Bird & Bird

A risk of "greenwashing" by competition authorities?

Pauline Kuipers, Tialda Beetstra and Joost van Roosmalen, Bird & Bird (Netherlands)

Sustainability as a policy priority

It is no news that sustainability is an important topic of competition policy across the EU. There is clear consensus that competition law enforcement should be careful not to hinder cooperation between companies, even competitors, that facilitates the realisation of or progress towards reaching sustainability goals of climate policy (or beyond). However, the extent to which Article 101(3) TFEU can be used as a legal basis for exempting restrictive sustainability agreements between competitors from the cartel prohibition continues to be a hotly debated topic between the European Commission and the national competition authorities within the European Competition Network.

However, with the push for companies (and public decision-makers) to make real progress towards reaching sustainability goals comes a risk of 'greenwashing'. Greenwashing is the phenomenon of companies giving a false impression of their environmental impact or benefits of their products or conduct (like exaggerating the benefits or distorting the facts). Greenwashing can consist of unsubstantiated claims or misleading information. Consumer authorities warn against greenwashing and put the topic high on their agenda. For example, the Dutch Authority for Consumers and Markets, the ACM, published Guidelines for sustainability claims and launched an investigation on sustainability claims in the energy, clothing and dairy sectors), resulting in commitments from retailers H&M and Decathlon to adapt their sustainability claims to avoid misleading statements.

Competition law framework

Competition authorities are also pushed to facilitate corporate initiatives – often involving agreements or coordinated conduct between competitors – that contribute to more sustainable methods of production or distribution and thus to reaching sustainability goals. Both the European Commission and national competition authorities are exploring opportunities of providing guidance to companies on how to overcome competition law barriers relating to cooperation with the aim of reaching sustainability goals. This development can only be strongly encouraged as competition law should not (be perceived to) stand in the way of genuine sustainability initiatives between undertakings (see also our outlook articles for 2021 and 2022).

The Dutch ACM, which enforces both consumer law and competition law in The Netherlands, is one of the leading competition authorities in the EU pushing for a more flexible or lenient approach to the application of Article 101(3) TFEU in its draft Guidelines on sustainability agreements (see also our blog here).[1] The ACM is also leading when it comes to encouraging

[1] Upon finalisation of this article (13 September 2022), the ACM published three informal opinions and two press releases in relation to sector initiatives with a sustainability angle and in which it applied its Guidelines on sustainability agreements: Informal Opinion ACM 2 September 2022, reference: ACM/UITNZP/001508 (*Garden Retail Sector*); Press release ACM 26 July 2022 (*Cooperation soft-drink suppliers*); Informal Opinion ACM 27 June 2022, reference: ACM/UITNZP/001473 (*Project Aramis – Shell/TotalEnergies*); Press release ACM 28 February 2022 (*Cooperation VEMW wind energy*); Informal Opinion ACM 24 February 2022, reference: ACM/UITNZP/001356 (*Regional grid operators*). On 13 September 2022, the ACM also published consumer law commitments from retailers H&M and Decathlon relating misleading sustainability claims for clothing.

and providing guidance on sustainability cooperation in relation to competition law (see also our blog here and here).

In September 2021 the European Commission published a *policy brief* Competition Policy in Support of Europe's Green Ambition in which it discussed the role of competition law in relation to sustainability, followed by its draft revised Horizontal Guidelines in March 2022 with a full Chapter (9) devoted to the application of Article 101 TFEU to sustainability agreements. Although the Commission does not go as far in the application of Article 101(3) TFEU as the ACM is advocating (see also our blog here), it explicitly attempts to facilitate cooperation with sustainability objectives under its own interpretation of Article 101(3) TFEU.

'Greenwashing' by authorities?

There seems to be a slight risk, however, that the keen attempts of competition authorities like the ACM to facilitate sustainability initiatives of companies may lead them to "greenwash" initiatives that do not strictly need a more lenient 'competition law sustainability assessment' in order to be in compliance with or even out of scope of competition law.

