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Non-economic objectives under Article 101 TFEU: recent trends

*Public and Private Enforcement of EU Competition Law in the Age of Big Data
COMP.EU.TER Project*

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Introductory notes...



- Societal and market challenges: digitalization and sustainable development
- What is the role of competition law facing those challenges?
- Non-economic objectives in EU competition law: “sword” and “shield”
- Art. 101 TFEU: to which extent are non-economic objectives considered in the assessment of anti-competitiveness of an agreement between undertakings?



Outline of this presentation

1. An overview of the EU competition law approach to non-economic objectives

2. Recent developments on art. 101 TFEU and collective labour agreements: digital platform workers' rights

3. Recent developments on art. 101 TFEU and sustainability objectives: sustainability agreements

1. An overview of the EU competition law approach to non-economic objectives

BEFORE MODERNISATION AND ECONOMICIZATION

- Metro I (C-26/76): workable competition - competition «necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty»
- COM: assessment of economic and non-economic benefits that benefitted either individual consumers or society as a whole

AFTER MODERNIZATION AND ECONOMICIZATION

- Consumer welfare, more economic approach
- Commission's Guidelines on Article 101(3) TFEU of 2004: non-economic benefits should only be taken into account if they are «goals pursued by other Treaty provisions» but only to the extent that they can be «subsumed» under the four conditions of Article 101(3) TFEU.
- “objective economic efficiencies” to be “calculated”
- CJEU: not clarified, but references to non-economic benefits.
“objective advantages” that should be “examined”.

1. An overview of the EU competition law approach to non-economic objectives

Winds of change...?

Commissioner Vestager: «protecting competition is about efficiency, but not only. Fundamentally, it is a question of **fairness** (...)



2. Recent developments on art. 101 TFEU and collective labour agreements: digital platform worker's rights

- Right to collective bargaining for workers as **fundamental right**: Universal Declaration on Human Rights (art. 23(4)), the International Covenant on Social, Economic and Cultural Rights (art. 8), the European Convention of Human Rights (art. 11) and the International Labor Organization (ILO) constitution. In the EU, this right is protected in Article 28 of the Charter of Fundamental Rights of the European Union
- Collective labour agreements and art. 101 TFEU:
 - Albany (Case C-67/96). Agreement falling outside art. 101(1) if
 1. is conducted in the context of collective bargaining between employers and employees (or representatives) and
 2. is aimed directly at improving the working terms and conditions of employees.*[no agreement between undertakings]*
 - FNV Kunsten (Case C-413/13): exception false self-employed (situation comparable to employee)

2. Recent developments on art. 101 TFEU and collective labour agreements: digital platform worker's rights

➤ Art. 101 TFEU and digital platform workers (gig workers)?

Commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022):

- Clarify when collective labour agreements between solo self-employed persons and one or several undertakings fall under art. 101 TFEU
- Definition of «solo self-employed persons working through digital labour platforms»:
 - Emphasis placed on the role of the online platform in organising the work performed by individuals at the request of the recipient of the service provided by the platform.
 - Does not cover online platforms that merely provide how the service providers can reach the end user.
- Reference to art. 3(3) TEU, art. 9 TFEU, art. 152 TFEU and art. 28 CFR

Other possible paths...?



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3. Recent developments on art. 101 TFEU and sustainability objectives: sustainability agreements

- Art 37 CFR, Art. 3(3) and (5) TEU, art. 7 TFEU, art. 9 TFEU, art. 11 TFEU
- **Art. 101(3) TFEU:**
 - *efficiency gains, fair share*, indispensability, remaining competition
 - 2004 Guidelines on art. 101(3) TFEU and 2011 Horizontal Guidelines: restrictive interpretation of art. 101(3)
 - Last years: calls from academics and NCAs to consider sustainability agreements

3. Recent developments on art. 101 TFEU and sustainability objectives: sustainability agreements

➤ Commission: Revised Horizontal Guidelines 2023. Chapter 9: Sustainability agreements

- Broad definition of sustainability: environmental, social and economic
- Standardisation agreements
- **Agreements involving individual use value benefits**
- **Agreements bringing individual non-use value benefits:** indirect benefits which result from the consumers' appreciation of the impact of their sustainable consumption on others.
 - Willingness to pay
 - Example: agreement improving animal welfare conditions
- **Agreements bringing collective benefits:** affects a larger group of society irrespectively of consumer's individual appreciation (internalize negative externalities).
 - Fair share: in the case of collective benefits, where two markets are related, efficiencies achieved on separate markets can be taken into account, provided that the group of consumers affected by the restriction and benefiting from the efficiency gains is substantially the same
 - Example: environmental damage agreement



3. Recent developments on art. 101 TFEU and sustainability objectives: sustainability agreements

Other routes beyond art. 101(3) TFEU:

- Albany route
- Wouters (C-309/99): exception on the basis of pursuing legitimate objectives of domestic public policy.

Conclusion

- 2 recent developments by the Commission regarding non-economic objectives and art. 101 TFEU:
 - *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons (2022).*
 - *Revised Horizontal Guidelines 2023. Chapter 9 on sustainability agreements*

- The TFEU provides for the consistency between its policies and activities, taking all of its objectives into account (art. 9 TFEU), which seems to be considered regarding social policy objectives but does not meet the same mark when considering other EU policy objectives concerning sustainable development.
 - NCAs and academic discussion seemed to go further.
 - But consumer welfare and efficiency at the center of art. 101 TFEU

- For now, COM uniform interpretation after many calls for clarity, serving judges as NCAs as guide for interpretation and enforcement of art. 101 TFEU

Thank you for your attention

Questions/ comments?

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