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Skadden Discusses the Intersection of Sustainability Agreements and Antitrust Laws in the EU

By Bill Batchelor, Frederic Depoortere, Giorgio Motta, Ingrid Vandenborre, Aurora Luoma and Aristeidis Demiroglou December 14, 2020

Comment

Sustainability issues are increasingly high on the list of competition policy priorities both at the European Union and member state levels. The European Commission (EC) and national competition authorities are actively rethinking how competition policy can better support the transition to sustainable economic growth. Whilst recent initiatives are setting the path to much-needed guidance and legal certainty, there are already lessons businesses can take away from the discussions to date.

- Industry initiatives to tackle sustainability objectives can breach competition rules and should therefore be approached with the same eye to competition law compliance as any other collaboration with competitors. The current debate appears to be focused on providing guidance on how existing competition rules may apply to new agreements, rather than changing the rules or putting sustainability agreements outside the existing framework.
- However, there appears to be growing support to ensure competition rules do not act as a hurdle to industry initiatives. As the debate intensifies and new guidelines are developed, there may be increasing opportunity for companies to consider more radical and ambitious sustainability agreements, with greater confidence on how competition rules would apply in the context of environmental, social and governance planning.
- In the meantime, in light of recent EC and member states statements, there is also likely to be greater opportunity to approach European competition authorities for meaningful guidance on such initiatives.
- However, businesses should keep a close eye not only on potential divergence at the national member state level in terms of how sustainability agreements are treated but also on the international dimension; whilst EU developments in this area are to be welcomed, sustainability agreements in practice may well have a wider impact in jurisdictions where different competition rules, policy and industrial objectives may apply.

The European Green Deal and the Antitrust Hurdle

In December 2019, the president of the EC, Ursula von der Leyen, introduced the European Green Deal,[1] the EU's long-term growth strategy intended to make the EU's economy sustainable, resource-efficient and competitive. The primary goal is for the EU to be climate-neutral by 2050, where economic growth is decoupled from resource use. In March 2020, the EC proposed the first European Climate Law,[2] intended to turn the 2050 climate-neutrality objectives into a legal obligation, provide predictability for investors, and ensure that the transition is irreversible and that all sectors play their part.

The transition to a more sustainable economy is harder to achieve through unilateral action and has a great chance of success through joint, collaborative initiatives. Sustainability initiatives can come with costs that individual companies would be disadvantaged in bearing alone, and some initiatives may benefit from the sharing of ideas or resources across the industry to reach the best solutions. Joint initiatives could include, for example, commitments to minimum standards (such as using environmentally friendly materials), aligning resources (for example, logistics to reduce carbon impact), or joint research and development into green technologies.

Existing Antitrust Exemptions

Antitrust laws set limits on cooperation agreements between actual or potential competitors (so-called horizontal agreements) and between firms operating at different levels of the supply chain (so-called vertical agreements) (Article 101 of the Treaty on the Functioning of the EU (TFEU)). Violations can lead to hefty fines, and criminal prosecutions are also possible in the UK and in several member states (Austria, France and Germany).

In theory, competition rules do not need to be a hurdle to industry initiatives around sustainability. Competition rules already provide that agreements caught by the prohibition may benefit from an exemption if they bring efficiency benefits for consumers (for example, by improving the production or distribution of goods or services, or by promoting technical or economic progress), provided they give consumers a fair share of the benefit, are indispensable to attaining efficiency goals and do not substantially eliminate competition. In principle, this could include sustainability benefits (Article 101(3) TFEU).

However, sustainability agreements can call for a more expansive application of these exemption principles than is generally applied; recent practice in applying Article 101(3) has tended to focus on direct "economic" benefits for the relevant consumers. However, the benefits accrued from a sustainability agreement (such as, for example, higher welfare food, lower emissions or less plastics), can be indirect, hard to quantify and attained over a long period of time. They may also accrue to the broader community as much as to the individual consumer. This can make it more difficult to weigh the benefits and disadvantages of an agreement to ensure that consumers receive a "fair share" of the benefit in accordance with Article 101(3). The questions arise as to which benefits are appropriately taken into account, to which consumers (*i.e.*, direct users or the broader community), over what time frame and how these benefits are appropriately balanced against potentially higher prices, costs or reduced choice for the consumer of the relevant product. The EC is not unfamiliar with these questions, although precedent is limited in number. In early 1999, in *CECED*,[3] the EC approved (under the old system of individual exemption) agreements between manufacturers of domestic appliances to stop producing less energy-efficient washing machines, water heaters and dishwashers on the basis that the energy savings to individual consumers outweighed the higher cost of the appliances; the EC also referred to the environmental benefits. Other agreements have not been approved. The Dutch Authority for Consumers and Markets (ACM) considered that industrywide sustainability agreements concerning the so-called "Chicken of Tomorrow" did restrict competition insofar as the additional costs for consumers resulting from the agreement to breed higher welfare chicken outweighed the proclaimed sustainability benefits (promotion of animal welfare, environment and public health). The ACM found that consumers were prepared to pay more for animal welfare and environmental improvements, but not for the measures in the particular agreement.

