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Sustainability Agreements vs Greenwashing under Article 101 TFEU

David Wouters (Deloitte Legal) · Thursday, June 3rd, 2021

On 6 May 2021, the European Commission ("Commission") published its evaluation of the Horizontal Block Exemption Regulations and the Guidelines on Horizontal co-operation agreements ("HGL") (as reported here). The evaluation indicated that revision and clarity is needed in various areas, *inter alia* for sustainability agreements.

The Dutch Authority for Consumer & Markets ("ACM") announced on 3 May 2021 that it launched investigations into greenwashing practices in the energy sector, the dairy industry and the clothing sector. Following the adoption of its "Guidelines sustainability claims" and the second draft of its Guidelines on Sustainability Agreements earlier this year, the ACM stays at the forefront of competition enforcement when it comes to sustainability agreements.

That the Dutch are leading the way was reaffirmed by the landmark decision of the District Court of The Hague in *Milieudefensie et al v. Shell*. In its judgement of 26 May 2021, the Dutch court rejected Shell's argumentation that a reduction obligation would lead to unfair competition on the oil and gas market and ordered Shell to reduce CO_2 emissions by 45% by 2030 relative to 2019 levels.

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 (clear) definition

Unlike other specific agreements under the HGL, terms as "sustainability agreements" or "sustainability claims" are still missing a clear definition setting out some well-defined criteria – as admitted by the ACM (second draft version of Guidelines on Sustainability Agreements, point 7). Critics say that this makes the entire concept abstract and of little use in practice. Proponents say that a clear definition is not needed as the approach does not differ from the one that is followed for any other kind of efficiency and follows the traditional interpretation of Article 101(3) TFEU.

The Commission did provide a like definition in the past. Unlike the current HGL which does not include such a definition, point 179 of the HGL of 2001 defined "environmental agreements" as

> *"[…] those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set out in Article 174 of the Treaty. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations. This excludes agreements that trigger pollution abatement as a by-product of other measures."*

According to the previous HGL, an environmental agreement would be unlikely to restrict competition if: (i) it does not place any individual obligation on the parties, or if parties only commit loosely to contributing to a sector-wide environmental target, or (ii) the agreement stipulates environmental performance with no effect on product and production diversity, or (iii) it gives rise to genuine market creation.

The Commission may find inspiration for a definition of sustainability agreements in the EU Regulation 2020/852 (Taxonomy Regulation). The Taxonomy Regulation sets out a framework according to which investors and businesses can assess whether certain economic activities are "sustainable". One may think of it as an EU dictionary of what activities may and may not be called sustainable. The Taxonomy Regulation defines "environmentally sustainable" in two stages. First, Article 3 lays down four tests that an economic activity must satisfy to be "environmentally sustainable". The activity must: (i) contribute substantially to at least one of the environmental objectives, (ii) not significantly harm any of the environmental objectives, (iii) comply with minimum social and governance safeguards, and (iv) comply with technical screening criteria to be adopted under the Regulation. Second, in order to be environmentally sustainable, the economic activity 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 contribute substantially to said objectives. These criteria take into account both the short- and the long-term market impact of a given economic activity, contain thresholds based on scientific evidence, are based on the precautionary principle of Article 191 TFEU and build upon Union labelling, certification and standards (G. de Stefano). The Commission's work on the technical screening criteria is already advanced but is not yet finalised (e.g. TEG final report and its technical annex and the JRC report on nuclear energy under the Taxonomy Regulation). DG Competition may assess sustainability agreements under Article 101 TFEU in a similar way. This post provisionally classifies sustainability agreements in three categories going from unproblematic to problematic.

Green light – outside Article 101 TFEU

A wide range of sustainability agreements – that do not contain by object restrictions – are not likely to fall under Article 101 (1) TFEU as they do not meet the appreciability requirement (cf. the applicable *de minimis* marker share cap). The following sustainability agreements do not fall under Article 101 (1) TFEU and are unlikely to raise competition law issues:

- Joint commitments to achieve sustainability targets without obligations to employ certain means;
- Creating new markets or products/services;
- Replacing non-sustainable products without impact on consumer price and choice;

- Granting of open-source access to IP;
- Adherence to – not or inadequately enforced – laws and regulations;
- Exchanges of sustainability-related information between competitors.

