malcolm Tiffin-Richards
Senior Associate
T +32 27885 512
malcolm.tiffin-richards@hengeler.com

Follow us

Don't miss any edition of our Brussels à Jour Newsletter.

You can simply follow the hashtag **#Brusselsajour** on LinkedIn to make sure you receive our updates in your feed.

www.hengeler.com