A more radical approach would be to step away from this type of cost-benefit analysis altogether and seek to exclude certain types of sustainability agreements from the application of competition rules in the first place. There is some precedent for relaxing the application of competition rules in certain cases for socioeconomic reasons. In the collective bargaining case *Albany*,[4] the European Court of Justice determined that the social objectives pursued by collective agreements would be seriously undermined if they were subject to the prohibition on anti-competitive agreements and therefore fell outside of its scope. More recently competition authorities have been willing to provide assurance that certain coordination to respond to COVID-19 would not raise competition concerns under Article 101; in *Medicines for Europe*,[5] the EC gave comfort that certain cooperation practices aimed at responding expeditiously and effectively to shortages of COVID-19 medicine did not raise concerns under the EU competition rules where they were strictly necessary for achieving the primary goals of the arrangements.

The lack of clear rules and guidance and the limited precedent both at the EU and national level may therefore become a real obstacle to the EU's green strategy. Against this backdrop, the EC and national competition authorities have started to rethink the application of antitrust rules to sustainability initiatives seeking to establish much-needed legal certainty and open up opportunities for businesses to collaborate.

The EC's Public Debate

On October 13, 2020, the EC launched a public debate on how the EU competition rules can better support the European Green Deal, with a call for contributions[6] on the fundamental question of how competition rules and sustainability policies interact with each other, and what can be done better. The EC called upon anyone with a stake in the issue — including industry, environmental groups, consumer organisations and competition experts — to submit ideas and proposals to fuel the discussion. The call for contributions runs through November 20, 2020. The different perspectives will be discussed at an EC conference in early 2021.

While competition policy cannot replace environmental laws and climate policies, the EC believes it can contribute to the effectiveness of green policies and complement regulation. The question is how it can do that most effectively. Short of any changes in the existing legal framework, competition policy's contribution to the Green Deal can only take place within the clearly defined boundaries of the EU treaties, existing EU secondary legislation and under the close supervision of the EU courts.

The existing antitrust framework already contributes to the Green Deal objectives in several ways — for example, by prohibiting anti-competitive practices that restrict the development or roll-out of clean technologies or foreclose access to essential infrastructure, such as power transmission lines, which are key to the roll-out of off-shore wind parks and other renewable energy sources. Existing guidance on standardization also allows businesses to develop new and improved products without restricting competition. When agreeing on standards, companies can also put in place safeguards ensuring that the benefits of a standard do not come with unnecessary restrictions on healthy competition.[7] Finally, sustainability agreements may also in principle benefit from the safe harbor of the EC's block exemption regulations provided the efficiency benefits outweigh the restrictions on competition.

With its call for contributions, the EC effectively seeks to identify whether there are any remaining barriers to agreements supporting Green Deal objectives, and if so, how such barriers can best be addressed. The EC invites feedback on the forms of green collaboration that cannot be implemented due to EU antitrust risks; the circumstances in which cooperation rather than competition between firms leads to greener outcomes; any additional clarifications and assurance that could be given to sustainability agreements; and the circumstances that would justify restrictive agreements beyond the current enforcement practice.[8]

Beyond antitrust rules, sustainability also has a role in state aid and merger control. The EC is reexamining how state aid rules — which prevent member state governments from subsidizing businesses except where exempt as strictly necessary to meet certain defined objectives — can be better aligned with environmental and climate policies. In September 2020, the EC adopted revised EU Emission Trading System State Aid Guidelines[9] and aims to launch a public consultation on the revision of the Guidelines on State Aid for Environmental Protection and Energy within the first quarter of 2021.[10] In merger control, we may see the EC increasingly assess the potential impact of mergers on the environment. Recent statements indicate that the EC is considering the extent to which environmental benefits may form part of the assessment framework for merger-specific efficiencies. Pierre Régibeau, the EC chief competition economist, commented that "out-of-market efficiencies" will play a role in future merger control assessment and that "green efficiencies tend by definition to be mostly out of market".[11]

