

Dutch competition authority offers more leeway for environmental sustainability initiatives

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Introduction

On 9 July 2020 the Netherlands Authority for Consumers and Markets ('**ACM**') published its draft sustainability guidelines ('**Draft Guidelines**') containing ACM's proposed approach of assessing the compatibility of sustainability initiatives with competition law. A new feature in the Draft Guidelines is the proposal to take into account in the competition law assessment of environmental sustainability initiatives the benefits for society as a whole instead of only the user group buying the involved products. This will provide companies with more room to enter into sustainability agreements, particularly to achieve climate objectives such as carbon emissions reduction.

Against the backdrop of the European Commission's [Green Deal policy](#) and, for example, the [Paris Climate Agreement](#) ACM takes with its Draft Guidelines a leading role in the policy debate on whether (also) competition law should be altered in order to make climate goals attainable. The big question is however whether the Draft Guidelines are in line with European competition law. With the publication of the Draft Guidelines national and international stakeholders have the opportunity to [submit their written views](#) on the Draft Guidelines until 1 October 2020 and join this debate.

Current approach in assessing sustainability initiatives

Sustainability initiatives are assessed against the cartel prohibition of Article 101 Treaty on the Functioning of the European Union ('**TFEU**') and its Dutch equivalent Article 6 of the Dutch Competition Act ('**DCA**'). Once a particular sustainability agreement has been found to be restrictive of competition, the key assessment is whether it could still be exempted under Article 101(3) TFEU and Article 6(3) DCA. Main obstacle is generally that the pro-competitive effects of the agreement must outweigh its anti-competitive effects. In order to meet the exemption criteria it is also required that consumers are allowed a fair share of the efficiency gains, the restriction of competition is indispensable for reaping the benefits and the sustainability agreement does not eliminate competition in respect of a substantial part of the market.

As is also stated in the ACM Draft Guidelines, several sustainability agreements will usually not be anti-competitive to start with (so an appeal to the exemption under Article 101(3) TFEU or 6(3) DCA is not even required) if they do not or not appreciably affect competition. The Draft Guidelines provide an overview of several types of these sustainability agreements that (under certain conditions) are allowed. Examples are sector agreements setting sustainability targets and codes of conduct on sustainability (involving e.g. joint standards and certification labels) with transparent, reasonable and non-discriminatory participation criteria.

However, in the past ACM found several sustainability initiatives to be in violation of the competition rules. Examples of this are the agreement between energy producers to [close down coal-fired plants](#) in The Netherlands and the arrangements between supermarkets, poultry farmers, and broiler meat processors concerning the selling of [chicken meat produced under enhanced animal welfare-friendly conditions](#). In these cases, the ACM took in the balancing exercise under Article 101(3) TFEU and Article 6(3) DCA only the benefits of the agreement for the (direct) users of the products involved into account instead of its wider societal benefits. Which benefits were considered to not weigh up to the higher prices and/or lower product choice for these users resulting from the sustainability initiative.

New elements in the Draft Guidelines for assessing sustainability initiatives

Taking account of the wider societal benefits of 'environmental-damage agreements'

The major change ACM now proposes in its Draft Guidelines is to conduct a different competition law assessment with respect to so-called 'environmental-damage agreements' versus other sustainability agreements. ACM argues in its Draft Guidelines that for environmental-damage agreements it should be possible to consider the benefits for the wider society as a whole instead of only the benefits for the users of the products involved. According to ACM, this means that for an environmental-damage agreement to be allowed under the competition rules '*the benefits for society as a whole must be equal or greater than the disadvantages for users*'. On the basis of this standard the benefits of an agreement will more quickly outweigh the disadvantages compared to the current applicable standard.

