

Competition Law and Sustainability: Cooperation between competitors in the time of energy and environmental law change

Matthew Levitt - 17 March 2022

Overview

- Achievement of sustainability goals will involve cooperation between competitors
 - Standardisation, labelling and definitions
 - Sharing of data
 - Monitoring of compliance
 - Boycotting and joint investment
 - Recycling
- But where is the line to be drawn between such laudable ambitions and competition law compliance?

Fit for 55 – Greener fuels for shipping

- The goal of the proposal on the use of **renewable and low-carbon fuels in maritime transport** (FuelEU Maritime) is to reduce the greenhouse gas intensity of the energy used on-board by ships by up to 75% by 2050, by promoting the use of greener fuels by ships
- Main proposals
 - setting reduction targets for the greenhouse gas intensity of energy used on-board by ships;
 - laying down requirements for the use of on-shore power supply or zero-emission energy at berth for ships applicable as of 2030;
 - establishing the principles on counting biofuels, biogas, renewable fuels of non-biological origin and recycled carbon fuels within the greenhouse gas intensity reduction targets;
 - establishing the FuelEU certificate of compliance and the obligation for ships to carry it;
 - introducing monitoring, reporting, verification, inspection, and enforcement procedures, and financial provisions (including penalties for ships for non-compliance as well as the allocation of said penalties to the Innovation Fund).

Industry initiatives – some examples

Recent headlines from Lloyd's List

MOL forms alliance to develop methanol-fuelled tankers

The alliance of six companies aims to deliver the first methanol-fuelled tanker serving the Japanese domestic market in 2024

Maersk joins calls on IMO to enshrine lifecycle emissions rules

An intersessional group meeting on lifecycle greenhouse gas and carbon intensity guidelines for marine fuels must not leave loopholes in deciding what is truly green, says Maersk

Competition policy's contribution to the green deal

Competition Policy in Support of Europe's Green Ambition

"[C]ompetition policy supports and complements a fair and just transition – aligning it with EU rules and values, and ensuring that nobody is left behind. [...]

Antitrust enforcement contributes to the pursuit of sustainability objectives by promoting and protecting competitive markets. By prohibiting anticompetitive practices, it ensures that prices remain cost-reflective and companies face incentives to come up with efficient and sustainable solutions

At the same time, the Commission acknowledges that in order to encourage companies to jointly invest, identify solutions, produce, and distribute sustainable products, more guidance is needed on the circumstances in which such cooperation complies with antitrust rules."

Competition Policy Brief - 2021-01 | September 2021

The relationship between environmental and competition law is not always clear

- Draft Corporate Sustainability Reporting Directive (CSRD)
- The CSRD draft expressly foresees the potential for horizontal cooperation between companies where necessary to prevent or mitigate potential adverse human rights and environmental impacts – *provided compliant with competition law*
- GC Judge Suzanne Kingston has commented that

“[D]ifficulties certainly remain in working out the interface between the new generation of legislative initiatives on sustainable corporate governance and competition law”.

“Difficulties can arise where the legislative framework does not actually mandate a precise activity, but some latitude is left to the company as to the best means of achieving the particular obligation”

New EU (draft) guidance

- EU Commission's draft Guidelines on Horizontal Cooperation
https://ec.europa.eu/competition-policy/system/files/2022-03/draft_revised_horizontal_guidelines_2022.pdf
- New chapter on sustainability agreements
- Three categories of agreement
 - Those that do not give rise to competition concerns
 - Those covered by the basic prohibition in Article 101(1) TFEU
 - Those that satisfy the exemption criteria of Article 101(3) TFEU

Sustainability agreements that do not give rise to competition concerns

- Agreements that do not affect parameters of competition, such as price, quantity, quality, choice or innovation
 - agreements on measures to eliminate single-use plastics in their business premises, not to exceed certain ambient temperature in buildings, or to limit the number of printed materials per day
 - agreements on the creation of a database containing information about suppliers that have sustainable value chains, use sustainable production processes and provide sustainable inputs, or distributors selling products in a sustainable manner, without requiring the parties to purchase from those suppliers or to sell to those distributors
 - agreements between competitors relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness of the environmental footprint of their consumption, without such campaigns amounting to joint advertising of particular products

Sustainability agreements covered by the basic prohibition in Article 101(1) TFEU

- Sustainability standardisation agreements
 - agreement to phase out, withdraw, or, in some cases, replace non-sustainable products (e.g. fossil fuels such as oil and coal, plastics) and processes (e.g. gas flaring) with sustainable ones
 - agreement on purchasing production inputs only if the purchased products are manufactured in a sustainable manner
- May lead to an increase in production or distribution costs and consequently to an increase in the price of the products sold by the parties
- Obvious concerns
 - agreement which translates increased costs resulting from the adoption of a sustainability standard into increased sale prices towards their customers
 - agreement to put pressure on third parties to refrain from marketing products that do not comply with the sustainability standard

Sustainability standardisation agreements that do not give rise to competition concerns

- Transparent and open to participation
- Not mandatory
- Doesn't prevent adoption of higher standards
- Participants don't exchange commercially sensitive information in development or adoption of the standard
- Effective and non-discriminatory access to the standard and its requirements
- Should not lead to a significant increase in price or to a significant reduction in the choice of products available on the market – if it does, this effect will need to be assessed (market coverage etc)
- There is a mechanism or a monitoring system to ensure that undertakings that adopt the sustainability standard comply with the requirements of the standard

Sustainability agreements that satisfy the exemption criteria of Article 101(3) TFEU

- Efficiencies
 - such as the use of cleaner production or distribution technologies, less pollution, improved conditions of production and distribution, more resilient infrastructure or supply chains
- Indispensability
 - where EU or national law requires undertakings to comply with concrete sustainability goals, cooperation agreements may be indispensable if they enable the parties to reach the goal in a more cost-efficient way
 - to avoid free-riding on the investments required to promote a sustainable product and to educate consumers (overcoming the so-called “first mover disadvantages”)
 - to achieve economies of scale – eg in establishment and monitoring of the standard

Exemption criteria

- Pass-on to consumers
 - Individual use value benefits
 - Positive externalities and non-use benefits – eg reduced pollution
 - Collective benefits
 - It must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one – but the current experience with measuring and quantifying collective benefits remains scarce
- No elimination of effective competition
 - May be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important parameter of competition (eg price)
 - Elimination of competition for a limited period of time, if this has no impact on the development of competition after this period elapses,

Open questions

- How to quantify sustainability benefits and weigh them against loss of competition?
- Is cooperation between competitors necessary where consumers are willing to pay more in any event
 - Willingness to pay may provide sufficient incentives to compete (rather than cooperate) on sustainability
 - And will cooperation in such circumstances simply result in lower standards?
- How much weight to attach to out-of-market benefits?
- What level of compliance risk should be imposed on competitors seeking to develop sustainability projects in good faith (cf ACM Guidance)

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