

## Consultation of Vision document on Competition and Sustainability

The Netherlands Authority for Consumers and Markets (ACM) read with great interest the comments it received about the draft version of the Vision document on Competition and Sustainability<sup>1</sup> as well as those about the draft version of the Policy rule on competition and sustainability of the Dutch Ministry of Economic Affairs (EZ). ACM would like to thank all respondents that put forward their views on the application of competition rules to sustainability initiatives for their contributions. This includes those who attended the meeting held at ACM on September 17, 2013, organized by the Dutch Competition Law Association, and who gave their views on both these draft versions. This document is a short summary of all of these comments, which includes a response from ACM.

### *The term sustainability and the relationship between the EZ policy rule and the ACM Vision document*

Although the background and drafting of the EZ policy rule differ from the background of the publication of the Vision document<sup>2</sup>, it goes without saying that it is the Minister of Economic Affairs who sets policies, and that ACM carries out statutory tasks. This means that the vision as outlined by ACM is a reflection of its interpretation as a regulator of how it will apply competition rules to sustainability initiatives. In its interpretation, ACM follows the relevant European and Dutch regulations and laws, including the policy rule of the Minister of Economic Affairs.

In its Vision document, ACM deliberately refrains from giving a definition of the term sustainability. After all, in practice, many initiatives with various objectives are submitted for assessment (formal and informal). Furthermore, the determining factor for the relationship with competition rules is not the banner of sustainability but the arrangement's actual substance. The Ministry of Economic Affairs, too, refrained from including a definition of the term sustainability in its policy rule.

### *Relationship between the Vision document and the previously published memo "The assessment of anticompetitive practices as a result of sustainability initiatives in practice"*<sup>3</sup>

In March 2013, ACM published on its website a memo that describes the practice of the assessment of sustainability initiatives by ACM and the European Commission. Both the Vision

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<sup>1</sup> In the draft version, the document was referred to as Position Paper.

<sup>2</sup> Following frequently recurring questions in practice, ACM wished to offer more certainty to market participants. The immediate reason behind the draft version of the policy rule was a motion of the Dutch House of Representatives proposed on January 24, 2013, which specifically requests the Minister of Economic Affairs to set policy rules for ACM containing instructions about offering room for arrangements in the agricultural and nutritional chain regarding public interests such as animal welfare and the environment. The Ministry of Economic Affairs and ACM have obviously consulted each other extensively about sustainability and competition.

<sup>3</sup> Published on March 12, 2013 in the Knowledge Bank on Sustainability of the NMa (now: ACM):

<https://www.acm.nl/en/publications/publication/11733/Opportunities-for-collaborations-with-regard-to-sustainable-development/>

document as the explanatory notes of the policy rule build on this memo. With its Vision document, ACM wishes to illustrate how the criteria in paragraph 3 of Section 6 of the Dutch Competition Act or in Article 101 of the Treaty on the Functioning of the European Union (TFEU) can be interpreted when assessing sustainability initiatives. Attention is given to the broad concept of welfare, which is relevant for the assessment of this type of initiative, and to the extent to which long-term consumer interests can be taken into account. The Vision document also explains that sustainability initiatives that do not restrict competition, because they do not concern a competition parameter or because they do not appreciably impede competition, are absolutely allowed.

#### *Relationship between the Vision document and the Guidelines of the European Commission*

Some respondents said that it is unclear what the relationship is between ACM's approach and the guidelines and decisional practice of the European Commission. In addition, they urged Brussels to give certainty about its approach to sustainability initiatives, since many arrangements are either cross-border or national arrangements, thereby falling under Article 101 or 102 of the TFEU.

ACM's Vision document stays within the boundaries of the relevant European Commission's guidelines. These give an outline of the boundaries within which the authorities in the European Competition Network (ECN) are to apply the TFEU's antitrust provisions. As ACM explicitly gives its opinion about sustainability initiatives, while these do not, hardly or no longer appear in the Commission's guidelines, one could get the impression that ACM is running ahead of the developments at an ECN level. This is not the case. ACM has obviously informed the European Commission and its fellow ECN regulators about the draft version of its Vision document. No fundamental difference of opinion was found.

ACM recognizes the importance of having an unequivocal approach to sustainability initiatives within Europe. ACM would welcome a joint clarification at ECN level of the application of the competition rules to sustainability initiatives. In the meantime, ACM will apply, where appropriate, the approach as outlined in the Vision document to concrete cases.

#### *Welfare concept / economic approach*

Various comments mentioned that ACM places too much emphasis on consumer welfare as the sole objective of competition law. The concept of welfare is discussed in greater detail in the Vision document.

### *Inherent restrictions*

In various comments, it was insisted to consider the theory of inherent restrictions applicable to sustainability initiatives<sup>4</sup>. The conclusion in the Vision document remains that ACM the relevant jurisprudence is an insufficient basis to make any statements about the applicability of this theory to sustainability initiatives. Said jurisprudence usually concerns situations where there was a statutory task to set the rules (general or appeal) that were the object of the legal procedures in question.

### *Animal welfare*

In the Vision document, animal welfare is named as an aspect to which consumers could attach value. Offering animal-friendly products could increase consumer choices. This could result in increased welfare because (and insofar) the offerings then meet consumer preferences better. As with environmentally friendly products, cooperation between undertakings could play a useful role. However, the question is whether the aspect of animal welfare can also justify the conclusion of market-wide arrangements. In concrete cases, ACM has not taken any position about this question yet.

### *Other remarks*

Several respondents also indicated that other public interests should also be discussed in the Vision document, and not just sustainability. ACM launched the Knowledge Bank on Sustainability, and drew up the Vision document in response to the calls from the public and lawmakers with regard to sustainability initiatives. In ACM's opinion, this is not the right time to expand its opinion on sustainability with other interests or questions. The main reason is that ACM would like to gain experience gained from concrete cases first before it is able to take a more general perspective.

A regularly recurring concern is the measurability of the costs and benefits of arrangements. ACM subscribes to this concern, but there is no fundamental difference between sustainability initiatives and other arrangements.

ACM will not draw up a step-by-step guide to explain the application of competition rules to sustainability initiatives. At this point, ACM wishes to gain experience with the approach described in the Vision document and with the application of the policy rule.

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<sup>4</sup> See also: E.H. Pijnacker Hordijk, Assessment of sustainability initiatives under the cartel prohibition, outline of a general assessment framework and its application to the Energy Agreement (*Beoordeling van duurzaamheidsinitiatieven onder het kartelverbod, Contouren van een algemeen beoordelingskader en toepassing daarvan op het Energieakkoord*), Markt en Mededinging, December 2013.