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Putting sustainability into competition law

Diverse but cautious approaches

Several European competition authorities propose to exempt anti-competitive environmental sustainability agreements provided they generate significant third-party benefits. Here I review and comment on the way this has been handled by the Netherlands, Austrian and UK competition authorities, and European Commission.

Main issues

Agreements between competitors including those covering sustainability are not illegal unless they restrict the 'parameters of competition' by fixing or agreeing on prices, market shares and output. These can still be exempt if they generate 'efficiency' benefits provided a fair share is given to consumers under Article 101(3)TFEU. This consumer pass-on requirement has been criticised for deterring industry-initiated cooperation which while anti-competitive generates significant sustainability benefits. There is little evidence that this is the case or that it has dampened industry investment in sustainability.

Draft Revised Guidelines

Nonetheless, in the face of some strong advocacy, several competition authorities have published draft revised guidelines to clarify the way Article 101 will be enforced. These reiterate that cooperation among competitors in general, including over sustainability and environmental standards, have never been illegal except where they have an appreciable restrictive effect on competition.

For anti-competitive cooperation agreements, the guidelines propose a more permissive yet qualified approach to exemption. The Netherlands' competition authority's (ACM) draft Guidelines on Sustainability Agreement 2020 succinctly encapsulate this:

> The ACM believes there is good reason to deviate from this basic principle [the fair share to consumers] if two criteria are met: (i) the agreement aims to prevent or limit any obvious environmental damage, and (ii) the agreement helps, in an efficient manner, comply with an international or national standard to prevent environmental damage to which the government is bound.

The UK Competition and Market Authority's (CMA) draft Environmental Sustainability Guidance follows suit. It maintains the commitment to the fair share to consumers test for sustainability agreements such as fair trade, animal welfare, packaging, etc., and a more permissive approach to 'climate change agreements' 'in line with existing legally binding requirements or well-established national or international targets.' For these, it widens the fair share to all UK consumers. As an example, an agreement between delivery companies to switch to electric vehicles 'will be able to take into account the totality of the carbon dioxide emissions reduction to compensate for the harm to competition that results from their agreement, without apportioning those benefits between consumers of the delivery service (inside the relevant market) and all UK consumers (i.e., the wider group of the consumers who benefit from the agreement, which is outside the relevant market).' The CMA says it will not prioritise enforcement actions against parties to climate change agreements that meet the requirements set out in its Guidance.

Austria has gone further. In 2021 it amended section 2(1) (the equivalent of Article 101(1)) of the Austrian Cartel Act and Competition Act (KaWeRÄG 2021) to exempt 'sustainability agreements' which 'contribute significantly to an ecologically sustainable or climate-neutral economy'. The Austrian Federal Competition Authority's Sustainability Guidelines, state that the 'fair share for consumer' test is met if the benefits that result from improvements to the production or distribution of goods or the promotion of technical or economic progress which 'contribute substantially to an ecologically sustainable or climate-neutral economy.' The exemption is limited to agreements that make a significant contribution to ecological sustainability (such as the circular economy, the prevention and reduction of environmental damage, the protection and restoration of biodiversity and ecosystems, and the sustainable use and protection of water resources) or a climate-neutral economy. Agreements that simplify or achieve sustainability goals mandated by existing regulations in a more cost-efficient way will not be exempt. Agreements that harm competition must generate significant benefits with no need to fully 'compensate' consumers.

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The European Commission's draft revised Horizontal Cooperation Guidelines take a more conservative position. They define sustainability agreements broadly with no distinction between sustainability and large-scale environmental concerns other than the categorisation of the benefits generated. The Guidelines identify three categories of benefits: (i) individual 'use value benefits' from the use or consumption of the product that directly improve the consumers' experience (ii) 'indirect benefits' from the consumers' appreciation of the impact of their sustainable consumption on others; and (iii) 'collective benefits' which accrue from greater sustainability to a larger group. Where collective benefits are claimed the consumers 'in' and 'outside' the relevant market must substantially 'overlap' allowing the relevant proportion of the collective benefits to consumers to be included 'if they are significant enough to compensate consumers in the relevant market for the harm suffered.' The Commission has retained the consumer pass-on test.

Assessment of recent reforms

The draft guidelines take a cautious approach to sustainability. With the exception of the European Commission, they limit the widening of the 'efficiency' test to environmental and climate change damage agreements which implement national and international environmental regulatory obligations. This begs a question about the relationship between competition law and environmental laws. If the industry is cooperating to implement environmental regulations, then the exemption criteria is acting as a filter to ensure that firms do this without generating significant anticompetitive effects. Even then there has been a hesitancy over how far this should go. The European Commission guidelines qualify this by requiring a significant overlap between the benefits to consumers and those who suffer negative externalities thus preserving the requirement of zero harm to consumers test.

The Austrian, Dutch and UK guidelines not unsurprisingly limit the wider test to their national jurisdictions. Their draft guidelines beg the question of the extent to which 'out of market' effects are to be taken into account especially where citizens in other Member States benefit most, and how the distributional consequences are to be resolved. There will be many situations where the spillover effects of airborne or water pollution are felt largely in other Member States. An environmental agreement among domestic firms (which would be unlikely as it would be commercially untenable) would see their customers bear large price increases to benefit non-consumers in other countries. Even the Commission seeks to restrict the third-party effects to the footprint of the product's customers. Further, the development of different national approaches is leading to the 're-nationalisation' of competition law and with it increased business uncertainty.

The need for and extent of the quantification of public benefits must also be addressed and refined. The Commission's draft Guidelines require the efficiencies to be 'substantiated,' 'objective, concrete and verifiable.' The Dutch guidelines propose that true or social prices be used to value environmental benefits. This can be based on well-developed-of-the-shelf theoretical and empirical literature setting out different methods of valuing environmental benefits. However, these are 'shadow' prices, not the actual prices/costs which determine the actions of producers and consumers. While it is early days judging by past practice the issue will be finessed at an impressionistic level or else the competition authorities will be drawn into an elaborate cost-benefit analysis.

There is also a debate to be had, one wider than sustainability, of the way competition law is being fashioned, revised, and expanded. With the notable exception of Austria, the reforms have been undertaken through 'soft law' i.e., non-legally binding guidelines which set out a competition authority's decisional practice and enforcement priorities. There is no change in the substantive law only its interpretation and application by regulators. This process is being undertaken by enforcement officials rather than by the courts or the legislature, although the former will play a subsequent role in constraining and expanding the law through its decisions. But it does raise the fundamental question of where the rule of law lies in the present urge to reform competition law in this and other areas.

For a more developed critique see my 'The Case Against Green Antitrust' *European Competition Journal* 2022 (download a pre-publication version here).

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