CPI TALKS…

…with Martijn Snoep

In this month's edition of CPI Talks…we have the pleasure of speaking with Martijn Snoep, Chairman of the Netherlands Authority for Consumers and Markets ("ACM").

Earlier in July 2020, the ACM released draft "Sustainability Agreements Guidelines."[1] These Guidelines include examples illustrating the opportunities for business collaboration that contributes to a sustainable society. The ACM is now presenting these Guidelines to national and international interest groups, businesses, academics, interested parties, and government authorities for consultation.

Thank you, Chairman Snoep, for sharing your time for this interview with CPI.

1. Why did you decide to publish these "Sustainability Agreements Guidelines"?

Sustainability – as a policy issue – has gained tremendous importance for the government and for us as multifunctional competition, consumer, telecoms, and energy authority over the years. And so has, in this slipstream, the call on businesses to take responsibility. Businesses increasingly want to take up this responsibility for the sake of the environment in general, and against global warming specifically. Lack of transparency and standards, first mover disadvantages and economies of scale sometimes require agreements among competitors. But competition rules may stand in the way or are at least perceived as a barrier for collective initiatives. Our present Guidelines on Competition Law and Sustainability of 2014 neither fully reflect our current thinking nor do they include the experience that we gained in the assessment of actual cases. I believe that the new draft Guidelines clearly show our aim to increase the opportunities for businesses to collaborate in pursuit of sustainability objectives that help to solve the big environmental challenges our societies are facing. We are open to actively engage in a dialogue with businesses on how competition rules play out in sustainability initiatives, guiding them to solutions that fall outside the scope of competition law, or that fully compensate the users for any price increase, or, under certain conditions, that are beneficial to society as a whole.

2. Sustainability is sometimes narrowed to environmental objectives although the concept is much broader. How do you define true sustainability agreements and avoid attempts to "greenwash" collaborations which may not have genuine sustainability objectives? How do you assess whether consumers get a "fair share" of the sustainability benefits?

We do not envisage a narrow definition of sustainability. In principle, all kind of agreements that fall within the broad description of sustainability of the 2012 UN Resolution 66/288 are covered by our Guidelines.[2] Nevertheless, we do make a distinction within the broad category of sustainability agreements. The framework that we envisage contains basically two lines of reasoning. The first one follows the more traditional approach, while the second is moving the needle a bit as it diverges from the strict interpretation of Article 101(3) that a fair share of the benefits for users implies that they must under all circumstances at least be compensated for the negative effects of the agreement. In the first approach, the definition of sustainability is not critical, as the approach does not differ from the one that is followed with respect to any other kind of efficiency and follows the traditional and well-known interpretation of Article 101(3).

1 https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

2 https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_66_288.pdf.

The second approach deviates from this traditional approach and we strongly believe that this is in line with EU case law. Admittedly, the EU courts have never explicitly endorsed this approach but at the same time, they have never ruled to the contrary either. This second approach is restricted to what we have labelled as "environmental-damage agreements." This category of agreements is strictly defined: (i) the agreement must aim to prevent or limit an obvious environmental damage (economists would say: decrease negative externalities that the companies concerned are causing), and (ii) the agreement contributes efficiently to compliance with international or national requirements to prevent or limit environmental damage to which the government is bound. An "efficient contribution" means that the agreement must lead to a net benefit for society as a whole. In the case of environmental-damage agreements, the users will get a fair share of the benefits if the benefits for society as a whole (users and non-users) outweigh the costs for the users. We believe this is a fair share under these specific circumstances because the users inflict with their consumption a negative externality upon non-users that the government is required to prevent or limit. As long as users and non-users share equally in the environmental gains, it's a fair outcome that the pain of the restriction of competition is taken on by the users only. The counter factual, the situation without the agreement, is that the pain of the environmental damage is shared equally but only users get the gain of the lower price. This would be against one of the leading principles that the polluter pays for the environmental damages he induces. Obviously, the other criteria for the application of Article 101(3) should also be met before the agreement is exempted. Notably, that the agreement and all its restrictions must be necessary to achieve the environmental goals pursued, and that the agreement does not afford the companies in question the possibility to eliminate competition in respect of a substantial part of the products and services concerned. We believe that these conditions taken together will prevent the situation where this new framework can be applied in an undesirably broad manner and will provide no room for "greenwashing."

3. The ACM Guidelines will undoubtedly become a reference point for businesses also outside of the Netherlands because of the present lack of guidance from other competition authorities. Have you discussed the Guidelines with other agencies and do you expect them to follow suit?

We discussed the draft Guidelines with the European Commission and within the European Competition Network and also intend to discuss the Guidelines within the OECD and the ICN. The importance of the matter as well as our aim to offer guidance for sustainability agreements is shared by many colleagues. But it is too early to say whether they also share our ideas. A complicating factor is that the majority of the NCAs have less experience than we have when it comes to analyzing sustainability agreements. They cannot evaluate from their own experience our new approach towards sustainability agreements in general and environmental-damage agreements more specifically. Therefore, we will continue to discuss our framework with the European Commission and within the European Competition Network and in other international fora. Hopefully this will lead to a common approach towards sustainability agreements.

4. Do all sustainability agreements inherently restrict competition or do some fall outside of Article 101 TFEU and equivalent provisions?

The draft Guidelines identify several categories of agreements that may fall outside of Article 101, for the reason that they are pro-competitive or competition-neutral. One of these categories concerns covenants by which companies bind themselves to comply with laws abroad in the field of e.g. labor rights or the protection of the environment, and for which the companies, for example, jointly organize oversight by an independent body. Another category concerns agreed codes of conduct promoting environmentally-conscious or climate-conscious practices. These often involve joint standards and certification labels about the use of raw materials, production methods, etc. With regard to such codes, the participation criteria must be transparent, and access must be granted on the basis of reasonable and non-discriminatory criteria. In addition, it should remain possible for participants to use alternative standards or certification labels of equal standing, and also to sell products that fall outside of such codes.

5. Sustainability agreements pursue long-term societal goals which may sometimes lead to short-term price increases. How do you reconcile this within the context of antitrust enforcement?

Our mission is to make markets work well for people and businesses, now and in the future. We believe competition law is not only focused on short-term prices. It also pursues long-term welfare goals. Take merger control and theories of harm based on innovation. They clearly have a long-term perspective, just like our sustainability Guidelines. So antitrust enforcement can and should always have a short-term and a long-term perspective in order to stay relevant and legitimate. The challenges our societies are facing are simply too complex to look at short-term price effects only.

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