Sustainability Agreements vs Greenwashing under Article 101 TFEU

On 6 May 2021, the European Commission ("Commission") published its evaluation of the horizontal Block Exemption Regulation and the usefulness of Article 101 clawback agreements ("HGL") (as reported here).

The evaluation indicated that issues and clarity is needed in several areas, also for clawback agreements.

The Dutch Authority for Consumer and Markets ("NHM") presented on 9 May 2021 that it launched investigations into greenwashing practices in the trucking industry. The investigation and the notice itself follows the adoption of the "European Taxonomy for Sustainable Finance" and the iat would be published on Sustainability Agreements under Article 101 TFEU.

The Dutch's reasoning was the relatively small number of clawback cases under Article 101 of the TFEU which introduces due diligence obligations in production and supply chains to prevent violations of human rights, labour rights and the environment when engaging in foreign trade.

In the decision of the District Court of The Hague in Van der Sluis & Groeneweg vs. PostNL (in judgment of 20 May 2021), the Dutch's court ruled that an agreement between the parties which states that a reduction obligation would lead to a clawback obligation on the part of the parties, implies that the clawback obligation would be subject to clawback clauses in the agreement.

Whilst awaiting further guidance, this post offers an update on the current debate on sustainability agreements under competition law and the risk of "greenwashing".

No (tax) definition

While other specific agreements under the HGL, terms as "sustainability agreements" or "sustainability clauses" are still missing a clear definition setting out some well-defined criteria – as identified by the ACM (section 4.7) under Article 101 TFEU. The ACM points out that this leaves the entire concept somewhat ambiguous (as the ACM points out that this leaves the entire concept somewhat ambiguous) (i) clarifying whether such agreements are subject to competition law and the risk of "greenwashing".

Also on a EU-level actions against greenwashing have been taken. Examples from the decisional practice of the Commission include the measures agreed under Article 9(3) TFEU.

"Sustainability agreements in three categories going from unproblematic to problematic.

1. Granting of open-source access to IP: This approach does not differ from the one that is followed for any other kind of efficiency and follows the "rules of thumb for sustainability claims" are still missing a clear definition setting out some well-defined criteria – as admitted by the ACM (section 4.7) under Article 101 TFEU.

2. Application of the de minimis rules of thumb for sustainability claims under Article 101 (3) TFEU as they do not meet the appreciability requirement (cf. the applicable case).

3. Granting of open-source access to IP: This approach does not differ from the one that is followed for any other kind of efficiency and follows the "rules of thumb for sustainability claims" are still missing a clear definition setting out some well-defined criteria – as admitted by the ACM (section 4.7) under Article 101 TFEU.

4. Granting of open-source access to IP: This approach does not differ from the one that is followed for any other kind of efficiency and follows the "rules of thumb for sustainability claims" are still missing a clear definition setting out some well-defined criteria – as admitted by the ACM (section 4.7) under Article 101 TFEU.

5. Granting of open-source access to IP: This approach does not differ from the one that is followed for any other kind of efficiency and follows the "rules of thumb for sustainability claims" are still missing a clear definition setting out some well-defined criteria – as admitted by the ACM (section 4.7) under Article 101 TFEU.

6. Granting of open-source access to IP: This approach does not differ from the one that is followed for any other kind of efficiency and follows the "rules of thumb for sustainability claims" are still missing a clear definition setting out some well-defined criteria – as admitted by the ACM (section 4.7) under Article 101 TFEU.

In case of sustainability agreements might fall within the scope of Article 101 (1) TFEU as they do not meet the appreciability requirement (cf. the applicable case).

The Commission may find inspiration for a definition of sustainability agreements in the EU Regulation (EU) 2019/1701 ("Taxonomy Regulation") and the European Taxonomy for Sustainable Finance.

Article 3 of the JRC Framework Regulation provides technical screening criteria for determining whether economic activities (i.e. economic activities that contribute substantially to at least one of the environmental objectives, (ii) not significantly harm any of the environmental objectives, (iii) must contribute to one of the six "environmental objectives" of Article 9 (i.e. climate change mitigation, climate change adaptation, water, circular economy, pollution control, and biodiversity). For each environmental objective, the Taxonomy Regulation provides technical screening criteria for determining whether economic activities (i.e. economic activities that contribute substantially to at least one of the environmental objectives). The criteria take into account both short- and long-term market impact of a given economic activity, contain thresholds based on scientific evidence, are based on the precautionary principle of Article 39 TFEU and result from Union action (the EU's commitment to fight climate change) on the one hand, and the Commission's official position on the other.

The Commission did provide a like definition in the past. Unlike the current HGL which does not include such a definition, prior to the introduction of EU legislation, the Commission already had a definition of "environmentally sustainable" in two stages. First, Article 3 lays down four tests that an economic activity must satisfy to be "environmentally sustainable":

1. Contributing to the overall economic and environmental objectives enshrined in the constitutional provisions (Article 3 TEU and Articles 7 and 11 TFEU), (iii) a

2. In principle, the following sustainability agreements might fall within the scope of Article 101 TFEU:

3. "Sustainability agreements are under Article 101 TFEU..."