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Setting A Standard for Sustainability Guidance? Seven Things Worth Knowing About the Final EU Antitrust Guidelines (Plus Soundtrack…)

Grant Murray (Baker McKenzie) · Tuesday, June 13th, 2023

The Commission has followed a Long and Winding carbon-free Road since only a few years ago when it seemed to favour the Status Quo and promoted a robust competitive process as the best way to guarantee sustainable outcomes for consumers.

The final chapter on Sustainability Agreements in the EU Horizontal Guidelines clearly shows a Commission that is rightly determined to play its role in addressing climate change by making it clear when competition law will not unduly stand in the way of laudable green competitor collaboration. Here are seven things that stand out:

All Together Now

The Commission is here to help. The Guidelines recognise that cooperation agreements may be necessary to "*cure*" residual market failure when it is not solved by public policy and regulation (para 519). In addition, 'sustainability' under the Guidelines includes social objectives (e.g. labour and human rights), not just environmental initiatives.

That wider scope sets it apart from other agency guidance and makes sense for companies whose ESG initiatives comprise numerous elements of E, S and G, e.g. cutting out bad inputs from the supply chain; incentivising different farming techniques to boost biodiversity and guaranteeing a living wage. The goals are often 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.

Don't Worry, Be Happy

The Commission is at pains to describe joint initiatives that will be no cause for concern. In the end, it's not a very generous list but it is good to see explicit acknowledgement that databases put together on the (un)sustainability of supply chain partners (whether supplier or reseller) will be OK provided there is no identification of whose supplier/reseller it is and no obligation to buy/not buy

(530). The Commission is hardly going out on a legal limb here, but it is useful to see the Guidance acknowledge that these sorts of databases can be an efficient way to help with some quite overwhelming due diligence obligations coming down the line. Companies trying to gather this information on their own will be making life unnecessarily harder for themselves.

In a late addition, the Guidance now reassures companies that agreeing with competitors to respect binding international treaties etc. (which would affect EU imports) but which may be underenforced at a national level will not offend the EU competition rules (para 528). Agreeing to play by the rules should never have been a problem but this now gives a clear signal to multinationals who want to do the right thing for all sorts of reasons. Firms can be assured of a level playing field (free from 'illicit' competition) and make these sorts of commitments with greater confidence.

We Can Work It Out

An effects analysis will (more) often be appropriate. The spectre of a 'by object' characterisation has all too often prevented laudable projects from getting off the ground. Of course, sustainability goals offer no free pass and the Commission rightly signals that cartels masquerading as green cooperation will be dealt with harshly. That would include agreements to pass on increased costs from sustainability standards to customers, to fix the prices of the more sustainable output, or to limit technological development to the minimum sustainability standard required by law.

But there is far **more guidance on the effects analysis**. This apparent 'broadening' of the 'effects' box for sustainability agreements is a positive thing. See in particular, the acid test in para 528 (I paraphrase): does the sustainability objective (once you look at its provisions, objectives and economic/legal context) cast reasonable doubt on the notion that it involves a sufficient degree of harm to competition? That is a test that advisers can work with to give reassurance that many projects can be explored in more detail without undue fear of competition law, albeit with the right safeguards in place.

Illustrative of this approach is the guidance that (i) agreements between competitors to jointly purchase as an input only products with a limited environmental impact or (ii) to buy exclusively from suppliers that respect certain sustainability standards (which are to be assessed under the guidance relating to Joint Purchasing agreements (not cartels). The Commission is essentially signalling that these sorts of agreements are not akin to collective boycotts, which would deserve harsher treatment.

Gimme Shelter

The Commission has defined a **genuinely useful "soft safe harbour" for sustainability standards** that meet certain criteria. This is a fertile area for guidance because standards can be developed and applied at any level of the supply chain – from input sourcing, manufacturing, distribution and even end-of-life /recycling.

Most eye-catching is that a standard can still benefit from the safe harbour even where the standard is binding on the firms as a minimum (para 549, 3rd indent). This is a step change for firms

wanting to pursue sustainability goals through standards but worried about first-mover disadvantages (as they invest in compliance with the standard). No one expects anyone to sue a competitor for buying outside a label etc. but an instant advantage of this guidance 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 must not lead to a "significant" increase in price/reduction in quality. That seems a sensible and yet fairly generous upper price threshold for a safe harbour (deliberately higher than 'material' or 'appreciable'?). A footnote explains that what is "significant" depends on the product/market – and further guidance is found in para 551 and Example 3 (see below).

Borderline

It was always frustrating that the Guidance was silent on when sustainability efforts would only result in a **non-appreciable effect on competition**. The Guidance now confirms that a price increase resulting from a standard (if such an increase arises at all) may be insignificant where "*the product covered by the sustainability standard represents only a small input cost for the product*" (para 551).

