The assessment of anticompetitive practices as a result of sustainability initiatives in practice

Introduction

This memo contains an overview of anticompetitive practices that could arise as a result of arrangements[1] made as part of sustainability initiatives. Using concrete examples, it is explained, wherever possible, how such arrangements have been assessed.

The following categories are discussed:

- Horizontal price-fixing agreements concerning the resale price;
- Joint approach of an ancillary service;
- Standardization;
- Qualitative restriction of supply.

As the latter category is the most interesting from a sustainability point of view, it is discussed in greater detail, while distinguishing the following scenarios:

A. The restriction to competition is of minor importance;
B. The competition parameter in question is of non-minor importance, and the arrangement is not a market-wide arrangement;
C. The competition parameter in question is of non-minor importance, and the arrangement is a market-wide arrangement.

Horizontal price-fixing agreements

Arrangements made among competitors that directly concern the resale prices of the goods or services that they produce or distribute are some of the most serious anticompetitive practices. Such arrangements are almost always prohibited under Section 6.1 of the Dutch Competition Act (the equivalent of Article 101 TFEU).

A distinction can be made within this category between arrangements concerning the resale price as a whole, and arrangements concerning a part of that price.

I. Arrangements concerning the resale price as a whole

The NMa has had no documented cases in which agreements concerning the resale price as a whole could be considered admissable based on a sustainability objective. However, there have been some cases in which environmental objectives were used as a pretense to justify cartel agreements.[2] Such cases concern traditional cartels, which can be fined[3] as such.

[1] In a nutshell, the term 'arrangements' in this memo is understood to be agreements between undertakings, decisions by trade organizations, and concerted efforts by undertakings.

[2] For example, case 358, *Electrical and mechanical carbon and graphite products,* ruling of the European Commission of December 3, 2003. And, more recent, the ruling of April 13, 2011, concerning a detergent cartel that was fined EUR 315.2 million, which operated under the pretense of an environment-friendly industry standard ("AISE initiative") (case COMP/39579 – *Consumer Detergents*). See also Laurence Idot, *Competition Law and Environmental Protection*, Concurrence no. 3-2012 no. 48129*, www.concurrences.com, par. 13.*

[3] This may also be the case with arrangements that result in markets being divided or in a quantitative restriction of supply, or with the exchange of competition-sensitive information. See also: DG Competition *Paper Concerning Issues of Competition in Waste Management Systems*, 25-09-2005, par. 13 and 61.

II. Arrangements concerning a part of the resale price

In some cases, sustainability agreements were assessed that concerned fixed surcharges on prices that were otherwise set individually.

- VOTOB: six undertakings that were active in chemical storage wished to introduce a surcharge, which had been collectively agreed upon, in order to fund certain environment-related investments. The European Commission (informally) ruled negatively.[4]
- The so-called 'milk dime': several supermarket chains wanted to charge consumers an additional ten cents per liter of milk in order to compensate the increased purchasing costs as a result of an outbreak of foot-and-mouth disease. The NMa ruled negatively.[5]

These cases, as well as various other cases that will be discussed later, make it clear that, generally speaking, it is an implausible assertion that, for a well-functioning collaboration aimed at sustainability, arrangements should concern the resale price as well, regardless whether it concerns the price as a whole, a part thereof, or just a certain surcharge.

III. Arrangements concerning passing on costs

Making a commitment to pass on a certain cost component to buyers is considered an indirect horizontal price-fixing agreement. This was the case in collective waste-management systems (which will be discussed further below). The NMa ruled differently in such cases, depending on each of the cases' circumstances. In most cases, (Vereniging Bloemenveilingen in Nederland and Stichting Batterijen), it was not accepted to pass on costs mandatorily. In the Wit- en Bruingoed case, a mandatory passing on of costs was allowed for the period that was needed to cover the costs of the 'historical inventory' (which refers to the appliances that were already in circulation for which no so-called waste-disposal fee was charged at the time of purchase).[6] In the Stichting Papier Recycling case, a mandatory passing on of costs to the next link in the production chain was accepted because it enabled the system to be created in the most efficient manner.[7] It can be concluded that, barring exceptional circumstances, undertakings must always set their prices individually, including when, for example, a collective fund is created or joint purchasing costs or joint investment costs are involved.

