



**INTERNATIONAL LEAGUE
OF COMPETITION LAW**



Competition Law Association

British Group of the
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(International League for Competition Law)

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Antitrust Enforcement in the Pan-National Context

Coherent or divergent policy approaches to the topics of the day, such as sustainability, labour and purchasing cartels and other enforcement trends, including in relation to information exchange, AI and the use of algorithms

Panel: Juliette Enser (Interim Exec. Director, Competition Enforcement, UK CMA)

Mariska van de Sanden (Authority for Consumers and Markets)

Ingo Brinker (White & Case)

Vera Pozzato (Antitrust Policy Officer, DG Competition)

Nicholas Khan KC (Monckton Chambers)

Chaired by Sharon Horwitz (CMA)

SUMMARY OF SESSION

1. Sustainability

- Sharon noted the importance of competition regulation allowing for collaboration on environmental sustainability.
- Mariska noted that the Authority for Consumers and Markets (“**ACM**”) wanted to take away the perception that existed in the Netherlands that sustainability initiatives and competition law cannot go hand in hand. Therefore, the ACM published draft guidelines in 2020 setting out what room there is to take away the perception. Now that the EC horizontal guidelines include a chapter on sustainability the ACM basically revoked its draft guidelines. Instead, the ACM published a Policy Rule.
 - In the Netherlands, for compliance agreements and environmental damage agreements, if parties can show that a policy rule is being fulfilled by their actions, the Dutch authorities will not investigate (as a result of which, initiatives are likely to proceed more quickly compared to the European Commission (the “**Commission**”)).
 - In terms of engagement by companies with the ACM on environmental cooperation, many questions have related to companies that do not restrict competition (where Mariska gave the example of a collaboration between coffee capsule companies on joint investment in sorting machines). Hence, Mariska commented, more generally, that the impact of guidance on environmental collaboration for Dutch companies has not been as “groundbreaking” as the ACM expected as there are very few questions about a section 3 analysis. Nevertheless, ACM’s practice does show that providing informal guidance is helpful to take away the competition law hurdle.

- Vera commented that the EU's Green Deal is a major initiative of the outgoing Commission, that coincided with the necessary review of the EU's horizontal block exemption regulations and accompanying Horizontal Guidelines.
 - Vera noted that the Commission has faced queries from companies on how to approach agreements involving sustainability and competition issues. Vera noted that, within this context, the Commission has focussed on a “balanced approach”, keeping the traditional approach while showing flexibility on the criteria for exemption. A lot of attention in the debate focused on the “fair share criterion”, requiring that benefits brought about by the anticompetitive agreement must have a neutral effect on consumers harmed by the violation of Article 101(1) TFEU.
 - At the Commission level, not many companies were coming forward to request guidance (where the level of queries / engagement may be larger at a national level).
- The Corporate Sustainability Due Diligence Directive (“**CSDDD**”) regime also raised issues on cooperation and how companies comply, commenting that the CSDDD was in draft whilst the Commission drafted the horizontal block exemption guidelines.
- Vera noted that a new Commissioner, Teresa Ribera, would be heading up the Competition directorate general of the European Commission. Vera commented that Mrs Ribera has a background on sustainability and that her mission letter encouraged the Commission to support the EU Green Deal and Clean Industrial Deal policies. However, Vera highlighted that the Commission's approach to sustainability would be dependent on whether there would be a pro-competitive outcome, in the relevant case.
- Juliette commented that there was a “converging experience”, noting that the CMA has an “Open Door” policy to give informal advice to businesses on how the CMA may interpret sustainability initiatives. Since the CMA published informal guidance on the subject, the CMA has had 12 approaches from businesses and provided published advice in two cases.

2. Labour and purchasing cartels

- Nicholas provided an overview of the legislative framework and key cases on purchasing cartels, including comments on how Article 101 TFEU prohibited price fixing cartels for purchases and how purchasing cartels are rarer in practice.

- In relation to the EU’s horizontal guidelines, Nicholas emphasised the difference between a joint purchasing agreement (“**JPA**”) (which may be pro-competitive) vis-à-vis a purchasing cartel.
 - On this difference, Vera noted that the Commission understood the clarity needed on the line between these activities, which led the Commission to dedicate part of the joint purchasing chapter to this distinction. Summarising this chapter, Vera noted that the purchasing cartels are established by object, whereas a JPA may be established by effect (where parties jointly negotiate terms with suppliers, whereas parties may coordinate individually but not jointly, in a purchasing cartel).
 - 2 elements that differentiate the 2 activities: (1) a JPA involves a degree of transparency with suppliers, and the members of the group are bound by the agreed terms, and (2) members of a JPA often have a written agreement on cooperation, which also facilitates ex post compliance control.
 - The Commission’s decisions on cartels were not “widening” the cartel box.
- In terms of the German approach, Ingo noted that the German market has cooperatives (known as joint purchasing cooperations) which had been increasing their market power over recent years.
 - Ingo noted that the German Bundeskartellamt had recently published an announcement in relation to a BMW / Mercedes case, which focussed on the German authority following standards of the Commission on joint procurement and that the authority only publicly “tolerated” the collaboration between BMW and Mercedes (in that case), rather than support the initiative.
- In terms of coordination in labour markets, Nicholas noted recent debate on the status of a “working person” and the growing dicta of the CJEU on competition in labour markets, specifically in the football market.
 - Cases relating to sports was not the “ideal” context for discussions on the interaction between competition law and labour, noting that often parties argue measures are required to preserve the “spirit of the game”.
 - An upcoming decision in the Tondela case on restrictions agreed on transfer of football players during the COVID-19 pandemic. Nicholas noted that restrictions had been justified on the basis of the effects of the COVID-19 pandemic on football clubs, but

queried whether such restrictions were in effect “no poach agreements” (for which the horizontal guidelines on buying cartels do not contain guidance on).

- Juliette noted that the CMA had published advice to employers on competition (noting that labour market agreements were a subset of purchasing agreements) and that labour markets had been a focus area for the CMA in recent years, with the CMA having 3 ongoing investigations.
- Employers should be reminded not to restrict competition when it comes to employees (through wage fixing, no poach agreements and information sharing provisions), in the same way that they should not cartelise selling markets.
- Vera noted increasing antitrust investigations in labour markets, for example in food delivery service businesses where such businesses agreed not to poach employees, which led the Commission to publish a policy brief on wage fixing and no poach agreements (and how these fall under Article 101 TFEU).

3. Technology

- Nicholas noted that, generally, competition rules are a statement of principles which can be interpreted by authorities based on circumstances.
- An area of uncertainty on algorithm pricing decision making used by businesses, where there is a question on whether parties using the same algorithms may suggest a concentration.
 - Mariska built on Nicholas’s comments, noting that there is theoretical literature that algorithms can learn to collude (but have not actually done so).
 - There was ongoing empirical research on algorithms using in petrol stations, where preliminary results indicate that price algorithms lead to higher prices (but it is unclear whether this is due to algorithmic collusion or algorithms understanding consumers’ willingness to pay).