SLAUGHTER AND MAY/

SUSTAINABILITY

GOVERNANCE AND IMPACT
Part of the Horizon Scanning series

DUTCH COMPETITION AUTHORITY LEADING THE WAY ON SUSTAINABILITY AGREEMENTS

As anticipated in our previous briefing, the Dutch competition authority (the ACM) has started a consultation on draft guidelines for the treatment of 'sustainability agreements' under Dutch competition law (the Guidelines).

The Guidelines are the first specific proposals from a European competition authority on the treatment of sustainability agreements following recent debate on the relationship between sustainability and competition law. The Guidelines respond to some of the discontent expressed in that debate and offer a creative response to help companies work together on sustainability goals without breaking competition law. If other regulators follow, the result could be a major step forward for industry-led responses to climate change and other sustainability goals.

The consultation period for the Guidelines runs until 1 October 2020, with further details available on the ACM's website.

// We're seeing that businesses are increasingly prepared to take responsibility for delivering a more sustainable society. We welcome that. The Guidelines give businesses more scope to collaborate to achieve that goal without breaching competition rules. We define that scope, but also set clear conditions to prevent 'greenwashing' and ensure that society as a whole benefits from the collaboration. //

Martijn Snoep,
Chairman of the Board of the ACM

The Guidelines – a summary of the proposals

What are sustainability agreements?

The Guidelines define sustainability agreements broadly, as any agreement between companies that is aimed at the identification, prevention, restriction or mitigation of the negative impact of economic activities on people, animals, the environment and nature.

The Guidelines therefore capture a wide set of cooperative arrangements, including not only those relating to environmental matters (on which much of the current debate around competition law and sustainability has focussed) but also issues such as working conditions and animal welfare.

How do the Guidelines propose applying competition law to sustainability agreements?

The Guidelines place sustainability agreements in three categories:

- First, agreements that, by their nature, do not fall within current prohibitions of anti-competitive agreements. This would include e.g. agreements that do not materially affect competition on key parameters such as price. For example, the Guidelines propose that non-binding targets or codes of conduct agreed between companies could fall outside the prohibition. More interestingly, the Guidelines also propose that joint initiatives relating to the start-up phase of new products or markets, for which collaboration is required to achieve sufficient scale or acquire sufficient production resources and know-how, may fall outside the prohibition – the Guidelines give the example of collaborations between companies to build zero-energy housing. Moreover, the Guidelines also propose that agreements between companies relating to compliance with overseas laws (e.g. local labour laws, environmental regulations and fair-trade rules) should also fall outside the competition law prohibition where designed correctly.
- Second, agreements that give rise to sufficient benefits to off-set any restrictions on competition. While the balancing of benefits and restrictions is already a feature of the Dutch (and EU) approach to the competition law assessment of agreements between undertakings, the Guidelines offer a new approach on some key points:

- A fresh approach to the 'fair share' test for agreements aiming to prevent harm to humans, the environment and nature (referred to as 'environmental-damage agreements' in the Guidelines). The orthodox approach in recent years has been that the customers of the product / service affected by the agreement must receive a 'fair share' of the environmental benefit in order to off-set any competitive harm arising from the agreement. In contrast, the Guidelines propose that, where the agreement aims to prevent / limit obvious environmental damage and helps the Dutch government comply with international standards on environmental protection, then the benefits ('fair share') for society as a whole – not just customers – are relevant. This is a very important step. The nature of environmental harms like greenhouse gas emissions is that their effects are suffered by all citizens – not just customers of a specific product. So taking account of the benefits of environmental agreements for all citizens increases the off-setting benefits that can be used to justify a restriction of competition.
- A practical approach to quantifying environmental benefits. The Guidelines propose the use of 'environmental prices' when a careful balancing of costs and benefits is required. Such prices are used in other policy contexts when making social cost-benefit analyses (e.g. to measure the monetary benefit to society of reduced emissions) and can be set by reference to concrete policy objectives (such as environmental standards). When quantifying the costs and benefits of an environmental-damage agreement, 'environmental prices' therefore provide an objective basis for carrying out that analysis by reference to pre-existing environmental standards to which the Dutch government is bound.

- Third, agreements that do not fall either into the first or second categories above. In these circumstances, the Guidelines encourage consultation with the ACM. Where agreements follow the Guidelines in good faith but turn out to be incompatible with competition law, then the ACM will not impose fines for infringements provided that appropriate adjustments are made. Where an agreement cannot be made compatible with existing Dutch competition law, then the Guidelines show a willingness to consider changes to law where justified.

Conclusions

The Guidelines provide some welcome clarity on how the ACM may approach the assessment of sustainability agreements. The ACM is clear that these agreements will often be compliant with competition law and should not require complex legal assessments prior to implementation.

While remaining consistent with the fundamentals of Dutch (and EU) competition law, the Guidelines also demonstrate a willingness to help businesses respond quickly to urgent problems like climate change e.g. by giving examples of specific initiatives and how the ACM would assess these, and by actively welcoming consultation with the ACM where companies have questions on particular proposals. Indeed, the ACM's enforcement policy is refreshing, by recognising that it should be aimed at finding solutions to make it possible to reap the sustainability benefits of initiatives rather than being aimed at 'enforcement based on fines'.

In being willing to take some new approaches, the ACM is clear that the Guidelines are intended to operate in the context of the wider environmental and other sustainability standards to which the Dutch government is bound. These policy objectives and standards inform the way in which the ACM proposes to assess some aspects of sustainability agreements, where the Guidelines' proposals are more far-reaching and, in some respects, novel. Notably, the Guidelines propose:

- A wider application of the 'fair-share' test when assessing the benefits of certain sustainability agreements, to include society as a whole (not just customers).
- The use of an 'environmental price' when quantifying the benefits of a given agreement in order to compare them with its costs, with that price being calculated by reference to specific policy objectives to which the Dutch government is bound.

Such proposals look to reflect the fact that (i) environmental benefits necessarily accrue to society as a whole, not just narrow customer groups, (ii) sustainability agreements can (and should) support wider policy objectives to which the Dutch government is bound, and (iii) it can be difficult to quantify objectively the benefits arising from sustainability agreements.

As detailed in our previous briefing, a number of other national competition regulators as well as the European Commission have indicated that they are currently considering the interface between sustainability and competition law. It can therefore be expected that similar proposals may be published by other regulators in due course. If other regulators are willing to follow the ACM's example (so ensuring a joint and coordinated approach by EU antitrust regulators), businesses across Europe will be able to collaborate on sustainability goals with much greater confidence in their legal position. We note in this context that the European Commission has stated, in response to the ACM's consultation, that it "fully supports the need for clear guidance on agreements aiming at reducing greenhouse gas emissions that would be compatible with competition law".

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