Arrangements that concern the resale price (or a part thereof) generally fall under Section 6.1. Furthermore, it is highly unlikely that they fall under Section 6.3[8].

Joint approach of an ancillary service (waste management systems)

Relatively much experience has been gained in the assessment of collective waste management systems. They are assessed on a case-by-case basis. Anticompetitive arrangements that are concluded in this context can influence markets for waste collection, separation and processing. One important thing to remember is that they may lead to market exclusion. That is why competition authorities usually require there be some room for other competitors. Exclusivity arrangements are not automatically rejected, but they would have to be proportional.[9] In addition, several preconditions have been set that a) ensure access in a transparent and non-

[4] 1992 annual report on the European Commission's competition policy.
[5] Case 2432 (2001).
[6] This approach was in accordance with a European directive.
[7] It concerned a rather atypical case because the statutory requirement to introduce waste collection did not apply to the link in the production chain where payment could have been organized the most efficiently.
[8] This annex usually just mentions Section 6 of the Dutch Competition Act, where Article 101 TFEU sometimes also applies.
[9] See the ruling in case T-419/03 (*Alstoff Recycling Austria v. European Commission)*, 20 March 2011, Jur. 2011 II-00975.

discriminatory manner for those needing waste management services, and that b) mandate regular tendering of the provision of collection or processing services.[10]

A well-known yet interesting case is the DSD ('Grüne Punkt') system, for which the Commission in 2001 granted an exemption under Article 101.3. But, at the same time, it also established a violation under Article 102 for the previous behavior, because DSD imposed a surcharge on parties that had chosen not to use the system, but, instead, organized waste collection in a different manner. The Commission qualified this as both exploitative abuse (vis-à-vis buyers) and as exclusionary abuse (vis-à-vis competitors). [11]

Collective waste management systems may fall under Section 6.1 if anticompetitive arrangements are attached to them. They can fall under Section 6.3 based on a sometimes complex assessment.

Standardization

Standardization arrangements relating to sustainability may concern, for example, logistics, distribution or product packaging. In its Guidelines on Horizontal Cooperation Agreements, the Commission offers the example of standardized product packaging[12]. Apart from the benefits for the undertakings involved, it may be desirable from an environmental point of view to use standardized packaging that can be re-used multiple times (crates, trolleys, bottles). One thing that must be paid attention to is that such a system will not be a barrier to enter the market of the transported product. If this is not an issue, it is conceivable that such an arrangement may fall outside the prohibition of cartels completely. Moreover, the Commission believes it is likely that the exception criteria of Article 101.3 are met. There are cost benefits, and, assuming there is enough competition on the primary markets (the sales market of the producers and importers of the product that is transported), it is likely that these benefits are passed on to consumers. Even if it is a market-wide arrangement, it is still likely that there is enough residual competition.

Standardization for the purpose of logistics, distribution or packaging will, if it already falls under Section 6.1, be considered an exception under Section 6.3 relatively easily.

Qualitative restriction of supply

Many sustainability arrangements mean that undertakings collectively decide to not offer certain product types and/or to offer other types with an eye to environmental protection and sensible use of scarce resources. Such arrangements (hereafter: qualitative restriction of supply) can be anticompetitive within the meaning of Section 6.1, but not necessarily so. If uniforming the product range to a certain degree made it possible (or easier) to launch a new product type, it could actually lead to an expansion of the product range, thereby possibly rendering Section 6.1 inapplicable to the arrangement in question.[13]

[10] See, among other cases, the ruling in case T-289/01 (*Duales System Deutschland v. Commission)*, 24 May 2007, Jur. 2007 II-01691
And for examples from national competition-law practice in Germany, France and Italy, Laurence Idot, *Competition Law and Environmental Protection,* cited earlier.

[11] Ruling of the EC Court of Justice in case C-385/07P (*Der Grüne Punkt v. Commission*)*,* 16 July 2009, Jur. 2009 I-06155.

[12] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1 , 14 January 2011 ('Horizontal Guidelines'), par. 331.

[13] Horizontal Guidelines, par. 304.