Example 3 illustrates this in relation to an initiative where clothing brands commit only to buying from producers that respect minimum wage levels. While the initiative appears to inflate the wages of workers, it would not do this to a degree that is problematic when you trace that impact through to the final product. That's because the wage component of production costs was only 30%, meaning that a 20% increase only meant an ex-factory increase of 6% which is a drop in the ocean when you take into account the 200-300% mark-up added on by the final seller. That is a methodology that firms can work with (without having to exchange granular confidential information) – though it is admittedly more useful for differentiated products with a large value-add element.

Good Vibrations

Three categories of benefits are explicitly identified as being relevant to the competitive analysis:

- 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*); and
- 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*).

Any or all of these consumer benefits can be relied upon to justify an agreement. The Commission also now recognises that in some cases, there may be a lag before benefits materialise. This won't prevent firms from relying on those benefits though the greater the time lag, the greater the benefits

need to be (para 591).

Overall, it is very useful to have these three headings of benefits. The notion of ‘collective benefits’ has great potential. In principle, it allows wider benefits to society to be brought into the calculus which should allow projects to address negative externalities more easily. But, despite criticism and legal argumentation, the Commission has not moved on its narrow interpretation of the law that appears to require full (not just ‘fair’) compensation for the consumers harmed by the restrictive arrangements. In other words, benefits to consumers in other markets are not included in this assessment

That aversion to taking into account benefits accruing outside the relevant market amounts to a ‘polluter must benefit’ type test. The Commission therefore appears to be at odds with the competition authorities of the Netherlands and the UK which are trying to get beyond this by favouring an approach that aims to consider, in certain cases, benefits for wider society as a whole, rather than only the consumers of the products in the relevant market.

It’s also worth flagging that the Commission has widened the text about when cooperation is indispensable for claimed benefits. The Guidance now explains that the presence of regulation won’t necessarily be a bar to sustainability cooperation – including because it allows the parties to reach the goal “*more quickly*” (para 565).

The Guidance also explains that consumer willingness to pay, while important, does not necessarily mean that a sustainability agreement is not indispensable. That’s because even though consumers may be willing to pay, a restrictive agreement may still be necessary, e.g. to overcome first-mover disadvantage or to achieve cost-reducing economies of scale (footnote 403). That provides an important reconciliation of two notions (paying consumers/indispensability) which might seem to be at odds on occasion.

Hello

The Commission has now confirmed explicitly that it has an open door and invites firms to rely on its Informal Guidance Notice procedures to provide clarity on “*novel or unresolved questions on individual sustainability agreements*”. This is a good gesture and would be more valuable if the Commission were able to coordinate with other agencies who might be approached about the same conduct (and may, even within Europe, be minded to take a different approach). As helpful as these Guidance are, Europe is only one albeit important part of the Jigsaw Puzzle and many sustainability projects will be targeted at events, firms and processes in other countries.

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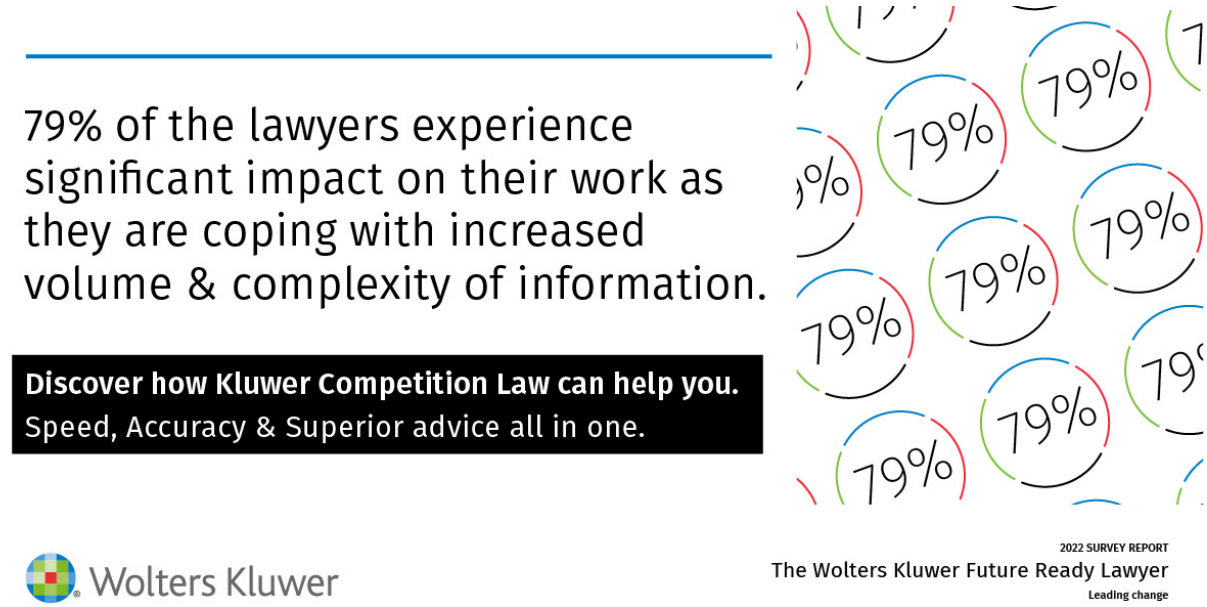

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