

Competition Law and Sustainable Growth: The Dutch Competition Authority consults on Guidelines that pave the way for more flexibility in the field

21 July 2020

Companies are under increasing pressure to ensure they are operating in a sustainable manner and, in turn, contributing to broader goals of sustainable growth (e.g. achieving CO² reduction goals). However, it is often the case that meeting such objectives requires companies to cooperate with competitors in order to achieve the necessary scale or combine the required know-how. It is in this context that the Dutch Authority for Consumers and Markets (the "ACM") very recently published draft guidelines in respect of so-called sustainability agreements entered into between competitors or vertically linked companies (the 'Draft Guidelines on Sustainability Agreements – Possibilities within competition law', hereafter the "Guidelines").

The ACM is the first competition authority in the EU to take such a public (formal) stance on this issue. In doing so, the ACM recognizes that agreements between companies (including between competitors) can contribute to public goals of sustainable development. This move is a testament to the ACM's and the Dutch Government's support of sustainable growth initiatives and is likely to foster a similar focus within other competition authorities in the EU (and possibly beyond). In that respect, the European Commission (the "EC") has already expressed support and acknowledges the need for clear guidance on agreements between companies that aim to reduce negative externalities of economic growth on humans, animals and the environment more generally. In fact, the EC has indicated it is looking closely at including sustainability agreements into the updated Horizontal Block Exemption Regulation expected in 2022.

What is the guidance for Sustainability Agreements?

Sustainable development is a broad concept that cannot be defined unequivocally. The ACM refers to the UN Resolution 66/288 of 2012 which defines sustainable development as "*development towards an economically, socially and environmentally sustainable future for the earth and for present and future generations*". This includes the protection of the environment, biodiversity, climate, public health, animal welfare and fair trade.

Thus in the ACM's view, sustainability agreements are aimed at identifying, preventing, limiting or restoring the negative externalities of economic activities on people (including their working conditions), animals, the environment and/or nature.

The ACM provides guidance to companies in respect of agreements entered into with competitors or companies at other levels in the vertical value chain that pursue sustainability objectives. While the ACM underlines that this is no free ticket for companies to enter into anti-competitive agreements, it notes that the cartel prohibition does not stand in the way of companies concluding sustainability agreements. Thus, the ACM acknowledges that pursuing sustainable growth may in some instances trump manageable antitrust concerns, especially where society as a whole is better off as a result of a sustainability agreement entered into by competitors.

How the ACM proposes to review Sustainability Agreements?

The Guidelines identify different types of sustainability agreements and provide guidance with respect to each of these. This guidance is aimed at giving companies sufficient support in designing their sustainability agreements in a competition law compliant manner:

1. **Sustainability agreements that do not restrict competition and may fall outside of the prohibition on agreements restricting competition.**

Sustainability agreements that only impact less crucial parameters of competition (ie. no impact on prices or regional availability of products/services) and have only negligible effects on competition will not fall under the cartel prohibition contained in Article 101 TFEU and its Dutch equivalent. The Guidelines provide examples of such agreements:

- Codes of conduct for environmentally or climate conscious market behaviour;
- Agreements aimed at improving the quality of products whereby certain less sustainably produced or offered products are no longer sold; or
- Initiatives that create new products or markets and that require a joint initiative to have sufficient means of production, know-how, or to achieve sufficient scale.

2. **Sustainability agreements that restrict competition but generate sustainability efficiencies that outweigh the loss of competition.**

Agreements which fall under the Dutch/EU prohibition on restrictive agreements and restrict competition in respect of more critical parameters of competition but, nevertheless, generate sustainability efficiencies, may be allowed according to the ACM. The Agency notes that this assessment requires the meeting of the four cumulative criteria of Article 101(3) TFEU and its Dutch equivalent: (i) the agreements offer sustainability benefits; (ii) the users of the products/services in question are allowed a fair share of those benefits; (iii) the restriction of competition is necessary to obtain the benefits and does not go beyond what is necessary; and (iv) competition is not eliminated in respect of a substantial part of the products/services in question.

The most striking element of the ACM's draft Guidelines is that sustainability benefits are not only assessed narrowly in reference to the users of products/services directly impacted by the restriction of competition in question. Sustainability benefits that are valuable for current (and future) users are also to be taken into account. For environmentally focussed agreements that contribute to achieving a national or international environmental

standard (and do not aim to go beyond this), benefits for society (or parts thereof) as a whole may sufficiently outweigh a loss of competition. Thus, a sustainability agreement having the effect of reducing CO₂ emissions in line with the related EU goals can be lawful if society benefits more widely – even if users of products/services in question are not entirely compensated for the loss of competition (e.g. incur a price increase).

Companies can substantiate benefits either in a qualitative or quantitative way (e.g. with third-party studies), depending on the case at hand. For instance, environmental benefits can often be quantified, namely by indicating the extent to which certain harmful emissions will be reduced. However, in the absence of numerical data, substantiation will sometimes have to remain qualitative (i.e. descriptive). Furthermore, the Guidelines indicate that it is not necessary to quantify precisely the effects of the sustainability agreement when the parties have combined market shares not exceeding 30% or when the disadvantages of the agreement clearly do not outweigh the benefits. In those cases, a qualitative substantiation may suffice.

The ACM is looking to have dialogue with companies, not to fine them

The ACM makes clear that its goal in assessing sustainability agreements is to enter into dialogue with companies and to find solutions that allow the realisation of sustainability objectives should questions arise. The ACM does not privilege enforcement of anti-competitive sustainability agreements by means of repressive measures such as fines. In particular, for publicly announced sustainability agreements that incorporate the principles of the Guidelines in good faith but later turn out not to be compatible with the Dutch Competition Act, it is envisaged that an adjustment of the agreements can be made in consultation with, or after an intervention by, the ACM.

What does this mean for the future?

The forward-looking nature of these new Guidelines make the ACM stand out as one of the most progressive competition authorities in Europe and will undoubtedly spur further debate on the topic. It will be interesting to see which other authorities follow suit. It will also be interesting to see whether the EU courts will consider these guidelines aligned with EU competition law should cases be brought before them.

While the EC expressed support for the ACM's position by noting that there is a need for clear guidance in this field, it nevertheless stressed the need for a uniform approach. The EC has also indicated that it is looking into this issue as part of the current review of the Guidelines on Horizontal Cooperation Agreements.

We encourage stakeholders to consider whether they want to participate in the ACM's consultation process, which runs until 1 October 2020.

Further information can be found on the ACM's [website](#).

Contacts



Dr. Salomé Ciscal De Ugarte
Partner, Brussels
T +32 2 505 0908
salome.ciscaldeugarte@hoganlovells.com



Raphaël Fleischer
Senior Associate, Brussels
T +32 2 505 0914
raphael.fleischer@hoganlovells.com



Ivan Pico
Associate, Brussels
T +32 2 505 0969
ivan.pico@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2020. All rights reserved.