If an arrangement results, on balance, in a qualitative *restriction* of supply, the following aspects in particular are of importance in the assessment thereof[14]:

1. What is the significance of the competition parameter that is the object of the arrangement?
2. What market power do the undertakings involved in the arrangement have collectively?

A. The restriction to competition is of minor importance

If an arrangement concerns a competition parameter of minor importance, it may escape Section 6.1 even if a considerable share of the market takes part[15] in it. In the Guidelines on Horizontal Cooperation Agreements, the Commission gives the example of a recommendation, which had been developed collectively, to reduce the fat content in food items. Considering the fact that undertakings were still able to compete on price, quality, flavor, image, etc, the Commission believed this arrangement would probably not have any anticompetitive effect, despite the fact that, in this example, 70% of the market took part in the agreement. Article 101.1 therefore does not apply.[16] This example did not assess the arrangement's positive effects for consumers. A similar case was the British sodium content initiative, which involved an arrangement aimed at reducing the sodium content in food products[17].

In this example, one could speak of 'qualitative non-appreciability´.[18] Only few examples of this term can be found in case law.[19] But that does not take away the fact that it can be applied, especially in connection with sustainability, particularly if the arrangement is not aimed at excluding cheaper products, which means there is no upward pressure on prices.

Compare: Quality labels such as the 'Choose Consciously' ('Kies Bewust') logo for healthy nutrition, which is an initiative of several major food producers and supermarket chains. The logo is awarded by an independent committee based on objective criteria.

Compare: Castration of boars with the use of anesthesia[20], which was an arrangement to reduce the practice of castrating boars without the use of anesthesia. If viewed separately, the arrangement itself did not concern a competition parameter of significant importance, yet there was upward pressure on prices. However, that pressure was limited and lasted shortly. The arrangement included a temporary contribution made by supermarkets of 3 cents per kilo of purchased meat. The NMa said that it could not be concluded in advance that the arrangement fell under Section 6.1. The NMa based its opinion in part on the fact that the arrangement was not a market-wide arrangement, which meant that consumers still had enough options.

[14] See *NMa Guidelines on Cooperation between Undertakings*, 2008, par. 23-25.

[15] Furthermore, an arrangement can generally escape Section 6.1 because of the weak market position that the undertakings involved together have. This will not be discussed further in this memo, because it does not specifically affect sustainability-related arrangements.

[16] Horizontal Guidelines, par. 330.

[17] At the instigation of the British government (*Food Safety Authority, FSA),* British food manufacturers agreed to gradually reduce the sodium content in their food products. The government's position with regard to this topic enjoys broad support, also internationally. The arrangement entailed a gradual reduction of the sodium content in many different food items. By implementing the reduction collectively, it was prevented that manufacturers faced a first mover disadvantage, which would occur if consumers continued to choose products with a higher or too high a sodium content of non-participating manufacturers.

[18] This is different from 'quantitative non-appreciability,' which concerns a small market share of the undertakings involved.

[19] See case IV/32.2002, *Belgian pharmacy association ABP*, ruling of European Commission 14 December 1989 par. 41-42. The rarity of this type of cases might be explained by the fact that, when it comes to harmless arrangements, formal assessments are often not made.

[20] Informal opinion of the NMa in case 6456 (2008).

An arrangement that concerns a parameter of minor importance in the competitive process may, even if it is a market-wide arrangement, escape Section 6.1. Section 6.1 possibly also offers some room for allowing market-wide arrangements, which are of influence to a competition parameter of significant importance (such as price) while that influence is very limited[21]. At the same time, it is critical that the undertakings continue to have control over all other competition parameters. This means that competition on price, quality and service remains intact, and markets and customers are not divided.

B. Competition parameter of non-minor importance, the arrangement is not a market-wide arrangement[22]

Numerous examples exist in competition law of collaborations between competitors that concern competition parameters of non-minor importance, yet that are compatible with Section 6. In those cases, it might have been concluded that Section 6.1 is not applicable, but such cases are more likely to revolve around the question of applicability of Section 6.3.

