



New Dutch guidelines on sustainability: ACM offers room for sustainability initiatives

Conference Atelier de la Concurrence: “Stehen Klima, Energie und Wettbewerb im Widerspruch zueinander?”

Caroline Wolberink

Presentation Outline

- Sustainability : importance for society and ACM
- Most important elements of ACM Guidelines;
 - clarity on the scope of the cartel prohibition
 - interpretation of “a fair share for consumers”
 - quantification or qualification of benefits
 - practicalities
- Discussion

Sustainability cooperation: importance for society and ACM

- Sustainability is an important issue for the Netherlands and the ACM
- Government needs to effectuate timely and significant measures on sustainability
- Government relies heavily on self-regulatory measures to attain sustainability goals
- Widespread perception that private initiatives are hindered by competition policy
- ACM feels the responsibility to do what is possible to take barriers to cooperation away
- ACM 2014 vision document on sustainability agreements no longer reflects our present thinking
- January 26th 2021 publication of revised draft guidelines
- Goal of revision: 1. More companies contact us for guidance; 2. More sustainability agreements; 3. Ultimate goal: a harmonized approach in Europe

Most important changes in ACM policy (1): clarity on the scope of the cartel prohibition

- More attention for initiatives that fall outside the scope of Section 6(1) of the Dutch Competition Act (cartel prohibition)
- Allowed are: agreements on standards, bundling know-how, joint ambitions without being specific/mandatory
- Allowed are also: agreements to ensure that undertakings concerned, their suppliers and/or distributors comply with the laws of the countries in which they do business; ie International Responsible Business Conduct
- Example: wood processors agree to procure responsibly in accordance with a covenant signed by the Dutch government and the sector. The objective of the agreement is to prevent environmental damage and human-rights violations in the production chain in Asia, Latin America, and Africa. In that context, they will follow the standards that have been laid down in the national laws of those countries. It is allowed to agree to only procure wood from pre-approved regions.

Most important changes in ACM policy (2): interpretation of a fair share for consumers

- If an agreement falls under the cartel prohibition, an exception is possible if the agreement has benefits that offset the restrictions, is necessary and does not exclude competition entirely
- Important requirement: the users of the product must be allowed a fair share of the benefits
- ACM uses a broad interpretation of “a fair share for consumers”. Distinction between:
- Environmental-damage agreements with material external effects that make an efficient contribution to the realization of a standard to which the government is bound
 - >>> full compensation for users is not required.
 - We take into account benefits for society as a whole (out of market efficiencies)
- Other agreements, aimed at animal welfare, fair wages, the environment ‘beyond or outside of standards’
 - >>> full compensation of consumers is required

Most important changes in ACM policy (3): quantification or qualification of benefits

- For weighing the costs and the benefits quantification is normally preferred
- In some cases a qualitative approach is more suitable
- Quantification of costs and benefits is not required if:
 - Limited market share (max 30%): the undertakings involved must only demonstrate that their initiative focuses on a sustainability objective, and that it can reasonably be expected that the initiative will make a real contribution to the realization thereof,
 - or
 - Benefits clearly offset costs: for example when agreements will only lead to a limited price increase or limited restriction of choices for customers, while it is evident that users will have significant benefits.
- Quantitative assessments
 - In more critical cases
 - Methods: shadow prices and willingness to pay studies

Most important changes of ACM policy (4): practicalities

- Companies are invited to discuss their initiatives with the ACM
- ACM provides companies with an informal view on possible risks, no safeguard
- If complaints companies need to demonstrate that their agreements meet the requirements of section 6(3)
- If the agreement restricts competition, the ACM will not impose fines when:
 - the sustainability agreement has been publicly announced, and the Guidelines have been followed in good faith, or
 - the sustainability initiative has been discussed with the ACM and the ACM did not identify any major risks **AND**
 - changes to those agreements are agreed on in consultation with the ACM or after intervention by the ACM

Questions and Discussion

Thank you for your attention!

For questions and discussion afterwards please contact:
Caroline.Wolberink@acm.nl

Substantiation of interpretation of “fair share”

- Debate in ECN on the interpretation of this requirement
- No legal obligation to compensate consumers always in full
- Environmental damage is especially serious and urgent (efficient use of common resources)
- A standard exists to which the government is bound or concrete policy objectives (democratic legitimation)
- The arrangement makes an efficient contribution to the standard (society as a whole will be better off)
- It is fair that users that cause the damage also bear (in full or partially) the costs
- Provided that they are part of the society that benefits from the agreement, and thus enjoy the same benefits

Hypothetical example environmental damage agreement

- The government is required to reduce CO₂-emissions by 25% (Supreme Court of the NL in Urgenda ruling)

This means that there is a clear standard to which the government is bound

- The government takes measures to realize this goal (subsidies, closure of plants, etc.)
- A private agreement aims to make an efficient contribution to this goal: costs for society are lower than the environmental gains

We measure this by comparing the costs with the so called shadow price: the price the government would have paid to attain this goal. If the costs are lower than the shadow price, it is efficient

- It is possible that the negative effects for consumers (price increase) are larger than the benefits
- This is not a problem: no need for fully compensating consumers for the costs