Accompanying memo to the second draft version of the Guidelines on Sustainability Agreements - opportunities within competition law

The second draft version of the Guidelines on Sustainability agreements - opportunities within competition law (hereafter: the Guidelines) explain ACM's planned new regulatory regime and policy with regard to the assessment of sustainability agreements. The Guidelines consist of both an expansion as well as a further explanation of the application of the cartel prohibition to sustainability agreements between undertakings.

On 9 July 2020, the first draft version of the Guidelines (hereafter: the draft Guidelines) was published for public consultation. During the public-consultation period, a total of 27 stakeholder responses were received. These responses came from international undertakings (mostly larger ones), NGOs, trade associations, law firms, economists, and several fellow competition authorities. The vast majority of the responses were positive about the draft Guidelines. In the responses, respondents also pointed to several elements that were still unclear, and which raised questions. On the basis of those responses, ACM has amended the draft Guidelines. Below is a summary of the most important points from the public consultation, and of the way in which these have been incorporated into the Guidelines.

ACM prefers an EU-wide harmonized competition policy with regard to this particular subject. At this time, ACM does not publish a final version of the Guidelines as discussions about how sustainability agreements are best assessed under Article 101, paragraph 3 TFEU are still being held across Europe. In the interim, ACM will use these draft Guidelines as a prioritization instrument.

Most important changes following the public consultation

The line between environmental-damage agreements and other sustainability agreements

The distinction that ACM made between environmental-damage agreements and 'other sustainability agreements' raised questions. The responses during the public consultation boiled down to the question of whether a proper justification existed for treating environmental-damage agreements more favorably than the category consisting of 'other sustainability agreements'. ACM has tightened this point in the Guidelines, and has added additional reasons. Marginal 8 of the Guidelines describes what ACM means by environmental-damage agreements, and, in marginals 44 through 47, it is explained in detail what the conditions are under which users do not need to be fully compensated for the drawbacks of a restriction of competition, and why ACM finds that fair. In that context, it is also explained in what ways environmental-damage agreements are different from 'other sustainability agreements'. The changes are briefly explained below.

By environmental damage, ACM means all damage to the environment (including biodiversity) when goods and services are produced and consumed. A characteristic feature of environmental-damage agreements is that they are aimed at reducing negative externalities (i.e. damage to society as a whole that is not included in the production costs). In the new version of the Guidelines, it is emphasized more strongly that these externalities lead to an inefficient usage of scarce natural resources (common resources). The Guidelines assume that, when undertakings reduce environmental damage through collaborations, they generate efficiency gains (marginals 8 and 36). The efficiency gains can be taken into account in assessments under Article 101, paragraph 3 TFEU, provided that the agreement is necessary for realizing said efficiency gains. This follows from the third criterion of paragraph 3. In the draft version of the Guidelines, this was called the 'first-mover disadvantage'. This term is, considering the responses, not sufficiently clear. In the new version, it is stated that an agreement can be necessary, among other reasons, if it is unlikely, for economic reasons, that undertakings are individually able to change their production or distribution that would lead to a more efficient usage of natural resources (marginal 65 and example 4).

With regard to 'other sustainability agreements', which could concern, for example, labor conditions, animal welfare or human rights, ACM follows the principle that users should be fully compensated for

the drawbacks they suffer as a result of the restriction of competition. However, these types of agreements could fall outside the scope of the cartel prohibition for other reasons, as is further explained in marginals 27 through 29 of the Guidelines.

ACM assumes too quickly that agreements are necessary for realizing a more sustainable production

Economists expressed their concern that ACM assumes too quickly that agreements would be necessary for making progress towards a more sustainable production. In that context, it is pointed out that too accommodating a position vis-à-vis sustainability agreements could even have the opposite effect, as these agreements reduce the incentive for undertakings to compete with each other for the favor of consumers, which increasingly prefer more sustainable products.

ACM believes that its proposed assessment framework contains sufficient safeguards to prevent such an opposite effect, but it has, in response to that criticism, added several clarifications in the new draft version of the Guidelines. In marginal 38, it is now expressly pointed out that undertakings are often able to realize a more sustainable production on their own, and they actually do so. In addition, the application of the necessity criterion has been phrased more succinctly. It is stressed that an agreement is only necessary *if* and *insofar* it solves a market failure (see marginals 36, 37 and 66). This shows that ACM will not accept sustainability claims if it is plausible that market participants are able to realize the sustainability gain on their own. Furthermore, an agreement must also be tailored to the identified market imperfection. For example, if consumers are prepared to pay more for sustainable products, whereas the only problem is that they have insufficient confidence in the sustainability claims of market participants, the solution may be that these market participants set up a joint certification program for their products. In that case, a far-reaching agreement is, in principle, not necessary.