This risk recently manifested itself in the ACM's informal guidance concerning three sustainability cooperation initiatives.[2] For, while the ACM bases its assessment of these initiatives on its Guidelines on sustainability agreements, it seems that these initiatives could probably also have been decided on using the 'classical' competition law framework. One may even question if these initiatives – regardless the justified exemption under Article 101 TFEU – can truly make a difference in terms of reaching sustainability goals and thus justify applying the Guidelines' framework.

On the basis of ACM's publication on the matters (but without knowing the details), we cannot help but wonder whether reference to the Guidelines on sustainability agreements was required to assess the exemption for these forms of cooperation under Article 101 TFEU.

- The first informal opinion contains an assessment of a collaboration between Shell and TotalEnergies for a joint initiative to store CO2 in empty gas fields in the North Sea, so-called CCS services (carbon capture and storage). The agreements that were made concern 20% of the capacity of the pipeline to be constructed. The informal opinion does not mention that the requesting parties appealed to the Guidelines, but the ACM applies them anyway.

  We wonder if this 'special treatment' under the Guidelines was necessary in view of the fact that an exemption under 101(3) TFEU seems a likely outcome: a new market is created, potential restrictions of competition seem quite limited and the benefits (efficiencies of the cooperation and the fair share for users) seem obvious. Based on the considerations relating the 'indispensability' criterion it is even doubtful if either party could individually have established the CCS infrastructure. Contrary to ACM's previous (pre-sustainability focus) negative assessment of the coal plant closure in 2013, the recent assessment does not contain any quantification of potential cost increases for consumers nor of any alleged efficiencies.

- The second assessment is not published as an informal opinion, but only in a press release on ACM's website. In this press release, the ACM takes a positive stance regarding a cooperation between various soft drink suppliers, including Coca-Cola.

[2] Informal Opinion ACM 2 September 2022, reference: ACM/UITNZP/001508 (*Garden Retail Sector*); Press release ACM 26 July 2022 (*Cooperation soft-drink suppliers*); Informal Opinion ACM 27 June 2022, reference: ACM/UITNZP/001473 (*Project Aramis – Shell/TotalEnergies*).

These suppliers initiated to abolish the plastic handle that comes on multipacks of soft drinks and water bottles. The ACM states that it believes that competition is not restricted by the agreement and that the agreement therefore falls within the scope of Chapter 4 of its Guidelines on sustainability agreements ('Sustainability agreements without restrictions of competition').

We question however whether an initiative of omitting the plastic handles is in fact a sustainable one – or at least whether it will truly make a difference in reaching the sustainability goals, given that the remaining packaging and the bottles themselves continue to consist of plastic and the significance (and hence environmental impact) of removing the handles seems quite limited. Also, one would think that using less packaging materials represents a cost saving that makes an agreement on the topic perhaps not indispensable. Furthermore, we believe that in the pre-sustainability focus the ACM probably would not have given informal guidance on this type of cooperation but would have referred the initiators to the self-assessment.

- In a third informal opinion relating to a proposed agreement to reduce the use of illegal crop protection products, the ACM concludes that the agreement, though contributing to sustainability and better functioning of the Dutch floriculture market, is not restrictive of competition (i.e. outside the scope of Article 101 TFEU). The objective of the agreement is to avoid 'below legal standard competition' and more particularly to combat trade in illegal plant protection products and biocides.

  Also, in this situation, it seems that the agreement – while probably contributing to sustainability goals – could really have been cleared under Article 101 TFEU on the basis of self-assessment by the requesting association and without reference to the Guidelines.

Concluding remarks

In our opinion, these examples reflect that authorities should be mindful of whether the 'sustainability competition law angle' is suitable and required for the assessment of any form of cooperation that contributes to reaching sustainability goals. At the same time, we find that a bit of "greenwashing" by the authorities can be absolved in order to create more legal 'comfort' on discussing sustainability initiatives and to encourage cooperation between competitors that – especially if not restrictive of competition – contributes to reaching sustainability goals.

Competition law does not have to and should not stand in the way of discussing sustainability initiatives between competitors, even if competition law compliance is always a point of attention. Despite these critical considerations on the necessity of invoking the Guidelines on sustainability agreements, we can only applaud the way in which the ACM is paving the way for discussions of this important policy topic.

For more information, please contact Pauline Kuipers, Tialda Beetstra or Joost van Roosmalen.

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