Member States Initiatives

Similar initiatives have emerged at the member state level. In the Netherlands, the recent draft guidelines issued by the ACM on sustainability agreements[12] constitute the most notable and practical contribution to the debate so far. They propose a safe harbor from the prohibition of competition rules for pure sustainability agreements. The safe harbor list includes nonbinding agreements that incentivize companies to make a positive contribution to a sustainability objective, codes of conduct promoting environmentally conscious or climate-conscious practices, and agreements aimed at improving product quality or replacing products that are produced in a less sustainable manner.

The draft guidelines further set an assessment framework under Article 101(3) for sustainability agreements with benefits that offset restrictions of competition. This sticks to the tried and tested formula of a quantitative analysis of advantages and disadvantages of the agreement, but the general idea behind this assessment is that sustainability agreements should be exempted from the prohibition of competition rules if their benefits are generally useful for the society (for users and nonusers) and outweigh the disadvantages of any restriction of competition — even if the immediate user pays a higher price and does not receive full compensation for it. This broader approach to assessing whether consumers get a "fair share" of the benefit would apply only to agreements that aim to prevent or limit an obvious environmental damage and contribute efficiently to international or national requirements to which the government is bound.

The draft guidelines further exempt the parties from the obligation to quantify these benefits if the parties have a combined market share of less than 30% or it is obvious the benefits offset the harm to competition, and/or are less likely to harm competition. The ACM proposes not to impose fines for joint agreements where companies have clearly followed the guidelines in good faith but ultimately do not meet all the conditions. Rather, the authority would favor amendments to the problematic agreements.

Similarly, in Greece the Hellenic Competition Commission (HCC) proposes the development of a sustainability "sandbox" (*i.e.*, a safe space allowing industry experiments on sustainable business formats without immediately triggering the prescribed regulatory consequences) and/or the publication of general guidelines.[13] The HCC also advocates the harmonization of competition rules at the international and EU levels, targeted competition law interventions that would provide further clarity on the applicable rules and close collaboration with other regulatory authorities.

Meanwhile, the UK Competition and Markets Authority and the French Competition Authority made sustainability an area of priority in their respective 2021 action plans.[14] On October 1, 2020, the German Federal Cartel Office invited more than 130 competition law experts to discuss and exchange views over a virtual meeting on the theme "Open markets and sustainable economic activity – public interest objectives as a challenge for competition law practice."

Key Takeaways

Discussion and debate on this topic is likely to continue for the foreseeable future. However, all signs point to these EU and member states initiatives in due course being substantiated with rules and guidance on the application of competition rules to joint agreements that serve sustainability objectives. Key questions include how extensively the scope of "sustainability" agreements will be interpreted, what type of simplified comfort mechanisms will be presented and, assuming the primary approach will be to clarify the application of Article 101(3) (and equivalent rules) to future provisions, how flexible the approach to quantifying the benefits of these types of agreements can be. As more member states follow suit, it will be crucial to have a common understanding across the EU. Further developments may also be anticipated in relation to state aid and merger control.

Pending further guidance, companies must be careful to remain within the contours of antitrust laws as they aim for efficiency-enhancing objectives. There are steps companies can take to ensure that antitrust laws do not stand in the way of their legitimate goals.

Companies should be careful to examine whether joint initiatives, including any structural coordination, restrict commercial independence and incentives to compete. For example, antitrust regulators will closely examine initiatives to exchange current, disaggregated, competitively sensitive information — including on prices, customers, production costs, volumes, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, research and development programs and their results. Where initiatives may involve exchanges or coordination that touch on these aspects, it will be important to examine their potential environmental or broader societal benefits and how intrinsic these benefits are to the envisaged collaboration. If there are material benefits the initiatives seek to achieve, it will also be important to ensure internal materials reflect those benefits and the rationale behind achieving them so as to present a full perspective. These are key areas where antitrust compliance frameworks and guidance can be helpful in supporting beneficial collaboration.

ENDNOTES

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This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "'Green' Competition: European Commission and Member States Consider Intersection of Sustainability Agreements and Antitrust Laws," dated November 19, 2020, and available here.