Some criteria that are part of a Section 6 assessment are applied more forcefully in practice than are other criteria. Whether there are any benefits for production, distribution, or for technical or economic progress is a question that, in these cases, is usually subjected to nothing more than a plausibility assessment. In addition, from the fact that enough residual competition will remain in the market, it is *deduced* that consumers will get a fair share of the expected benefits, since the disciplining effects of the market remain intact. The presence of enough residual competition forces the undertakings involved in the sustainability initiative to make an effort to actually pass on the expected benefits to consumers. If they fail in their efforts, consumers will still have access to alternatives.

Imagine several competitors, whose combined market share on the relevant market is not so insignificant (say 20%), decide to collectively switch over to a production process that takes into account a certain public interest, one that rises above the direct interests of producers and buyers. As a result of this choice, the price of their products rises, which indicates that this arrangement falls under Section 6.1. The question is thus whether the criteria of Section 6.3 are met.

In some sense, the initiative restricts supply (the undertakings no longer offer any 'unethical' products), but it also increases supply, since the undertakings now bring a new ethical product to the market. The result is that individual buyers are able to choose to buy this product, which they will if they think the public interest in question is important enough.[23]

What is the added value of a *joint* initiative over an initiative by an individual undertaking? First, bigger players may be able to implement such an initiative on their own, but smaller players probably not (or less effectively). Second, a joint initiative means that the product and the public interest in question may become known to the

[21] Support can be found in *C-180-184/98, Pavlov et al/Stichting Pensioenfonds Medische Specialisten*, Jur. 2000 I-06451, par. 93-97, in which the Court concluded that an arrangement concerning a collective pension fund, which meant that a very small share of professional expenses was harmonized, did not have an appreciable effect on competition.

[22] In this memo, market-wide and non-market-wide arrangements are presented as two separate categories (the term 'market-wide' first and foremost relates to the combined market share on the relevant market of the undertaking involved in an arrangement). In the real world however, a spectrum or continuum can be observed. Furthermore, when assessing arrangements, the extent to which it involves the entire market must be seen in connection with the other circumstances relevant to that assessment.

[23] There is some evidence that the amount of what consumers are willing to pay extra depends on the specific interest that is protected: relatively more for organic products or those produced under animal-friendly conditions, but less for environment-friendly products. Backus, Van Mil and Meeusen, *Kosten die de kassabon niet halen; verborgen kosten van negatieve externe effecten in de voedselketen*, LEI Wageningen June 2012, page 26.

public sooner.[24] Third, if the undertakings involved manage to organize the joint initiative well, the joint label or logo can give consumers confidence that the product actually stands for the thing it says it stands for.[25]

Joint initiatives can thus yield efficiency benefits that may be included in a Section 6.3 assessment. A qualitative restriction of supply may also help serve a public interest if the arrangement is not a market-wide arrangement. This is more likely when consumers are more likely to take into account the public interest in question in their purchase decision. A trustworthy sustainability label enables them to turn that willingness into action. Such labels may concern aspects like working conditions, biodiversity, craftsmanship, or responsible use of scarce resources.

If the initiative is not market-wide, consumers will still have enough freedom of choice, and the initiative can prove its value on the market.[26] A relatively light paragraph 3 assessment suffices in that case. One point of attention though is that, if a logo or label were to offer a clear competitive advantage, requirements with regard to transparency and non-discrimination could become an issue. However, an actual weighing of the efficiency benefits against the drawbacks of creating market power is often not necessary in these types of situations.

Sustainability initiatives that are not market-wide, and external effects[27]
From a purely economic point of view, it is remarkable that the abovementioned initiatives get off the ground. Every single consumer that chooses to pay more for a product that is produced ethically knows that he/she will benefit from the positive effects of his/her choice, such as a better environment or increased biodiversity, to only a tiny degree, and that many others will benefit from the other positive effects. These are called 'complex external effects.' Yet, apparently there is a willingness to make an effort as an individual in order to realize a certain collective objective. Consumers thus associate their role of market participant with that of active citizen.

However, there is no guarantee that the value consumers attach to that particular interest will be completely reflected in everybody's buying behavior. Some consumers will act as free riders: such consumers benefit from the positive effects of the ethical buying behavior of other consumers, but do not share in the costs themselves. So from an economic perspective, demand for the ethically produced product may still be too small, albeit to a lesser extent.

