ACM Legal Memo, 27 September 2021

What is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context?

1. Introduction

There is an ongoing debate on the issue of what is meant by a fair share for consumers in article 101(3) TFEU in a sustainability context. In this Memo the ACM will set out its point of view. This is intended to inform both the discussion on this issue in the ECN context and the ACM's own policy towards sustainability agreements.

The fair share issue is related to three different questions:

- can out of market benefits be counted towards compensation of the consumers negatively affected by a sustainability agreement?
- can out of market benefits benefiting other consumers be counted towards a fair share for consumers overall?
- is full compensation of the negatively affected consumers required at all?

Below, we have discussed how these questions are addressed in the case law in order to assess the law as it stands. In addition, we discuss several related policy considerations.

2. The text of Article 101(3) TFEU itself

The first and second condition of Article 101(3) TFEU require a legal exemption for an otherwise anticompetitive agreement 'which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'. The third and fourth condition then regard the requirement of necessity and the bar on eliminating competition altogether. The second condition speaks of a fair share for consumers, and not of full compensation. It does not specify that this fair share regards a specific group of consumers in a particular market. To the contrary, what is fair is by nature context specific and cannot be defined by a hard and fast rule applicable in all circumstances. Observed in isolation, this Treaty provision therefore does not suggest that full compensation of consumers, let alone in-market, is required. The same applies if the relevant case law is analysed, as will be seen below.

3. The relevant case law prior to MasterCard

In *Consten and Grundig* (1966), the Court held regarding benefits under the first condition of Article 101(3) TFEU that '(T)his improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition'.[1] This concerns the general balancing required under that condition. Regarding the question of a fair share for consumers under the second condition, this statement by the Court therefore does not determine whether full compensation of negatively affected consumers is necessary or whether these advantages should be in or out of market. This casts doubt on the general applicability of the reference to *Consten and Grundig* in the current Article 101(3)

[1] Joined cases 56 and 58-64 *Consten and Grundig v Commission*, Judgment of the Court of 13 July 1966, ECLI:EU:C:1966:41, English special edition page 348.

Guidelines as the authority for the claim that full compensation of the directly affected group of consumers is always required.[2]

The Article 101(3) TFEU Guidelines cite the Court of First Instance (CFI) in *Shaw* (2002), as authority to substantiate the claim statement that in principle benefits should be sought in the same relevant market.[3] However, *Shaw* states that the assessment of countervailing benefits 'had to be made within the same analytical framework, that of the effect of the notified agreements on the functioning of the market, and hence on the situation of the tied lessees taken as a whole, not on each lessee considered in isolation'.[4] The CFI also states that 'it is not material that the benefits produced by the notified agreements do not entirely compensate the price differential suffered by a particular tied lessee if the average lessee does enjoy that compensation'.[5] This means that not the situation of the individual consumer is essential but a fair share for consumers as a whole. It does not require *per se* that the group of consumers to be compensated is normally limited to the relevant market. It is thus doubtful whether this case should be read as authority for a generally applicable rule that benefits should be sought and shared only in the relevant market, especially considering the *Compagnie Générale Maritime* judgment of the same year.

In *Compagnie Générale Maritime* (2002), the CFI held that Article 101(3) TFEU does not require that the benefits taken into account are linked to a specific market: 'regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market […], but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement'.[6] This case therefore clearly states that out of market benefits can be taken into account. It does not specify that disadvantaged consumers should always be fully compensated. Yet, the Article 101(3) TFEU Guidelines rely on *Compagnie Générale Maritime* as authority for considering effects in markets other than the relevant market only where substantially the same group of consumers is involved – as was in fact the case here, but not commented on by the CFI.[7]

GlaxoSmithKline (2006) was the first significant relevant case postdating the Article 101(3) Guidelines. Here, when analysing the first condition of Article 101(3) TFEU and citing *Compagnie Générale Maritime*, the CFI held that benefits could occur in different markets.[8] Because in the case at hand these markets were vertically related, the CFI observed that '(A)s those markets correspond to different stages of the value chain, the final consumer likely to benefit from those advantages is the same'.[9] In doing so it echoed the 2004 Article 101(3) Guidelines. Yet it did not say this is a generally applicable requirement for a fair share, or that full compensation is always necessary.

