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Art 101(3) and sustainability – new developments in the Netherlands

Jan Peter van der Veer (RBB Economics) · Thursday, May 15th, 2014

On 6 May, the Dutch government issued a set of [policy directions](#) (“Directions”) to the Dutch competition authority (“ACM”) concerning the application of the Dutch equivalent of Article 101(3) TFEU in respect to sustainability initiatives. Around the same time, ACM published a [Vision Document](#) setting out how the authority intends to implement the Directions in practice. Both documents raise interesting issues on the application of Article 101(3), and corresponding national laws, on sustainability initiatives, and in particular on the question of how to assess the consumer benefits of such initiatives.

Sustainability is a hot topic as an increasing number of companies seek to do business in a way that avoids compromising the ability of future generations to meet their needs. Many initiatives are undertaken unilaterally. In some cases, however, it is clear to companies that a certain level of collaboration is required to reach particular sustainability targets. When this results in agreements that affect parameters of competition, the question arises whether they are eligible for exemption under the four criteria of Article 101(3). Among other things, this requires an assessment of efficiency benefits generated by such collaboration, as well as the question whether consumers stand to receive a fair share of these benefits.

A particular issue in the context of the efficiency benefits of sustainability initiatives is that some of these benefits may be non-economic in nature, or may only occur in the future. Consider for example an agreement between fishermen to reduce overfishing. Such an agreement will reduce supply and may give rise to price increases. However, if the agreement prevents depletion of the fish stock in question, it will give rise to an important environmental benefit. It will also ensure that future consumers will be able to continue to enjoy the fish in question.

Both the Directions and ACM’s Vision Paper state, in this context, that when assessing whether an agreement gives rise to efficiency benefits (akin to the first criterion of Article 101(3)), a **broad welfare perspective** is to be adopted. This implies that not only direct benefits to consumers in terms of price, quality or product variety are to be taken into account, but also broader benefits such as environmental effects. This approach is fully in line with economic principles applied, for example, when undertaking cost/benefit analysis of proposed public investment projects: effects on the environment (positive as well as negative) are routinely quantified using standard valuation techniques.

The documents helpfully clarify the role of this broad welfare principle in the discussion of the

extent to which consumers stand to receive a fair share of the benefits (akin to the second criterion of Article 101(3)). As the Directions require and as ACM confirms, **the interests of both current and future consumers are to be taken into account** when undertaking this assessment (under Dutch law). In the fishing example referred to above, this means that an agreement to reduce overfishing might thus be exempted if it is sufficiently clear that it will enhance prospects for future generations of consumers also to enjoy the fish, even if prices for current consumers would rise.

Subject to this point, the documents state, in line with par. 85 of the [Article 101\(3\) Guidelines](#), that 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. Consumers within the market to which the agreement relates must thus not be made worse off, with some flexibility for trading off the interests of current and future consumers within that market.

In this context, an interesting question arises with respect to the assessment of those agreements that give rise to broader environmental benefits, for example lower CO₂ emissions. This question arose in the *CECED* case, for which the Commission granted an [individual exemption](#) in early 1999. This case concerned an agreement between producers of domestic washing machines to cease producing and importing the least energy efficient washing machines. This agreement resulted not only in direct benefits to consumers in the form of lower energy costs, but also in environmental benefits through lower CO₂ emissions. At the time, the Commission took both types of benefit into account, stating in respect to the CO₂ benefits that “*such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines* (par. 56).” However, in subsequent (implicit) references to this case, notably at par. 329 of the [Guidelines on horizontal cooperation agreements](#), the Commission no longer referred to the CO₂-related benefits (seemingly downplaying them), instead only citing the direct consumer benefits through lower energy costs that the agreement would give rise to.

The Directions bring the CO₂-related benefits back on the table, stating in the context of the discussion of the *CECED* case that “*the reduced CO₂ benefit will provide future benefits to consumers because they need to incur less costs to reduce CO₂ emissions*”. From an economic point of view, this is entirely correct. However, it remains the case that the benefits in terms of reduced CO₂ emissions accrue to a wider group of consumers than those directly affected by the agreement. Unfortunately, the Directions and the Vision Document do little to resolve this tension.

The developments in the Netherlands represent welcome steps towards an assessment of sustainability initiatives that is more firmly rooted in an appropriate economic welfare perspective. However, in particular given the critical importance of reducing CO₂-emissions, it would be very useful to see wider environmental benefits more directly incorporated into the evaluation framework than is the case at present. Only that way can competition policy truly contribute to sustainable development.

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