Kluwer Competition Law Blog

Making EU competition law sustainable: all good things come in threes

Grant Murray (Baker McKenzie) · Wednesday, March 16th, 2022

The Commission's draft chapter on sustainability cooperation may surprise even those following the debate about EU antitrust policy and sustainability closely. A more worldly approach to benefits, a new and useful tailored safe harbour for sustainability standards, plus a good first attempt to keep sustainability cooperation out of Article 101.1 (or at least the 'by object' box) proves that the Commission has journeyed far from where it stood just a couple of years ago.

Whereas the Commission used to favour the status quo, pointing out that regulation and a robust competitive process were reliable ways to guarantee sustainable outcomes for consumers, the Guidelines now explicitly recognise that cooperation agreements may be "necessary" to fill the gap when residual market failures are not solved by public policy and regulation.(para 546)

'Sustainability' under the Guidelines also includes social objectives (e.g. labour and human rights), not just environmental initiatives. This makes sense for companies from whom that was a distinction without a difference and who see the goals as connected: projects that pursue social or economic objectives can make it easier to achieve green objectives, and the impact of climate change can disproportionately affect those in disadvantaged areas (para 543)

This blogpost considers the key innovations contained in the draft Guidelines and suggests areas for further consideration:

#1. A broader view of benefits that are relevant to the competitive analysis, including qualitative and 'out of market' benefits in certain circumstances.

#2. A 'soft safe harbour' for sustainability standards that appears to be capable of covering binding standards

#3. A fair-minded approach to deciding when sustainability cooperation is anticompetitive by object –exemplified by the reassurance that an agreement to buy only from sustainable suppliers is not a joint boycott of non-sustainable suppliers.

#1. A broader view of benefits that are relevant to the competitive analysis, including qualitative and 'out of market' benefits in certain circumstances.

Three categories of benefits are relevant under the draft Guidelines for offsetting potential harm from competitor cooperation pursuing sustainability goals:

- Individual use benefits – where the cooperation directly improves the consumer's experience with the product (*I value this because it's better*)
- Individual non-use benefits – where the consumer's experience is unchanged, but the consumer derives value from knowing that another group is benefiting (*I value this because it's better for others*)
- Collective benefits where, irrespective of the consumer's view, there is some objective benefit for a class of people of which the consumer is part (*Whatever I think, the cooperation is good for a group which includes me*)

The third (and arguably the second) category opens (or at least unlocks) the door to 'out of market benefits'. This was a contentious issue in the public consultation. Commentators invited the Commission to take a more 'worldly' view of competitor cooperation agreements (and the benefits they create) given that not all negative externalities can be cured through the voluntary, individual actions of consumers.

Limiting principles mean that the Commission is not opening the floodgates to unverifiable claims. A nexus is still needed between the benefits and those consumers suffering the harm from the restrictive agreement. For example, if companies claim that consumers attach value to the fact that the product benefits others, this will need to be demonstrated, e.g. using surveys that show that consumers will pay more for that reason. (para 597)

When collective benefits are alleged to arise outside of the relevant market, the consumers in the relevant market need to substantially overlap with or be part of the beneficiaries outside that market. The collective benefits also need to be "significant enough" to compensate consumers in the relevant market for the harm suffered (para 603). Helpfully, while consumers need to receive a fair share of benefits, the draft Guidelines only require that the overall effect on those consumers is at least "neutral". So the Commission appears to be departing from the more restrictive notion of "fully compensated" (which remains in the 101.3 exemption guidelines, unfortunately).

The notion of collective benefits could mean a real step change for addressing environmental negative externalities. Cleaner areas and lower emissions could be accounted for and be part of the equation. But important questions remain unanswered – and probably intentionally. Precisely what will count as "collective benefits" and how will they be measured? Will firms rely on global benefits or just EU benefits or just the share of benefits enjoyed by EU consumers? The answers to these questions may determine whether the collective benefits are indeed significant enough to offset harm in the relevant market. The more benefits that are taken into account, the greater the chance of a positive environmental impact, so it is hoped that the Commission will take into account all global benefits that objectively occur – i.e. that accrue to society as a whole.