Moreover, specifically with regard to environmental-damage agreements, the Guidelines now explain that the costs of such agreements cannot be higher for consumers than the costs of a government measure that generates the same sustainability gain. This so-called cost-efficiency test is discussed under the necessity criterion (see marginal 67).

The Wouters-route: other options for assessing sustainability agreements

In the responses to the public consultation, the test of qualitative appreciability (also known as the *Wouters*-route) was mentioned as an appropriate (or more appropriate) way to exempt sustainability agreements with a legitimate objective from the cartel prohibition of Section 6, paragraph 1, Dutch Competition Act (hereafter: Mw). In the draft version of the Guidelines, a reference to this was missing. ACM also considered the application of this doctrine, but finds the doctrine still too insufficiently developed to comment on it in the Guidelines. In marginal 18 of the Guidelines, an additional substantiation for ACM's choice for its approach under Article 6, paragraph 3 Mw has been given.

A single approach within Europe: relationship with EU Competition Law

In the public consultation, it was often pointed out that, with its Guidelines, ACM has taken a unique position within Europe, and that it deviates from the position of the European Commission, or from a common interpretation of EU competition law. In that context, it was, for example, emphasized that, for far-reaching common sustainability initiatives, it is necessary that, within Europe, the same approach is taken everywhere. On that note, it was also mentioned that uncertainty about whether the European Commission and the European courts support the Guidelines would result in internationally operating undertakings finding it difficult to benefit from the Guidelines.

ACM is of the opinion that, with its Guidelines, it interprets EU competition law correctly, and finds itself supported on this position by various experts. On the other hand, ACM also finds it important that, at the EU level and in other EU Member States, there is a consensus regarding the application of competition rules to sustainability initiatives.

Substantiation of the benefits (including efficiency gains)

In multiple responses, additional guidance was requested for substantiating the benefits (including efficiency gains) of sustainability agreements. In marginals 38 through 41, ACM explained how efficiency gains can be identified, and (in marginals 56 through 62) what methods can be used to do so.

ACM had a technical-economic report drawn up about the methods that can be used for substantiating efficiency gains in a quantitative manner. This report will be made public, and will be published on our website.

Various respondents requested further clarification of the geographical scope when taking into account users' benefits. The question that was raised in that context is whether benefits outside the Netherlands can be included. This highly depends on the individual case itself, and has therefore not led to any changes to the Guidelines. Benefits outside the Netherlands can, in principle, be taken into account, especially if environmental-damage agreements have cross-border and international effects both in terms of the benefits as well as the drawbacks of those agreements. However, in that case, it must be substantiated in what way the benefits have an effect on users in the Netherlands. This can be assessed on a case-by-case basis.

The role of binding standards

Another element that emerged during in the public consultation was the role of binding standards. For example, it was unclear why ACM attaches value to binding standards, and what standards ACM refers to. This point has led to some revisions. In the Guidelines, it is assumed that, with regard to environmental-damage agreements, the agreement must lead to an efficient contribution towards compliance with an international or national standard or a concrete policy objective. As a result thereof, if users are not sufficiently compensated for the damage that the agreement had caused to them, that non-full compensation is then legitimized by an act of the government or parliament. Moreover, a standard or policy objective is an important starting point for determining, through the application of shadow prices, the value of the benefits resulting from an agreement. The Guidelines also clarify that a sustainability agreement can relate to multiple international and national standards, and that it is not limited to climate-related objectives.

Clarification of the categories of permitted agreements

On the basis of the input from the public consultation, ACM has adjusted the descriptions of the categories of permitted sustainability agreements. More specifically, the second category of 'codes of conduct promoting environmentally-conscious or climate-conscious practiced' has been expanded to include socially responsible market conduct (marginal 24), and the final category includes a more detailed discussion of the assessment of CSR covenants under the Guidelines (marginal 27 through 29), where undertakings make arrangements to comply with international standards related to child labor, livable wages and the freedom to unionize. The Guidelines make an exception to the prohibition of anticompetitive agreements if they concern sufficiently concrete and international standards.