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[2] 'In line with the overall objective of Article 81 to prevent anti-competitive agreements, the net effect of the agreement must at least be neutral from the point of view of those consumers directly or likely affected by the agreement.' Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ 2004, C101/97 (Article 101(3) TFEU Guidelines), para 85, with a general reference to *Consten and Grundig*, above note 1.
[3] Article 101(3) TFEU Guidelines, above note 2, para 43, and text in footnote 56.
[4] Case T-131/99, *Michael Hamilton Shaw and Timothy John Falla v Commission*. Judgment of 21 March 2002, ECLI:EU:T:2002:83, para 163.
[5] *Ibid.*
[6] Case T-86/95, *Compagnie Générale Maritime and others*, Judgment of 28 February 2002, ECLI:EU:T:2002:50, para 343.
[7] Article 101(3) TFEU Guidelines, above note 2, Para 43, and text in footnote 57.
[8] Case T-168/01, *GlaxoSmithKline*, Judgment of 27 September 2006, ECLI:EU:T:2006:265, para 248. Confirmed on appeal in Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others*, Judgment of 6 October 2009, ECLI:EU:C:2009:409.
[9] *GlaxoSmithKline*, above note 8, para 251.

Finally, in *Asnef/Equifax* (2006), the Court held that '(I)n order for the condition that consumers be allowed a fair share of the benefit to be satisfied, it is not necessary, in principle, for each consumer individually to derive a benefit from an agreement, a decision or a concerted practice. However, the overall effect on consumers in the relevant markets must be favourable'.[10] This case did not revolve around whether full compensation is always required for consumers in a particular market. Hence it merely confirms the CFI ruling on the absence of a need for individual effects in *Shaw*.

In sum, the case law prior to *MasterCard* did not hold that full compensation was required for a fair share of benefits for negatively affected consumers to exist. It is the *MasterCard* case that sets out the most recent and complete statement of the law in this respect.

4. The MasterCard Case

The *MasterCard* case (2014) is sometimes used to support the view that competition authorities should credit only (a) objective benefits, (b) directly related to the consumers in the relevant market, and (c) of such a magnitude as to fully compensate these consumers

This is based on the Court's statement that where restrictive effects have been found on only one market of a two-sided system, 'the advantages flowing from the restrictive measure on a separate but connected market cannot, in themselves, […] compensate for the disadvantages resulting from that measure in the absence of any proof of appreciable objective advantages […] in the relevant market, in particular, […] where consumers on the two markets are not essentially the same'.[11] This is then seen as in line with the earlier ruling on the relevance of vertically related markets in *GlaxoSmithKline* discussed above.

Yet the Court in the statement quoted above merely states that such out of market benefits cannot 'in themselves' compensate for an absence of appreciable objective advantages in the relevant market if the two groups of consumers are not substantially the same. What this means is that if the two groups were substantially the same, out of market benefits could possibly suffice. This is because fair compensation for consumers can result from out of market benefits for a larger group of beneficiaries that includes the consumers who are also present in the relevant market, for instance because the relevant benefits accrue to society as a whole. This is the case at least if appreciable objective advantages accrue to the directly affected consumers. They need not be compensated out of market to the same extent as others.[12] However, whether they are conferred in market or out of market, or as the sum of both, the advantages enjoyed by directly affected consumers should be appreciable and objective.

While *MasterCard* therefore supports the view that out of market benefits cannot 'in themselves' compensate for in market disadvantages, it does not state that disadvantaged consumers should always be fully compensated by in market benefits. This is inherent in the requirement of a fair share as meaning appreciable objective advantages, not necessarily full compensation. That reading fits well with cases where out of market

[10] Case C-238/05, *Asnef-Equifax*, Judgment of 23 November 2006, ECLI:EU:C:2006:734, para 72.

[11] Case C-382/12 P, *MasterCard Inc*, Judgment of 11 September 2014, ECLI:EU:C:2014:2201, paragraph 242.