Yet the notion of collective benefits literally has its limits. Local/regional benefits, or societal aims, seem unlikely to qualify under the draft Guidelines as 'collective benefits' given the absence of overlap between those consumers paying and those consumers benefitting. Instead, societal gains can only count as individual non-use benefits where consumer willingness to pay is proven. This means that, although environmental and social aims are both included in the notion of sustainability, they qualify for different treatment. Societal benefits are arguably subject to an extra hurdle of willingness to pay, which will sharply focus the need for well-designed consumer

surveys in relation to a “representative fraction” of all consumers in the relevant market. (para 600)

#2. A ‘soft safe harbour’ for sustainability standards that appears to be capable of covering binding standards

The Commission also wants to reassure firms that certain sustainability cooperation will fall outside the competition rules in the first place (perhaps to avoid the complexities of exemption arguments). The new soft safe harbour for sustainability standards is a prime example and sits in a section that is now tailored to the realities of sustainability initiatives and no longer concerned with technical interoperability etc.. (para 572)

The safe harbour contains some familiar requirements (transparency, consultation, accessibility). But two particular innovations stand out. First, it seems that a standard can still benefit from the safe harbour even where it is binding on the firms (i.e.. they can agree not to manufacture or buy outside of a label, subject to other conditions). (572, 2nd indent) The idea that binding sustainability standards covering a large part of the market can still in principle benefit from the safe harbour needs to be clarified in the next draft. But this certainly makes sense and would mean a step change for firms wanting to pursue sustainability goals through standards but worried about first-mover disadvantage. It does not seem likely that one company would sue a competitor for buying outside a label etc. (though there could be other repercussions – e.g. ejection from a group). But an instant advantage is the signal and reassurance that, in the right circumstances, competitors can actually agree to respect a standard without fear that this alone will be framed as anticompetitive coordination.

Critically, the safe harbour also includes a safety valve according to which the sustainability standard cannot lead to a “significant” increase in price/reduction in choice. That seems a sensible and yet fairly generous upper threshold for a safe harbour (higher than ‘material’ or ‘appreciable’). In a nod to recent enforcement cases, the parties must also remain free to adopt for themselves a higher sustainability standard than the one agreed with the other parties to the agreement (e.g. they may decide to use more sustainable ingredients in their final product than the standard may require).

#3. A fair-minded approach to deciding when sustainability cooperation is anticompetitive by object –exemplified by the reassurance that an agreement to buy only from sustainable suppliers is not a joint boycott of non-sustainable suppliers.

The Guidelines remain tough on cartels masquerading as sustainability initiatives but also promise that, if an agreement genuinely pursues a sustainability objective, this is relevant when determining whether or not the restriction is anticompetitive by object. (para 559)

This is reflected in the way the draft Guidelines treat joint purchasing agreements where competitors agree to purchase only from suppliers with a limited environmental footprint. Rather than characterise these agreements as “collective boycotts” the Commission explains that, in view of its content, objectives and legal and economic context, the agreement will not be seen as having the object to exclude suppliers producing unsustainable products from the market. (para 333)

Instead, a collective boycott is described as a very different arrangement where a group of purchasers aims at excluding an actual or potential competitor from the same level of the selling market. (para 334)

Joint purchasing agreements like this could be very effective for competitors wanting to bring about change. The Guidelines helpfully remove the spectre of a 'by object' characterisation that can stop laudable projects from even getting off the ground.

Just warming up?

The draft chapter clearly reflects a huge amount of careful thought, debate and, no doubt, negotiation and compromise. It is already quite an achievement, and commentators will be watching carefully to see how it is received by other antitrust agencies around the world – particularly in countries where sustainability initiatives are often directed but which have been largely silent on the application of local antitrust laws. In addition, there are some areas for extra guidance and assurance:

- The need for an expanded section on the types of cooperation that fall outside Article 101.1 – including agreements to comply with national laws or international treaties (environmental/human rights) or cooperation that does not relate to an important parameter of competition.
- Case studies which explore more nuanced, borderline issues including societal aims such as living wage /human rights commitments which, depending on the facts, might be outside Article 101.1 or have a non-appreciable impact due to, say, low commonality of costs or negligible impact on end-consumer prices.
- Guidance on how to measure collective benefits (defined globally) and how to counterbalance those benefits against competitive harm
- Confirmation that binding standards can benefit in principle for the soft safe harbour
- A more generous approach to the state compulsion defence. Government policies in this field are and should be fast-moving and so will require flexible policy instruments and not just legislative compulsion. Where corporate action conforms to clear and precise government policy, there should at least be a defence in the sense that no resulting coordination is considered a 'by object' infringement.

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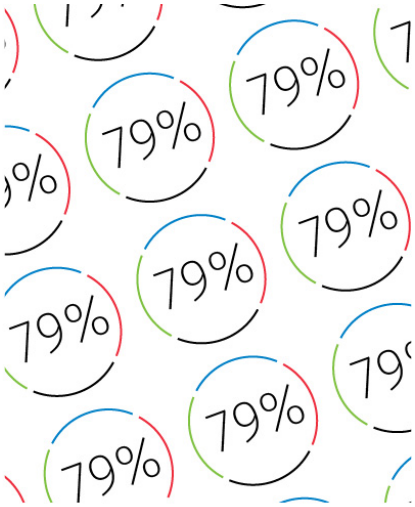

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