

Competition law and sustainability initiatives: Dutch bill provides more leeway

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Introduction

On 4 July 2019 a long-awaited Dutch legislative proposal regarding sustainability initiatives ("Wet ruimte voor duurzaamheidsinitiatieven") was submitted to the Dutch House of Representatives. The proposal aims to foster collaboration between undertakings towards sustainability goals by removing the barrier of competition law. This is an interesting development because of at least two reasons: (i) it shows that sustainability is high on the agenda of the Dutch government and (ii) it allows collaborations which would otherwise perhaps not have been allowed under the competition rules, more specifically the cartel prohibition.

In this blog, we briefly discuss the background of the proposal, the proposal itself and how the proposal should be seen in light of the principle of loyalty as laid down in Article 4 (3) of the Treaty of European Union ("TEU") which prohibits Member States to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules.

Background of the proposal

Closure of coal plants and "Chicken of Tomorrow"

In recent years, the Netherlands experienced the barriers that competition law can pose to sustainability initiatives, even when those initiatives have a broad consensus within society. For example, the Dutch Authority for Consumers & Markets ("ACM") blocked both the plans for a coordinated closure of five coal plants and an initiative among supermarkets, slaughterhouses and farmers to completely replace regularly-produced broiler chicken with more sustainable alternatives in order to raise animal welfare (so-called *Chicken of Tomorrow*-initiative) because the conditions of Article 6(3) of the Dutch Competition Act (DCA) (the Dutch equivalent of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU)) were not fulfilled.

Article 101(3) TFEU/6(3) DCA did not provide the desired outcome

According to the ACM, the agreements were restrictive of competition and on balance harmed consumers, while offering too few benefits. In the case of the closure of the five coal plants, for example, the ACM concluded that the possible reduction of carbon dioxide (CO₂) emissions was cancelled out by the fact that the emission rights could be used elsewhere on the European market for CO₂ emission rights. Emissions were thus on balance not reduced but merely transferred elsewhere. In the so-called *Chicken of Tomorrow*-initiative, the ACM concluded, amongst other things, that there were less far-reaching measures that could also lead to making the chicken meat offered in supermarkets more sustainable, such as improved consumer education.

Consequently, sustainability initiatives were blocked on the basis of competition law, even those that the government considered desirable for a number of reasons.

Amending policy document Competition and Sustainability was insufficient

In order to address this issue, the Dutch government announced in its letter of 13 July 2015 that it would amend its "Policy Document: Competition and Sustainability" (*Beleidsregel mededinging en duurzaamheid*) in such manner that the interests of consumers and the interests from a sustainability perspective should be weighed equally when assessing sustainability initiatives. This policy document aims to provide guidance to the ACM on how to assess sustainability initiatives within the competition law framework. However, the Dutch government concluded that due to European rules, it turned out not to be possible to have an equal weighing of consumer and sustainability interests. With the current legislative proposal this should, however, be possible, according to the Dutch government.

What does the proposal entail?

Submission of request

In brief, parties, whether being an organisation, an undertaking or even an individual citizen, can propose a sustainability initiative to the relevant Minister and request that Minister to have this initiative translated into legislation.

Procedure and minimum requirements

The proposal sets out the procedure for submitting such a request and lays down some minimum requirements. For example, the parties will need to describe what sustainable goals are served by their initiative. Although "sustainable development" has been given a broad definition in the proposal, the government decided to limit the proposal for now only to initiatives related to (i) the reduction of greenhouse gas emissions, (ii) sustainable energy production or energy savings and (iii) animal health or welfare. Other topics can be added in the future.^[1]

Moreover, the requesting parties need to substantiate the level of support for the initiative from the society and the consequences of the initiative for the sustainable development, the market and otherwise.

Assessment by the Minister

The request is then assessed by the relevant Minister. Thereby, the Minister is obliged to request the advice of the ACM regarding the market effects and to take into account amongst others the practicability and enforceability of the initiative and whether less restrictive alternatives exist.

If the Minister believes it is in the public interest to give the initiative a "green light", the initiative will be laid down in a general administrative order (*algemene maatregel van bestuur*). This order will not have an indefinite validity, but in principle a maximum period of five years with the possibility of a one-time extension of another five years. Initiatives that turn out to be successful can get a permanent character by following the regular legislative procedure.

The proposal in light of Article 4 (3) TEU

Interesting aspect of this proposal is whether it is not contrary to European law to lay down sustainable initiatives in legislation that otherwise might have been blocked for reasons of competition law. Although the cartel ban is addressed to undertakings and not to laws or regulations emanating from Member States, the cartel ban, read in conjunction with Article 4(3) TEU, nonetheless requires Member States to refrain from (i) requiring or encouraging the adoption of agreements, decisions or concerted practices contrary to Article 101 TFEU or reinforcing their effects, or (ii) from divesting its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere. See for example the cases *Cipolla*, *Mauri* and *Arduino*.

According to the explanatory memorandum to the proposal, however, that would not be the case here as, for example, the parties only submit a request to set rules which enable the sustainability initiative. There is thus not (yet) an agreement that restricts competition which is then ratified by laying it down in legislation. In that context, it is of course important that the parties do not apply the agreement before the rules have actually been laid down, thus the explanatory memorandum.

Next steps

It is, however, yet to be seen whether this proposal will successfully pass the Dutch House of Representatives and the Dutch Senate. The Dutch Council of State was quite critical in its advice regarding this proposal. According to the Council of State, there is currently a risk that on the one hand, the involvement of the undertakings concerned in the drafting of the request already leads to a conflict with competition law and, on the other hand, parties become perhaps unnecessarily reluctant in developing sustainability initiatives.

Moreover, according to the Dutch Council of State, the scope for sustainability initiatives in relation to competition law should preferably be clarified on a European level. The Dutch competition rules are based on the European rules and therefore a structural solution should be achieved within the European framework; not on a national level. For that reason the Council advises to continue the discussions on an EU level.^[2]

The proposal shows, however, that sustainability is high on the agenda of the Dutch government as a result of which the proposal might successfully pass the legislative procedure anyway. To be continued.

[1] Although an amendment has already been submitted to also add international chain responsibility to the proposal, see the amendment through the following link (available only in Dutch): <https://zoek.officielebekendmakingen.nl/kst-35247-5>.

[2] See for more information about the bill our *Competitive Edge Newsletter* of August 2019, this blog by Dario Chiari and for recent developments in the US, this blog by Lennard Michaux.