Arrangements that are not market-wide that involve a qualitative restriction of supply, and (as such) have a sustainability objective can probably easily pass a paragraph 3 assessment, even if they affect a competition parameter of significant importance. A relatively light assessment (a qualitative assessment) applies in particular to the criteria 'promoting economic progress' and 'allowing consumers a fair share of the resulting benefit.'

C. Competition parameter of non-minor importance, market-wide arrangement

[24] Backeus et al. identify education and marketing as tools to bring about a behavioral shift through convincing, persuading, and transfer of knowledge; id. page 63.
[25] Horizontal Guidelines, par. 305; Backeus et al., id. page 26.
[26] In this context, Backeus et al. talk about 'creating a market for an external effect' and about 'business models' for the undertakings involved; id page 70.
[27] Paul de Bijl and Theon van Dijk, *Mededingingsrecht en publieke belangen: een economisch perspectief*, Markt en Mededinging, September 2012, pages 149-156.

If there is a market-wide qualitative restriction of supply, buyers are denied an alternative to choose certain products that best suit their individual preferences. In theory, this implies a heavy burden of proof on the undertakings involved, and calls for a critical assessment by the competition authority. In such cases, the question of what justifies an intervention in free markets that could, on balance, negatively affect a certain group of consumers, is raised rather explicitly.

An example of an arrangement that was more or less market-wide was the CECED case, which was an agreement that involved more than 95% of the market to no longer produce certain energy-inefficient laundry machines. The Commission granted an exemption based on weighing the pros and cons of the arrangement. The benefits that could be identified were benefits for both consumers (energy bill savings) and for society (reduced CO2 emissions). However, it is striking that, when it discussed this case in the new Horizontal Guidelines, the Commission no longer mentioned the latter benefits, and implicitly qualified them as irrelevant.[28]

The CECED case shows that, in case of a more or less market-wide arrangement which does not fall in the earlier mentioned category A, a relatively thorough analysis may be necessary before it can be concluded that the welfare effect, on balance, is positive.

The case also shows that the fact that an arrangement is market-wide in itself does not necessarily stand in the way of a positive outcome of a Section 6.3 assessment. When testing against the criterion of residual competition, the combined market share of the undertakings involved is not the only aspect that is important. Other factors are important, too, such as the extent to which the arrangement in question influences competition, as well as the presence of other disciplining factors such as potential competition and buyer power.[29]

Furthermore, the factor of residual competition should not be seen separate from the other criteria in Section 6.3. At the end of the day, Section 6.3 is an assessment of the pros and cons of an arrangement for users. That basic principle implies that, as a restriction to competition becomes more significant, so too should the efficiency improvements and the benefits for users.[30]

It can be considered whether the presence of complex external effects may be a reason to justify market-wide arrangements. An example that illustrates this is the so-called Treaty of Den Bosch, the participants of which made arrangements about reducing the use of antibiotics in animal breeding. The reduction of antibiotics may lower the risk of the development of antibiotic-resistant bacteria. If a certain share of all consumers chooses to buy antibiotic-free meat (which is more expensive), the chances of the development of those bacteria will decrease. This potentially benefits all citizens. The behavior of these consumers thus has positive external effects (welfare-increasing) for all citizens. Conversely, the choice the other consumers make increases, for all citizens, the likelihood of infections that are difficult to combat (negative external effects). If complex external effects exist, it may be desirable to take action collectively and thus have a market-wide arrangement (in the absence of a strict government instruction with similar import).

[28] In its discussion on the case, the Commission explicitly notes that the arrangement's benefits must fall to the same group of consumers that are affected by the anticompetitive increase in costs.
[29] *Commission Guidelines on the application of Article 81, paragraph 3 of the Treaty*, OJ C 101/97, 27 April 2004, par.108-110.
[30] Id. par. 90.

Market-wide arrangements with a sustainability objective that concern a competition parameter of significant importance must be assessed using a relatively thorough paragraph 3 assessment, in which the collaboration's efficiency gains must be weighed against the drawbacks of increased market power as carefully as possible. In case of market-wide arrangements, extra attention must be given to the criterion of residual competition, through this criterion does allow some freedom.