Orange light

In case a sustainability agreement might have restrictive effects on competition, a case-by-case analysis remains necessary to determine if they actually fall under Article 101 (1) TFEU.

In principle, the following sustainability agreements might fall within the scope of Article 101 (1) TFEU:

- Replacing non-sustainable products with cost increase;
- Setting of compulsory sustainability standards (stricter than law);
- Joint voluntary investments or payments to offset the negative environmental or social impact.

Arguments to avoid said agreements from being caught by Article 101 (1) TFEU include (i) the ancillary restraint or objective necessity doctrine (*Meca-Medina*-case), (ii) sustainability agreements pursuing the objectives enshrined in the constitutional provisions (Article 3 TEU and Articles 7 and 11 TFEU), (iii) a *mutatis mutandis* application of the *Albany*-case (§60), (iv) demonstrating that the four conditions of Article 101 (3) TFEU are met.

Red light – greenwashing alert

When sustainability objectives are used as a pretext to engage in a disguised cartel regarding price-fixing, the limitation of output or sales or the allocation of markets or customers, the prohibition of Article 101 (1) TFEU obviously remains in full force and no exception can be tolerated. The risk of greenwashing or misleading sustainability claims is however not limited to the case of disguised cartels. The Taxonomy Regulation also provides for a definition of greenwashing, namely: "*the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met.*" Over the last years, a wide variety of products and services have been labelled as sustainable which raises questions about the credibility, effectiveness and desirability of this trend. While one should not "throw the baby out with the bathwater" and more sustainable products and services are of course to be welcomed, there is currently little or no check on the accuracy of such sustainability claims. As a result, there is a risk that businesses with genuine sustainability claims face unfair competition from businesses with misleading claims.

That is why the Consumer Department of the ACM recently started investigating misleading sustainability claims. On 22 September 2020, the ACM published rules of thumb for sustainability claims calling upon businesses to substantiate their sustainability claims with facts, to keep them clear, honest and up-to-date and to make them useful and not confusing for consumers. Where it finds misleading sustainability claims, the ACM can impose fines amounting to EUR 900.000,00 per violation. Previously in 2020, the ACM announced that it will provide more information about certification labels in order to increase awareness of their reliability and that it will take stricter enforcement action against misleading practices. It also called on the Dutch legislature to introduce

stricter rules for certification labels (e.g. introducing mandatory accreditation). This is reflected in the broader draft bill of 11 March 2021 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.

Also on an EU-level actions against greenwashing have been taken. Examples from the decisional practice of the Commission include the *Consumer Detergents*-case, the *Trucks*-case and the *Car Emissions*-case.

Way forward

To check the accuracy of sustainability claims is likely to prove challenging for competition authorities. However, as the comparison with the Taxonomy Regulation shows, other authorities will face similar challenges when assessing sustainability claims. It remains to be seen whether authorities will co-operate on this and how competition law will be reshaped in this regard.

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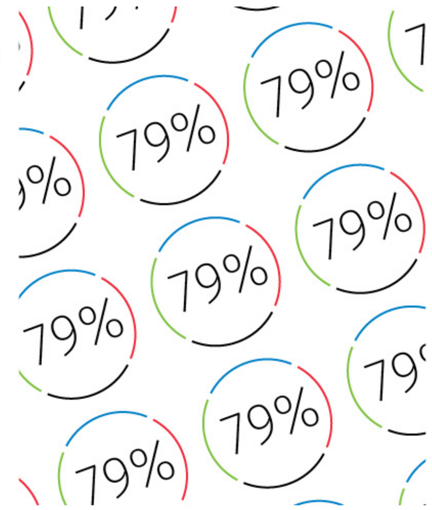

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