[12] 'Lastly, in so far as the appellants complain that the General Court did not explain why all the categories of consumers must benefit from the same share of the profit resulting from the MIF, suffice it to note that that complaint is based on a misreading of the judgment under appeal. The General Court did not in any way find that each group of consumers should benefit from the same share of that profit, but merely indicated that, as merchants constitute one of the two groups of users affected by payment cards, they should also enjoy appreciable objective advantages attributable to the MIF. Thus, by using the word 'also' in paragraph 228 of its judgment, the General Court correctly indicated that merchants had to enjoy the MIF 'as well as' cardholders, and not 'to the same extent' as them.' *Ibid.*, para 248.

benefits result in appreciable objective advantages being enjoyed by a larger group contribute to a fair share for consumers overall.

As such *MasterCard* clarifies the case law regarding the three questions set out at the beginning of this memo as follows:

(i) out of market benefits are counted towards compensation of the consumers negatively affected, in particular if they affect substantially the same group;
(ii) out of market efficiencies benefiting other consumers can also be counted toward a fair share for consumers overall; and
(iii) full compensation of the negatively affected consumers is not required, just conferral of appreciable objective advantages.

Therefore, in so far as the *MasterCard* and/or *GlaxoSmithKline* are relevant because they deal with the special case of two-sided respectively vertically related markets instead of with broadly felt sustainability benefits, and based on the prior case law discussed above, the essential questions regarding out of market benefits can indeed be solved as set out here. If the discussion in the ECN context were to conclude otherwise, in the alternative, we submit that the *MasterCard* and *GlaxoSmithKline* case law may be context specific.[13]

In any event we conclude that as a matter of the law as it stands, out of market benefits are relevant, full compensation of directly affected consumers in the relevant market is not required in all cases, and we should act accordingly when applying Article 101(3) TFEU to sustainability agreements.

5. Who should pay for addressing negative external effects?

Of course, this discussion is not for academic reasons. In fact, in the light of the recent IPCC report, the urgency of the matter scarcely needs further underlining.[14] We are convinced that our interpretation is correct not only in law, but also as a matter of policy for sustainability agreements for the following reasons. The sustainability context is generally that of initially negative but potentially (once remedied) positive externalities affecting society as a whole. Where sustainability issues result from negative externalities, consumers in the relevant market are also polluters who have a choice to modify their behaviour or not. The out of market consumers share in the negative effects of the pollution without having this choice or the option of forcing in market consumers to modify their polluting behaviour.

Hence questions such as who the beneficiary of polluting consumption is, and who controls that consumption, are relevant to deciding whether in market consumers should incur (part of) the costs of measures that are designed to reduce the relevant negative externalities through sustainability agreements. The principle of the polluter pays expressed in Article 191(2) TFEU means the costs of negative externalities should rest with direct beneficiaries of the pollution, and conversely the benefits of addressing these externalities need not be limited to these direct beneficiaries. Applying this principle in the Article 101(3) TFEU context would justify a fair share for direct consumers that amounts to appreciable objective benefits but does not equate with their full compensation.

[13] Case C-382/12 P, *MasterCard*, Opinion of Advocate General Mengozzi of 30 January 2014, ECLI:EU:C:2014:42, para 150ff.
[14] Climate Change 2021, The Physical Science Basis: Working Group I contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 9 August 2021, https://www.ipcc.ch/report/ar6/wg1/

This again would be in line with the obligation to apply the competition rules in a manner that is consistent with the other objectives of the Treaties such as sustainable development based on balanced economic growth, and a high level of protection and improvement of the quality of the environment, and with the requirement of a consistent interpretation of the Treaties overall. We refer to:

- Article 7 TFEU, which requires the EU to 'ensure consistency between its policies and activities';
- Article 11 TFEU, which demands that 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'; and
- Article 191(2) TFEU, which states EU policy, including competition policy, 'shall be based on the […] principles […] that environmental damage should as a priority be rectified at source and that the polluter should pay'.

For all these reasons we advocate the approach set out above.

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