This proposal deviates from the basic Article 101(3) TFEU principle used by the European Commission to compensate user groups of the involved product(s) at least for the harm caused to them by the restriction of competition:

"The concept of 'fair share' implies that the pass-on of benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1) [currently Article 101(1)]. In line with the overall objective of Article 81 [currently Article 101] 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 (80). If such consumers are worse off following the agreement, the second condition of Article 81(3) [currently Article 101(3)] is not fulfilled."^[1]

In order to qualify as an "environmental-damage agreement" ACM defines two cumulative criteria:

- the agreement aims to prevent or limit any obvious environmental damage, and
- the agreement helps, in an efficient manner, to comply with an international or national standard to prevent environmental damage to which the government is bound.

With respect to other sustainability agreements (e.g. on fair international labour conditions or animal welfare) and environmental agreements that do not meet the two cumulative criteria (e.g. environmental standards that are more ambitious than the binding standard for the government), ACM will still follow the basic principle that users must be fully compensated by the benefits of the sustainability agreements for the harm that they suffer caused by a restriction of competition.

No quantification of the effects in every case required

In addition, ACM proposes in its Draft Guidelines that it is not required to quantify the effects of an agreement in every case and that in some cases a qualitative assessment will suffice. This is relevant as quantifying the effects of sustainability agreements has in the past proven to be complicated and burdensome for the parties involved. ACM states in its Draft Guidelines that it is usually possible to conclude that an agreement meets the requirement of Article 101(3) TFEU and Article 6(3) DCA without quantification if:

- the companies involved have a combined market share of no more than 30%; or
- the benefits of the agreement clearly outweigh its harm to competition.

No fines imposed by ACM if guidelines are followed in good faith and the agreements were published

A final interesting element in the Draft Guidelines is that ACM states it will not impose fines with respect to published sustainability agreements for which the guidelines have been followed in good faith, but which have in the end proven to be incompatible with the competition rules. While ACM indicates no fines will be imposed in these situations, it may however be required in these cases to adjust the involved agreements in consultation with or after an intervention by ACM.

Final remarks

In the past competition law sometimes turned out to be an obstacle for private sector sustainability initiatives. ACM's Draft Guidelines aim to accommodate this. In addition to the Draft Guidelines, a [legislative proposal](#) ('*Wet ruimte voor duurzaamheidsinitiatieven*') on sustainability initiatives is also currently pending in the Dutch House of Representatives. This legislative proposal provides for a procedure enabling private parties to request the relevant Minister to legitimize a sustainability initiative (outside of the competition law rules) by laying it down in a generally binding regulation. At this point, it is still uncertain whether and when this bill will be passed. See for more information about this bill the [blog](#) by Mariska van de Sanden and Hera Butt (Bird & Bird Netherlands LLP).

A prominent question that comes to mind is whether the abovementioned examples of sustainability initiatives that have been blocked by ACM in the past (e.g. closing of coal-fired plants and the so-called "chicken of tomorrow"), would have been approved under the Draft Guidelines now proposed by ACM. Especially since the Draft Guidelines explicitly supersede ACM's narrower approach set out in its 2014 Vision Document on Competition and Sustainability and 2016 Basic Principles for ACM's oversight of sustainability agreements.

In any case, with its Draft Guidelines ACM now takes a progressive and leading stance in the European policy debate on whether also (the application of) competition law should be altered in order to make climate and other sustainability policy goals attainable. The big question is whether ACM's proposal to take into account the wider societal benefits in its assessment of environmental-damage agreements will be followed by other competition authorities. Shortly after the publication of the Draft Guidelines the European Commission published a [statement](#) with respect to ACM's proposal stating that it: '*fully supports the need for clear guidance on agreements aiming at reducing greenhouse gas emissions that would be compatible with competition law*'. The Commission is currently examining sustainability agreements as part of its [review](#) into the two horizontal block exemption regulations which are due to expire on 31 December 2022. It will be interesting to see whether the European Commission will join ACM in a more lenient approach towards environmental-damage agreements in the future.

ACM invited stakeholders to [submit their written views](#) on the ACM Draft Guidelines until 1 October 2020 and join this debate.

[1] Guidelines on the Application of 101 (3) TFEU, par. 85.