ACM Guidelines on competition law and sustainability, a new dawn for sustainability agreements

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A welcome initiative

Pressure has been increasing on businesses to contribute proactively to achieving climate and broader sustainability objectives. Companies consider that such initiatives often require cooperation with others, in order to get such projects successfully off the ground (for example, due to a minimum scale being required and/or due to a first mover disadvantage). However, competition law is often perceived as obstructing the fruition of collaborative sustainability initiatives, as the cartel prohibition can apply in case such joint projects (e.g. when resulting in increased prices or a reduction of available products).

A fear of fines being imposed has prevented many sustainability initiatives from being implemented. Competition authorities have therefore been encouraged by companies to allow for more flexibility in the area of sustainability and to provide more concrete guidance about what is and what is not allowed. Against that background, on 9 July, the Netherlands Competition Authority (*Autoriteit Consument en Markt*, ***ACM***) published its draft revised Guidelines on Sustainability agreements (the ***Guidelines***) for public consultation.[1]

In doing so, ACM wants to take a leading role among competition authorities in Europe. Throughout the Guidelines, ACM identifies additional legal and practical flexibility under the Dutch competition rules permitting sustainability collaborations, and also gives concrete additional guidance to help companies assess their planned initiatives. The Guidelines provide more clarity on categories of agreements that (a) may fall outside the scope of the cartel prohibition, or (b) can be exempted from the cartel prohibition as a result of identified sustainability benefits outweighing any restrictions of competition.

Increased flexibility, increased sustainability

The Guidelines refer to the UN description of "*sustainable* development"[2], which covers matters including the environment, animal welfare, fair trade and human rights. As further explained below, the Guidelines distinguish between (a) agreements relating to the protection of the environment (referred to as so-called environmental-damage agreements) and (b) other sustainability initiatives

(referred to as other sustainability agreements). The Guidelines are more lenient in relation to the first category.

ACM reiterates that **many sustainability initiatives do not restrict competition** and therefore fall outside the scope of the cartel prohibition to begin with. These include, for example:

- sustainability Codes of Conduct (e.g. certification labels) as long as access is voluntary and non-discriminatory;
- joint sourcing or know-how sharing agreements for the introduction of new more sustainable products, provided the agreement only applies in the start-up phase and individual companies lack the know-how to do so themselves; and
- covenants to ensure compliance with legislation in the whole supply chain (e.g. a ban on illegal logging), provided no competitively sensitive information is exchanged.

Sustainability **initiatives that do fall within the scope of the cartel prohibition are nonetheless allowed** if they comply with the so-called four cumulative criteria exemption test (articles 6(3) Dutch Competition Act and 101(3) Treaty on the Functioning of the European Union).[3] In short, companies need to demonstrate that sustainability gains outweigh any harm to competition, that there are no less restrictive means available, and that customers (or in certain instances, society as a whole – see below) benefit sufficiently. Companies can, *inter alia*, use third party studies to substantiate the sustainability gains and negative externalities can be included for this purpose.

In an effort to as much as possible facilitate genuine sustainability initiatives which may impact competition, ACM includes the following four key points in the Guidelines:

1) Benefits to wider society can be taken into account – Importantly, with respect to environmental-damage agreements – which aim to improve production processes that cause harm to humans, the environment, and nature – ACM adopts the position that agreements affecting key parameters of competition (e.g. on price, volume or available assortment) can be offset by sustainability gains that benefit the entire society. It is further required that these benefits support an international or national standard to which the government is bound (e.g. the Paris Climate Agreement).

Traditionally, competition authorities have required that a reduction in competition could only be offset by sustainability gains that benefit the users of the goods in question. By expanding the scope of beneficiaries, companies should find it easier to demonstrate the required sustainability benefits. It will be interesting to see whether this new approach is considered compatible with competition law by courts and the European Commission. Note that this relaxation in the application of the cartel prohibition does not apply to other sustainability agreements (e.g. agreements on animal welfare) or to environmental-damage agreements which have benefits beyond those mandated by the standards binding upon the government.

2) Case specific guidance possible – Although companies in principle need to self-assess whether their sustainability initiative is compatible with the cartel prohibition, ACM is willing to provide case specific guidance at an early stage and invites companies to be in contact.

3) Reduced risk of fines – The Guidelines provide additional comfort that ACM will not impose fines in case an initiative results in competition law infringements where (a) companies have followed the Guidelines in good faith and their sustainability initiative was public, or (b) ACM has provided previous guidance which did yet not identify a concern.

4) Quantification of sustainability benefits not always necessary – A challenge faced by

companies in the past is that it can be difficult to quantify sustainability gains. The Guidelines specify that a qualitative substantiation is sufficient where (a) the companies involved have a combined market share of not more than 30% or (b) it is self-evident that the benefits (more than) offset the harm to competition.

In other cases where quantification is required, ACM proposes the inclusion of the "environmental price"[4] to calculate the price of a product. This means that costs to society which are prevented by the initiative may be included in the analysis. An example could be the avoidance of an increase in health care costs due to air pollution.

Outlook

It is clear that ACM is taking a progressive approach, which is set to impact the wider debate in the EU and across the globe on how competition law should be applied to sustainability collaborations.[5]

Although ACM's consultation process will invariably result in changes being made, we expect that the essence of the Guidelines will survive and ultimately be adopted. In this respect, interested parties may want to consider whether they want to participate in the consultation process.

The Guidelines should be seen as the "first domino piece" and attention will now move to whether other authorities will follow suit. At an EU level, the European Commission has indicated it will come up with more concrete guidance in the context of its evaluation of the horizontal cooperation guidelines. It expressed support for ACM's position that there is a need for clear guidance in this field, while stressing the need for a uniform approach.

Ultimately, internationally operating businesses will (also) be seeking comfort that their cross-border sustainability projects will not remain vulnerable to challenges by authorities in other jurisdictions – including at the EU level. That said, there seems to be clear momentum for businesses, trade associations and interest groups to (informally) initiate conversations with ACM to explore permissible shaping of sustainability initiatives, whether having a strictly Dutch scope or broader. A positive opinion of ACM may help convince authorities in other jurisdictions as well.

We encourage interested parties to get in touch about how the Guidelines and liaising with ACM could assist in advancing sustainability initiatives.

[1] The consultation runs until 1 October 2020. The Guidelines aim to replace ACM's existing guidelines in the area of sustainability.

[2] As described in UN's 2012 Resolution 66/288 as the development towards "*an economically, socially and environmentally sustainable future for our planet and for present and future generations*".

[3] These are: (a) the agreements offer efficiency gains, including sustainability benefits; (b) the users of the products in question are allowed a fair share of those benefits; (c) the restriction of competition is necessary for reaping the benefits, and does not go beyond what is necessary; and (d) competition is not eliminated in respect of a substantial part of the products in question.

[4] See CE Guide on environmental prices (CE Delft 2017).

[5] For an overview of the debate on climate change and competition law in other jurisdictions, see https://sustainability.freshfields.com/post/102g6wo/green-competition-law-a-changing-enforcement-cli

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