

**Submission of the Netherlands Competition Authority (NMa) and the Ministry of Economic Affairs to the public consultation on the Draft revised Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements and the Draft revised Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements**

The European Commission's Guidelines on Horizontal Co-operation Agreements (herein "the horizontal guidelines") are of considerable importance to the NMa, as a source of reference when dealing with cases on the enforcement of Dutch and EC competition law. Furthermore, both companies and the NMa invoke the Commission's horizontal guidelines before the Courts, and the Dutch judiciary tends to attach great weight to them.

In this submission, the NMa focuses on the following points:

- a) appreciable effect and standard of proof;
- b) potential competition;
- c) collective recycling fees;
- d) extent of the obligation to disclose IP rights.

A. Appreciable effect and standard of proof

The Commission's explanation of the concepts of 'appreciability' and 'standard of proof' are frequently of importance to the NMa in cases before the Dutch Courts. It is therefore of the utmost importance to the NMa that these terms be delineated as precisely as possible in the draft horizontal guidelines.

Paragraphs 22-28 of the draft revised horizontal guidelines address two separate legal issues:

- 1) the standard of proof for infringements of article 101 TFEU and
- 2) the requirement of an appreciable effect on competition.

It is important that these two issues are addressed in a clearly separated way in the guidelines.

Firstly, the NMa is concerned that the section 'Market power and other market characteristics' may be read as an explanation of the notion of appreciability (see paragraphs 40-43 of the revised draft horizontal guidelines). This would then

(possibly) raise the barrier above which a restriction could be considered appreciable by a substantial degree. It is the NMa's firmly held opinion, that this would be an undesirable development. Assuming that what is said in paragraphs 40-43 is related to the "safe harbour" thresholds as also mentioned in footnote 31, the NMa suggests to skip the reference to the "De Minimis Notice" in this footnote.

Moreover, in the view of the NMa the appreciability-criterion is not related to decision-making independence but to the (actual or potential) effects on the market. As a consequence, the NMa is of the opinion that the sentence "*the agreement must appreciably reduce the parties' decision-making independence*" does not sufficiently reflect the requisite proof with respect to appreciability. The present wording focuses on how an agreement influences the degree of autonomy of market participants instead of, as the NMa believes it should focus on, the competitive effects which the agreement may have on the specific market conduct.

The fact that account must be taken of actual and potential effect does not imply that the effects must be likely, as is suggested by the wording "In other words" in paragraph 24 of the draft revised horizontal guidelines. In the opinion of the NMa, the degree of likelihood that must be proven is a separate point (i.e. the standard of proof). Therefore, the NMa suggests to amend paragraph 24 as follows: instead of "*In other words, the agreement must have likely anti-competitive effects*", a more appropriate text would be " "*In other words, the agreement must have at least potential anti-competitive effects. Furthermore, these (actual or potential) effects must be likely.*"

In addition, the phrase "actual or likely appreciable effect" in paragraph 25 of the draft revised horizontal guidelines mixes up three different issues (i.e. actual versus potential effects, appreciability and, standard of proof). Therefore, the NMa suggests to separate these issues as follows: Instead of (-) *actual or likely appreciable adverse impact* (-) we would suggest: (-) actual or potential impact (-), while adding at the end of this paragraph that this impact must be appreciable.

#### B. Potential competition

Paragraph 10 of the draft revised horizontal guidelines states, as far as is relevant here, that:

*"A company is treated as a potential competitor of another company if, absent the agreement, in case of a small but permanent increase in relative*

*prices it is likely that the first company, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the other company is active. This assessment can be based on reasonably objective grounds, the mere theoretical possibility to enter a market is not sufficient."*

The definition of potential competition in the revised horizontal guidelines is in line with the definition in the current guidelines on horizontal cooperation agreements. The current guidelines state, however, in addition that (in order for a company to be regarded as a potential competitor) "*the threat of potential entry is a constraint on the market participants' behavior*". The NMa suggests, in order to provide more clarity as to how the assessment of potential competition has to be made, to add to the paragraph that contains a description of a potential competitor that the threat of entry of a potential competitor should constrain the market participants' behavior.

Similarly, the NMa suggests to clarify the definition of a potential competitor in paragraph 45 of the draft revised horizontal guidelines, by adding that the threat of entry of a potential competitor should constrain the market participants' behavior.

### C. Collective recycling fees

The former horizontal guidelines contained a paragraph on the environment, which is no longer present in the draft revised horizontal guidelines. It is important for both the NMa and the Ministry of Economic Affairs that attention is drawn to environmental issues in the guidelines. The most common cases of this type are cases concerning collective recycling fees.

The NMa deals regularly with such cases, and believes that such an example is necessary to ensure clarity for operators on this point. Therefore, it is suggested to supplement chapter 6 Agreements on Commercialisation with an example of the restrictive effects of collective recycling fees. This example could show that where, on the basis of specific environmental legislation, a collective recycling system is established, whereby the superior logistics of the system in comparison with individual collection and processing, can be welfare enhancing, the Authority can assess the necessity and proportionality of the restriction, taking as given the relevance and value of the environmental protection on the basis of the specific legislation.

#### D. Extent of the obligation to disclose IP rights

The new Article 3.2 of the Draft Regulation stipulates that prior to commencing the research and development, the parties to the agreement will disclose all their existing and pending intellectual property rights in so far they are relevant to the exploitation of the results by the other parties. Though the concerns underlying the introduction of this new Article are clear and the introduction of the Article is undisputed, questions arise whether the Article provides sufficient legal certainty to the business community. Parties to an R&D agreement cannot foretell what results will be relevant for future exploitation at the stage of entering into such an agreement. The uncertainty of future results, inherent to the nature of R&D, creates difficulties in determining the extent of the obligation to disclose. The Ministry requests the Commission to consider providing further guidance on this matter in paragraph 3 of the Draft Guidelines.

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